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H. C. MITRA'S

INDIAN LIMITATION ACT

(ACT IX OF 1908)

As amended up to date

EDITED BY

B. B. MITRA, B. A., B. L.

AUTHOR OF CRIMINAL PROCEDURE CODE, TRANSFER OF PROPERTY ACT, INDIAN SUCCESSION ACT, PROVINCIAL SMALL CAUSE COURTS ACT, GUARDIANS AND WARDS ACT, ETC, ETC.

"The plea of limitation is by no means a generally dishonourable defence; it might often be a righteous defence."

FOURTEENTH EDITION

REVISED & BROUGHT UP TO DATE

BY

B. C. MITRA, B. A., LL. B.

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW, SENIOR ADVOCATE, SUPREME COURT OF INDIA.

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PREFACE TO THE FOURTEENTH EDITION.

Nearly seven years have elapsed since the publication of the last edition of this work. In the task of preparing the present edition I have confined myself to revise and supplement the last edition in the light of legislative amendments and judicial pronouncements since made and I have tried to adhere to the previous commentaries as much as possible. Most of the relevant and important Indian and English cases reported during the period ending with March 1959 have been referred to in their proper places, and only such of them as could not be incorporated on account of the present edition going through the press have been included in the Addenda. It is therefore, needless to notice any of them here. No pains have been spared to make this edition quite upto date within the prescribed compass, but should any errors or omissions be detected they may be kindly pointed out for future correction.

It is hoped that the present edition will prove to be of use like its predecessors.

I desire to record my thanks to Mr. Sudhindra K. Palit, Advocate, for his able assistance in the preparation of this edition.

BAR LIBRARY, HIGH COURT,
CALCUTTA.
April 15, 1959.

B. C. MITRA.

THE INDIAN LIMITATION ACT, 1908.

ACT NO. IX OF 1908.

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ABBREVIATIONS EXPLAINED.

(English Reports)

A. C. or App. Cas.	Law Reports, Appeal Cases.
A. & E.	Adolphus & Ellis' Reports, King's Bench.
Atk.	Atkyns' Reports.
B. & Ad.	Barnewall and Adolphus' Reports.
B. & C.	Barnewall and Cresswell's Reports.
Bing.	Bingham's Reports.
Brod & Bing.	Broderip and Bingham's Reports, Common Pleas.
Burr.	Burrow's Reports.
Camp.	Campbell's Reports.
C. B.	Common Bench Reports.
C. & M.	Crompton and Meeson's Reports, Exchequer.
C. M. & R.	Crompton, Meeson and Roscoe's Reports.
Ch. or Ch. D.	Laws Reports, Chancery Division.
Deg. & J.	DeGex and Jones' Reports.
DeG. J. & S.	DeGex, Jones and Smith's Reports.
D. & L.	Dowling and Lowndes' Reports.
East	East's Reports.
E. & B.	Ellis and Blackburn's Reports.
Eq.	Equity Reports.
Esp.	Espinasse's Reports.
Ex. or Exch.	Exchequer Reports.
Ex. D.	Law Reports, Exchequer Division.
H. & C.	Hurlstone and Coltman's Reports.
H. L. C.	Law Reports, House of Lords Cases.
Ir. L. R.	Irish Law Reports.
Jac. & W.	Jacob and Walker's Reports, Chancery.
K. & J.	Kay and Johnson's Reports, Chancery.
L. J. Ex.	Law Journal, Exchequer.
L. R. Ch.	Law Reports, Chancery Division.
L. R. C. P.	Law Reports, Common Pleas.
L. R. Eq.	Law Reports, Equity Cases.
L. R. Ex.	Law Reports, Exchequer.
L. R. Q. B.	Law Reports, Queen's Bench.
L. T. (N. S.)	Law Times (New Series).
Lev.	Levinz's Reports.
M. & C.	Mylne and Craig's Reports.
M. & G.	Macnaghten and Gordon's Reports.
M. & S.	Maule and Selwyn's Reports.
M. & W.	Meeson and Welsby's Reports.
Moo. P. C.	Moore's Privy Council Reports.
Phillim.	Phillimore's Reprints.
Ph.	Phillip's Reports, Chancery.
P. Wms.	Peere Williams' Reports, Chancery.
Q. B.	Adolphus and Ellis' Queen's Bench Reports.

Q. B. D.	[illegible]	Law Reports, Queen's Bench Division.
R. & M.	..	Russel and Mylne's Reports.
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Stark.	[illegible]	Starkie's Reports.
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,,	141	..	554A
,,	190	..	105, 109
,,	290	..	144
,,	695	..	453
,,	697	..	331
,,	728	..	474
,,	899	..	39A
182 I.C.	108	..	37A, 128
,,	426	..	370, 508
,,	368	..	380A
,,	510	..	7
,,	632	..	153
,,	718	..	363
,,	801	..	420, 422
,,	831	..	363
,,	860	..	378
,,	862	..	331
183 I.C.	82	..	417
,,	386	..	346
,,	584	..	372
,,	853	..	290, 491
184 I.C.	139	..	406, 407
,,	151	..	694
,,	169	..	525
,,	493	..	313
,,	559	..	360
,,	573	..	162
,,	611	..	367
185 I.C.	63	..	473, 485
,,	73	..	445
,,	233	..	416A
,,	339	..	361, 363
,,	736	..	6A
,,	805	..	406
,,	816	..	420
186 I.C.	210	..	113A, 463
,,	235		330
,,	582	..	265, 352
,,	674	..	435, 440
,,	850	..	481
,,	859	..	104
187 I.C.	663	..	527
188 I.C.	411	..	465
,,	585	..	39A
,,	663	..	402
189 I.C.	200	..	7
,,	418	..	473, 474
,,	444	..	359A
,,	535	..	429
,,	642	..	372
,,	678	..	378, 433
190 I.C.	405	..	115 564
,,	631	..	477
,,	639	..	470
,,	721	..	464, 483
,,	817	..	289
,,	840	..	543
191 I.C.	42	..	503
,,	647	..	329

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191 I.C.	825	93
„	867	291
„	878	543
„	885	318, 324, 330
193 I.C.	61	26
„	172	469, 485
„	481	383, 384, 386, 398
„	501	340
„	693	519
194 I.C.	565	440
„	580	264
„	727	352
„	744	389
195 I.C.	515	582, 583
„	732	79
„	844	440
196 I.C.	444	337
„	466	488
„	565	549
„	654	49A
„	821	118, 433
„	888	374
197 I.C.	217	25
„	245	91
„	321	380A
„	449	355, 406
„	498	437, 440
„	708	694
198 I.C.	806	567A
„	326	450
199 I.C.	408	78, 86
„	431	436
„	437	310 310A
„	438	436
„	788	466
200 I.C.	81	268
„	309	152
„	357	109
„	732	564, 566
„	889	567D
201 I.C.	650	354
202 I.C.	52	281
„	218	345A
203 I.C.	223	463
„	611	306
204 I.C.	352	550
„	429	300
„	481	408
„	509	379
„	574	548
205 I.C.	133	492
„	307	349A
„	520	509
206 I.C.	94	533
„	126	386 416
„	599	330
207 I.C.	133	352, 406
„	178	290
208 I.C.	129	108A, 115
„	230	107
	340	372, 410
	543	29
209 I.C.	157	450
„	257	86
„	521	171, 174
210 I.C.	385	509
„	513	289
211 I.C.	230	429
„	334	446
„	533	170, 171
212 I.C.	421	254
„	628	162, 694
213 I.C.	255	281
214 I.C.	272	429, 433
„	273	531
215 I.C.	12	155, 157
216 I.C.	120	435
217 I.C.	65	150, 152, 153, 156A
219 I.C.	52	420
„	159	4
220 I.C.	134	694
„	208	554A
221 I.C.	524	433, 436
„	666	299, 300
223 I.C.	175	4
„	248	485
„	531	416A
224 I.C.	160	57
„	201	465, 477
„	537	594
225 I.C.	122	394
„	291	49
226 I.C.	60	567F
„	97	85
„	411	281
„	464	306, 341, 348
228 I.C.	479	369
„	479	437, 508
„	493	376A
„	607	694
229 I.C.	348	514
„	373	341
„	528	313
230 I.C.	233	433, 434
„	311	598
„	311	257, 289
„	451	509
231 I.C.	58	324
„	131	281B
„	282	157

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1939 Kar	111	596, 598, 600
„	602	363
„	648	41
„	793	600, 609, 610
1939 Kar. (P.C.)	211	150
1940 Kar	225	154
„	277	359A
„	534	508
1940 Kar. (P.C.)	419	483
1941 Kar.	72	93
„	124	549
„	495	146, 374 436

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1941 Kar. (P.C.)	176 ..	105
1942 Kar.	392 ..	107, 117
,,	442 ..	408
,,	452 ..	548
1942 Kar. (P.C.)	166 ..	113A
1943 Kar.	315 ..	569
,,	404 ..	289
,,	409 ..	41
1943 Kar. (P.C.)	69 ..	101
1944 Kar. (P.C.)	115 ..	421, 422
,,	170 ..	521, 523
1945 Kar.	40 ..	117, 506
,,	293 ..	153
1945 Kar. (P.C.)	43 ..	162
1947 Kar.	109 ..	104
,,	144 ..	312
,,	168 ..	291

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,,	89	641
,,	187 ..	664, 691
,,	206 ..	232
,,	357 ..	178
,,	363 ..	665, 675
,,	508 ..	51
,,	554 ..	594
,,	558 ..	78, 85B
,,	602 .	648
2 Lah.	1 ..	50, 70
,,	127 ..	32
,,	133 ..	310
,,	316 ..	401, 485, 490
,,	320 ..	102
,,	376 .	352
3 Lah.	43 .	509
,,	215 .	68
,,	261 ..	270
,,	280 .	125
,,	326 .	176A, 177, 380, 453
,,	426 ..	527
4 Lah.	90 ..	102
,,	122 .	57
,,	217 .	406
,,	249 .	614, 617, 626
,,	350 ..	854
,,	367 ..	685
,,	402 ..	514
,,	428 .	254
,,	432 ..	258
5 Lah	27 ..	108, 317, 418
,,	192 ..	244, 620A
,,	257 ..	692
,,	368 ..	492
6 Lah.	132 .	509
,,	163 ..	193, 394
,,	194 .	204
,,	206 ..	289
,,	233 ..	57
6 Lah.	276 ..	10A
,,	301 ..	309, 312, 312A
,,	405 ..	78, 509A
7 Lah.	77 ..	649
,,	161 ..	28
,,	210 ..	644
,,	403 ..	207
,,	423 ..	487
8 Lah.	19 ..	78, 101
,,	22 ..	509
,,	48 ..	491
,,	54 ..	148, 490A
,,	167 ..	317
,,	215	524
,,	253 .	692
,,	274 ..	41, 655
,,	655 ..	600
9 Lah.	33 ..	331
,,	76 ..	46, 60, 72
,,	191 ..	436, 440
,,	244 ..	131, 136
,,	428 ..	509
,,	519 ..	164
10 Lah.	161 ..	257
,,	237 ..	525
,,	713 ..	78, 80
,,	745 .	380
,,	748 ..	186, 380
,,	750 ..	195
11 Lah.	12 ..	37, 155
,,	111 ..	57, 130
,,	369 ..	273
,,	657 ..	508, 509, 516
12 Lah.	190 ..	401
,,	420 ..	353, 406
,,	741 ..	230, 232, 244
13 Lah.	70 ..	162
,,	432 ..	613
,,	448 ..	198
,,	520 ..	78
14 Lah.	267 ..	313
,,	380 ..	401, 469, 485
,,	530 ..	201
,,	587 ..	178
,,	596 ..	553
,,	646 ..	401, 469, 485
,,	656 ..	45
15 Lah.	35 ..	469
,,	242 ..	355, 363
,,	308 ..	22, 35
,,	389 ..	289
16 Lah.	442 ..	600
,,	448 ..	136
17 Lah.	481 ..	363
,,	621 ..	122
,,	737 ..	177, 195
18 Lah.	623 ..	365, 433
,,	769 ..	78
42 Lah.	183 ..	221

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1940 Lah.	180 ..	499
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1941 Lah.	191 ..	134, 136
,,	843 ..	508
1945 Lah.	523 ..	254, 256, 318
,,	231 ..	78
,,	252 ..	581
,,	355 ..	483
1946 Lah.	107 ..	31, 37A, 155
,,	309 ..	509
,,	300 ..	567A
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,,	310 ..	364
,,	389 ..	697, 718
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,,	516 ..	330
7 Lah.L.J.	201 ..	42
9 Lah.L.J.	5 ..	134
,,	293 ..	470
10 Lah.L.J.	183 ..	80
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,,	889 ..	483
51 L.W.	666 ..	567D
52 L.W.	440 ..	424
57 L.W.	312 ..	318, 508
58 L.W.	238 ..	300
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59 L.W.	504 ..	500, 524
,,	683 ..	41

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,,	153 ..	699, 715
,,	273 ..	620A, 626
,,	423 ..	564
,,	428 ..	691
,,	441 ..	600, 612
,,	469 ..	612
,,	529 ..	561, 614
,,	569 ..	711, 715
2 Luck.	172 ..	620
,,	180 ..	210
,,	239 ..	618
,,	419 ..	708
,,	447 ..	123
,,	618 ..	615, 623, 637
,,	686 ..	554
3 Luck.	102 ..	312A
,,	241 ..	218
,,	439 ..	554
,,	580 ..	714
,,	668 ..	621B
,,	684 ..	683, 691, 716
,,	719 ..	706
4 Luck.	107 ..	483
,,	209 ..	668, 695
,,	241 ..	162
,,	270 ..	422
,,	480 ..	389A
,,	503 ..	329, 330
5 Luck.	492 ..	170, 267
6 Luck.	203 ..	464
7 Luck.	250 ..	610
,,	270 ..	177, 183, 202
,,	313 ..	176A, 184
,,	320 ..	244
,,	442 ..	554, 554A
,,	505 ..	527
,,	655 ..	7
8 Luck.	119 ..	263
,,	240 ..	554A
,,	427 ..	721
9 Luck.	475 ..	244
14 Luck.	4 ..	144
,,	138 ..	32
,,	467 ..	556
,,	478 ..	381
,,	694 ..	185
,,	701 ..	49
15 Luck.	157 ..	6A
,,	390 ..	41
,,	487 ..	509
,,	526 ..	50

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16 Luck.	402	..	152
„	464	..	383, 384, 386, 398
„	638	..	133
17 Luck.	1	..	281A
„	289	..	374 487
„	314	..	129
„	456	..	281
„	487	..	49
„	628	..	41
„	805	..	499
18 Luck.	439	..	533
„	624	..	600, 602, 610
19 Luck.	70	.	551A, 552
„	163	..	290, 499
„	515	.	118
„	531	..	340
21 Luck.	447	..	31, 29A
22 Luck.	33	.	393
„	299	..	393
„	522	..	533
23 Luck.	65	..	416

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1 Mad.	309	.	337
„	335	..	221
„	391	..	275
2 Mad.	5	.	10A
„	174	..	716
„	226	..	616
„	314	..	641
„	400	..	120
„	407	..	146
3 Mad.	61	..	393
„	76	.	467
„	79	.	721
„	107	..	308
„	118	.	613
„	124	.	260
„	236	..	684
„	240	..	309
„	256	.	719
„	384		173
4 Mad.	155	..	17, 642, 697, 700
„	160	..	79
„	172	..	8, 691
„	178	..	281
„	302	..	275
„	419	..	23, 122, 134
5 Mad.	54	..	281
„	91	.	106
„	113	..	674
„	141	.	715
„	169		210B
„	171	..	191
„	185	..	35
„	226	..	239
„	388	..	312
6 Mad.	54	..	117
„	81	..	715
„	176	..	221, 317
„	182	..	180
„	250	..	712
6 Mad.	281	..	198
„	290	..	388
„	325	..	180
„	344	..	430, 433
„	351	..	628
„	402	..	105, 372
„	417	..	550
7 Mad.	1	..	404
„	55	..	200
„	76	..	200
„	80	..	719
„	83	..	719
„	99	..	263
„	100	..	265
„	258	..	281
„	306	..	715
„	307	..	715
„	337	..	116
„	341	..	540
„	392	..	180
„	417	..	118
„	512	..	281
„	539	..	204
„	540	..	724, 725
„	577		393
„	583	..	393
„	595	..	694
8 Mad.	82	..	286
„	137	..	693
„	175	..	302
„	207	..	8, 691
„	229	..	162
„	411	..	22
„	424	..	583, 584
„	506	..	275, 278
„	525	..	106
9 Mad.	57	..	281, 286
„	175	.	625, 644
„	244	..	621A
„	258	.	23, 132
„	271	..	201
„	285	..	612, 644
„	334	..	354
„	450	..	70
„	457	..	281, 430
10 Mad.	66	..	718
„	100	..	481
„	115	..	540, 543, 611
„	189	..	614
„	199	..	406
„	210	..	42
„	213	..	420
„	259	..	177A, 406
„	292	..	121
„	357	..	60
„	375	..	118
„	509	..	548
11 Mad.	56	..	481
„	103	..	159. 694
„	153	..	356, 398
„	218	..	194
„	274	..	105, 109, 117, 117A
„	332	..	9

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11 Mad.	333	..	317, 346
,,	336	..	716
,,	345	..	306
,,	380	..	533
,,	413	..	550
,,	416	..	553, 615
,,	452	..	443
12 Mad.	1	..	151, 158
,,	26	..	4
,,	161	..	393
,,	168	..	430
,,	192	..	393
,,	316	..	561
,,	356	..	693, 710
,,	434	..	157
,,	467	..	152, 158
,,	479	..	703A
,,	487	..	514
13 Mad.	135	..	101, 186
,,	236	..	95
,,	269	..	43, 49, 51
,,	277	..	117, 567B
,,	347	..	721
,,	366	..	275
,,	437	..	306, 337
,,	445	..	503
,,	447	..	35
,,	451	..	153
,,	467	..	621A
,,	490	..	272
,,	491	..	243
,,	504	..	581, 674
,,	512	..	14, 589, 591, 593
14 Mad.	1	..	117, 608
,,	26	..	420
,,	38	..	614
,,	61	..	109
,,	81	..	50
,,	96	..	625
,,	153	..	118
,,	237	..	533
,,	255	..	721
,,	258	..	186
,,	396	..	719
,,	465	..	488
,,	495	..	585
15 Mad.	6	..	420
,,	57	..	532
,,	60	..	517
,,	78	..	23
,,	101	..	644
,,	123	..	607
,,	157	..	341, 348
,,	169	..	133
,,	186	..	531, 533
,,	258	..	447
,,	315	..	625, 642, 644
,,	331	..	578
,,	380	..	181, 355, 477
,,	382	..	377
,,	414	..	649
,,	417	..	215
,,	491	..	188
,,	492	..	508

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16 Mad.	61	..	517
,,	99	..	507
,,	138	..	420, 500
,,	142	..	712
,,	220	..	177, 178
,,	274	..	152
,,	294	..	540
,,	304	..	232
,,	305	..	465, 508
,,	311	..	420
,,	361	..	437, 508
,,	366	..	178, 188
,,	436	..	93
,,	452	..	716
,,	456	..	118
17 Mad.	12	..	219
,,	76	..	711
,,	89	..	579
,,	92	..	198
,,	122	..	507, 513
,,	165	..	715, 716
,,	189	..	95
,,	221	..	190
,,	225	..	466
,,	255	..	242
,,	293	..	406
,,	299	..	153
,,	316	..	99
,,	379	..	8, 691
,,	395	..	521
18 Mad.	99	..	32, 41, 75
,,	144	..	578
,,	173	..	374, 436, 440
,,	193	..	330
,,	257	..	483A
,,	265	..	273
,,	266	..	117, 585
,,	316	..	273
,,	331	..	483A
,,	374	..	123
,,	390	..	360, 361
,,	481	..	531
,,	456	..	190
,,	478	..	281, 283
,,	482	..	698
,,	484	..	74, 689
19 Mad.	52	..	467, 489
,,	67	..	152, 715
,,	80	..	306, 350
,,	90	..	151, 152
,,	149	..	317
,,	154	..	223, 632, 642
,,	162	..	719
,,	165	..	625, 644
,,	340	..	195
,,	368	..	389
,,	425	..	515
,,	437	..	617
20 Mad.	23	..	367, 442
,,	33	..	282
,,	40	..	491
,,	48	..	153
,,	118	..	281

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20 Mad.	239	178
,,	245	554
,,	249	32
,,	305	272
,,	398	117
,,	448	718
,,	469	34
,,	476	136
,,	493	589
21 Mad.	8	436, 484
,,	53	612
,,	134	242
,,	139	554
,,	141	6, 469
,,	151	563
,,	153	583, 598, 612, 613, 625
,,	228	76
,,	242	436
,,	257	479
,,	278	244, 523, 611
,,	326	548
,,	385	31
,,	400	716
,,	494	668
22 Mad.	14	457, 488
,,	20	554
,,	179	31, 32
,,	182	683
,,	256	16
,,	342	318, 418
,,	351	508, 611
,,	468	716
,,	494	2, 153
23 Mad.	10	600
,,	24	300
,,	33	641
,,	37	616
,,	60	703B
,,	271	14, 331, 520, 522
,,	292	507
,,	389	31
,,	439	619
,,	571	293
,,	583	153, 473, 508
,,	593	471, 502, 623
,,	621	305, 306
24 Mad.	25	705
,,	27	437, 438, 440
,,	185	715
,,	233	469
,,	246	583
,,	339	233, 304
,,	361	153, 178
,,	387	99
,,	441	533
,,	449	272
,,	471	563
,,	512	683
,,	646	52
,,	669	711
,,	672	716
25 Mad.	26	86, 453
,,	50	489
25 Mad.	55	27
,,	99	561
,,	149	453
,,	166	46, 68
,,	220	188, 210B
,,	244	692
,,	307	583, 613
,,	361	515
,,	367	26
,,	396	376, 437
,,	431	95, 205
,,	448	259
,,	452	583
,,	507	583, 613
,,	540	223
,,	587	436, 487
,,	635	632, 642
,,	721	275
26 Mad.	91	703, 703A
,,	101	712
,,	113	508, 519
,,	143	586, 623
,,	186	380, 381
,,	267	675
,,	291	494, 538, 540
,,	410	221, 223, 243, 337, 509
,,	488	500, 524
,,	514	259
,,	535	583
,,	669	711
,,	686	366, 443, 550
,,	730	465
,,	740	581
,,	780	159, 693
27 Mad.	21	129, 130
,,	25	279
,,	28	243, 469
,,	67	276
,,	143	466
,,	192	244, 520
,,	243	352, 507, 513
,,	343	430
,,	346	306
,,	528	356, 508
,,	535	295
,,	608	205
28 Mad.	40	191, 707
,,	50	694, 694A
,,	57	78, 509A
,,	67	25
,,	69	644
,,	72	221
,,	87	581
,,	127	691
,,	197	522, 523
,,	205	78
,,	208	346
,,	211	701
,,	257	644
,,	338	153, 426, 602
,,	344	454, 456
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,,	399	715
,,	423	331
,,	436	315
,,	452	130
,,	473	204, 683
,,	479	87, 297
,,	493	29, 443, 550
,,	498	686
,,	505	642
,,	557	712, 715
29 Mad.	42	543
,,	46	693
,,	212	389
,,	225	273
,,	234	195
,,	305	469
,,	314	693
,,	353	484
,,	390	493, 509A, 524
,,	501	563
,,	519	177A
,,	529	686
,,	556	466
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	16 M.L.T.	193 ..	715
	,,	251 ..	215
	,,	614 ..	414
	17 M.L.T.	18 ..	26
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	,,	78 ..	200
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	18 M.L.T.	492 ..	616
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	22 M.L.T.	218 ..	559
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	5 M.L.W.	222 ..	190
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	,,	374 ..	330
	,,	375 ..	416
	7 M.L.W.	280 ..	508
	,,	413 ..	35
	10 M.L.W.	67 ..	362
	,,	466 ..	203
	12 M.L.W.	9 ..	714
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	16 M.L.W.	285 ..	440
	17 M.L.W.	413 ..	35
	20 M.L.W.	190 ..	205, 716
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	22 M.L.W.	592 ..	508
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	25 M.L.W.	108 ..	163
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	27 M.L.W.	30 ..	263
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	37 M.L.W.	489 ..	127
	38 M.L.W.	204 ..	178
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	39 M.L.W.	62 ..	95
	40 M.L.W.	623 ..	695
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	41 M.L.W.	30 ..	449
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	59 M.L.W.	448 ..	567D
	62 M.L.W.	635 ..	341, 345
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	,,	1232 ..	655
1914	M.W.N.	606 ..	104
1915	M.W.N.	215 ..	378
	,,	722 ..	207
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	,,	915 ..	289
1916	M.W.N.	112 ..	711
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	,,	277 ..	45, 682
	,,	455 ..	217
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1917	M.W.N.	5 ..	561, 562, 564
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1918 M.W.N.	42	181
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,,	242	362
,,	244	274
,,	477	653
,,	564	362
,,	586	395
,,	888	681
,,	892	527
1919 M.W.N.	429	367
,,	550	394
,,	897	670
1921 M.W.N.	37	112
,,	188	162
,,	193	291
,,	472	401
,,	793	655
1922 M.W.N	620	117A
1923 M.W.N.	524	465
1927 M.W.N.	356	206
1931 M.W.N.	8	522
,,	570	451
1934 M.W.N.	1343	249
1935 M.W.N.	15	711
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,,	107	508
,,	120	449
,,	142	720
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,,	379	551
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,,	740	623
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,,	403	331
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,,	847	123
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1939 M.W.N.	298	540
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,,	437	112
,,	449	22
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,,	798	508
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,,	241	583
,,	400	41
,,	449	422
,,	493	273
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„	345	306
„	412	474
„	464	171
„	650	4
„	655	378
„	791	420
„	800	694
1951 M.W.N.	301	493
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„	48	236
„	57	238
„	64	620
„	67	718
„	68	268
„	76	600
„	79	570
„	80	270
„	89	32, 50
„	96	677, 678
1918 P.R.	100	126
„	107	50
1919 P.R.	4	104, 627
„	27	54
„	45	325
„	64	52
„	70	151
„	85	345, 370
„	89	146
„	98	509
„	99	564
„	117	568
„	131	177A
„	151	691, 695
„	163	126

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1912 „	126	64
„	131	678
„	173	78
1916 „	12	680
„	14	652
„	49	458
„	80	42
„	103	406
„	148	380
1917 „	27	65
„	163	638
1918 „	18	81
„	146	666
„	177	221
1919 „	8	570
„	17	162

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1 Rang.	186	496
„	256	74
„	402	145
„	405	508, 517
„	463	386, 509
„	492	621
„	533	669
„	584	49
„	714	550
2 Rang.	367	207, 559, 561
„	386	649
„	393	205
„	486	49
„	555	348
„	561	563
„	655	41, 66
3 Rang.	69	26, 483
„	206	108, 112
„	208	254
„	220	132
„	310	134
4 Rang.	265	49, 134
„	358	386
5 Rang.	93	619
„	186	422
„	266	421
„	283	440
„	384	247, 691
„	422	719
„	477	264
„	576	531, 625
„	582	517
„	600	145, 150
6 Rang.	175	19, 136
„	198	453, 475
„	271	47
„	297	554
„	302	122, 134
„	334	721
„	490	669
„	533	178
„	547	630
„	566	723
„	691	156
„	743	130
7 Rang.	18	49, 127
„	85	600
„	104	170
„	132	707, 708
„	164	620
„	201	658, 682, 691
„	288	7, 474
„	466	151
„	487	234
„	522	197
„	540	378
„	744	517, 620
8 Rang.	168	68
„	380	274, 675
„	556	598, 600
„	581	29A
„	645	109, 369, 509

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„ 150 ..	32
„ 575 ..	419
10 Rang. 82 ..	514
„ 321 ..	203
11 Rang. 186 ..	479A
„ 275 ..	697
32 Rang. 96 ..	93

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„ 457 ..	418
„ 468 ..	361, 363
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„ 626 ..	225, 352
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„ 136 ..	113A, 463, 508
„ 273 ..	26, 117A
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„ 213 ..	54

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„ 159 ..	50
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„ 420 ..	43, 71
„ 433 ..	49, 64
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„ 169 ..	75
„ 265 ..	49A
„ 400 ..	75
„ 419 ..	27

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„ 181 ..	151, 153
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„ 132 ..	111
„ 153 ..	665
„ 190 ..	652
„ 235 ..	43
„ 294 ..	164
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„ 90 ..	393
„ 143 ..	177A, 180
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„ 16 ..	126
„ 156 ..	713
17 S.L.R. 1 ..	267
„ 324 ..	177A
19 S.L.R. 268 ..	561
20 S.L.R. 90 ..	41
21 S.L.R. 195 ..	4, 235
„ 336 ..	416
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„ 242 ..	50
„ 360 ..	201
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„ 146 ..	466
„ 301 ..	148
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3 W.R. 3 ..	178
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„ 165 ..	335
„ 176 ..	572
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„ 47 ..	293
„ 169 ..	78, 101
„ 281 ..	149
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,,	151	..	287
,,	164	..	351
,,	199	..	285
,,	529	..	50
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,,	209	..	335
,,	395	..	181
9 W.R.	124	..	626
,,	181	..	60
,,	187	..	104
,,	402	..	150
,,	505	..	589
,,	564	..	334
10 W.R.	22	..	335
,,	48	..	333
,,	51	..	334
,,	71	..	335
,,	174	..	105
,,	178	..	60
,,	249	..	335
,,	253	..	138
11 W.R.	72	..	104
,,	107	..	650
,,	130	..	60
,,	529	..	352
12 W.R.	45	..	147, 152
,,	194	..	459
,,	458	..	650
13 W.R.	52	..	590
,,	96	..	477
,,	305	..	327
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,,	284	..	283
15 W.R.	24 (P.C.)		174, 563
,,	69	..	152
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,,	102	..	626
17 W.R.	11	..	232
18 W.R.	130	..	643
19 W.R.	189	..	60
20 W.R.	25	..	601
,,	95	..	108
,,	216	..	267
21 W.R.	178	..	1
,,	415	..	105
22 W.R.	29	..	510
,,	79	..	50
,,	246	..	597
,,	340	..	233
,,	512	..	700
23 W.R.	52	..	232
,,	99	..	640
,,	125	..	593
,,	183	..	694
,,	285	..	78
24 W.R.	20	..	195
,,	97	..	221
,,	163	..	450
,,	228	..	238
,,	385	..	541
,,	410	..	626
,,	463	..	121
25 W.R.	249	..	195, 612
,,	282	..	244
,,	521	..	473, 623

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1949 Ajmer	8	..	498, 509
1951 Ajmer	1	..	509, 600
,,	52	..	42
,,	54	..	50
1955 Ajmer	50	..	266, 268

A. I. R. ALLAHABAD SERIES.

1921 All.	92	..	280
,,	133	..	499A
,,	335	..	198
1922 All.	115	..	509
,,	320	..	313
,,	410	..	471
1923 All.	1	..	391
,,	22	..	310
,,	64	..	143
,,	75	..	601
,,	79	..	662
,,	146	..	223
,,	151	..	339
,,	271	..	553
,,	321	..	374, 440
,,	466	..	312
1924 All.	70	..	177
,,	99	..	692
,,	115	..	51
,,	302	..	277
,,	370	..	420
,,	384	..	620
,,	443	..	313
,,	450	..	313
,,	543	..	1A
,,	677	..	530
,,	740	..	20A
,,	798	..	530
,,	855	..	181, 190
,,	884	..	105, 111
,,	908	..	212
1925 All.	128	..	225
,,	131	..	321
,,	133	..	614
,,	164	..	398A
,,	174	..	186, 210
,,	324	..	269
,,	330	..	620
,,	419	..	132A
,,	454	..	610
,,	499	..	392
,,	579	..	317
,,	656	..	310A
,,	672	..	93, 94
,,	691	..	692

			Note No.
1925	All.	707	561
	,,	778	172
1926	All.	20	637
	,,	62	614
	,,	95	713
	,,	155	186
	,,	329	197
	,,	331	694
	,,	345	144, 713
	,,	493	549, 554A, 633
	,,	538	256
	,,	549	267
1927	All.	16	159, 694
	,,	181	145, 158
	,,	209	210
	,,	268	450
	,,	436	419
	,,	446	102
	,,	454	620
	,,	488	177A
	,,	577	176
	,,	710	378
	,,	719	151
	,,	799	610, 625
	,,	802	205
	,,	807	565
	,,	818	593
	,,	826	424
1928	All.	99	7
	,,	111	662
	,,	134	108A
	,,	236	406
	,,	267	420, 421
	,,	299	710
	,,	313	489
	,,	360	436, 440, 479A
	,,	363	281
	,,	368	715
	,,	412	621C
	,,	491	207
	,,	561	589
	,,	629	691
	,,	708	4
	,,	719	144
	,,	798	3
1929	All.	121	485, 551
	,,	253	706
	,,	267	94
	,,	293	436, 479A
	,,	315	618
	,,	380	210
	,,	390	750
	,,	625	714
	,,	677	155, 692
	,,	879	329, 330, 331
1930	All.	326	299, 300
	,,	392	201
	,,	467	212
	,,	711	665
	,,	742	164, 299
	,,	771	436
	,,	785	437
	,,	858	329, 331
1930	All.	861	87, 88
	,,	866	243
1931	All.	145	669
	,,	203	554
	,,	225	591
	,,	229	352
	,,	419	469
	,,	458	694A
	,,	560	184
	,,	635	3
	,,	652	445, 457
	,,	675	136
	,,	725	211
	,,	727	665
	,,	752	164
1932	All.	16	254, 256
	,,	108	331
	,,	153	554
	,,	199	176, 243
	,,	256	341, 343
	,,	342	470, 477
	,,	350	253
	,,	358	253
	,,	377	152
1933	All	100	101, 186
	,,	235	392
	,,	363	198
	,,	410	474
	,,	453	197
	,,	466	308
	,,	648	653
	,,	775	610
	,,	789	691
1934	All.	126	355
	,,	152	554
	,,	434	82
	,,	661	253
	,,	688	154
	,,	993	596, 600, 601, 605
1935	All.	47	197
	,,	58	197
	,,	92	25, 93
	,,	99	133
	,,	102	716
	,,	129	176
	,,	156	312
	,,	323	1, 8, 9A
	,,	366	51
	,,	417	330
	,,	421	554
	,,	528	254
	,,	538	254
	,,	569	473
	,,	605	197
	,,	606	706
	,,	636	190
	,,	727	714
	,,	757	709
	,,	759	435
	,,	774	601
	,,	786	484
	,,	889	669
	,,	946	197

			Note No.
1935 All.	964	..	313
,,	995	..	431
1936 All.	369		715
,,	454	..	298
,,	467	..	711
,,	820	(F.B.) ..	204, 210A, 709
,,	870	..	487
1937 All.	90	..	254
,,	124	.	620
,,	129	..	176
,,	134	.	152
,,	168	..	593
,,	472	..	313
,,	481	..	463
,,	640	..	197
,,	689		547
,,	820	..	210A
,,	632	..	310
1938 All.	20	..	313. 313A, 498
,,	49	..	300
,,	78	..	148
,,	106	..	129
,,	213	..	6
,,	221	..	550
,,	297	..	401, 485
,,	305	..	317
,,	429	..	473
,,	451	..	421
,,	504	..	380A, 406, 407
,,	606	.	39A
1939 All.	82	..	162
,,	113	..	170
,,	158	..	270A
,,	217	..	453
,,	252	..	39A
,,	257	..	598, 600. 601
,,	277	..	164
,,	348	.	420, 421, 422
,,	378	..	360
,,	403	..	121, 161
,,	442	..	372 410
,,	526	..	525
,,	542	..	175
,,	590	..	157
,,	738	..	416A
1940 All.	145	..	150, 152
,,	209	..	406
,,	416	..	329
,,	424	..	509
,,	428	..	600
1941 All.	1	..	105, 519
,,	152	..	508
,,	207	..	42
,,	278	..	25
,,	306	..	582, 583
1942 All.	358	..	463
,,	429	..	31
1943 All.	36	..	605
,,	162	..	147, 148
,,	291	..	162
,,	294	..	374. 435
,,	393	..	176A
1944 All.	88	..	162
,,	198	,,	394
1945 All	35	..	175
,,	119	..	392
,,	185	..	352
,,	367	..	420
,,	377	..	144, 148
1946 All.	58	..	4
,,	142	..	367
,,	447	.	465, 477
,,	149	..	374
,,	389	.	600, 605
,,	502	.	352
1947 All.	7	.	554A
,,	38	..	394
,,	187	..	162
,,	252	..	271A
,,	256	..	162, 376A. 497
,,	296	..	604
1948 All.	56	..	601
,,	75	.	378
,,	213	..	46
1949 All.	31	..	324
,,	471	..	266
,,	764	..	253
1950 All.	7	..	525A
,,	60	.	638
,,	290	..	271A
,,	439	..	609
,,	486	..	122
,,	526	..	100, 569
,,	626	..	610
,,	632	..	266, 268, 501
,,	647	..	501
1951 All.	122	..	122 133
,,	167	..	564
,,	242	..	41
,,	408	..	509
,,	433	..	563
,,	589	..	477, 483, 401, 402
,,	626	..	600
1952 All.	105	.	534
,,	184	..	332
,,	190	..	620A
,,	300	..	638
,,	303	..	721
,,	305	..	623
,,	310	..	609, 611
,,	391	..	703
,,	715	..	683
,,	856	..	687
,,	875	..	590A
,,	897	..	312A
,,	900	..	719
1953 All.	414	..	686
1955 All.	41	..	176A. 194
,,	49	..	715
,,	226	..	670
,,	254	..	692
,,	339	..	562
,,	526	..	242
,,	552	..	703
,,	707	..	264
1956 All.	5	..	150
,,	32	..	722A

		Note No.
1956 All.	63	363
,,	273	134
,,	305	136
,,	435	2
,,	660	27
1957 All.	76	665
,,	334	133
,,	575	540
,,	622	683
,,	740	564
,,	805	662
1958 All.	149	659
,,	170	401, 485
,,	234	312A

A. I. R. Andhra Pradesh Series.

1955 Andhra	18	117, 441
,,	212	612
,,	274	550
1956 Andhra	105	201
,,	141	492
1957 Andhra	1	665
,,	40	620
,,	66	711
,,	76	453
,,	280	500, 508
,,	406	9, 41
,,	419	221
,,	437	201
,,	572	623
1958 Andhra	19	620
,,	48	454, 620
,,	309	408B

A. I. R. Assam Series.

1949 Assam	10	341, 351, 506
,,	24	71
1950 Assam	50	165, 580
,,	55	600
,,	57	600
,,	71	604
,,	83	72
,,	101	164, 299
1952 Assam	34	612
,,	45	678
,,	141	318, 324, 341
,,	172	709
1955 Assam	129	128
,,	177	174
,,	231	420
1956 Assam	63	51

A. I. R. Bombay Series.

1921 Bom.	20	675
,,	56	517
1921 Bom.	175	543
,,	291	178
1922 Bom.	2	621C
,,	118	711, 714, 715
,,	150	615 620
,,	183	179
1922 Bom.	234	564
,,	243	601
,,	271	668
,,	319	92
,,	350	563, 567
,,	356	177B
,,	359	710
1923 Bom.	62	281
,,	82	406
,,	155	343, 344
,,	193	666
,,	245	89
,,	300	637
,,	364	589
,,	415	577
,,	420	692
,,	431	710
1924 Bom.	28	360
,,	112	713
,,	124	420
,,	273	288
,,	290	84, 224
,,	364	164
,,	366	665
,,	387	554
,,	399	49
,,	417	567
,,	425	126
,,	468	78
1925 Bom.	9	624
,,	22	655
,,	113	151
,,	292	331
,,	309	683
,,	321	470
,,	372	330
,,	339	176
,,	414	710
,,	417	563, 564
,,	440	479A, 484
,,	443	707, 708
,,	465	616
1926 Bom.	54	26
,,	366	212
,,	406	713
,,	467	289
,,	590	509
1927 Bom.	32	692
,,	52	712
,,	55	289
,,	61	78
,,	125	406
,,	184	279
,,	221	50
,,	362	361
,,	398	109, 117
,,	424	107
,,	433	361
,,	480	31
,,	613	613
,,	650	583
,,	667	621A
1928 Bom.	28	4
,,	58	109, 114

		Note No.
1928 Bom.	64	53, 648
„	236	696
„	319	176
„	383	527, 529
1929 Bom.	13	93, 95
„	14	156
„	139	623
„	174	621A
„	186	330
„	196	712
„	345	242, 593
„	379	279
„	418	710
1930 Bom.	55	4, 192
„	61	509, 530A 531
„	297	554A
„	466	179, 190
„	505	148
„	512	220, 224, 476
1931 Bom.	24	14
„	47	29
„	74	177
„	189	542
„	365	485
„	590	214
1932 Bom.	36	374, 436
„	255	531
1933 Bom.	43	331
„	190	273
1934 Bom.	234	330
„	434	290, 330
1935 Bom.	213	193, 354, 356
„	313	356
„	320	242
„	326	242
„	361	316
„	366	316
„	420	81, 85B
1936 Bom.	34	118
„	162	703
„	322	1, 341, 342, 343
1937 Bom.	64	122
„	242	139, 143
„	307	288
„	491	299
1938 Bom.	97	420
„	158	464A
„	206	93
„	209	31
„	210	600, 609, 610
„	281	154
„	295	483
„	358	81
„	392	93
„	459	68
„	500	93
1939 Bom.	1	146, 162, 609
„	26	144, 153
„	46	123
„	56	290, 508
„	75	161
„	126	108, 373
„	322	508
„	392	483
1939 Bom.	394	367
„	418	29
„	425	290
„	427	330
„	522	490A, 490B
1940 Bom.	5	151
„	20	304
„	97	480, 508
„	136	527
„	158	352
„	161	402
„	188	289
„	252	378, 433
„	294	288, 291
1941 Bom.	197	79
„	203	74, 162
„	307	118
1942 Bom	138	567D
„	263	277
„	300	306
1943 Bom.	12	273, 277
„	21	378, 550
„	164	161
„	216	372, 410, 508
„	283	429
„	288	281
„	292	29
„	419	429, 433, 531
1944 Bom.	37	155, 157
„	63	29
„	267	420, 508
„	303	162
1945 Bom.	63	78
„	200	176
1946 Bom.	131	109
„	192	508
„	437	49, 122
1947 Bom.	82	498, 509
„	140	157
„	144	281B
„	152	554
„	205	360
„	206	576
„	451	499, 541
1948 Bom.	101	502
„	150	78, 99
„	185	156A
„	211	22
„	265	420, 508
1949 Bom.	64	502
„	104	2, 279
„	137	582, 609
„	379	156A
1950 Bom.	247	507
„	346	281, 600
„	386	470, 508
„	399	463, 508
„	401	484
1952 Bom.	106	448, 624
„	122	123, 128
„	395	588
1953 Bom.	35	42
„	79	378
„	334	212

			Note No.
1953	Bom.	353	37, 155
	,,	405	553
1954	Bom.	208	724
	,,	243	655
	,,	309	148
	,,	407	554
	,,	417	321
	,,	436	156A
	,,	457	705
	,,	525	122, 133, 689
	,,	537	46
1955	Bom.	93	151
1956	Bom.	86	122
	,,	347	197
	,,	447	42
	,,	553	201
	,,	600	4
	,,	601	290
1957	Bom.	178	7A
1958	Bom.	10	2, 662
	,,	51	212
	,,	270	491

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1921	Cal.	62	313
	,,	89	706
	,,	131	422
	,,	416	629
	,,	472	694
	,,	538	453
	,,	571	108
	,,	774	306
	,,	786	420, 429
	,,	814	366, 444
1922	Cal.	3	710
	,,	30	691
	,,	44	715
	,,	53	416
	,,	91	683
	,,	114	204
	,,	149	212
	,,	157	368
	,,	189	452
	,,	229	279
	,,	253	463
	,,	345	333
	,,	557	601
1923	Cal.	1	109 561
	,,	71	176
	,,	74	195, 598
	,,	85	437, 669
	,,	200	239
	,,	242	683
	,,	287	668
	,,	288	703
	,,	392	539
	,,	507	305
	,,	601	279
1924	Cal.	150	620
	,,	349	703
	,,	420	80, 331
	,,	481	78
	,,	600	102
1924	Cal.	638	281
	,,	686	703
	,,	744	274, 277
	,,	855	601A, 612
1925	Cal.	23	724
	,,	67	145, 156
	,,	175	47
	,,	213	724
	,,	270	602
	,,	351	669
	,,	456	156
	,,	485	215
	,,	559	312
	,,	584	172
	,,	684	49
	,,	735	128
	,,	862	210A
	,,	953	288
	,,	1012	205, 691
	,,	1147	277
	,,	1148	281
	,,	1153	210B
1926	Cal	65	100, 101, 463, 502
	,,	150	202, 203
	,,	229	172
	,,	297	440
	,,	392	543
	,,	507	239
	,,	510	200
	,,	560	553
	,,	568	108A
	,,	612	215
	,,	677	50
	,,	688	47
	,,	693	150, 178
	,,	757	327
	,,	789	392
	,,	798	581
	,,	883	539
	,,	1022	337
	,,	1064	642
	,,	1105	44, 123
	,,	1166	601A, 610
	,,	1218	195
1927	Cal.	60	509
	,,	89	703A
	,,	177	324, 341, 433
	,,	249	229
	,,	307	132
	,,	315	281, 283
	,,	614	691
	,,	623	128
	,,	718	49
	,,	760	703
	,,	794	212
	,,	829	49
	,,	853	723
	,,	902	333
	,,	904	703
	,,	952	710
1928	Cal.	1	381
	,,	46	151, 152, 155
	,,	302	707, 708, 715
	,,	317	723

		Note No.
1928 Cal.	349	171
,,	535	620
,,	574	620
,,	670	500
,,	686	724
,,	864	562
1929 Cal.	143	627
,,	155	190
,,	216	436
,,	250	578
,,	325	158, 248
,,	481	506
,,	542	234
,,	609	553
,,	650	706
1930 Cal.	5	148, 156
,,	15	614
,,	86	690
,,	165	589
,,	311	609
,,	313	606, 616
,,	329	694A
,,	402	614
,,	466	620
,,	474	589
,,	612	244, 340
,,	651	404
,,	748	420
1931 Cal.	29	290
,,	69	429, 430
,,	113	564
,,	131	420
,,	157	193
,,	166	692
,,	295	64
,,	319	660
,,	323	52, 646
,,	359	408
,,	385	211
,,	493	550
,,	506	57
,,	578	52, 646
,,	670	515
,,	719	205, 716
,,	731	129
1932 Cal.	249	232
,,	331	123, 128
,,	440	200
,,	482	44
,,	504	588
,,	534	52, 646
,,	558	68
,,	620	210
,,	627	672
1933 Cal.	124	246, 249
,,	251	692
,,	295	618
,,	414	612
,,	462	49
,,	508	74
,,	539	238
,,	641	474
,,	812	421
1933 Cal.	885	669, 689
,,	914	157
1934 Cal.	87	108, 109, 118
,,	130	690
,,	543	128
,,	745	665
1935 Cal.	131	672
,,	255	177
,,	267	279
,,	333	159, 690A
,,	335	100
,,	382	583
,,	511	508
,,	515	463
,,	631	87, 93
,,	648	210
,,	702	585, 588
,,	779	171, 606
,,	817	414
,,	821	414
1936 Cal.	239	694
,,	277	7B
,,	279	694
,,	289	538
,,	291	520
,,	382	27
,,	400	152
,,	653	253, 254
1937 Cal.	241	29
,,	284	198
,,	305	567C
,,	347	356
,,	454	35
,,	547	721
,,	581	706
,,	587	479A
,,	732	646
1938 Cal.	25	75
,,	113	670
,,	150	600
,,	192	279
,,	206	600
,,	263	170
,,	298	308
,,	333	159
,,	336	109
,,	377	151
,,	384	279
,,	577	148, 280A
,,	604	499
,,	673	105, 109
,,	709	508
,,	790	578
,,	791	157
,,	804	499
,,	861	380A
,,	874	509
1939 Cal.	26	483, 554A
,,	310	41
,,	331	694
,,	354	596, 598, 601A
,,	413	378, 508
,,	468	465, 508
,,	471	694

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1939 Cal.	625	154
„	651	715
„	663	170, 171
„	749	290, 499
1940 Cal.	16	279
„	51	108, 508
„	93	514, 517
„	185	600
„	194	600
„	228	115, 564A
„	363	372, 508
„	400	477, 508
„	530	65
„	589	331
1941 Cal.	41	500, 509A
„	193	601A
„	245	352
„	257	413, 550
„	304	310, 310A
„	333	281
„	378	123
„	595	380A
„	632	600
1942 Cal.	153	548
„	180	598
„	222	466, 468
„	444	354
„	483	508
„	606	70
1943 Cal.	67	40
„	143	605
„	203	330
„	460	144, 152, 499
1944 Cal.	4	54
„	106	488
„	157	75
„	211	567D
„	302	401, 449
1945 Cal.	144	508
„	194	554
„	387	93
„	449	207, 508
„	484	499
1946 Cal.	123	342, 612
„	480	290
1947 Cal.	98	312A
„	461	561, 563
1948 Cal.	97	341, 345
„	207	477
„	226	152
1949 Cal.	212	172
„	307	171
„	530	508
„	591	310, 312
1950 Cal.	92	576
„	134	468
„	166	172
„	217	41
„	298	100
„	356	42. 136
„	394	310, 312
„	467	498
„	506	574
„	522	172
1950 Cal.	555	279
„	566	280
1951 Cal.	251	370, 467
„	330	543
„	385	543
„	402	42, 249
„	462	312A, 189
„	518	686, 691
„	551	691
1952 Cal.	58	508
„	76	691
„	226	655
„	230	628
„	322	662
„	387	567D
„	473	525A
„	542	35
1953 Cal.	13	689
„	433	645
„	499	674
1954 Cal.	169	703
„	202	152
„	233	342
„	238	46
„	352	662
„	386	364
„	520	134
„	569	686
„	604	172
1955 Cal.	194	177B, 558
„	269	161
„	290	264, 449
„	353	151
„	369	242, 578
„	400	242
„	448	310A
„	484	722A, 724, 725
„	553	49
„	578	49
1956 Cal.	66	177
„	216	120
„	390	312A
1957 Cal.	67	597
„	106	508
„	153	477
„	177	211
„	479	134
„	483	221
„	688	215
1958 Cal.	1	162
„	296	688
„	437	622A

A. I. R. Dacca.

1950 Dacca	1	609
„	13	373, 412, 414, 415, 505

A. I. R. East Punjab.

1948 E.P.	68	152. 153
1949 E.P.	20	281A
„	29	7

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1949 E.P.	141	..	612
„	233	..	567D
„	299	..	42
„	318	..	273
1950 E.P.	157	..	176A
„	160	..	312A
„	195	..	122, 138
„	252	..	612
„	255	..	41

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1943 F.C.	36	..	2
1947 F.C.	23	..	449, 477, 540
1950 F.C.	142	..	531

A. I. R. Himachal Pradesh.

1950 H.P.	1	.	281, 430
„	6	..	612
„	15	..	509
1951 H.P.	54	.	508
„	67	..	682

A. I. R. Hyderabad.

1950 Hyd.	52	..	370, 416, 508
1951 Hyd.	57	..	144, 157
„	137	..	612
1954 Hyd.	104	..	646
„	166	..	686
1956 Hyd.	140	..	628

A. I. R. Jammu & Kashmir.

1951 J. & K.	21	..	620
„	25	..	331, 605
„	27	..	601, 620
1952 J. & K.	16	..	703
1955 J. & K.	36	..	317

A. I. R. Kerala Series.

1957 Kerala	92	..	352
„	100	..	25
1958 Kerala	22	..	576
„	58	..	612
„	246	..	384

A. I. R. Kutch.

1950 Kutch	58	..	120
1951 Kutch	15	..	4

A. I. R. Lahore Series.

1921 Lah.	124	..	126
„	196	..	370
„	242	..	313
1922 Lah.	198	..	352
„	210	..	270
„	219	..	125
„	271	..	560
1922 Lah.	316	..	406
„	390	..	68
1923 Lah.	23	..	551
„	41	..	80
„	58	..	108
„	95	..	65
„	144	..	65
„	268	..	527
„	495	..	614, 617
„	519	..	514
„	612	..	51
„	696	..	137
1924 Lah.	40	..	570
„	162	..	258
„	169	..	254
„	191	..	665
„	331	..	695
„	599	..	123
„	681	..	95
„	878	..	171
1925 Lah.	115	..	125
„	364	..	394
„	478	..	312
„	566	..	683
„	627	..	570
„	639	..	665
„	654	..	509
1926 Lah.	121	..	130
„	200	..	416
„	343	..	65
„	379	..	28
„	437	..	644
„	451	..	27
„	542	..	45
„	553	..	691
„	615	..	612
„	616	..	207
„	633	..	1A
„	676	..	504
„	693	..	49
1927 Lah.	54	..	649
„	59	..	123
„	97	..	78, 101
„	106	..	162, 712
„	172	..	460
„	186	..	153
„	192	..	134
„	200	..	148
„	388	..	270
„	433	..	317
„	543	..	469
„	570	..	439
„	717	..	45, 134
„	773	..	104
„	784	..	268
„	786	..	153
„	832	..	177
„	848	..	406
„	858	..	131, 136
1928 Lah.	51	..	380
„	98	..	600
„	157	..	200
„	216	.	60
„	250	..	80

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1928 Lah.	349	164
„	705	268
„	755	122
„	794	313
1929 Lah.	254	78
„	263	38
„	264	186
„	288	195
„	407	372
„	425	37, 155
„	505	212
„	535	313
„	661	82
„	753	105, 107, 111, 514
„	753	105
1930 Lah.	17	670
„	303	612
„	394	155
„	438	493
„	603	625
„	914	621C
1931 Lah.	118	665
„	241	406
„	395	230
„	586	670
1932 Lah.	39	78, 89
„	314	212, 215
„	441	688
„	456	207
„	531	144
„	605	78
1933 Lah.	239	35
„	341	201
„	345	178
„	404	26
„	412	489
„	479	88
„	568	49
„	589	151
„	611	157
„	681	45
„	705	313
„	793	469
„	821	42
„	860	469
„	866	78
1934 Lah.	384	289
„	617	45
„	622	35
„	878	171, 267
„	908	82
„	968	78
„	986	64
„	993	570
1935 Lah.	134	688
„	139	243
„	645	691
„	682	122
„	702	693
1937 Lah.	26	129
„	709	301
1938 Lah.	1	78
„	23	474
1938 Lah.	81	64
„	99	433
„	139	370, 508
„	193	492
„	196	306, 401
„	225	143
„	227	499
„	234	31
„	241	601
„	254	499
„	264	407
„	267	477
„	286	7
„	317	37A, 130
„	318	499
„	338	352, 433
„	365	365
„	369	22
„	457	524
„	493	306
„	512	290
„	570	554A
„	671	499
„	707	37A, 122
„	708	144
„	752	567A
„	809	570
„	836	57
„	869	422
1939 Lah.	6	509
„	47	157
„	118	317
„	135	290, 491
„	172	600
„	212	569
„	217	604
„	236	386
„	280	101, 162
„	290	78
„	307	352
„	315	609
„	356	406
„	378	134
„	428	499
„	439	49A
„	455	583
„	583	254, 504
1940 Lah.	75	162
„	154	499
„	225	473, 474
„	314	65
„	321	401, 402
„	349	279
„	359	503
„	410	583
„	475	508
„	497	275
1941 Lah.	166	450
„	256	151
„	257	134, 136
1942 Lah.	94	49
„	118	268
1943 Lah.	213	450
„	281	86

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1944 Lah.	106	..	75, 81
„	136	..	150. 156A
„	186	..	152, 153
„	402	..	581
„	409	..	78
1945 Lah.	164	..	374, 433, 436, 508
„	165	..	440
„	210	..	374
„	227	..	162
„	233	..	65
„	324	..	254, 256, 318
1946 Lah.	97	..	483
1947 Lah.	36	..	694
„	76	..	46, 49, 71
„	117	..	509 569A
„	168	..	31, 37A, 155
„	210	..	62
„	276	..	45
„	290	..	500, 524
1950 Lah.	76	..	133
A. I. R. Madhya Bharat Series.			
1950 M.B.	71	..	694
1951 M.B.	40	..	491. 609
1954 M.B.	18	..	37A
1955 M.B.	113	..	360
1956 M.B.	127	..	49
„	166	..	596
1957 M.B.	188	..	128
A. I. R. Madya Pradesh Series.			
1957 M.P.	95	..	151
„	237	..	181
„	238	..	244
A. I. R. Madras Series.			
1921 Mad.	116	..	162
„	246	..	593
„	283	..	372
„	349	..	421
„	362	..	312
„	380	..	493
„	425	..	331, 527
„	464	..	178
„	514	..	401
„	545	..	427
1922 Mad.	12	..	85B
„	59	..	604
„	150	..	413 463, 531
„	186	..	41
„	247	..	715
„	290	..	607
„	409	..	117
„	417	..	156, 669
„	457	..	515
1923 Mad.	23	..	440
„	46	..	440
„	72	..	710
„	82	..	70
„	88	..	520
„	108	..	593
„	160	..	576
„	278	..	406
„	354	..	41
„	461	..	466
„	489	..	35
„	578		105, 108, 628, 630
„	652	..	293
„	665	..	293
„	667	..	109. 358
1924 Mad.	57	..	272
„	73	..	465
„	114	..	41
„	210	..	694
„	278	..	283
„	286	..	177, 178
„	607	..	229, 420
„	673	..	162
„	676	..	601
„	708	..	453
„	840	..	414
„	906	..	715
„	920	..	109
1925 Mad.	14	..	40
„	76	..	553
„	78	..	95
„	80	..	554
„	131	..	205, 716
„	152	..	694A
„	185	..	628
„	379	..	278
„	446	..	582
„	703	..	716
„	709	..	41, 71
„	780	..	644
„	793	..	330
„	796	..	564
„	799	..	337
„	835	..	610
„	861	..	621
„	885	..	433
„	1241	..	133
„	1260	..	477, 502
1926 Mad.	42	..	621
„	81	..	564
„	109		109
„	114	..	207
„	125	..	644
„	141	..	443, 550, 552
„	160	..	554
„	245	..	519
„	255	..	484
„	311	..	563
„	452	..	179
„	681	..	514
„	698	..	694
„	747	..	706
„	796	..	560, 564
„	857	..	690
„	966	..	578
„	1061	..	204
„	1081	..	153
„	1123	..	491
„	1176	..	203

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„ 1190	287, 332
„ 1209	710
1927 Mad. 80	203
„ 216	78, 526
„ 288	581, 715
„ 381	666
„ 391	163
„ 468	214
„ 488	281
„ 568	509
„ 586	337
„ 597	9A, 102
„ 631	365, 554
„ 674	492
„ 835	670
„ 849	621C
„ 917	225
„ 945	550
„ 959	203
„ 1094	610
1928 Mad. 27	263
„ 42	93
„ 143	715
„ 226	206
„ 377	521
„ 404	49
„ 440	710
„ 499	360
„ 509	195
„ 522	696
„ 627	162
„ 652	620
„ 693	212
„ 820	364, 367, 550. 620
„ 1055	93
„ 1124	383, 483
1929 Mad. 38	337
„ 53	483
„ 69	285
„ 313	229, 331, 529
„ 419	195. 202, 210
„ 577	492
„ 879	229
„ 881	209
1930 Mad. 48	337
„ 65	186
„ 173	498
„ 218	186
„ 403	606, 607
„ 528	691, 697
„ 588	715
„ 635	221, 306, 307A, 349A
„ 821	85B, 229, 592
1931 Mad. 58	108, 317, 508
„ 149	650
„ 274	524
„ 282	601
„ 501	522
„ 525	293
„ 590	695
„ 597	230
„ 647	451
1931 Mad. 812	665
„ 813	665
1932 Mad. 112	42
„ 139	34
„ 142	41
„ 170	85
„ 287	32
„ 328	567A, 618
„ 352	42
„ 432	299
„ 516	183
„ 574	686
„ 589	509
„ 661	490A
„ 685	363
1933 Mad. 376	398
„ 418	159, 162
„ 442	691
„ 454	147
„ 565	178
„ 626	172
„ 686	190
„ 745	690
„ 967	499
1934 Mad. 12	365, 453
„ 45	197
„ 103	93
„ 147	289, 293
„ 306	122
„ 392	710
„ 593	154
„ 605	229
1935 Mad. 377	244
„ 731	508
„ 914	242
1936 Mad. 118	716
„ 250	322
„ 346	331
„ 613	709
„ 778	22
„ 914	93
1937 Mad. 340	263
1938 Mad. 38	417
„ 41	157
„ 73	583
„ 133	453
„ 157	167, 169
„ 193	509
„ 218	53
„ 236	361
„ 349	300
„ 353	317, 506
„ 394	559, 561
„ 415	605
„ 532	376A
„ 581	583
„ 589	433
„ 612	164
„ 641	506
„ 677	331
„ 822	331
„ 823	122, 123
„ 836	554A
„ 999	506

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1939 Mad.	114	418
,,	397	22
,,	512	147
,,	570	540
,,	671	508
,,	678	7
,,	722	112, 485
,,	724	144, 150
,,	867	281
,,	877	508
,,	907	86
1940 Mad.	81	567A
,,	85	388
,,	102	593
,,	106	508
,,	233	483
,,	495	31
,,	530	93
,,	689	22, 152
,,	798	600, 605
,,	887	381
,,	908	39
,,	920	566
,,	934	22
1941 Mad.	77	273
,,	81	499, 503
,,	319	150
,,	391	378
,,	428	499, 541
,,	449	75, 577D, 609
,,	481	331
,,	498	499
,,	589	136
,,	678	91
,,	727	378, 508
,,	742	368, 433, 434
,,	786	22
,,	841	109
1942 Mad.	41	273
,,	104	458
,,	170	43, 51
,,	303	349A
,,	386	370, 508
,,	406	37A
,,	483	145, 150
,,	487	463, 508
,,	514	508
,,	539	258
,,	622	612
,,	628	548
,,	660	503
,,	713	152, 153
,,	728	595
1943 Mad.	13	352, 406
,,	28	551
,,	55	74
,,	80	154
,,	150	484
,,	191	368, 378, 508
,,	252	508
,,	276	515, 517
,,	378	78
,,	413	577, 612
,,	457	152, 156A
1943 Mad.	498	150
,,	501	281, 291
,,	633	151, 278
,,	691	105, 109
1944 Mad.	47	150, 151
,,	67	147, 162
,,	172	554A
,,	211	435
,,	218	474
,,	253	150
,,	417	273
,,	430	133, 133A
,,	431	318, 508
,,	347	138
,,	512	93
,,	571	41
1945 Mad.	5	318, 508
,,	20	499, 541
,,	33	493
,,	60	341
,,	70	161
,,	86	156A
,,	149	85B
,,	157	483
,,	288	300
,,	315	11, 140
,,	498	93
,,	500	365
1946 Mad.	33	348
,,	116	104, 375, 514
,,	122	416A
,,	133	312A
,,	236	508
,,	248	378, 508
,,	324	279
,,	381	41, 42
,,	423	554
,,	444	340
,,	453	306, 343, 348
,,	461	281
1947 Mad.	3	567D
,,	90	433, 434
,,	238	162
,,	274	488
,,	457	403, 477
1948 Mad.	76	410
,,	412	550
,,	420	601
,,	446	299, 318
,,	480	41
,,	521	35
1949 Mad.	114	273
,,	279	162
,,	421	465, 477
,,	437	342
,,	542	509
,,	592	392
,,	624	53
,,	638	437, 440
,,	673	600, 604
,,	849	144
1950 Mad.	30	310, 310A, 312A
,,	39	550
,,	52	53

			Note No.
1950 Mad.	291	..	378
„	358	..	281
„	388	..	420
„	390	..	329
„	438	..	312A
„	460	..	172, 430
„	504	..	698A
„	506	..	588
„	552	..	102
„	734	..	306, 348
„	749	..	389, 598
„	762	..	4
„	801	..	171
„	820	..	474
1951 Mad.	234	..	372, 508
„	314	..	4
„	356	..	595
„	388	..	508
„	429	..	694
„	472	..	41
„	547	..	372, 508
„	572	..	341, 345
„	704	..	348
„	711	..	694
„	788	..	621A
„	817	..	329, 331, 605, 623
„	824	..	493
„	844	..	721
„	962	..	703
„	1010	..	721
1952 Mad.	26	..	508
„	90	..	712
„	124	..	724
„	179	..	624
„	186	..	9A, 247
„	377	..	668, 669
1953 Mad.	360	..	646
„	465	..	42
„	561	..	655
„	611	..	420
„	694	..	317
„	726	..	224
„	767	..	656
„	909	..	656
1954 Mad.	74	..	709
„	101	..	628
„	185	..	445
„	195	..	665
„	258	..	618
„	475	..	665
„	585	..	85B
„	650	..	563
„	831	..	690, 690A
„	961	..	281
1955 Mad.	23	..	2
„	67	..	161
„	96	..	138
„	144	..	459
„	202	..	578
„	288	..	153, 508
„	294	..	215
„	369	..	514
„	542	..	600
„	643	..	378
1956 Mad.	15	..	21
„	96	..	118
„	108	..	508
„	134	..	687
„	198	..	172
„	210	..	406
„	238	..	203
„	283	..	360
„	399	..	522, 567D
1957 Mad.	1	..	190
„	8	..	181
„	14	..	39B
„	106	..	363
„	431	..	2
„	440	..	690A
„	665	..	716
1958 Mad.	319	..	540
„	418	..	723

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1956 Manipur	33	..	133

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1951 Mysore	68	..	310, 310A, 312
1952 Mysore	1	..	329
„	65	..	420
„	121	..	703B
„	186	..	161
1954 Mysore	1	..	715
„	29	..	474
1955 Mysore	33	..	600
„	110	..	247
1957 Mysore	1	..	554
1958 Mysore	43	..	198

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1921 Nag.	141	..	129
„	248	..	306
1922 Nag.	23	..	545
„	60	..	420
„	76	..	289
„	201	..	331
„	212	..	324
„	250	..	176
1923 Nag.	11	..	308
„	14	..	267
„	47	..	413
„	143	..	187
„	187	..	273
„	241	..	155
„	321	..	148
1924 Nag.	27	..	127
„	94	..	173, 174
„	108	..	671
„	125	..	324
„	263	..	453, 454
„	271	..	646
„	411	..	203

		Note No.
1925 Nag.	115 ..	104
„	291 ..	692
„	374 ..	683
„	385 ..	93
1926 Nag.	84 ..	554
„	124 ..	330
„	126 ..	158
„	236 ..	249
„	331 ..	31
„	349 ..	127, 646
1927 Nag.	28 ..	392
„	104 ..	620
„	247 ..	52
„	294 ..	690
„	308 ..	715
„	343 ..	684
1928 Nag.	63 ..	132A
„	91 ..	41
„	192 ..	176
1929 Nag.	89 ..	268
„	219 ..	150, 153
1930 Nag.	92 ..	290
„	113 ..	126
„	129 ..	123
„	142 ..	244, 340
„	206 ..	8
„	300 ..	6
1931 Nag.	17 ..	280A
1932 Nag.	1 ..	393
„	117 ..	198
1933 Nag.	13 ..	146
„	70 ..	393
„	130 ..	147
„	379 ..	485
1934 Nag.	260 ..	264
1936 Nag.	1 ..	148
„	21 ..	312
„	285 ..	21
„	289 ..	129
1937 Nag.	66 ..	152
„	215 ..	47, 155
1938 Nag.	13 ..	383, 398
„	30 ..	114, 117, 441
„	46 ..	24
„	84 ..	318
„	156 ..	43, 46, 64
„	180 ..	380A
„	233 ..	41
„	266 ..	352
„	286 ..	264. 354
„	287 ..	123
„	300 ..	151
„	335 ..	420
„	534 ..	9A
1939 Nag.	7 ..	596, 598, 600, 601A
„	81 ..	162
„	113 ..	406, 407
„	150 ..	123
„	163 ..	605
„	177 ..	346
„	197 ..	503
„	242 ..	554
1939 Nag.	245 ..	75
„	260 ..	589
1940 Nag.	94 ..	78
„	235 ..	470
„	401 ..	39A
1941 Nag.	60 ..	162
„	132 ..	264
„	169 ..	484
„	181 ..	104, 368, 463, 508
„	308 ..	50
1942 Nag.	92 ..	380A
„	138 ..	393
„	178 ..	483
1943 Nag.	9 ..	370
„	90 ..	268
„	178 ..	100
„	227 ..	414
„	284 ..	85B
1944 Nag.	101 ..	360
„	124 ..	477
„	155 ..	161, 162
„	313 ..	148
„	356 ..	123
„	377 ..	107
1945 Nag.	106 ..	498
„	129 ..	509
1946 Nag.	112 ..	380A
„	117 ..	392, 393
„	277 ..	588
„	377 ..	422
„	401 ..	499
1947 Nag.	101 ..	161
„	153 ..	477
„	224 ..	310A
1948 Nag.	15 ..	155
„	20 ..	313
„	41 ..	26
„	50 ..	123
„	150 ..	431
„	189 ..	150
„	225 ..	392
„	328 ..	598
„	334 ..	148
„	377 ..	359, 361
„	385 ..	42
„	395 ..	123
„	397 ..	499, 541
„	401 ..	485
1949 Nag.	48 ..	402
„	103 ..	554A
„	235 ..	108, 441
„	329 ..	263, 264, 449
1950 Nag.	37 ..	151, 158
„	201 ..	136
„	228 ..	352, 381
„	229 ..	374, 435
„	295 ..	501
1951 Nag.	148 ..	465, 476, 508
„	255 ..	360, 363
„	327 ..	509
„	366 ..	687
„	382 ..	64

			Note No.
1951 Nag.	403	..	329
„	440	..	721
1952 Nag.	40	..	501
1954 Nag.	38	..	363
„	46	..	312A
„	115	..	312A
„	212	..	508
„	300	..	505A
„	319	..	491
1955 Nag.	126	..	21
„	145	..	2, 563, 564, 565
„	238	..	667
„	265	..	164
„	300	..	23
1956 Nag.	11	..	612
„	129	..	722A
„	200	..	703
„	204	..	508
1957 Nag.	24	..	165
„	57	..	42, 655

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1949 Orissa	64	..	4
1950 Orissa	64	..	337
„	125	..	2
„	140	..	285
1951 Orissa	40	..	147
„	183	..	596, 598
„	342	..	499, 503
1592 Orissa	31	..	330
„	62	..	190
„	182	..	508
1953 Orissa	13	..	161
„	85	..	703
1954 Orissa	78	..	618
1955 Orissa	11	..	440
1956 Orissa	34	..	136
„	124	..	13
„	136	..	290
„	193	..	101, 186
1957 Orissa	224	..	445

A. I. R. Oudh Series.

1922 Oudh	1	..	563
„	15	..	531
„	31	..	81
„	39	..	129
„	109	..	222
„	133	..	617, 626
„	135	..	178, 210A
1923 Oudh	19	..	304, 398
„	61	..	533
„	185	..	588
1924 Oudh	31	..	694
„	40	..	616
„	44	..	563, 564
„	266	..	625
„	347	..	568
„	377	..	438
„	381	..	500
1925 Oudh	20	..	244
	42	..	625
1925 Oudh	148	..	70
„	369	..	41, 149
„	371	..	46
„	373	..	393
„	374	..	64
„	385	..	617
„	400	..	1
„	411	..	41, 669, 671
„	440	..	212
„	446	..	41
„	600	..	127
„	613	..	553A
„	643	..	71, 129
1926 Oudh	20	..	81
„	141	..	617, 626
„	199	..	74
„	206	..	49
„	288	..	7
„	258	..	620
„	289	..	715
„	313	..	242, 625
„	358	..	612
„	410	..	626
„	444	..	618
„	464	..	620
„	500	..	626
„	547	..	563, 564
„	594	..	561, 614
„	601	..	210
„	616	..	715
1927 Oudh	129	..	123
„	134	..	708
„	209	..	612
„	347	..	615
„	478	..	312
„	499	..	537
„	582	..	612
1928 Oudh	251	..	621C
„	289	..	553
„	348	..	527
„	391	..	621C
„	442	..	706
1929 Oudh	76	..	668
„	284	..	330, 620
„	337	..	620
„	402	..	242
„	479	..	197
1930 Oudh	49	..	49
„	51	..	687
„	67	..	178
„	82	..	329
„	184	..	57, 71
„	287	..	176, 197
„	334	..	190
„	339	..	588
„	371	..	246
„	395	..	628
„	420	..	449
„	463	..	645
1931 Oudh	1	..	268
„	51	..	697
„	54	..	178
„	177	..	85, 622
„	310	..	203

			Note No.
1931 Oudh	314	..	58
,,	351	..	161
,,	382	..	610
1932 Oudh	1	..	202
,,	46	..	610
,,	66	..	527
,,	154	..	177
,,	326	..	665
1933 Oudh	38	..	564, 566
,,	92	..	244
,,	518	..	317, 477
,,	523	..	46
1934 Oudh	21	..	610
,,	96	..	108
,,	303	..	244
,,	455	..	193
,,	465	..	191
1935 Oudh	35	..	662
,,	131	..	671
,,	139	..	243, 554
,,	378	..	435
,,	391	..	191
,,	392	..	300
1936 Oudh	168	..	621B
,,	270	..	225
,,	387	..	337
,,	394	..	499
1937 Oudh	26	..	129
,,	375	..	105
,,	394	..	364
1938 Oudh	100	..	144
,,	112	..	151
,,	186	..	32
,,	214	..	601
1939 Oudh	57	..	556
,,	118	..	694
,,	120	..	381
,,	122	..	331
,,	227	..	175
,,	245	..	49
1940 Oudh	134	..	6A, 600
,,	283	..	509
,,	310	..	50
,,	412	..	151
1941 Oudh	1	..	464
,,	93	..	162
,,	161	..	152
,,	165	..	93
,,	172	..	318, 324, 330, 605
,,	210	..	383, 384, 386, 398
,,	247	..	133
,,	415	..	600
,,	485	..	389, 392
1942 Oudh	33	..	281A
,,	82	..	374, 487
,,	120	..	281
,,	125	..	49
,,	204	..	41
,,	362	..	50
,,	374	..	499
,,	392	..	135C
,,	447	..	60
1942 Oudh	449		551A, 552
,,	488		65
,,	489	..	300
1943 Oudh	57	..	49A
,,	177	..	533
,,	296	..	78
,,	368	..	290, 499
1944 Oudh	135	..	49, 49A
,,	139	..	118
,,	193	..	50
,,	250	..	340
1945 Oudh	70	..	554A
,,	94	..	71
,,	258	..	563
1946 Oudh	129	..	7
,,	213	..	594
1947 Oudh	3	..	39A
,,	128	..	393
,,	147	..	162
,,	235	..	393
1948 Oudh	125	..	331
,,	307	..	533
,,	351	..	99
1949 Oudh	51	..	416

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1935 Pesh.	95	..	508
,,	133	..	622
,,	147	..	623
,,	179	..	392
1936 Pesh.	147	..	623
,,	164	..	126
,,	168	..	621B
,,	179	..	126
,,	192	..	53
,,	361	..	210A
1937 Pesh.	40	..	210A
,,	95	..	508
,,	588	..	197
1941 Pesh.	65	..	337
,,	74	..	49A
1942 Pesh.	39	..	564, 566
,,	57	..	345A
,,	85	..	379
1943 Pesh.	83	..	509
1944 Pesh.	17	..	162, 694
1947 Pesh.	15	..	509
1950 Pesh.	31	..	598

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1921 Pat.	1	..	285
,,	29	..	176A
,,	36	..	598
,,	225	..	153
,,	237	..	600
,,	476	..	200
,,	777	..	596
1922 Pat.	47	..	25A
,,	188	..	713
,,	201	..	162, 692
,,	310	.	715
,,	364	..	406

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1922 Pat.	450	11, 149
,,	479	565
,,	499	365
,,	507	669
,,	549	164
,,	597	715
,,	601	271
1923 Pat.	22	715, 716
,,	88	211
,,	201	583
,,	242	407
,,	259	369
,,	298	312
,,	384	710
,,	464	415
,,	475	223, 498, 509
1924 Pat.	23	712
,,	107	406, 407
,,	113	126
,,	160	703B
,,	231	477
,,	333	211
,,	471	153, 712
,,	560	582
,,	572	583
,,	576	694, 709
,,	664	415
,,	721	169, 585, 588
,,	806	177
1925 Pat.	40	703
,,	68	108, 109, 112, 585
,,	216	582
,,	459	714, 715
,,	494	409
,,	499	583
,,	521	172
,,	557	483
,,	568	612
,,	727	309, 321
,,	748	239
,	765	378, 434
,,	784	288
,,	787	617, 626
1926 Pat.	28	219
,,	73	45
,,	160	715
,,	192	100
,,	194	147
,,	205	117, 540
,,	337	553
,,	340	556
,,	397	172
,,	401	281, 430
,,	421	290
,,	512	614
,,	533	712
1927 Pat.	92	711
,,	113	707
,,	177	669, 691
,,	215	703
,,	223	707
,,	232	64
,,	248	487
,,	256	151
1927 Pat.	324	712
,,	335	312
1928 Pat.	24	219
,,	86	162
,,	156	204
,,	221	177, 406, 407
,,	431	613
,,	612	715
,,	615	282
1929 Pat.	36	162
,,	117	626
,,	228	171, 176A
,,	245	224, 317, 322
,,	258	176A
,,	368	676
,,	388	479A
,,	604	275
1930 Pat.	46	485, 490
,,	54	151
,,	256	16A, 27
,,	286	706
,,	301	176
,,	455	2, 80
,,	573	591
1931 Pat.	44	470
,,	285	490, 554A
1932 Pat.	145	581, 624
,,	337	206
,,	349	57
1933 Pat.	1	210
,,	45	310
,,	224	221, 340, 499
,,	473	281
,,	557	600
1934 Pat.	7	476
,,	353	134, 247
1936 Pat.	43	694
,,	60	638
,,	147	623
,,	158	538
,,	362	642
,,	462	487
,,	496	670
1937 Pat.	42	469
1938 Pat.	16	550
,,	69	420, 421
,,	92	83
,,	192	476, 508
,,	203	157
,,	222	600, 601
,,	273	105
,	275	401
,	337	331
,	395	162
,,	413	43, 49, 71
,,	429	477
,,	524	290
,	600	107, 514
1939 Pat.	33	93
,,	86	150, 153
,	109	274
,,	194	401, 485
,,	261	363
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,,	502	480, 483
,,	548	509
,,	667	31
1940 Pat.	71	381
,,	74	481
,,	81	435, 440, 487
,,	90	104
,,	106	313
,,	129	361, 363
,,	149	162
,,	151	445
,,	155	473, 485
,,	201	420
,,	358	22
,,	609	465
,,	677	144
1941 Pat.	45	75
,,	50	289
,,	108	49
,,	116	543
,,	201	543
,,	372	340
,,	348	437, 477
,,	452	469, 485
,,	490	281
,,	499	160, 176
1942 Pat.	83	488
,,	99	78, 86
,,	112	694
,,	181	414, 505
,,	188	596, 603
,,	201	355, 406, 433
,,	234	22
,,	245	437, 440
,,	335	25
,,	378	152
,,	386	281
1943 Pat.	68	492
,,	218	386, 416, 508
,,	289	108A, 115
,,	305	446, 554
,,	377	171, 174
1944 Pat.	40	170, 171
,,	109	597
,,	225	152, 153
,,	310	176
1945 Pat.	276	694
,,	298	330
,,	326	567F
,,	368	4
,,	369	152, 277
,,	398	162
1946 Pat.	59	4
,,	60	4
,,	154	85
,,	185	594A
,,	202	165
,,	417	57
1947 Pat.	11	485
,,	47	514
,,	99	612
,,	329	134
,,	475	600

		Note No.
1948 Pat.	18	355, 406
,,	328	488
,,	391	600
,,	408	600, 601
,,	420	554
1949 Pat.	117	153, 694
,,	212	94
,,	268	312A
,,	293	148, 153
,,	447	392
,,	465	29
,,	510	602, 605
1950 Pat.	21	485
,,	25	273, 279
,,	134	611, 612
,,	174	552
,,	191	99, 600, 604
,,	202	12
,,	206	9, 121, 600
,,	218	500, 524
,,	247	420
,,	447	498, 509, 524
,,	484	601
1951 Pat.	325	340
,,	348	437, 477
,,	462	42, 247, 249
,,	556	596
,,	602	306, 348
1952 Pat.	4	710
,,	8	709
,,	43	613, 621A, 625
,,	46	598, 621A, 613
,,	73	484
,,	123	624
,,	143	594
,,	201	610, 611A, 625
,,	213	710
,,	244	669, 691, 695
1953 Pat.	283	498
1954 Pat.	164	694
1955 Pat.	187	711
,,	234	715
,,	284	703
,,	292	525
,,	320	177A
,,	333	703
,,	375	348
1956 Pat.	277	485
,,	414	554
,,	511	678
,,	522	35
,,	526	342
,,	533	600
1957 Pat.	37	622
,,	117	42
,,	213	614
,,	235	44
,,	299	711
,,	534	620
,,	538	3
,,	559	210
1958 Pat.	1	436
,,	118	312A

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1958 Pat.	252	..	655
,,	386	..	601

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1951 Pepsu	132	..	249
1952 Pepsu	18	..	392
,,	21	..	247, 249
,,	46	..	600, 625
,,	52	..	694
1956 Pepsu	17	..	171
,,	33	..	290
,,	40	..	134
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1933 P.C.	63	.	2, 508
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1938 P.C.	66	..	355
,,	110	..	349
1939 P.C.	128	..	150
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1940 P.C.	44	..	567D
,,	132	..	359A
,,	204	..	483
,,	215	..	508
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,,	6	..	386
,,	130	..	105
1942 P.C.	47	..	337, 499
,,	64	..	113A
1943 P.C.	83	..	101
,,	98	..	711
1944 P.C.	24	..	521, 523
,,	85	..	554
1945 P.C.	5	..	162
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,,	111	..	422
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1951 Punj.	45	..	501
,,	125	..	637
,,	341	..	498
1952 Punj.	367	..	133
1954 Punj.	162	..	201
,,	278	..	169
1956 Punj.	21	..	203, 210
1957 Punj.	49	..	312A
,,	108	..	289
,,	134	..	648
,,	278	..	453
1958 Punj.	79	..	719
,,	132	..	697, 718
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,,	150	..	703
1952 Raj.	4	..	675
,,	60	..	713
,,	66	..	709
,,	180	..	133
1954 Raj.	135	..	214
,,	273	..	703
,,	287	..	53
1955 Raj.	57	..	215
,,	91	..	219
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1956 Raj.	6	..	3

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,,	226	..	74
,,	261	..	604
1924 Rang.	68	..	386, 508
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,,	155	..	508, 517
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1925 Rang.	187	..	41, 66, 660
,,	223	..	483
,,	289	..	108
,,	337	..	561
,,	344	..	134
1926 Rang.	7	..	435, 440
,,	71	..	420
,,	95	..	517
,,	135	..	136
,,	143	..	645
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,,	186	..	421
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,,	165	..	47
,,	189	..	554
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,,	326	..	178
1929 Rang.	55	..	156
,,	62	..	170
,,	96	..	130
,,	116	..	49, 127, 646
,,	229	..	682, 691
,,	251	..	7. 474
1930 Rang.	21	..	378
,,	41	..	68
,,	72	..	620
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1931 Rang.	40	..	588
,,	80	..	49

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1932 Rang.	1	..	418, 419
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„	88	..	203
1933 Rang.	96	..	675
„	180	..	697
1934 Rang.	287	..	200
„	329	..	307A
1935 Rang.	152	..	190
„	187	..	692
„	235	..	265
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„	473	..	197, 202, 304
1936 Rang.	11	..	47, 155
„	80	..	464A
„	82	..	133, 134
„	89	..	134
„	124	..	623
„	183	..	47
„	312	..	322
„	313	..	224
„	338	..	364
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„	484	..	483
1938 Rang.	65	..	576, 615
„	214	..	59
„	224	..	406
„	258	..	418
„	264	..	422
„	270	..	406
„	318	..	151
„	335	..	361, 363
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1939 Rang.	42	..	363
„	278	..	420
„	365	..	113A, 463, 508
1940 Rang.	14	..	64
„	17	..	265 352
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1941 Rang.	194	..	54

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„	181	..	177A
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1927 Sind	270	..	3
1928 Sind	45		177, 177B
1929 Sind	168		471
1930 Sind	150	..	291
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1939 Sind	78	..	41
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„	132	..	41
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1944 Sind	44	..	289
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„	247	..	611
„	469	..	626
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1953 S.C.	98	..	341, 345
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„	225	..	186
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1957 S.C.	31	..	620
,,	314	..	599
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1951 Tra.-Co.	26	..	148, 157
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,,	232	..	610
,,	246	..	600
1952 Tra.-Co.	29	..	393
,,	37	..	690, 691
,,	40	..	697, 718
,,	69	..	714
1952 Tra.-Co.	78	..	721
,,	86	..	622A
,,	136	..	691, 695
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1953 Tra.-Co.	196	..	183
,,	220	..	703
1954 Tra.-Co.	97	..	496, 703
,,	203	..	477
,,	302	..	508
,,	311	..	183
,,	312	..	429
,,	317	..	563
,,	362	..	312A
,,	499	..	364
1955 Tra.-Co.	51	..	152
,,	188	..	21
1956 Tra.-Co.	70	..	281
,,	262	..	281
1957 Tra.-Co.	40	..	162
,,	61	..	378
,,	133	..	312A
,,	145	..	614
,,	186	..	190
,,	188	..	21
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1954 V.P.	1	..	642
1956 V.P.	26	..	378

ADDENDA.

Preamble. Note 2.

After A.I.R. 1957 Punj. 273 add—*Natha Singh* v. *Tejinder*, A.I.R. 1958 Punj. 283. See also *Sirajul-Haq*. v. *Sunni Central Board*, A.I.R. 1959 S.C. 198.

Preamble. Note 4.

After 18 I.C. 64 add—*Chotmal* v. *Ramchand*, A.I.R. 1958 Bom. 137.

S. 2, cl. (7). Note 13.

After A.I.R. 1956 Orissa 124 add—A similar view was expressed by the Supreme Court in its recent decision in the case of *Madhavrao* v. *Ramkrishna*, (1958) S.C.J. 963, A.I.R. (1958) S.C. 767.

S. 3. Note 26.

After A.I.R. 1948 Nag. 41 add—See also *Ariadne* v. *Eftichia*, (1958) A.C. 469, (1958) 3 W.L.R. 265.

S. 5. Note 49.

Add after A.I.R. 1955 Cal. 553—This section has got no application to an appeal under the provisions of the Bihar Land Reforms Act, XXX of 1950—*Uma* v. *Lakshmi*, A.I.R. 1958 Pat. 609.

S. 12, cl. (1). Note 121.

After 6 B.L.R. 292 add—See also *Vishnu Bhatta* v. *Domakkee*, A.I.R. 1958 Ker. 326.

S. 12, cl. (2). Note 123.

After 12 All. 461 (F.B.) add—See also *Natha Singh* v. *Tejinder*, A.I.R. 1958 Punj. 283.

S. 14. Note 151.

After A.I.R. 1955 Bom. 93 add—See also *Madhavrao* v. *Ramkrishna*, A.I.R. 1958 S.C. 767, (1958) S.C.J. 963.

S. 15. Note 162.

After A.I.R. 1944 Mad. 67 add—In *Siraj-ul-Haq* v. *Sunni Central Board*, A.I.R. 1959 S.C. 198, it has been recently held by the Supreme Court that if an express order or injunction is produced by a party that will clearly meet the requirements of this section, but that it is open to argument if it will do so if an order or injunction is produced which by necessary implication stays the institution of the suit.

S. 19. Note 190.

After A.I.R. 1952 Mad. 136 add—Auditor—An auditor of a company is not (apart from any special contract) an agent of the company, at any rate for the purpose of being able to bind the company by merely signing the normal certificate at the foot of the balance-sheet. The scheme of the Companies Act seems to be designed to produce this result, that a skilled professional man or a firm of skilled professional men is or are appointed in order that there is to be before the company all the requisite information indicated in the Act, and that by their certificate

they pledge themselves that they have properly performed their statutory duty—In re. Transplanters (Holding Company) Ltd., (1958) 1 W.L.R. 822, (1958) 2 All.E.R. 711.

S. 23. Note 221.

After A.I.R. 1940 Pat. 449 add—See also *Harendra* v. *Chairman, Municipality, Goalpara,* A.I.R. 1958 Assam 93.

Note 253.

After 136 I.C. 829 add—See also *Great India Steam Navigation Co. Ltd.* v. *Hooghly Docking & Engineering Co., Ltd.,* I.L.R. (1957) 1 Cal. 587.

Art. 2. Note 254.

After 164 I.C. 860 add—See also *Chetandas* v. *State of Bihar,* A.I.R. 1958 Pat. 512.

Art. 2. Note 257.

After 103 I.C. 1 add—See also *Braham Dutt* v. *East Punjab,* A.I.R. 1958 *Punj.* 351.

Art. 12. Note 281.

After 27 I.A. 216 add—In a recent case, *Nani Bai* v. *Gita Bai,* (1958) S.C.J. 925, A.I.R. 1958 S.C. 706, where the Court had not been invited to determine any controversy as between the person substituted for the judgment-debtor and the true legal representative of the deceased judgment-debtor and the property had been sold as that of the substituted judgment-debtor, the Supreme Court held that Malkarjun's Case, supra, was of no assistance to the appellants and that the suit was not barred by this Article.

Art. 32. Note 312A.

After A.I.R. 1958 Pat. 118 add—See also *Union of India* v. *Meghraj,* A.I.R. 1958 Cal. 434.

Art. 36. Note 317.

After 38 Mad. 275 (277) add—A claim for compensation for injury to a chattel bailed under a contract caused by the negligence of the bailee is governed by Art. 115 and not by Art. 36, because the obligation to take care is made an implied term of such a contract by Section 151 of the Contract Act—*Great India Steam Navigation Co., Ltd.,* v. *Hooghly Docking & Engineering Co. Ltd.,* I.L.R. (1957) 1 Cal. 587.

Art. 36. Note 318.

After A.I.R. 1944 Mad. 431 add—This Article applies to an action by a municipal corporation against a defendant whose lorry has damaged a lamp-post belonging to the former.—*Corporation of Madras* v. *B. D. K. Chetty,* A.I.R. 1958 Mad. 620.

Art. 49. Note 345A.

After A.I.R. 1933 Cal. 253 add—See also *Raghunath* v. *Gokul,* A.I.R. 1958 S.C. 827, (1958) S.C.J. 1067, where judgment was delivered by Das C. J. who held that a plaintiff's suit for separating his share out of an estate and for allotment and delivery thereof to him is not one for specific moveable property as contemplated by Article 49.

Art. 89. Note 414.

After A. I. R. 1950 Dac. 12 add—See also *Jagir Singh* v. *Dheru*, A.I.R. 1958 Punj. 487.

Art. 115. Note 477.

After 38 Mad. 275 (277) add—A claim for compensation for injury to a chattel bailed under a contract caused by the negligence of the bailee is governed by Art. 115 and not by Art. 36, because the obligation to take care is made an implied term of such a contract by Section 151 of the Contract Act.—*Great India Steam Navigation Co. Ltd.* v. *Hooghly Docking & Engineering Co. Ltd.*, I.L.R. (1957) 1 Cal. 587.

Art. 142. Note 598.

After (1879) L.R. 5 Ex.D. 264 (274) add—See also *Williams Brothers* v. *Raftery* (1958) 1 Q.B. 159.

Art. 144. Note 613.

After (1879) L.R. 5 Ex.D. 264 (273) add—See also *Williams Brothers* v. *Raftery* (1958) 1 Q.B. 159.

Art. 182 (7). Note 719.

After A.I.R. 1958 Punj. 79 add—*Ramdass Prasad* v. *Raghubir Chand*, 62 Cal. W.N. 722. 726.

THE

INDIAN LIMITATION ACT.

ACT NO. IX OF 1908.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(*Received the assent of the Governor General on the 7th August, 1908.*)

An Act to consolidate and amend the law for the Limitation of Suits, and for other purposes.

WHEREAS it is expedient to consolidate and amend the law relating to the limitation of suits, appeals and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

1. History of the Law of Limitation:—Before the time of Justinian *præscriptio* included both sorts of limitation, *viz.*, (i) positive or acquisitive, and (ii) restrictive (limitation). The first kind was denominated *usucapio*, the second, *exceptio*. The Roman *usucapio* has descended to modern jurisprudence under the name of "prescription," and *exceptio* under that of limitation proper. Under the Civil Law of Rome there were some actions which could be filed at any time as there was no time limit for these actions. They were known *actiones perpetuæ*. The other kind of actions which were to be instituted within a definite time-limit was known as *actiones temporalis*. In 1424 A.D. a formal statute of limitation was introduced by Emperor Theodosius. The object of the statute was to fix a period within which all sorts of actions were to be instituted.

In England, at first, actions for real property were forbidden beyond the return of John or accession of Henry I, though no particular *duration* was prescribed. In 1540 during the time of Henry VIII *fixed periods* of limitation for real actions were introduced and in 1623 it was extended to personal actions during the time of James I. Before 1834 limitation was recognised as a *judicial bar* only and in that year during the time of Williams the principle of extinctive limitation or prescription was recognised.

For Statement of Objects and Reasons, see *Gazette of India*, 1908, Pt. V. p. 22; for Report of Select Committee, see *ibid*, 1908. Pt. V, p. 223; and for Proceedings in Council, see *ibid*, Pt. VI, pp. 2, 13, 37 and 145.

The Act has been declared in force in the Sonthal Parganas by Notification under the Sonthal Parganas Settlement Regulation (3 of 1872), and in the Angul District by the Angul Laws Regulation, 1936 (5 of 1936). Extended to Berar by the Berar Laws Act, 1941 (4 of 1941).

In India, though from 1793 Regulations were passed from time to time for fixing the period of limitation for institution of actions, a definite recognition of the law of limitation was deferred till 1859, when for the first time, a law on the subject was passed into a Code (Act XIV of 1859). Since then the law has undergone considerable amendments and has now come as Act IX of 1908.

Though the old Hindu Law recognised both "prescription" and "limitation" and the Moslem Jurisprudence recognised neither of them (Acharya's *Codification* T.L.L. 1912 p. 84; *Khejaruannissa* v *Risa Unnissa*, 5 B.L.R. 87) now both are amenable to law of limitation, which makes no racial or class distinction, *Fattehsanghi* v. *Kalliamraiji*, 1 I.A. 34, 21 W.R. 178 (P.C.).

1A. Distinction between Limitation and Prescription:—A Law of Limitation limits the time *after* which a suit or other proceeding cannot be maintained in a Court of Justice.

A Law of Prescription prescribes a period, at the expiry of which a substantive or primary right is (under certain circumstances) acquired or extinguished (Mitra's Law of Limitation and Prescription; T.L.L. 1896 pp. 1 and 2). From the above definitions it is apparent that limitation is concerned only with the judicial remedy of a person whose rights have been infringed and is a part of adjective law whereas prescription affects the substance of the conflicting rights between rival claimants and comes under the category of substantive law. In other words, Limitation only bars the *remedy* and Prescription extinguishes the *right*. Cf. *Gouri Shanker* v. *Sheo Nandan*, 46 All. 384, A.I.R. 1924 All. 543; *Suttar* v. *Ladha*, A.I.R. 1926 Lah. 633.

1B. Object:—The object of the Limitation Act is to quiet long possession and to extinguish stale demands—*Luchmee* v. *Runjeet*, 20 W.R. 375 (377) (P.C.), 13 B.L.R. 177. "Statutes of limitation are statutes of repose, to quiet title, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished or ought to be held extinguished whenever they are not litigated within the prescribed period. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have now from lapse of time become inexplicable. It has been said by John Voet that controversies are limited to a fixed period of time, lest they shou'd be immortal, while men are mortal"—Story's Conflict of Laws, 8th Edn., p 794. For this reason the statute of limitation has been termed a statute of repose, peace and justice—*Mangu* v. *Kandhai*, 8 All. 475 (484); *Jag Lal* v. *Har Narain*, 10 All. 524 (529); *Tolson* v. *Kaye*, (1822) 3 Brod. & Bing. 222 (223) (*per* Dallas, C.J.); *Hunter* v. *Gibbons*, (1856) 26 L.J. 5 (*per* Bramwell, B.). "All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost, and in all well regulated countries the quieting of possession is held an important point of policy"—*per* Lord St. Leonards in *Trustees of the Dundee Harbour* v. *Dougall*, (1852) 1 Macqueen H. L. 321. "The public have a great interest in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the possesser may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost."—*per* Plumber M. R. in *Cholmondelay* v. *Clinton*, 2 Jac. & W. 140. Statutes of limitation are definite rules of law giving to the population for whom those laws have been framed a guarantee

that after the lapse of a certain period they may rest in peace and rely upon titles or other rights which they have acquired—*Ramjiwan* v. *Chand Mal*, 10 All. 587 (595). The object of the Act is not to create or define causes of action but simply to prescribe the period within which existing rights can be enforced in Courts of law—*Suryamani* v. *Kalikanta*, 28 Cal. 37 (46); *Jivi* v. *Ramji*, 3 Bom. 207; *Binda* v. *Kaunsilia*, 13 All. 126 (142). The principle of the Act is not to enable suits to be brought within certain periods, but to forbid them from being brought after periods, each of which starts from some definite event—*Hurry Bhusan* v. *Upendra*, 24 Cal. 1 (7) (P.C.). The Limitation Act merely prescribes a period for the institution of a suit, and does not of itself create an obligation to sue where none existed—*Narayana* v. *Lakshmanan*, 39 Mad. 456 (458), 28 M L.J. 571, 29 I.C. 1. "The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right"—*per* Sir Richard Couch in *Hurrynath* v. *Mothoor*, 20 I A. 183, 21 Cal. 8 (18) (P.C.); *Bhajja* v. *Mahomed Said*, 54 All. 525, 1932 A.L J. 489, A.I.R. 1932 All. 543, 138 I.C. 396; *Ram Narain* v. *Barkandi*, 12 O.L.J. 77, 86 I.C. 725, A.I.R. 1925 Oudh 400; *Kalicharan* v. *Sukhoda*, 20 C.W.N. 58 (61), 30 I.C. 821.

2. Construction:—The Act of Limitation, being an Act which takes away or restricts the right to take legal proceedings, must, when its language is ambiguous, be construed strictly, *i.e.*, in favour of the right to proceed—*Umiashankar* v. *Chhotalal*, 1 Bom. 19 (22); *Collector* v. *Rajaram*, 7 Bom. 542 (545); *New Fleming Spinning Co.* v. *Kessowji*, 9 Bom. 377 (402); *Balvant* v. *Secretary of State*, 29 Bom. 480 (498); *Chunilal* v. *Dahyabhai*, 32 Bom. 14 (22) (F.B.), *Venkanna* v. *Venkata Krishnayya*, 41 Mad. 18 (22), 33 M.L.J. 35, 41 I.C. 807; *Murlidhur* v. *Mulu*, 11 N.L.R. 18, 27 I.C. 935 (936); *Sundar* v. *Salig Ram*, 26 P.R. 1911, 9 I.C. 300 (302) (F.B); *Dheru* v. *Sidhu*, 56 P.R. 1903 (*per* Chatterji, J.); *Om Prakash* v. *Sohan Devi*, A.I R. 1956 All. 435; *Ramaswami* v. *Krishnier*, A.I.R. 1957 Mad. 431; *Kandaswami Pillai* v. *Kannappa Chetty*, A.I.R. 1952 Mad. 186 (F.B.); *P. N. Flms Ltd.* v. *Overseas Films Corpn. Ltd.*, A.I.R. 1958 Bom. 10. Statutes of Limitation are in their nature strict and inflexible and are not susceptible of equitable construction—*Naurangi* v. *Ram Charan*, 9 Pat. 885, 11 P.L.T. 403, A.I.R. 1930 Pat. 455 (472), 127 I C. 817; *Deutsch Asiatische Bank* v. *Hiralal*, 47 I.C. 122 (124) (Cal.). The statute of limitation, the object of which is to prevent stale demands, must be construed strictly—*Kaikhusroo Mankeshah* v. *Gangadas*, A.I.R. 1936 Bom. 322, 38 Bom.L.R. 712, 165 I.C. 184. Where the interpretation sought to be put upon the technical words of a statute like the Limitation Act is arrived at by implication and inference, the Court ought not to adopt a construction which has a restricting and penalising operation, unless it is driven to do so by the irresistible force of language—*Abdul Karim* v. *Islamunnissa*, 38 All. 339 (343). The scope of the Limitation Act can not be extended by implication, and a party's rights to go to Court cannot be taken away unless the Act expressly provides that his right is so barred—*Madhavprosad* v. *S. G. Chandavarkar*, 50 Bom.L.R. 747, A.I.R. 1949 Bom. 104. No man is to be deprived of rights which would by law belong to him, unless the specific provisions of law which are alleged to take away those rights can be shown to apply clearly and in precise terms to his case—*Sundar* v. *Salig Ram*, supra. The provisions of this Act, when set up as a defence, must not be extended to cases which are not strictly within the enactment, whilst exceptions or exemptions from its operations are to be construed liberally—*Poorna* v. *Sassoon*, 25 Cal. 496 (503); *Roddam* v. *Morley*, 1 DeG & J. 1 (23). "A statute of Limitation, like any other statute, must be interpreted in accordance with the fair meaning of the language used, and a litigant who relies upon it must bring his case within its terms as so interpreted"—Lightwood's Time Limit on Actions, p. 2. The Act ought to receive such a construction as the language in its plain meaning imports—*Luchmee* v.

Runjeet, 20 W.R. 375 (377)', 13 B.L.R. 177 (P.C.). It should not be so interpreted as to include cases not falling within the strict meaning of the words used—*In re-Ramsankar*, 3 C.L.R. 400; *Parashram* v. *Rakhma*, 15 Bom. 299 (305).

In construing the clear words of the Limitation Act it is not permissible to alter or cut down their effect by a comparison with the language of the earlier statutes. In dealing with a statute of limitation which curtails the rights of parties, it is for the litigant who pleads the bar, to justify a construction which is other than literal and which would have the effect of depriving the party entitled to a right of the benefit arising by a literal construction—*Maduri Lakshminarasimham* v. *Maduri Surayanarayana*, I.L.R. (1948) Mad. 624, (1947) 2 M.L.J. 443; A.I.R. 1948 Mad. 246.

In certain Allahabad cases, however, Mahmood, J. expressed the opinion that statutes of limitation must be construed strictly in favour of their operation, *i.e.*, against the right to take legal proceedings—*Mangu* v. *Kandhai*, 8 All. 475 (484). The learned Judge also remarked that statutes of limitation are statutes of repose, intended to check tendency of dilatoriness, and they should be administered not slackly but as strictly as possible in order to strengthen the repose at which they aim. The rule of limitation is not to be administered as a lax system to be modified, varied or fluctuating according to the individual views or wishes of the Judge—*Ramjiwan* v. *Chand Mal*, 10 All. 587 (595, 596); *Jag Lal* v. *Har Narain*, 10 All. 524 (529).

In construing the Limitation Act, the Courts cannot allow any question of hardship to influence them, where the wording of the Act is plain and unambiguous. They have to construe the Acts of the Legislature as they find them, whether they approve of them or not—and not to alter or amend them. They have no power to read into the Limitation Act an Article which is not there or any section or words which it does not contain—*Balkaran* v. *Gobind Nath*, 12 All. 129 (137) (F.B.). The provisions of the Limitation Act require to be strictly construed. The Court should not attempt to interpret the law of limitation whereever possible in favour of the creditor on the ground of suggested technical difficulty—*Ram Swarup* v. *Dulraj*, 1946 A.M.L.J. 13. Courts have no power to devise their own technique from saving claims from the bar which the statutes of limitation create—*Gulab Singh* v. *Nathri*, I.L.R. (1944) Nag. 419, 1944 N.L.J. 200, A.I.R. 1944 Nag. 145. The fixation of the periods of limitation must always be to some extent arbitrary, and may frequently result in hardship. But in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide. There is no warrant for reading any qualifications into the words of any Article—*Nagendra Nath* v. *Suresh Chandra*, 60 Cal. 1 (P.C.), 36 C.W.N. 803 (809), 137 I.C. 529, A.I.R. 1932 P.C. 165. *Ashutosh* v. *Kumedkamini*, A.I.R. 1933 Cal. 422, 144 I.C. 150—*Rama Chandra* v. *Bhalu*, A.I.R. 1950 Orissa 125 (F.B.). The bar of limitation is purely arbitrary. It is sometimes harsh and it is very often regarded as inequitable. But the Courts have to enforce the bar, because the Legislature has cast a duty upon the Courts to see that suits and applications are within time. The Courts have no option in the matter, and it would not be a proper way of interpreting an article by rejecting a particular interpretation, though following logically from the language used, on the ground that it would create a hardship—*Parmeshar* v. *Sitla Din*, 1934 A.L.J. 503 (F.B.), A.I.R. 1934 All. 626 (633), 150 I.C. 1096, *Kripal Shah* v. *Shri Harikishan*, A.I.R. 1957 Punj. 273. It is clear that there is no general judicial discretion outside the Limitation Act which would enable a Court to relieve a suitor from the operation of the Limitation Act on the ground of hardship. There is no question of equity in cases governed by the Limitation Act. "There is no room for the introduction of equitable principles in the administration of the law of limitation. There is no

sanction in law to invoke in aid principles of equity to enlarge the period of limitation by excluding some time in computing the period of limitation, for which no authority is to be found within the four corners of the Limitation Act. When the law is clear, it is the duty of the Court to give effect to it irrespective of the fact that the result leads to some injustice to one party or the other"—*Md. Yunis* v. *Tilokchand*, 1935 A.L.J. 201, A.I.R. 1935 All. 323, 153 I.C. 1058. Equitable or ethical considerations cannot weigh with Courts in interpreting limitation statutes which are technical in their nature—*Narayanappa* v. *Revenue District Officer*, A I.R. 1955 Mad. 23. See also *Balabhau* v. *Rangulal*, A.I.R. 1955 Nag. 145 (F.B.). There is no judicial discretion to relieve the parties from the operation of the Limitation Act in a case of hardship or any authority in the Court to dispense with its provisions—*Eng. Gim Moh* v. *Chinese Merited Banking Co. Ltd.*, A.I.R. 1940 Rang. 276 (F.B.). Limitation Act is meant to be exhaustive—*Ram Gopal* v. *Mt. Ganga Devi*, A.I.R. 1936 All. 383. But while an interpretation of any article ought not to be based on any ideal of mitigating a hardship that may be supposed to follow from a strict application of that article, it is also clear that an interpretation which works in nothing but hardship should not be accepted, and if possible any other interpretation which is not quite foreign to the language used by the statute should be adopted—*Ibid.*

The construction of Acts not in *pari materia* with the Limitation Act (*e.g.*, the Court Fees Act) cannot be called in aid of the construction of the Limitation Act—*Dayachand* v. *Hemchand*, 4 Bom. 515 (526) (F.B.); *Assan* v. *Pathumma*, 22 Mad. 494 (502); though similar words and expressions occuring in statutes in *pari materia* (*e.g.*, Limitation Act and Code of Civil Procedure) should be given same meaning unless there is something repugnant in the subject or context—*Rama Chandra* v. *Bhalu*, A.I.R. 1950 Orissa, 125 (F.B.); *P. N. Films Ltd.* v. *Overseas Films Corpn. Ltd.*, A.I.R. 1958 Bom. 10. The various articles dealing with a variety of particular cases should be so construed as to make them harmonious and consistent—*Sati Prasad* v. *Jogesh*, 31 Cal. 681 (684) (F.B.), 8 C.W.N. 476; *Amme Raham* v. *Zia Ahmed*, 13 All. 282 (284) (F.B.). The language of the third column of the first schedule should be so interpreted as to carry out the true intention of the Legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party—*Muthukorakkai* v. *Madar Ammal*, 43 Mad. 185 (213) (F.B.).

Where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded—*Ramanandi* v. *Kalawati*, 55 I.A. 18, A.I.R. 1928 P.C. 18; *Hansraj* v. *Official Liquidators*, 60 I.A. 13, A.I.R. 1933 P.C. 63; *Emperor* v. *Benoari Lall*, 1943 F.C.R. 96, A.I.R. 1943 F.C. 36.

3. Effect of change in law—Which law applicable:—The general rule is that a statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might have accrued before the Act came into existence—*Baijnath* v. *Doolarey*, 50 All. 865, 26 A.L.J. 1317, A.I.R. 1828 All. 798, 110 I.C. 719. Hence, the law of limitation applicable to a suit or proceeding is the law in force at the date of institution of the suit or proceeding, unless there is a distinct provision to the contrary—*Soni Ram* v. *Kanhaiya*, 35 All. 227 (234) (P.C.); *Kanai Lal* v. *Purna Chandra*, 34 C.W.N. 733 (734); *Begam Sultan* v. *Sarvi Begum*, 48 All. 121, 90 I.C. 274, A.I.R. 1926 All. 93 (94); *Gurupadapa* v. *Virabhadrapa*, 7 Bom. 459 (462); *Ram Karan* v. *Ram Das*, 54 All. 299, A.I.R. 1931 All. 635, 1931 A.L.J. 1018 (F.B.); *Gangaram* v. *Secy. of State*, 21 S.L.R. 195, A.I.R. 1927 Sind 270 (271); *Jethmal* v. *Ambsingh*, A.I.R. 1955 Raj. 97 (F.B.); *Dayachand*

v. *Sanwalchand*, A.I.R. 1956 Raj. 6; *Lakhmir Singh* v. *I. T. Commissioner*, A.I.R. 1957 Pat. 538. Thus, a suit brought in 1904 on a mortgage executed in 1870 would be governed by the Limitation Act of 1877, not by the Act of 1859—*Soni Ram* v. *Kanhaiya*, 35 All. 227 (235) (P.C.). If an *ex parte* decree is passed when the Act of 1877 is in force, and the application for setting aside the decree is made when the Act of 1908 comes into operation, the application would be governed by the latter Act (Art. 164)—*Jia Bibi* v. *Ilahi*, 37 All. 597 (600); *Monohar* v. *Sadiqa*, 101 P.R. 1916, 37 I.C. 292 (294); *Chidambaram* v. *Karuppan*, 35 Mad. 678 (679); *Zaibulnissa* v. *Ghulam Fatima*, 70 P.L.R. 1911, 10 I.C. 823. If a sale takes place before 1908, and an application to set aside the sale (Art. 166) is made after the passing of the Limitation Act of 1908, it will be governed by the new Act—*Rai Kishori* v. *Mukunda*, 15 C.W.N. 965 (971), 11 I.C. 295. An application for execution is governed by the Act in force at the time when the application is made, and not by the Act which was in force at the time when the decree was passed—*Gurupadapa* v. *Virabhadrapa*, 7 Bom. 459 (463), distinguishing *Mungul* v. *Grijakant*, 8 Cal. 51 (P.C.) and *Behary* v. *Goberdhan*, 9 Cal. 446. No one has a vested right in any period of limitation. It cannot be said that there is any substantive right in an appellant to wait for a particular period of time before filing the appeal. Rules of limitation are rules of procedure, and the rules applicable to an appeal would be the rules which are in force at the time when the appeal is filed *Baijnath* v. *Doolarey*, supra. A suit is governed by the law of limitation which is *actually in force* at the time when it is instituted; thus, a suit brought in September 1877 would be governed by the Act of 1871, and not by the Act of 1877, because the latter Act *came into force* from 1st October 1877, although it *was passed* on 19th July 1877——*Mohesh* v. *Busunt*, 6 Cal. 340 (347).

4. Effect of change in law—If retrospective:—The law of limitation is not always a law of procedure, that is to say, a purely adjective law; for amongst its other consequences it has the creation of rights by prescription; and *if those rights have vested* in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation, or by an amendment in the law—*Chotmal Ganeshram* v. *Ramchand*, (1957) 59 Bom.L.R. 828; *Gajanan* v. *Waman*, 12 Bom.L.R. 881, 8 I.C. 189; *Moro* v. *Balaji*, 19 Bom. 809 (814); *Gangaram* v. *Secy. of State*, 21 S.L.R. 195, A.I.R. 1927 Sind 270 (271). The repeal of a statute or other legislative enactment cannot, without express words or clear implication to that effect in the repealing Act, take away a right acquired under the repealed statute or other enactment while it was in force—*Sitaram* v. *Khanderav*, 1 Bom. 286 (291); *Fazal Karim* v. *Annada*, 15 C.W.N. 845 (847); *Baijanath* v. *Doolarey*, 50 All. 865, 26 A.L.J. 1317, A.I.R. 1928 All. 708; *Sahib Dad* v. *Rahmat*, 90 P.R. 1904 (F.B.), 88 P.L.R. 1904; *Maganlal* v. *Mulji*, Kutch. 15. When the retrospective application of a statute of limitation would destroy vested rights, or inflict such hardship or injustice as could not have been within the contemplation of the Legislature, the statute is not, any more than any other law, to be construed retrospectively—*Khushalbhai* v. *Kabhai*, 6 Bom. 26; *Gopeswar* v. *Jiban Chandra*, 41 Cal. 1125 (1140) (S.B.); *Ram Ditta* v. *Tehlu*, 4 P.R. 1902, 153 P.L.R. 1901; *Ramakrishna* v. *Subbaraya*, 36 Mad. 101 (103), 24 M.L.J. 54, 18 I.C. 64. The statute of limitation is a law of procedure and that ordinarily it is retrospective in its operation. But when under the existing law a right of suit has become barred and a person has consequently acquired a title, such right of suit cannot be revived, and such title cannot be extinguished by subsequent legislation. A new law of limitation or an amendment in the law cannot divest a person of a right or title which has vested in him under the previous law of limitation—*Tej Bahadur* v. *Kothi Radha Kishan*, A.I.R. 1936 All. 858 (859-60), 1936 A.L.J. 1393, 1936 A.W.R. 1044. Where an Act contains provisions for the limitation of suits which take away altogether

a vested right of suit, without providing any equivalent remedy, then according to the approved rule of construction, the provisions must be considered to have been enacted subject to the implied exception that they were not to extend to such vested rights of suit which were to continue subject to the rules of limitation in force at the time of the passing of the Act—*Rajah of Pittapur* v. *Venkata*, 39 Mad. 645 (650), 29 M.L.J. 1, 30 I.C. 94 (F.B.). Thus where a suit is within time under the Indian Limitation Act as applied by the Kutch (Application of Laws) Order, 1949, but is barred under the new Limitation Act as applied by the Merged States (Laws) Act, 1950 the suit is governed by the old Limitation Act inasmuch as the result of applying the new Act would be to destroy the right to sue which was vested in the plaintiff at the time the new Act came into force—*Maganlal* v. *Mulji*, A.I.R. 1951 Kutch. 15. "When a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions whether commenced before or after the passing of the Act"—*per* Wilde B in *Wright* v. *Hale*, (1860) 30 L.J. Ex. 40, 6 H. & N. 227 (232); *Hope Mills Ld.* v. *Vithaldas*, 12 Bom.L.R. 730, 7 I.C. 982 (985).

Similarly, a suit or an application which has been already barred by the old Act cannot be revived by the new one—*Khunnilal* v. *Govind*, 33 All. 356, 15 C.W.N. 545 (551) (P.C.); *Mohesh* v. *Taruck*, 20 Cal. 487 (497) (P.C.); *Nepal* v. *Niroda*, 39 Cal. 507 (509); *Fatimatulnissa* v. *Sundar Das*, 27 Cal. 1004 (1011) (P.C.); *Shumbhoonath* v. *Guruchurn*, 5 Cal. 894; *Nursing* v. *Hurryhur*, 5 Cal. 897 (900); *Jagamba* v. *Ram Chandra*, 31 Cal. 314 (317); *Vinayak* v. *Balaji*, 4 Bom. 230; *Dharima* v. *Govind*, 8 Bom. 99 (103); *Mahomed Mehdi* v. *Sakinabai*, 37 Bom. 393, 14 Bom.L.R. 908, 17 I.C. 629 (632); *Narayan* v. *Govind*, 29 Bom.L.R. 1563, A.I.R. 1928 Bom. 28 (31); *Bhogilal* v. *Amritlal*, 17 Bom. 173 (183); *Dhondi* v. *Lakshman*, 31 Bom.L.R. 1287, A.I.R. 1930 Bom. 55 (57); *Appasami* v. *Subramanya*, 12 Mad. 26 (33) (P.C.); *Teka* v. *Sohnu*, 39 P.R. 1901; *Khan* v. *Hakim*, 97 P.R. 1905; *Somasundaram* v. *Vaithilinga*, 40 Mad. 846 (867), 41 I.C. 546; *Pearey Lal* v. *Solu Gir*, I.L.R. 1945 All. 896, A.I.R. 1946 All. 58; 223 I.C. 175; *Mangapathi* v. *Krishnaswami*, (1950) 1 M.L.J. 107, A.I.R. 1950 Mad. 762; *Ramanathan* v. *Kandappa*, A.I R. 1951 Mad. 314, 1950 M.W.N. 650, (1950) 2 M.L.J. 624; *Fakiraya* v. *Achappanaick*, A.I.R. 1956 Bom. 600. A contrary view has been taken by the Patna High Court in *Baleswar* v. *Latafat*, 24 Pat. 249, A.I.R. 1945 Pat. 368; *Sarab Devaprasad* v. *Dwarka Prasad*, A.I.R. 1946 Pat. 59, 219 I.C. 159; *Jagadish Prasad* v. *Saligram*, 24 Pat. 391, A.IR. 1946 Pat. 60, and by the Orissa High Court in *Pitambar* v. *Lakshmidhar*, A.I.R. 1949 Orissa, 64. According to these High Courts though a right which has been extinguished by the pre-existing law of limitation cannot be revived by the new one, this principle is confined only to a case of title to property under sec. 28 of the Limitation Act and not to debts. Though the remedy to recover the debt is barred by limitation the right to the debt is not extinguished thereby and no question of revival of an extinguished right can arise. So also, a judgment or decree which had become unenforceable by lapse of time before the passing of the present Act cannot be revived or made effective by any retrospective operation of this Act—*Sachindra* v. *Maharaja Bahadur*, 49 Cal. 203 (214), 26 C.W.N. 859 (P.C.).

It should be noted in this connection that section 2 of the Limitation Act of 1877 contained a provision that "Nothing herein contained shall be deemed to affect any title acquired or to revive any right to sue barred, under the Limitation Act, 1871." But this clause has been omitted in the Act of 1908, in view of a similar provision existing in the General Clauses Act (X of 1897). Section 6 of the General Clauses Act provides that the repeal of any enactment "shall not revive anything not in force

of existing at the time of the repeal or affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

5. Pending proceedings:—Since the law of limitation applicable to a suit or proceeding *is the law in force at the date of institution of the suit* (see Note 3 above), any change in the law of limitation during the pendency of a suit does not affect the proceedings. A suit is governed by the provisions of the statute of limitation in force at the time of its institution and not by the provisions of a subsequent statute coming into operation during the pendency of the suit—*Maula Baksh* v. *Bhaba Sundari*, 19 C.L.J. 187 (188), 19 I.C. 968.

6. Applicability:—The Limitation Act applies to immoveable property made wakf, notwithstanding that the ownership in such property is said to be in God. It is impossible to read into Limitation Act any exception for property made wakf for the purpose of mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site or building for the purpose—*Shahid Gang* v. *Gurdwara Parbandhak Committee*, 67 I.A. 251, I.L.R. (1940) Lah. 493, 44 C.W.N. 957, 72 C.L.J. 199, 1940 M.W.N. 818, (1940) 2 M.L.J. 903, 1940 A.L.J. 522, 1940 P.W.N. 671, 22 P.L.T. 140, 42 Bom.L.R. 1100 (P.C.).

The provisions of the Limitation Act do not govern suits and applications provided for by the Agra Tenancy Act; *Fakhruddin* v. *Abdul*, 1938 A.L.J. 208, A.I.R. 1938 All. 213, 175 I.C. 20.

When there is a specific Article in the Limitation Act which covers a particular case, it is not proper to apply another Article, the application of which is not free from doubt—*Kalipada* v. *Palani*, 1953 S.C.R. 503, (1953) S.C.J. 208, A.I.R. 1953 S.C. 125.

6A. Applicability of sections and artcles:—The applicability of particular sections and articles of the Limitation Act ought to be determined by the character of the thing sued for, and not by the status, race, character or religion of the parties—*Fattehsangji* v. *Dessai*, 21 W.R. 178 (P.C.), 13 B.L.R. 254. In order to decide which article is applicable, the nature of the suit and the relief claimed are important. At the same time, one has to see what is in substance the nature of the claim, and if the language of a statutory enactment is imperative, the evasion of that law cannot be tolerated simply because the phraseology of the plaint has been carefully selected—*Jawahar* v. *Mathura*, 151 I.C. 585, A.I.R. 1934 All. 661 (668) (F.B.), 1934 A.L.J. 1035, 3 A.W.R. 845. In order to determine which of the Limitation Act is applicable to a suit the Court is not tied down to the statements in the plaint. It is the duty of the Court to consider the facts and circumstances admitted and proved in the case —*Jai Mangal* v. *Bindeshuri*, 15 Luck. 157, A.I.R. 1940 Oudh 134, 185 I.C. 736, 1939 O.W.N. 1005.

When a section and an Article contradict each other, the former is to be regarded the best interpreter of the intention of the Legislature—*Dhoneswar* v. *Roy*, I.L.R. 2 Cal. 336 (F.B.); *New Fleming etc. Co. Ltd.* v. *Kessowji Naik*, I.L.R. 9 Bom. 373.

When there are two articles which may possibly govern a case, the one more general and the other more particular and specific, the latter ought to be applied—*Sharoop* v. *Joggessur*, 26 Cal. 564 (567) (F.B.); *Ishur* v. *Jibun*, 16 Cal. 25 (29); *Mangu* v. *Dolhin*, 25 Cal. 692 (698, 699); *Natesan* v. *Soundararaja*, 21 Mad. 141 (142); *Municipal Board* v. *Goodall*, 26 All. 482 (487); *Madras Steam Navigation* v. *Shalimar Works*, 42 Cal. 85 (108); *Runchordas* v. *Parvatibai*, 23 Bom. 725 (736) (P.C.); *Narmadabai* v. *Bhabanishankar*, 26 Bom. 430 (432); *Md. Mazaharal* v. *Md.*

Azimuddin, 27 C.W.N. 210 (212); *Tofa Lal* v. *Moinuddin*, 4 Pat. 448, 93 I.C. 129, A.I.R. 1925 Pat. 765 (767); *Venkatasubba* v. *Asiatic Steam Navigation Co.*, 39 Mad. 1 (12); *Sesha Naidu* v. *Periasami*, 44 Mad. 951 (957). If there is a conflict between two periods of limitation, one of which, the longer, is applicable to all circumstances, and the other, the shorter, to special circumstances only, the longer term given by the statute to bring the suit ought to be applied, unless there is clear proof of the special circumstances which would make the shorter term applicable—*Tara Nath* v. *Iswar Chandra*, 16 C.W.N. 398 (401), following *Crum* v. *Johnson*, [1902] 92 N.W. 1054. But if two articles limiting the period for bringing the suit are wide enough to include the same cause of action, and neither of them can be said to apply more specifically than the other, that which keeps alive rather than that which bars the right to sue should generally, and apart from other equitable considerations, be preferred—*Tofa Lal* v. *Moinuddin*, supra; *Kasturchand* v. *Hari Govind*, A.I.R. 1934 Bom. 491 (495); *Jairam* v. *Bhilaji*, 27 N.L.R. 152, 127 I.C. 889, A.I.R. 1930 Nag. 300.

7. "Suits":—The Limitation Act is applicable to *suits* brought by the plaintiff; it does not apply to a right set up by the defendant *in defence*. The rule of law is that there is no limitation against a defence. A defendant will not be precluded from setting up a right by way of defence, even if he could not have done so as plaintiff by way of substantial claim—*Deodhari* v. *Dayanand*, 35 I.C. 610 (611) (Cal.); *Sri Krishan* v. *Kashmiro*, 20 C.W.N. 957 (967) (P.C.), 34 I.C. 37; *Akbar* v. *Ragnandan*, 57 I.C. 348 (349) (Lah.); *Kamra* v. *Bishambar*, 147 P.R. 1890 (F.B.); *Venkatachalapathi* v. *Robert Fischer*, 30 Mad. 444 (445); *Lakshmi Doss* v. *Roop Laul*, 30 Mad. 169 (178); *Meherban* v. *Raghunath*, 5 O.L.J. 768, 49 I.C. 115; *Gaya Prasad* v. *Gur Dayal*, 22 O.C. 32, 51 I.C. 549 (552); *Kanhaiya Lal* v. *Gulab Singh*, 7 Luck. 655, A.I.R. 1933 Oudh 9 (13), 138 I.C. 206; *Raisunnissa* v. *Zorawar*, 1 Luck. 92, 29 O.C. 118, 92 I.C. 675, A.I.R. 1926 Oudh 228 (229); *Mahadev* v. *Sadashiv*, 45 Bom. 45; *Mg. Po Kywe* v. *Mg. Po Tin*, 7 Rang. 288, 199 I.C. 744 A.I.R. 1929 Rang. 251 (252); *Ram Kishore* v. *Ram Nandan*, 25 A.L.J. 1086, A.I.R. 1928 All. 99 (101), 108 I.C. 149; *Nizam Din* v. *Ram Sukh*, A.I.R. 1938 Lah. 286, 182 I.C. 510; *Sant Bux* v. *Ali Raza*, 21 Luck. 194, A.I.R. 1946 Oudh 129; *Ram Sarup* v. *Ram Chandar*, A.I.R. 1949 E.P. 29. But where a suit by the defendant would have been barred under sec. 26 or 28, the defendant cannot set up his right by way of defence—*Mahadev* v. *Sadashiv*, 45 Bom. 45 (49), 22 Bom.L.R. 1082, 59 I.C. 118. So also when the defence raises a plea of some inchoate or imperfect right, the establishment of which would depend upon a suit within a particular time, he should not be allowed to urge that defence if the suit which has not been brought would, at the time when urged in defence have been time-barred; *Krishna* v. *Subba*, (1939) 1 M.L.J. 770, A.I.R. 1939 Mad. 678, 1939 M.W.N. 590, 189 I.C. 200. In other words when a man loses not only the remedy but also right by his failure to bring an action within time as laid down in section 28 the defence is barred—*Ram Sarup* v. *Ram Chunder*, 50 P.L.R. 167.

7A. Arbitration proceedings:—By S. 37 of the Arbitration Act of 1940, all the provisions of the Indian Limitation Act have been made to apply to arbitrations as they apply to proceedings in Court. S. 46 of the Arbitration Act, however, expressly excludes S. 37 thereof in its application to statutory arbitrations. It has recently been held in *Savitra Khandu* v. *Nagar A. S. and P. Co-op. Society Ltd.*, A.I.R. 1957 Bom. 178 that the Board of Arbitrators appointed to resolve disputes under S. 54 of the Co-operative Societies Act is not required to apply the law of limitation to claims made before it. In this case the leading cases reported in A.I.R. 1929 P.C. 103, 1938—2 All. E.R. 152 and (1899) 68 L.J.Q.B. 252 were considered and distinguished.

7B. Set off—Limitation:—A set off may be purely defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim, or it may be a

counter-claim under which the defendant claims a decree for the surplus amount due to him. Limitation applies to both these claims. In a defensive set off the set off caimed must be recoverable at the plaintiff's suit. In a counter-claim, the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, that is, at the date when he files written statement. The words legally recoverable in Or. 8, r. 6, C.P.C. mean legally recoverable at the date of the institution of the suit in one case, and as meaning legally recoverable at the date when the counter-claim is made in the other case—*Jitendranath* v. *Jnanada Kanta*, A.I.R. 1936 Cal. 277.

8. "Certain applications":—It should be noticed that this Act does not provide for *all* kinds of applications to Court, but is limited to *certain* applications mentioned in the 1st schedule. The following applications are not covered by this Act.—

(1) An application for a succession-certificate to collect the debts due to the estate of a deceased person—*Janaki* v. *Kesavalu*, 8 Mad. 207 (208).

(2) an application for probate or letters of administration—*In re Ishan Chunder*, 6 Cal. 707 (709); *Bai Manekbhai* v. *Manekji*, 7 Bom. 213 (214); *Gnanamuthu* v. *Vana*, 17 Mad. 379 (381);

(3) an application for revocation of a probate—*Kashi Chundra* v. *Gopikrishna*, 19 Cal. 48 (50);

(4) an application under the Religious Endowments Act, or an application for the appointment of new trustees—*Janaki* v. *Kasavalu*, 8 Mad. 207 (208);

(5) an application to a Court to exercise the functions of a ministerial character (*e.g.*, an application for the grant of a sale-certificate)—*Kylasa* v. *Ramasami*, 4 Mad. 172 (173); *Vithal* v. *Vithojirav*, 6 Bom. 586, (587); *Laxmibai* v. *Tukaram*, 26 N.L.R. 166, 122 I C. 441, A.I.R. 1930 Nag. 206; *Moolla Cassim* v. *Moolla Abdul*, 35 I.C. 950 (951), 8 L.B.R. 422;

(6) the Limitation Act must be held to apply to applications for the exercise, by the authority to which the application is addressed, of powers which it would not be bound to exercise without such application, and does not apply to an application to a Court to do what the Court is bound to do and has no discretion to refuse to do—*Darbo* v. *Kesho*, 9 All. 364 (365); *Balaji* v. *Kushaba*, 30 Bom. 415; *Madhabmoni* v. *Lambert*, 37 Cal. 796 (806); *Laxmibai* v. *Tukaram*, supra; *Moolla Cassim* v. *Moolla Abdul*, supra; as for example, an application to a Court to pass judgment according to an award—*Iswardas* v. *Dosibai*, 7 Bom. 316 (322); or an application for a certificate of sale by a purchaser of land at a Court sale—*Devidas* v. *Pirjada*, 8 Bom. 377 (380); *Kylasa* v. *Ramasami*, 4 Mad. 172 (173); or an application for amendment of a decree so as to bring it into conformity with the judgment—*Darbo* v. *Kesho*, supra. See Note 691 under Art. 181.

This Act applies only to applications to *Courts*. An application to the Collector to make a reference to the District Court under sec. 18, Land Acquisition Act, virtually amounts to an application to the District Court, and is therefore governed by this Act—*Burjorjee* v. *Special Collector*, 5 Bur.L.J. 26, A.I.R. 1926 Rang. 135 (136), 96 I.C. 110.

9. Criminal proceedings:—The Limitation Act does not apply to criminal proceedings unless it is made applicable to them by express provisions—*Q.* v. *Ameeroddeen*, 15 W.R. 25 (Cr.); *Q.* v. *Nageshappa*, 20 Bom. 543 (546); *Q. E.* v. *Ajudhia Singh*, 10 All. 350; *In the matter of Kittu*, 11 Mad. 332. Thus, an application for sanction under sec. 195, Cr. P. Code was not governed by any rule of limitation—

Q.-E. v. *Ajudhia Singh*, 10 All. 350; *Q.* v. *Nageshappa*, 20 Bom. 543. Act XIII of 1859 (Workmen's Breach of Contract Act) being a penal enactment, the Limitation Act is no bar to a claim under sec. 2 of that Act to recover an advance made to a labourer —*In the matter of Kittu*, 11 Mad. 332. Certain criminal appeals are specially provided for in Articles 150, 154, 155 and 157.

In a recent case in *Venkata* v. *Duvvuru*, A.I.R. 1957 Andh. Pra. 406, it has been held that Sec. 5 of the Limitation Act applies to an application for special leave to appeal under S. 417(4), Cr. P. C.

9A. The Act is a complete Code:—The Limitation Act, being the enactment of the Legislature which has dealt with all matters connected with the limitation of all actions, appeals, applications and so on, is a complete Code; and no Court would be entitled to invoke any principle for the purpose of holding a claim as not barred by the law of limitation, which is not contained or necessarily implied in any of the sections or articles of the Limitation Act—*Ammalu* v. *Narayanan*, 51 Mad. 549, 111 I.C. 210, A.I.R. 1928 Mad. 509 (513). See also *Ram Charan* v. *Goga*, 49 All 565, A.I.R. 1927 All. 446, 102 I.C. 96; *Sarat Kamani* v. *Nagendra*, 29 C.W.N. 973, 89 I.C. 1000, A.I.R. 1926 Cal. 65; *Satyanarayana* v. *Seethayya*, 50 Mad. 417, A.I.R. 1927 Mad. 597, 100 I.C. 776; *Maqbul Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85; *Md. Yunis* v. *Tilokchand*, A.I.R. 1935 All. 323; *Ram Gopal* v. *Mt. Ganga Devi*, A.I.R. 1936 All. 383. The Limitation Act is an exhaustive Code in itself and effect must be given to its provisions unhampered by questions of expediency and the like—*Rajaram* v. *Paiku*, I.L.R. (1940) Nag. 334, 1938 N.L.J. 336, A.I.R. 1938 Nag. 534, 180 I.C. 903. See also *Kandaswami Pillai* v. *Kannappa Chetty*, A.I.R. 1952 Mad. 186 (F.B.).

It is not right to read into the Limitation Act words which are not there when the words which are there have themselves a clear and unmistakable meaning—*Meghavaranam* v. *Md. Mohideen*, A.I.R. 1936 Mad. 782; *Sundaramurta* v. *Abdul Khader*, A.I.R. 1933 Mad. 420 (F.B.).

PART I.

PRELIMINARY.

Short title, extent and commencement.

1. (1) This Act may be called the Indian Limitation Act, 1908.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) This section and section 31 shall come into force at once. The rest of this Act shall come into force on the first day of January, 1909.

Note:—The words "and section 31" occurring in sub-section (3) should be omitted, because section 31 has been repealed by the Repealing and Amending Act, VIII of 1930, as it has been obviously spent. In sub-s. (2) the words "the whole of India except Part B States" were substituted by A.O. 1950 for the words "all the Provinces of India" and the words "except the State of Jammu and Kashmir" were substituted for the words "except Part B States" by Act 3 of 1951.

Definitions.

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

(1) "applicant" includes any person from or through whom an applicant derives his right to apply:

(2) "bill of exchange" includes a hundi and a cheque:

(3) "bond" includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be:

(4) "defendant" includes any person from or through whom a defendant derives his liability to be sued:

(5) "easement" includes a right not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another or anything growing in, or attached to, or subsisting upon, the land of another:

(6) "foreign country" means any country other than [India, but includes also the State of Jammu and Kashmir].

(7) "good faith": nothing shall be deemed to be done in good faith which is not done with due care and attention:

(8) "plaintiff" includes any person from or through whom a plaintiff derives his right to sue:

(9) "promissory note" means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight:

(9A) "India" means the territory of India excluding the State of Jammu and Kashmir.

(10) "suit" does not include an appeal or an application: and

(11) "trustee" does not include a benamidar, a mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title.

The words "Ind'a, but includes also any Acceding State" were substituted for the words "British India" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948. The Clause (9A) has been inserted by the Adaptation of Laws Order, 1950 issued under the Constitution of India.

10. Effect of a Definition Clause:—Where a term is defined in an Act, it should, all throughout the Act, be understood in the sense assigned to it by the Act—*Umacharan* v. *Ajedunnissa*, 12 Cal. 430 (433); *Q. E.* v. *Ramlal*, 15 All. 141. The words of an enactment must be taken *first* in the sense given to them by the Legislature, and *secondly* in their natural meaning, if not inconsistent with the Preamble or the context—*Robert Wigram* v. *Richard*, 4 M.I.A. 179. When the term is not so defined, it is to be understood in its popular or dictionary meaning unless a contrary intention *prima facie* appears, *Janki* v. *Sahebunnessa*, 7 O.C. 74 or in the sense in which it had previously been used, *Ruckmaboye* v. *Lulloobhy*, 5 M.I.A. 234 (250). Where the Legislature has left a term undefined, the Court should not lay down a rigid definition for it, and thereby crystallise the law—*Krishna* v. *Sarat*, 44 Cal. 163 (178), 25 C.L.J. 24.

10A. Cl. (3)—'Bond':—The definition is the same as in sec. 2 (5) (*a*) of the Indian Stamp Act, II of 1899. The definition given in this Act is not exhaustive, for in defining the term the word "includes" has been used. It is not limited in its meaning to conditional bond. It has been used in the same sense in which it is used in the ordinary legal parlance as meaning an instrument whereby a person obliges himself to pay money to another—*Lachman Singh* v. *Karansee*, 1947 M.L.R. 94. Where 40 maunds of wheat were advanced to the defendants who agreed in writing to repay the same with interest in kind, *held* that the instrument was a *bond* within the meaning of this section, and not a mere agreement—*Wadhawa* v. *Karim Baksh*, 6 Lah. 276, 86 I.C. 844, A.I.R. 1925 Lah. 415.

11. Cl. (4)—'Defendant'—'from or through':—Adverse possession of a defendant may be added to the previous adverse possession of the widow by whom the defendant was adopted, as the defendant derived his liability to be sued from the widow and thus brought himself within the definition of a "defendant" as provided by this section—*Padajirav* v. *Ranrav*, 13 Bom. 160 (165). So also, adverse possession by the defendant of the office of *archaka* may be supplemented by the previous adverse possession of his predecessor-in-office—*Krishnaswami* v. *Veeraswami*, 36 M.L.J. 93, 49 I.C. 393. Adverse possession of the defendant may be supplemented by the previous adverse possession of the judgment-debtor from whom the defendant purchased, and may be pleaded in a suit by the auction-purchaser under sec. 331 of the C. P. C. of 1882 (rr. 99 and 103, Order XXI of the Code of 1908)—*Namdev* v. *Ramchandra*, 18 Bom. 37 (40). A son in a Mitakshara family acquires an interest by devolution, as

soon as he is born, in the property vested in his father and other members of the family, and thus he derives his liability to be sued from or through his father and those members and to be impleaded as a defendant in a suit against the family property—*Hari Prasad* v. *Sourendra*, 1 Pat. 506 (521), 3 P.L.T. 709, 66 I.C. 945, A.I.R. 1922 Pat. 450. A purchaser at an auction sale acquires the right, title and interest of the judgment-debtor, and in virtue of that, is put in possession, by reason of which he becomes liable to be sued by the true owner. He therefore, derives such liability, within the contemplation of this section, from or through the judgment-debtor—*Ali Saheb* v. *Kaji Ahmad*, 16 Bom. 197 (199). A *char* which was found to be reformation *in situ* of the plaintiff's land was occupied for some years by Government. It was then claimed by the defendants as their property, and Government made over possession to them. On plaintiff's suing to recover possession, the defendants pleaded limitation and to make out their plea, claimed to tack on to their own occupation the period of Government's possession. *Held* that the defendants did not derive liability to be sued *from or through* the Government but on the other hand they had claimed *against* the Government and had recovered the land from the Government; they therefore could not tack the period of Government's possession to their own—*Bsanta Kumar* v. *Secretary of State*, 44 Cal. 858 (874) (P.C.), 21 C.W.N. 642, 40 I.C. 337.

In construing the Law of Limitation the Court must confine itself strictly within the terms of the Limitation Act and not enlarge the scope of the Act by introducing 'notional' defendant in the place of the word 'defendant'—*Manindra* v. *Santi Rani*, 55 C.W.N. 306, A.I.R. 1951 Cal. 518.

12. Cl. (5)—'Easement':—The definition of "easement" given in this section shall not apply to those places where the Easements Act applies, *viz.*, Madras, C.P., Coorg, Bombay, U. P. and Oudh. See sec. 29, sub-section (4). In those places, the definition given in sec. 4 of the Easements Act will be adopted. See Note 227 under sec. 26. Though a right to take earth from the land of another is not an easement, but a *profit in prendre in gross*, it falls within the extended meaning given to the word "easement" in this clause—*Darbari* v. *Khatir*, A.I.R. 1950 Pat. 202.

13. Cl. (7)—'Good faith':—The definition is almost the same as that given in sec. 52 of the Indian Penal Code. Cases of the nature where the plaintiff seeks protection under sec. 14, Limitation Act, are governed by the definition given in that Act—*Tirumala* v. *Panasa*, I.L.R. (1956) Cut. 135, A.I.R. 1956 Orissa 124.

14. Cl. (8)—Plaintiff—'from or through':—Under clause (8) of this section, the word "plaintiff" includes any person through whom the present claimant derives his right to sue. Compare the language of sec. 1 of the (English) Real Property Limitation Act, 1874:—"The person through whom another person is said to claim shall mean any person, by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the courtesy of England tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming or some person through whom he claims became entitled as lord by escheat."

A stanom, according to the customary law of Malabar is descendible from one *stanom-holder* to another in a peculiar line of succession, and each successive holder is in the same position as an ordinary heir succeeding on intestacy. *Stanom*-holders, therefore, derive their title to sue *from or through* their immediate predecessors within the meaning of this clause—*Rajah of Palghat* v. *Ramanunni*, 41 Mad. 4 (10), 33

M.L.J. 26, 42 I.C. 22. A succeeding watandar derives his title as son and heir of the preceding watandar; and therefore adverse possession against the preceding watandar bars the present watandar who derives his title from and through the preceding watandar —*Tuka Lakhu* v. *Gamu Vithu*, 55 Bom. 21, 32 Bom.L.R. 1398, 129 I.C. 145, A.I.R. 1931 Bom. 24 (27). But a *ghatwal* does not 'claim through' a previous *ghatwal* within the meaning of this clause, even though the latter may be the father of the former—*Prosanna* v. *Srikant*, 40 Cal. 173 (180), 17 C.W.N. 139, 16 I.C. 365. A reversioner claiming an estate under the Hindu law does not claim from or through the widow in whom the estate vested at the death of the last male holder—*Sambasiva* v. *Ragava*, 13 Mad. 512 (515). Therefore, adverse possession against the widow does not necessarily bar the reversioners. See this subject discussed under Article 141. An adopted son, who is adopted by a widow after the death of her husband, does not derive his right to sue from or through his adoptive mother—*Harek Chand* v. *Bejoy Chand*, 9 C.W.N. 795 (800). But see 13 Bom. 160 cited in Note 11, *ante*.

A trustee of an endowment derives his title *from* or *through* the trustee preceding him—*Gnanasambandha* v. *Velu Pandaram*, 23 Mad. 271 (280, 281) (P.C.). See also *Kalipada* v. *Palani*, 1953 S.C.R. 503, (1953) S.C.J. 208, A.I.R. 1953 S.C. 125. But one of several joint tenants does not claim *from or through* a deceased joint tenant, because where one of the joint tenants dies, no one claims anything under him, as there is no transmission of interest—*Richardson* v. *Young*, L.R. 6 Ch. 478 (481), cited in *Bhogilal* v. *Amrita Lal*, 17 Bom. 173 (178). And where there are several reversioners entitled successively under the Hindu Law to an estate held by a Hindu widow, no one of them claims through or derives his title from another, but each derives title from the last full owner—*Bhagwanta* v. *Sukhi*, 22 All. 33 (43) (F.B.). If therefore the right of the nearest reversioner to contest an alienation by the widow is allowed to be barred by limitation as against him, it will not bar the similar rights of the remoter reversioners. See Notes under Article 125.

15. Cl. (9)—'Promissory note':—Compare the definition given in sec. 4, Negotiable Instruments Act (XXVI of 1881): "A promissory note is an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument."

This clause is not subject to the provisions of law contained in paragraph 3 of sec. 5 of the Negotiable Instruments Act. According to the definition given in this clause an instrument which otherwise has the real and substantive character of a promissory note does not cease to be so merely because it contains a stipulation for payment of interest—*Lachman Singh* v. *Karansee*, 1947 M.L.R. 94.

'Specified sum':—Where an amount due under an instrument including interest can be found out from the instrument itself without any extraneous aid, it is a "specified sum" of money within the meaning of this clause even though a little calculation may be necessary—*Lachman Singh* v. *Karansee*, 1947 M.L.R. 94.

16. Cl. (10)—'Suit':—The word "suit" ordinarily means, and apart from some context must be taken to mean, a civil proceeding instituted by the presentation of a plaint—*Hansraj* v. *Official Liquidators*, 54 All. 1067 (P.C.), 1933 A.L.J. 175, 37 C.W.N. 379 (386). Therefore a proceeding under sec. 244, C. P. Code, 1882 (sec. 47 C. P. Code, 1908) is not a suit, as the proceeding does not begin with a plaint but with an application—*Venkatachandrappa* v. *Venkatarama*, 22 Mad. 256 (258). The word 'suit' in this Act does not include an appeal or an application—*Sahdeo* v. *Nathuni*, 8 B.R. 397. Thus, it does not include an appeal in a divorce suit—*A.* v. *B.*, 22 Bom.

612. Nor does it include an application under sec. 214, Indian Companies Act (1882)—*Connell* v. *Himalaya Bank*, 18 All. 12 (15). An application (under sec. 186, Indian Companies Act, 1913) in the winding up, by the official liquidators of a company seeking to recover certain sums from certain persons as debtors to the company is an application and not a suit for the purposes of this Act—*Hansraj* v. *Official Liquidators*, supra.

Cl. (11)—'Trustee':—See Notes under sec. 10.

PART II.

LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

Dismissal of suit, etc., instituted, etc., after period of limitation.

3. Subject to the provisions contained in sections 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made, after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence.

Explanation.—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is made; and, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

16A. Special or local laws:—By section 29 (2), as amended by the Indian Limitation Amendment Act, 1922, this section has been made applicable to special or local laws.

Thus, a suit under the Bengal Tenancy Act, if brought after the period prescribed by Sch. III, Art. 3 of that Act must be dismissed, although limitation has not been pleaded as a defence—*Gajadhar* v. *Ram Charan*, 9 Pat. 788 (F.B.), 125 I.C. 565, A.I.R. 1930 Pat. 256 (260). Where the local or special law is silent on the matter of limitation in respect of suits, appeals or applications contemplated or authorised by it, and some Article of Sch. 1, Limitation Act, would cover them the provisions of this section would be applicable. The amendment of sec. 29 by Act 10 of 1922, does not affect the position—*Province of Bengal* v. *Amulya*, 54 C.W.N. 297, A.I.R. 1950 Cal. 356.

17. Government:—Even the Government is not entitled to an exemption from the provisions of the Limitation Act—*Appaya* v. *Collector*, 4 Mad. 155 (156).

18. Custom:—No custom will be allowed to override the positive prescriptions of the Limitation Act—*Mohanlal* v. *Amratlal*, 3 Bom. 174.

19. Agreement of parties, waiver, etc.:—The parties cannot by consent or agreement extend or alter the period of limitation—*Kristo Komul* v. *Huree Sirdar*, 13 W.R. 44 (F.B.); *Lalla Ram Sahoy* v. *Dodraj*, 20 W.R. 395; *Noban* v. *Dhon Mahomed*, 5 Cal. 820 (821); *Khetra Mohan* v. *Mohim*, 18 I.C. 595 (596) (Cal.); *Midnapur Zemindary Co.* v. *Deputy Commissioner*, 3 P.L.J. 132 (136), 44 I.C. 370. Compare sec. 28, Contract Act, which enacts: "Every agreement.....which limits the time within which any party may enforce his rights is void to that extent." So also, the parties cannot *waive* the statute or contract themselves out of the law of limitation in this country. For, it is well settled that there can be no estoppel against an Act of the Legislature. An agreement by a person against whom a cause of action has arisen, that he would not take advantage of the law of limitation is ineffective—*Sitharama* v. *Krishnaswami*, 38 Mad. 374 (381), 25 M.L.J. 264, 21 I.C. 24. No one can contract himself out of the statute of limitation; and consequently, where the result of a compromise between the decree-holder and the judgment-debtor was that the limitation provided by law was extended, it was open to the judgment-debtor to plead that the decree-holder's application for execution was barred by limitation—*Gobardhan* v. *Dau Dayal*, 54 All. 573 (F.B.), 1932 A.L.J. 365, 138 I.C. 583, A.I.R. 1932 All. 273 (281). This section places it beyond the power of the Judge, as well as beyond the power of the defendant, to ignore or waive the plea of limitation—*Mangu* v. *Kandhai*, 8 All. 475 (483); *Samuel* v. *Improvement Trust*, 26 O.C. 324, 73 I.C. 127; *Ramanatha* v. *Commissioner*, 6 Rang. 175, A I.R. 1920 Rang. 152 (153); *Shanker Dass* v *Sita Ram*, A.I R. 1956 Pepsu 83. A covenant not to raise the plea of limitation in case a suit has to be filed is inoperative and invalid, since its effect is to defeat the provisions of this Act, and as such falls within section 23 of the Contract Act—*Ramamurthy* v. *Gopayya*, 40 Mad. 701 (705). Such a covenant will not prevent the Court from interfering and dismissing the suit—*Chaturbhuj* v. *Muhammad Habib*, 54 I.C. 36 (38) (Pat.).

20. Consent of parties:—The consent of parties cannot give a Court jurisdiction to hear an appeal when the same has been presented beyond the time prescribed by the Limitation Act—*Debi* v. *Mulhu*, 1894 A.W.N. 19.

20A. Plea of limitation:—It is against all law and equity to overlook limitation, and rob the vested rights of parties, in the absence of fraud, or at least fraud in equity though it is a technical right and may grate against the ordinary layman's sense of fair-play. Limitation is as valid and binding as any other plea in law, when it is fully proved—*Lakshminarasamma* v. *Seshayya*, (1951) 1 M.L.J. 150, A.I.R. 1951 Mad. 491.

21. Onus of proof:—This section compels the Court to dismiss the suit, if it is time-barred, although the defence of limitation has not been set up, and the plaintiff must show that his suit has been instituted within the period of limitation, or that there are circumstances which take his case out of the ordinary period of limitation—*Mahomed Arsad* v. *Eakoob*, 24 W.R. 181 (182); *Nihal Devi* v. *Kishore Chand*, 97 P.R. 1910, 8 I.C. 999 (1011). The plaintiff must on his own allegations be able to show that his suit is within time; if he cannot do so, and if his own allegations seem to show that the suit is time-barred, he cannot be allowed to adopt this and that allegation of the defendant in order to show that his claim is not barred—*Mansa Ram* v. *Behari*, 6 P.R. 1912, 12 I.C. 453 (454). The burden rests in the first instance upon the plaintiff to show that his suit is not instituted after the period prescribed therefor by the first Schedule and accordingly is not required to be dismissed under this section. Thus in a suit for redemption where there is no evidence that the mortgage was for any fixed time, the plaintiff has to show that the mortgage was

effected within 60 years of the date of suit. Mere proof that it was in existence within that period is not sufficient to shift the burden to the defendant for showing that the suit was not filed within time—*Md. Akbar* v. *Mt. Motal*, 74 I.A. 285, I.L.R. (1947) Lah. 729, 52 C.W.N. 132, A.I.R. 1948 P.C. 36; *Mt. Bhari* v. *Des Raj*, A.I.R. 1950 E.P. 157. See also *Thayammal* v. *Rangaswami*, A.I.R. 1956 Mad. 15, (1955) 2 M.L.J. 426; *Chouthmal* v. *Ramchandra*, I.L.R. (1955) Nag. 321, A.I.R. 1955 Nag. 126; *Peerumuhammad* v. *Kassim*, A.I.R. 1955 T.C. 188. But if the plaintiff proves his case and the defendant sets up the defence of limitation, the defendant must plead it and show that the claim is barred—*Radha Prasad* v. *Bhajan*, 7 All. 677 (680). If the defendant asserts that a shorter period applies, then the burden lies on the defendant to prove the circumstances which bring the suit within the shorter period. See *Mohan Singh* v. *Henry Conder*, 7 Bom. 478 (480). If when the plaintiff proves his case (in a suit to recover money on a bond) it appears from the facts that the debt accrued at a date earlier than the period of limitation, and the defendant has set up the plea of limitation, in that case the defendant will be entitled to judgment—*Radha Prasad* v. *Bhajan*, supra.

So also, this section compels the Appellate Court to dismiss a time-barred appeal although the respondent has not taken the objection; and it lies upon the appellant to prove affirmatively that the appeal has been presented in proper time—*Ramey* v. *Broughton*, 10 Cal. 652 (658, 661).

Where a suit on the face of it is time-barrred, the Court is bound to do its duty under sec. 3 and dismiss the suit to that extent, even though limitation has not been set up as a defence. The principle is applicable even to appellate Court—*Jiwandas* v. *Babu Lal*, A.I.R. 1936 Nag. 285.

22. Suit instituted:—Before 1908 there was a difference of judicial opinion as to whether for the purposes of limitation, the date of presentation of a plaint with insufficient Court-fees or the date of payment of requisite Court-fees within the period fixed by the Court, though after the period of limitation prescribed therefor, should be deemed to be the date of institution of the suit. But the controversy has been set at rest by sec. 149, C. P. Code, 1908, which lays down:—"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person by whom such fee is payable to pay the whole or part, as the case may be, of such Court-fee; and upon such payment, the document in respect of which such fee is payable shall have the same force and effect as if such fee had been paid in the first instance." So the grant of time by court after limitation relates the plaint back to the date of original filing—*Venugopal* v. *Thirugnana*, A.I.R. 1940 Mad. 934; *Faizulla* v. *Mauladad*—33 C.W.N. 781 (P.C.).

If a plaint has been insufficiently stamped at its presentation, and the deficiency is supplied after the expiration of the period of limitation, and *after expiry of the time fixed by the Court* for the supply of the deficient stamps, it will be liable to rejection and the suit will be considered as barred—*Haji* v. *Samjan*, 44 C.W.N. 449; *Ram* v. *Tribeni*, A.I.R. 1942 Pat. 234. As to application of S. 151, C. P. C. to such cases, see *Bibi Aliquannissa* v. *Sk. Md.* A.I.R. 1950 Pat. 358.

Similarly, when a plaint is returned and ordered to be *amended* within a time fixed by the Court, it is the date of the original presentation of the plaint, and not the date of the subsequent presentation after amendment, which is taken to be the date of institution of the suit—*Patel Mafatlal v. Bai Parson*, 19 Bom. 320 (323); *Ram Lal* v. *Harrison*, 2 All. 832; *Durgagir* v. *Kallu*, 7 N.L.R. 33, 10 I.C. 731 (733). A plaint may

be amended after it has been registered, and it is competent for the Court to return the plaint for necessay amendment, even though at the time of such return the period of limitation for the suit may have expired—*Barakatunnissa* v. *Muhammad Asad Ali*, 17 All. 288 (291). Even though the amendment (which is made after the expiry of the period of limitation of the suit) may be tantamount to a new cause of action which as an independent suit may be barred, still if the Court admits the amendment, the suit must be deemed to have been instituted when the plaint was filed and not when the amendment was admitted by the Court—*New Fleming Spinning Co.* v. *Kessowji*, 9 Bom. 373 (402), following *Ram* v. *Harrison*, 2 All. 832. If the Court specifies a date for presentation of the plaint after the amendment, and the amended plaint is presented within that date (*even though it is a date beyond the period of limitation*), the plaint is deemed as filed within time, the date of original presentation being the date material for the purpose. But if the Court specifies a date for amendment which is beyond the period of limitation and the amended plaint is presented *after* that date, the date of subsequent presentation will be treated as the date of presentation, and the plaint will be deemed as filed out of time. It is a settled rule of law that the date of amendment is immaterial, *unless indeed the time expressly allowed by the Court has been exceeded—Durgagir* v. *Kollu* (supra).

It is no doubt true that the Courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it, if that is required in the interests of justice—*Leach & Co. Ltd.* v. *Messrs. Jardine Skinner & Co.*, (1957) S.C.J. 313, A.I.R. 1957 S.C. 357. The ultimate test is: Can the amendment be allowed without injustice to the other side?—*Patil* v. *Patil*, (1957) S.C.J. 371, A.I.R. 1957 S.C. 363.

Where a plaint filed in time but returned owing to want of pecuniary jurisdiction is refiled after limitation in the same Court with reduced scope so as to bring it within the jurisdiction of the said Court, the new plaint can not be treated as a continuation of the previous suit—*Chandrayya* v. *Seethunna*, 1940 M.W.N. 662, (1940) 1 M.L.J. 590, A.I.R. 1940 Mad. 689 overruling the decision of Wordsworth J. reported in 1939 M.W.N. 449, A.I.R. 1939 Mad. 397.

But amendment of the plaint at a later stage on account of certain circumstances happening after the institution of the suit cannot be considered to mean the institution of a new suit, particularly when the parties are the same and the dispute is the same. Hence, a suit does not become time-barred on account of an amendment which added consequential relief to the declaration prayed for when the original suit for declaration without the consequential relief was within limitation—*Ganda* v. *Zora*, A.I.R. 1950 Pepsu 21.

Where a suit was by two plaintiffs, but the plaint being signed by one alone, it was returned for the signature of the other, and the same was re-presented after the period of limitation prescribed for the suit, *held*, that the suit was barred—*Vellappa* v. *Subramanian*, 26 M.L.J. 494, 23 I.C. 431 (433). So also where one of joint mortgagees brings a suit without impleading the other mortgagees, who are added after the period of limitation, the suit fails and is not maintainable as there is no cause of action under this section—*Adiveppa* v. *Rachappa*, 50 Bom.L.R. 30, A.I.R. 1948 Bom. 211 (F.B.). Where a plaint presented within time was returned to the plaintiff after issue of summonses, the defendants not having been found, for being re-presented when the whereabouts of the defendants could be found, the suit would be in time, though when the plaint was re-presented the period of limitation had expired—*Torobaz* v. *Pir*

Bakhsh, 22 P.R. 1887. Where plaint presented in time to the proper Court was returned by that Court to be presented to the Court deputed to try the suit, and was re-presented to the Court deputed at a time when the period prescribed had already expired, the suit should not be dismissed. The principle is that when a plaint is presented to the proper Court, which makes it over for disposal to a subordinate Court, the date of the suit is the date of original presentation, and the fact that the Court improperly returned the plaint to the plaintiff for presentation to the subordinate Court instead of itself forwarding it direct to such Court, does not affect the question of limitation—*Seth Thandi Ram* v. *Mahadia*, 7 P.R. 1895.

A suit is within time if the plaint is presented to the proper officer within the period of limitation, even though leave under Clause 12 of the Letters Patent is obtained after the expiry of such period—*Suprokash* v. *Amullya*, 44 C.W.N. 604.

Where the plaintiff unites several causes of action against the same defendant the question of limitation has to be regarded with special reference to the jurisdiction of that Court to try the suit and not to the jurisdiction of other Courts to try those suits when the causes of action are split up and filed before them—*Maha Latchayya* v. *Seshayya*, (1941) 2 M.L.J. 244, A.I.R. 1941 Mad. 786, 1941 M.W.N. 807.

As to the effect of *addition of a new party*, see Notes under sec. 22.

Proper presentation:—See the *Explanation*. The plaint must be presented to an officer authorised to receive it; otherwise there is no proper presentation and the suit is not 'instituted'—*Ram Chunder* v. *Googul Gope*, 18 W.R. 172. Thus, a plaint presented to the Naib-Sheriff who is not authorised to receive plaint under O. IV, r. 1, C. P. Code, cannot be said to be presented to the proper officer, and the suit is not properly "instituted"—*Nur Muhammad* v. *Ghulaman*, 15 Lah. 308, A.I.R. 1934 Lah. 622. So also, where a plaint was presented to a *karkum* left in charge of the Court during vacation, it was held that such presentation was invalid—*Nandavallabh* v. *Allibhai*, 6 B.H.C.R. A C. 254. A despatch *by post* is not presentation to the proper officer of the Court; but if such plaint is accepted and the party afterwards appears and takes out the necessary processes under the Court's orders, within the period of limitation, it may be held that the institution was not bad—*Sankarnarayana* v. *Kunjappa*, 8 Mad. 411 (413).

Suit against minor:—A suit against a minor defendant is instituted when the plaint is filed, and not when a guardian *ad litem* for him is subsequently appointed—*Khem Karan* v. *Har Dayal*, 4 All. 37 (39); *Imami* v. *Sadan*, 18 P.R. 1901, 31 P.L.R. 1901.

Suit relating to mosque:—This section applies to every suit and provides no exception for suits concerning wakfs, religious institution, or lands and buildings dedicated to sacred uses—*Masjid Sahid* v. *Shiromani*, 40 P.L.R. 319, A.I.R. 1938 Lah. 369 (F.B.).

Application by official Assignee u/s. 7 of the Presidency Towns Insolvency Act. It has been held by the Madras High Court in *Muthusamy* v. *Official Assignee*, 59 Mad. 1020, 71 M.L.J. 289, 1936 M.W.N. 609, A.I.R. 1936 Mad. 778 that an application by the Official Assignee under section 7 of the Presidency Towns Insolvency Act is equivalent to a suit for purposes of this section.

23. Appeal preferred:—In cases of appeals too, a conflict of opinion exists as to whether an appeal should be treated as preferred on the day on which it is first presented, or on the subsequent date on which it is presented after putting in of proper stamps. According to some cases, the date of the original presentation of the memo-

stamps, is deemed to be the date of filing of the appeal, and therefore the fact that the deficiency of stamps is supplied after the expiry of the period of limitation does not make the appeal time-barred—*Patch Saheb* v. *Sub-Collector*, 15 Mad. 78; *Sheo Partab* v. *Sheo Gholam*, 2 All. 875; see also *Chennappa* v. *Raghunath*, 15 Mad. 29. But in *Yakubunnissa* v. *Kishori Mohan*, 19 Cal. 747, and *Balkaran* v. *Gobind Nath*, 12 All. 129 (141) (F.B.) it has been said that a memorandum of appeal not properly stamped when presented cannot be treated as properly presented, and the subsequent presentation after supply of proper stamps beyond the period of limitation is ineffectual. The two last-mentioned cases are no longer good law in view of section 149 of the C. P. Code, 1908. See that section cited under Note 22 above. But it should be noted that that section gives a *discretion* to the Court to allow or not to allow the party to pay the deficient Court-fee afterwards. And so it has been held that if an appellant deliberately without any excusable ground and to suit his own convenience pays on his appeal insufficient Court-fees, the Court is not bound to accept the appeal and give the appellant time to make good the deficiency—*Ram Sahay* v. *Lachmi Narayan*, 3 P.L.J. 74, 42 I.C. 675. Again, where the appellant files the memorandum of appeal on the last day of limitation with insufficient Court-fees and pays the deficit amount of his own accord after the period of limitation, the appeal is out of time as it must be deemed to have been presented when the Court-fee is paid in full—*Ayyappa* v. *Marimuthu*, 165 I.C. 57, 44 L W. 249.

Where an appellant presented a memorandum of appeal within the period of limitation, but the Appellate Court returned it for correction, without specifying any date for such correction, and it was afterwards presented after amendment at a time when the period of limitation had expired, *held* that the appeal should be taken as preferred on the date of the first presentation (and not the subsequent presentation after amendment) of the memorandum of appeal, and was in time—*Jagannath* v. *Latman*, 1 All. 260.

Proper presentation of appeal:—An appeal is said to be 'preferred' when it is presented in accordance with sec. 541 of the C. P. Code, 1882 (O. XLI, R. 1 of the Code of 1908), *i.e.*, by a proper person to the proper Court—*Akshoy Kumar* v. *Chunder Mohun*, 16 Cal. 250 (251). Presentation of an appeal without a copy of the decree appealed from is not a proper filing of the appeal—*Masum* v. *Madan*, 9 I.C. 222 (223), 1911 P.W.R. 8; *Balkaran* v. *Gobind Nath*, 12 All. 129 (139) (F.B.); *Chamila* v. *Amir Khan*, 16 All. 77 (78); *Akbar Ali* v. *Ram Chand*, 53 P.R. 1887; *Nihal* v. *Iswar*, 147 P.R. 1879; *C* v. *C.*, 22 P.R. 1903; *Bhag Singh* v. *Jhanda Singh*, 7 P.R. 1879. But a copy of the decree of the first Court is not required to be filed with the memorandum of a second appeal—*Pirathi* v. *Vencatramanayyan*, 4 Mad. 419 (420) (F.B.); *Chunilal* v. *Dahyabhai*, 32 Bom. 14 (24) (F.B.). If a memorandum of appeal is presented to the District Jurge at his private residence after Court hours, on the last day of limitation, the Judge has jurisdiction to accept it, although he is not bound to do so. If he accepts the appeal at his private residence, he cannot afterwards reject it on the ground that it was presented out of Court hours after the expiry of the limitation period—*Thakur Din Ram* v. *Hari Das*, 34 All. 482 (486) (F.B.), 14 I.C. 744, 9 A.L.J. 743.

In a case under the Sea Customs Act, 1878, the Supreme Court has recently held that the date of receipt by the appellate authority of the memorandum of appeal is the date of filing appeal and not the date of posting the memorandum—*Roy* v. *Collector of Customs*, A.I.R. 1957 S.C. 648.

Appeal by prisoner:—Under the provisions of sec. 420, Cr. P. Code, presentation of the petition of appeal by a prisoner in jail to the officer in charge of the jail is equivalent to presentation to the Court—*Queen* v. *Lingaya*, 9 Mad. 258 (259).

24. "Application made":—For the purposes of limitation, application may be made at any time in the day, notwithstanding the rules of the Court prescribing certain hours for the receipt of petitions and hearing of motions—*Desputty* v. *Dootas Roy*, 1 C.L.R. 291. Thus, an application for execution presented to proper officer beyond Court hours on last day of limitation is a valid one and no ratification by the Judge is necessary for such presentation—*Kishanlal* v. *Narain*, I.L.R. (1938) Nag. 451, A.I.R. 1938 Nag. 46, 174 I.C. 597. An application made to the High Court (original side) of Bombay is deemed to be made for the purposes of limitation when the notice of motion is first filed in the proper office of the Court, and not when the motion is made—*Venkapaiya* v. *Nazerally*, 47 Bom. 764 (772).

When an application for execution is defective in certain particulars, and a supplemental application furnishing such particulars is put in, the two may be considered as one application put in on the date of the first—*MacGregor* v. *Tarini Churn*, 14 Cal. 124 (127). If an application presented within time is returned by the Court for amendment, and is re-presented after amendment after the period of limitation, the amendment relates back to the original presentation—*Shama Prasad* v. *Taki Mullik*, 5 C.W.N. 816 (817). But it has been held by the Allahabad High Court that an *insufficiently stamped* application for review will be considered as made, for the purposes of limitation, only on the date the deficiency in stamp is supplied—*Munro* v. *Cawnpore Municipal Board*, 12 All. 57 (60). Compare the cases cited *ante* as regards insufficiently stamped *plaints*. The Allahabad case is no longer good law in view of the provisions of sec. 149 of the C. P. Code, 1908.

The application must be made to the *proper* officer, otherwise there is no proper making of application. The presentation of an application for review to the *Munsarim* of the District Court instead of to the Judge was held to be improper—*Munro* v. *Cawnpore Municipal Board*, 12 All. 57 (59).

The principles of this section applies to execution proceedings—*Karali* v. *Probodh*, 54 C.W.N. 900, A.I.R. 1950 Cal. 513.

25. "Shall be dismissed":—"Reasons of public policy having dictated the enactment of the Law of Limitation, the Indian Legislature has expressly declared that, whether the defence of limitation be pleaded or not, the Courts whether of first instance or of appeal are bound to give effect to such law. The bar of limitation cannot be waived, and suits and other proceedings *must* be dismissed if brought after the prescribed periods of limitation."—U. N. Mitra's Limitation (5th Edn.), p. 38. Sec. 3 requires that every suit or application made after the period prescribed therefor shall be dismissed, although limitation has not been set up as a defence. An obligation is thus cast upon the Court to dismiss a suit or application, if it is barred by limitation —*Asutosh* v. *Upendra*, 21 C.W.N. 564 (568), 24 C.L.J. 467, 38 I.C. 17. It has been held in a Madras case that the obligation cast upon a Court to dismiss a suit exists only in cases where it is in a position to dismiss the *whole* suit. It does not exist, where the plaintiff's claim is partially admitted by the defendant—*Kandasamy* v. *Annamalai*, 28 Mad. 67 (68, 69). But the correctness of this decision may be doubted. If the portion of the claim before the Appellate Court is barred by limitation, may not the Court dismiss that portion?

It is well settled that the Court has no general discretion outside the limits of the Limitation Act to dispense with its provisions or to relieve a suitor from the operation of the Act on the ground of hardship or mistake. The provisions of sec. 3 of the Act are peremptory and impose a duty upon the Court to dismiss a suit or an application, as the case may be, which is out of time unless the delay can be condoned under sec. 5 of the Act, or under any other provision of law for the time being in

force—*Tejumal Bhagwandas* v. *Murad*, A.I.R. 1936 Sind. 169, 30 S.L.R. 242, 165 I.C. 91; (*Maqbal Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85, 57 All. 242, followed). Section 3 of the Act is peremptory, and it is the duty of the Court to notice the Act, and give effect to it, even though it is not referred to in the pleadings—*Maqbal Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85 (88), 57 All. 242, 62 I.A. 80, 39 C.W.N. 640, 61 C.L.J. 267, 68 M.L.J. 665, 1935 A.L.J. 578, 37 Bom.L.R 533, 1935 M.W.N. 438, 41 L.W. 629, 155 I.C. 205, 37 P.L.R. 395. The provisions of section 3 are mandatory—*Md. Yunis* v. *Tilokchand*, A.I.R. 1935 All. 323 (326), 1935 A.L.J. 201, 4 A.W.R. 1352, 153 I.C. 1058. Courts are bound to apply the law of limitation in suits whether it is pleaded or not and to dismiss a suit which is apparently beyond time—*Udeypal Singh* v. *Lakshmichand*, A.I.R. 1935 All. 946 (948-49), 1935 A.L.J. 1029, 1935 A.W.R. 155, 159 I.C. 387 (F.B.). The section is mandatory and leaves no room for equitable consideration—*Banwari* v. *Ramhari*, A.I.R. 1942 Pat. 335, 197 I.C. 217. This section casts a duty on the Court to dismiss the suit if it is instituted after the period of limitation, even though not pleaded in defence—*Shambhoo* v. *Firm Dindayal*, A.I.R. 1950 Nag. 228, I.L.R. (1950) Nag, 454, 1950 N.L.J. 150.

Unless sufficient cause is shown by an appellant for the admission of appeal which has not been filed within time, it is the duty of the Court to dismiss it although the respondent has not taken up such a plea—*Sudama Rai* v. *Bisheshar*, A.I.R. 1935 All. 92 (93), 4 A.W.R. 1460, 152 I.C. 939. In view of the provisions of sec. 3, Limitation Act, it is not permissible to claim any exemption apart from what is contained in the Limitation Act—*Jitendra* v. *Rebatimohan*, A.I.R. 1953 Cal. 335.

The obligation to dismiss a time-barred suit or appeal rests upon the Court before which the suit is instituted or appeal is preferred, but is not laid on each successive Court whenever the objection comes to view. That is, an Appellate Court is bound to consider whether the appeal before it is time-barred, but not whether the suit as instituted before the Court of first instance was time-barred or not. Similarly, a Second Appellate Court (High Court) is bound to consider whether the second appeal before it is time-barred, but not whether the suit in the Court of first instance was barred, or whether the appeal before the lower Appellate Court was so barred—*Dattu* v. *Kasai*, 8 Bom. 535 (537); *Ahmad Ali* v. *Waris*, 15 All. 123 (126).

The effect of this section is to bring about the automatic dismissal of suits, appeals and applications founded upon debts or causes of action which according to their various periods of limitation are time barred. It is only the remedy that is destroyed, but the debt remains. So such a debt can be set off by a liquidator in winding up proceedings against debts by the company to the debtor—*Thakur Prasad* v. *Official Liquidator*, I.L.R. (1941) All. 415, A.I.R. 1941 All. 278; *Eastern Mercantile Bank Ltd.* v. *Krishna Menon*, A.I.R. 1957 Kerala 100. Limitation bars the remedy; it does not destroy the right unless a case is of the description provided for by sec. 28. Hence, the right of a reversioner to challenge an alienation by a Hindu widow is not destroyed but continues to exist even after the period of limitation for a suit to challenge it has expired—*Bal Jit* v. *Chand Kiran*, I.L.R. (1950) All. 564, A.I.R. 1950 All. 7. The same High Court in the Full Bench case of *Rameshwar Bux* v. *Ganga Bux*, 1950 A.L.J. 632, A.I.R. 1950 All. 598 has held that it is no doubt true that the Limitation Act bars the remedy and not the right, the right remains; but it cannot be enforced by judicial process. Thus in the Courts a time-barred mortgagee has no legal status and no rights; he cannot sue and his presence as a defendant cannot enlarge or in any way affect proceedings which without him are defective and must fail. There is no place for him in the proceedings before the Court for his capacity to activate them is dead. But apart from this, the vital section, sec. 3, upon which the whole Limitation Act depends for its efficacy, in term says that he shall not be there, for the section not

only requires that every suit instituted after the period of limitation shall be dismissed, but also, that every application made after such period shall meet a similar fate. But see *Varaha* v. *Ummer*, A.I.R. 1951 Tra-Co. 17 where it has been held that the mortgagee can plead in defence time-barred claims due to him in a suit for redemption.

Time-barred appeal presented before wrong Court:—Where an appeal is filed in the wrong Court and is out of time, the Court is entitled to dismiss it, and not to return it for presentation to the proper Court in order that the latter may consider the question as to whether the time can be extended under sec. 5—*Charandas* v. *Amirkhan*, 48 Cal. 110 (117, 118) (P.C.), 25 C.W.N. 289, 57 I.C. 606.

25A. Admitting time-barred appeal subject to objections:—The practice of admitting a time-barred appeal "subject to objections at the hearing" has been condemned by the Privy Council in *Krishnasami* v. *Ramasami*, 41 Mad. 412, and should therefore cease. See also *Talendrajit* v. *Gunendrajit*, 31 C.L.J. 1, 50 I.C. 374; *Abdul Kassem* v. *Chaturbhuj*, 6 P.L.J. 444, 3 P.L.T. 110, A.I.R. 1922 Pat. 47; *Chaturbhuj* v. *Muhammad Habib*, 54 IC. 36 (38) (Pat.). In the above Privy Council case as well as in *Sundarbai* v. *Collector*, 43 Bom. 376 (P.C.) their Lordships of the Judicial Committee impressed on the Courts in India the urgent expediency of adopting a procedure which should secure at the stage of admission the final determination (after due notice to all parties) of any question of limitation affecting the competency of an appeal. See also Note 70 under section 5.

26. Limitation not pleaded as defence:—In a matter which is governed by an Act which in some limited respects gives the Court a statutory discretion, there cannot be implied in the Court, outside the limits of the Act, a general discretion to dispense with its provisions. And this view is supported by the fact that sec. 3 of the Act is peremptory and that the duty of the Court is to notice the Act and give effect to it, even though it is not referred to in the pleadings—(*Macbul Ahmad* v. *Sankar Pratap*, A.I.R. 1935 P.C. 85 (88); *Alaf Khan* v. *Kurban*, I.L.R. (1947) Nag. 245, 1947 N.L.J. 274, A.I.R. 1948 Nag. 41. It is well settled that the question whether a suit is within time must be decided primarily on the basis of the plaintiff's own pleading, and not on the basis of the *defence* set up—*Des Raj* v. *Lachhi Ram*, 147 I.C. 57, A.I.R. 1933 Lah. 404 (405). It may not be proper to draw upon facts stated by the defendant in his written statement for the purpose of determining a question of limitation—*Jainarain* v. *G. G. of India*, A.I.R. 1951 Cal. 462. The provisions of this section are mandatory and a Court is bound to take notice of a question of limitation not specifically raised in the written statement, if on the facts in the plaint and those found, it *patently appears* that the suit is barred —*Rhodes* v. *Padmanabha*, 17 M.L.T. 18, 26 I.C. 369; *Vishweswar* v. *Sadashiv*, 27 Bom.L.R. 1456, 93 I.C. 930, A.I.R. 1926 Bom. 54 (55). Quite apart from the plea of the defendant, it is the duty of the Court to see if upon the allegations in the plaint the suit is within time, and if the case is *prima facie* barred, it is the duty of the Court to take up this point *suo motu* and dismiss the claim. Even the fact that the defendant abandoned the plea of limitation in the lower Court does not relieve the Appellate Court of the duty of taking notice of the point of limitation *suo motu*—*Nihal Devi* v. *Kishore Chand*, 97 P.R. 1910, 8 I.C. 999 (1011). So also it is the duty of the appellate Court to take notice of the point of limitation even if the plea was not raised in the written statement or in the trial court and no issue was framed, if it appears to the appellate Court that the suit is barred by limitation—*Byom Kesh* v. *Madhavji*, A.I.R. 1939 Pat. 421, 1939 P.W.N. 114. This rule is applicable only where the question of limitation is purely one of law capable of determination on the facts admitted or proved before the court and not where the question of limitation

raises issues of facts not arising from the plaint—*Official Trustee* v. *Mrs. Raeburn*, 1940 Rang.L.R. 273, A.I.R. 1940 Rang. 207, 193 I.C. 61. But where the suit is not on the face of it obviously barred by limitation, the Appellate Court does not exercise a wise discretion in taking up the question of limitation on its own initiative—*Mg. Yan* v. *Mg. P. Ka*, 3 Rang. 60, 89 I.C. 56, A.I.R. 1925 Rang. 223. Though the question of limitation was never raised in either of the lower Courts, nor raised in the memorandum presented to the High Court in second appeal, the High Court can nevertheless dismiss the suit if it is time-barred on the face of the pleadings in accordance with the mandatory provisions of this section, provided that the other party is given adequate opportunity to be heard on the suit—*Balaram* v. *Mangta*, 34 Cal. 941 (945, 951) (S.B.), 11 C.W.N. 959, 6 C.L.J. 237.

But, in spite of the provisions of this section, it is advisable for the defendant to plead limitation, if the suit is instituted after the prescribed period. If the defence of limitation rests upon a disputed question of *fact*, and the defendant does not raise the plea in his written statement nor does the point of limitation arise upon the evidence, the Court may refuse to frame an issue on that point at the hearing—*Venkata Narasinha* v. *Bhashyakarlu*, 25 Mad. 367 (370, 378) (P.C.).

It is true that the plea of limitation can be urged at any stage having regard to sec. 3, Limitation Act, but when a party does take the appropriate defence but does not put before the Court materials to sustain that defence it becomes difficult for the Court sitting in appeal to give effect to the defence contention—*Bejoykumar* v. *Satishchandra*, A.I.R. 1936 Cal. 282.

27. Plea of limitation, when can be taken:—In the original Court, if the plea of limitation is taken before the issues are fixed, it must, of course, be entertained and decided. If it is taken by the defendant at a later stage and can be decided on the existing issues and on the record as it stands, here again the Court is bound to take note of it and decide it. This rule holds good whether the plea has been actually taken or not, if the matter has in any way come to the notice of the Court. But if, after the issues in the case have been fixed and the case has proceeded to some length, the defendant raises the question of limitation, and the Court finds that in order to decide that question, fresh issues of fact have to be gone into and additional evidence taken, then the Court has the option of refusing to entertain the plea. When a case has passed out of the Court of first instance and is before a Court of appeal, the rule remains the same; and an Appellate Court or a second Appellate Court is generally bound to listen to a plea of limitation if it can be decided without further inquiry; but the Court has also an option in the matter. But the Appellate or second Appellate Court is justified in refusing to entertain a plea of limitation which was not taken in the first Court nor in the grounds of appeal in the Appellate Court but is urged for the first time in argument in the latter Court, where the plea for its proper decision involves further inquiry into facts—*Shah Muhammad* v. *Piara*, 84 P.R. 1911, 13 I.C. 792 (794). If the defendant deliberately abandons the plea of limitation in the Court of first instance, he cannot be allowed to raise the question in appeal, if the facts found do not enable the Appellate Court to decide it and new findings would have to be obtained—*Seshachala* v. *Varada*, 25 Mad. 55 (60); *Rangayya* v. *Narasimha*, 19 Mad. 419 (419). But if the point of limitation arises upon the facts of the case, or is obvious on the record, and does not stand in need of being developed by fresh evidence, it must be heard and determined by the Appellate Court, though it does not appear on the pleadings or in the grounds of appeal or appears for the first time in the memorandum of appeal—*Deo Narain* v. *Webb*, 28 Cal. 86; *Harak Chand* v. *Deonath*, 25 Cal. 409 (410); *Bechi* v. *Ahsanullah*, 12 All. 461 (464) (F.B.); *Nadhu Mandal* v.

Kartik Mandal, 9 C.W.N. 56 (58); *Raghunath* v. *Pareshram*, 9 Cal. 635; *Gulabmal* v. *Shujawal*, 25 I.C. 354 (355); *Ganeshdas* v. *Nimbi*, 8 N.L.R. 174, 17 I.C. 638; *Dudo* v. *Md. Nathu*, 27 P.L.R. 870, A.I.R. 1926 Lah. 451 (452), 94 I.C. 251; *Palaniappa* v. *Veerappa*, 41 Mad. 446 (449); *Maharaj Sai* v. *Kedar Nath*, 29 N.L.R. 272, A.I.R. 1933 Nag. 130 (133), 144 I.C. 948; *Official Trustee* v. *Mrs. Raeburn*, A.I.R. 1940 Rang. 208; *Kashi Ram* v. *Kundan Lal*, A.I.R. 1956 All. 660. A plea of limitation can be entertained by the Appellate Court if there are materials on the record on which the plea can be disposed of, without requiring any fresh evidence on the point, even though no issue was framed in the Court of first instance on that point but the plea was merely taken in the pleading in that Court—*Radha Mohan* v. *Ami Chand*, 1933 A.L.J. 1283, A.I.R. 1934 All. 386 (387), 149 I.C. 651. Objection as to limitation can be taken at any stage of a suit or proceeding including the appellate stage—*Piarey Lal* v. *Sukhbasi*, 1949 R.D. 419. But it should be noted that if the plea of limitation is not taken in the grounds of appeal, the party urging it cannot argue it except on obtaining the permission of the Court under sec. 542, C. P. Code, 1882 (O. XLI, r. 2 of the Code of 1908)—*Balaram* v. *Mangta*, 34 Cal. 941 (945) (S.B.); *Asmad Ali* v. *Waris*, 15 All. 123 (127) (F B); and the Appellate Court should not refuse to grant the permission where the point arises on the face of the plaint and no question of fact has to be enquired into to enable the Court to dispose of it—*Balaram* v. *Mangta*, 34 Cal. 941 (945, 948) (S.B.), 11 C.W.N. 959.

Where the defendant in the Court of first instance made a general plea of limitation (*viz*, that the suit is barred by the 12 years' rule), the Appellate Court is not competent to dismiss the suit on the special plea, raised for the first time in the Court of Appeal, that the suit is barred under Sch. III, Art. 3 of the Bengal Tenancy Act, when no issue was raised in the original Court nor was the plaintiff allowed in that Court to adduce evidence on it, and the facts are not apparent on the face of the record in the Appellate Court—*Kedar Nath* v. *Mohesh Chandra*, 28 C.L.J. 216, 45 I.C. 787 (789). But where, although the plea of special limitation under Sch. 3, Art. 3 of the Bengal Tenancy Act was not taken in the Court of first instance, nor was taken before the District Judge in the first Appellate Court, but the District Judge in his judgment went into the question whether the suit fell under that article of the Bengal Tenancy Act, and there was no question of any prejudice to any party, the High Court in second appeal allowed the defendant-appellant to raise the question of special limitation under the Bengal Tenancy Act—*Gajadhar* v. *Ram Charan*, 9 Pat. 788 (F.B.), 11 P.L.T. 197, 125 I C. 565, A.I R. 1930 Pat 256 (260) distinguishing 28 C.L.J. 216 and 4 P.L.J. 645.

Where a respondent fails to object to the admission of a time-barred appeal by the lower Appellate Court, the High Court in second appeal is not precluded from considering the question of limitation—*Chaturbhuj* v. *Md. Habib*, 54 I.C. 36 (38) (Pat.). The Allahabad High Court holds that a second Appellate Court cannot entertain the plea that the first appeal to the lower Appellate Court was time-barred when it was presented, if the plea has not been set forth in the memorandum of second appeal—*Ahmed Ali* v. *Waris*, 15 All. 123 (128) (F.B.); *Ram Kishen* v. *Dipa*, 13 All. 580 (581). But a plea of limitation not taken in either of the Courts below cannot be entertained for the first time in second appeal where such entertainment would involve the *taking of additional evidence*—*Atmaram* v. *Sardar Kuar*, 1884 A.W.N. 327; *Pirsab* v. *Gurappa*, 38 Bom. 227, 16 Bom.L.R. 111, 24 I.C. 716 (719); or where the determination of the question would involve a *fresh investigation* of facts or would raise question of facts which were not stated in the written statement—*Bhadai* v. *Manohar*, 4 P.L.J. 645, 52 I.C. 125; *Shivapa* v. *Dod Nagaya*, 11 Bom. 114; *Khub Lal* v. *Jugdish*, 1 Pat. 23 (25, 26), 3 P.L.T. 795, A.I.R. 1922 Pat. 398, 69 I.C. 185. But though the

question of limitation was not raised in either of the Courts below nor set forth in the memorandum of second appeal to the High Court, that Court will allow it to be argued in second appeal if the facts necessary to determine the question of limitation are admitted or are apparent *on the face of the pleadings*, and the whole case is properly before the Court—*Balaram* v. *Mangta*, 34 Cal. 941 (950) (S.B.); *Rangacharya* v. *Guru Revti Ramanacharya*, 1929 A.L.J. 229, A I.R. 1928 All. 689 (695), 114 I.C. 734; or if the point of limitation is a pure point of law which does not require any fresh findings and which arises upon the materials before the Court, none of which is in dispute—*Pirsab* v. *Gurappa*, supra; *Raj Narain* v. *Ram Sarup*, 1930 A.L.J. 552, A.I.R. 1930 All. 467 (468), 123 I.C. 820. The plea can be raised for the first time in second appeal, only if it is certain that its legitimacy can be determined on the pleading and does not depend upon any question of fact regarding which the other party might have adduced evidence—*Peruma* v. *Rama*, 28 M.L.J. 115, 28 I.C. 378 (379); see also *Narasingha* v. *Pralhadman*, 46 Cal. 455 (456, 457), 22 C.W.N. 994, 47 I.C. 25. But in *Dattu* v. *Kasai*, 8 Bom. 535 (537), the second Appellate Court refused to entertain the plea of limitation raised for the first time in second appeal (even though the point appeared on the face of the plaint), on the ground that as the defendant had failed to avail himself of the opportunity of urging his objection before the Courts below, he must be considered to have waived his right to raise the objection.

A point of limitation cannot be raised for the first time in the High Court in revision, when it involves a mixed question of law and fact—*Natesa* v. *Ramachandra*, 27 M.L.J. 728, 27 I.C. 116 (118).

A plea of limitation as regards an application for execution can be taken at any time during the pendancy of the execution proceedings; thus, so long as an application for execution is pending, the judgment-debtor can at any time show that the application is barred, and the Court has no option but to dismiss it under this section. It is only when the point of limitation is concluded by proceedings in a previous execution that the judgment-debtor is not allowed to take an objection on the score of limitation in a subsequent execution of the decree—*Kesho Prosad* v. *Harbans Lal*, 2 P.L.T. 22, 53 I.C. 85 (89); *Atul Krishna* v. *Brindaban*, 9 Pat. 306, 11 P.L.T. 739, 125 I.C. 527, A.I.R. 1930 Pat. 330 (331). An objection as to limitation may be taken at any stage of the execution proceedings, if the facts upon which the objection is based are patent upon the face of the record—*Gunjra Koer* v. *Lakhan Koer*, 35 I.C. 337 (339) (Patna).

A plea of limitation can be taken even though the defendants have on a previous occasion acknowledged their liability. Thus, in a suit for money, although it appeared that in a previous suit the defendants had admitted their liability with regard to certain instalments which were then time-barred and had stated that they were always ready and willing to pay, still they were not precluded on any principle of estoppel from setting up the statute of limitation in the present suit—*Sitharama* v. *Krishnasamy*, 38 Mad. 374 (380).

28. Interference by High Court:—Where the lower Court allows an application which was clearly time-barred, without at all applying its mind to the question of limitation in the case, the lower Court acts without jurisdiction and the High Court has the right to interfere in revision under sec. 115, C. P. Code—*Piroj Sah* v. *Qarib Shah*, 7 Lah. 161, 95 I.C. 124, A.I.R. 1926 Lah. 379; *Kaliyaparama* v. *Chetty Firm*, 9 L.B.R. 71, 39 I.C. 154; *Asanand* v. *Jhangi*, 50 I.C. 610, 1919 P.L.R. 29; *Panchu Mandal* v. *Isaf*, 17 C.W.N. 667 (668), 18 I.C. 391.

29. Suit by a pauper:—The word "pauper" in Explanation to sec. 3 means a declared pauper and not a person whose application to sue in *forma pauperis* is rejected—*Alopi Prashad* v. *Mt. Gappi*, A.I.R. 1937 Lah. 151; *Keshav Ramchandra* v.

Krishna, 20 Bom. 508; *Naraini* v. *Makhanlal*, 17 All. 526. According to the Explanation appended to this section, a pauper suit commences for the purpose of limitation on the day on which the petition to sue *in forma pauperis* is presented to the Court under O. 33, r. 2, C. P. Code, and not on the day when the application being granted it is numbered and registered under O. 33, r. 8—*Keshavlal* v. *Bai Dahi*, 41 Bom.L.R. 784, A.I.R. 1939 Bom. 418. Therefore, if an application for leave to sue as a pauper has been presented in time, the absence of signature and verification does not prevent the petition from being properly regarded as an application under the Explanation to sec. 3 of the Limitation Act. The signature and verification can properly be made on a subsequent day—*Vora* v. *Japan Cotton Trading Co.*, 32 Bom.L.R. 1343, 128 I.C. 625, A.I.R. 1931 Bom. 47 (49, 50).

Where during the *pendency* of an application for pauperism and before it is accepted or rejected by the Court, the applicant, upon an objection by the defendant, pays into Court the necessary Court-fee, the date of the application, and not the date of such payment, is the date of institution of the suit, and limitation for the suit runs against him only up to the former date—*Skinner* v. *Orde*, 2 All. 241 (P.C.); *Janakdhary* v. *Janaki*, 28 Cal. 427 (431) (dissenting from 18 All. 206); *Alayakammal* v. *Subraya*, 28 Mad. 493; *Raja Ram* v. *Tilok Chand*, 59 P.R. 1930; *Bhusanchandra* v. *Kamailal*, 41 C.W.N. 537, 65 C.L.J. 151, A.I.R. 1937 Cal. 241; *Amar* v. *Dharichban*, 27 Pat, 259, A.I.R. 1949 Pat. 465. The Allahabad High Court is, however, of opinion that the latter date must be taken as the date of institution of the plaint—*Abbasi Begum* v. *Nanhi*, 18 All. 206 (209). The Explanation to sec. 3 applies when the application for leave to sue as a pauper is *granted* by the Court. If the application for leave to sue as a pauper is *rejected*, and the applicant takes time for payment of Court-fees, but makes the payment after limitation of the suit has run out, though within the time granted by the Court, the suit will be taken as instituted not on the day of the application for pauperism, but on the day of the payment of Court-fees, and therefore barred—*Keshav Ram Chandra* v. *Krishna Rao*, 20 Bom. 508 (510); *Keshav Lal* v. *Mayabhai*, 9 Bom.L.R. 204; *Abhoya* v. *Bissesswari*, 24 Cal. 889 (891); *Naraini* v. *Makhan*, 17 All. 526 (528); *Mahadev* v. *Bhikaji*, 45 Bom.L.R. 544, A.I.R. 1943 Bom. 292, 208 I.C. 543; *Vamanrao* v. *Pranlal*, I.L.R. (1943) Bom. 721, 45 Bom.L.R. 1002, A.I.R. 1944 Bom. 63. The principle is this: when the application for leave to sue *in forma pauperis* is *rejected*, the suit cannot be continued as of its original institution. When such an order of rejection is made, there is a bar to any further application to sue as a pauper, but the plaintiff, having first paid the costs, if any, incurred by the Government in opposing his application for leave to sue as a pauper, is allowed the liberty of instituting a suit in the ordinary manner in respect of such right as he may have (O. 33, r. 15, C. P. Code). Upon an order of rejection of an application for leave to sue as a pauper, the original proceedings come to an end, and if the applicant wishes to proceed with the vindication of his rights, he must sue in the ordinary course, and the date of the institution of that suit would not be the date of presentation of the previous application for leave to sue as a pauper, but would be the date on which the suit is actually instituted on proper Court-fee—*Naraini* v. *Makhan*, supra. The grant of time to pay Court-fees after the termination of pauper proceedings cannot revive the application which had already been disposed of—*Mahadev* v. *Bhikaji*, supra. The explanation is intended to show when limitation begins to run on a suit being instituted, and not to affirm that an application for leave to sue as pauper is tantamount to the filing of a suit—*Vamanrao* v. *Pranlal*, supra.

Appeal by pauper:—If an application for leave to appeal as a pauper is rejected, and the applicant afterwards files an appeal in the regular way, at a time when the period of limitation for filing the appeal has expired, the date of the appeal

is the date of filing the regularly stamped memorandum of appeal and cannot relate back to the date of filing the application for leave to appeal. The appeal is therefore barred—*Bishnath* v. *Jagarnath*, 13 All. 305 (308). But if at the time of dismissing the petition for leave to appeal as a pauper, the Court *grants time* to the appellant to file a regular appeal and such time happens to be beyond the period of limitation prescribed for the appeal, it is an exercise by the Court of a discretion vested in it under section 5. Therefore the appeal filed within the time granted would not be barred by limitation—*Girwar* v. *Lakshmi*, 26 All. 329 (330); *Nallavadiva* v. *Subramania*, 40 Mad. 687 (697). See also the cases cited in Note 55 under sec. 5.

29A. Claim against a company—Claim by liquidator:—The Explanation first of all states the ordinary rule that a suit is instituted when the plaint is presented to the proper officer; but to this general rule two exceptions are prescribed: (1) in the case of a suit by a pauper, the time at which that suit is instituted is to be taken as an earlier date, *viz.*, the date when the application for leave to sue as a pauper was made; and (2) in the case of a claim against a company, the institution of the suit is advanced also to an earlier date, *viz.*, the date when the claim was first sent in to the official liquidator. The Explanation is not concerned with the question as to what is a suit or is to be considered a suit within sec. 3. *It assumes the existence of a suit which has been instituted* by the presentation of a plaint and is concerned only with the *point of time* at which that suit is for the purpose of sec. 3 to be treated as being instituted. It follows, therefore, that a mere claim against a company, *not accompanied* by a proceeding instituted by the presentation of a *plaint*, cannot be considered as a "suit instituted" within the meaning of the Explanation—*Hansraj* v. *Official Liquidators*, 54 All. 1067 (P.C.), 1933 A.L.J. 175, 37 C.W.N. 379 (386, 387), 142 I.C. 7, A.I.R. 1933 P.C. 63. Similarly, a claim *by or on behalf of* a company (*e.g.*, an application in the winding up by the official liquidators of a company to recover certain sums from the debtors to the company) cannot be treated as a suit—*Hansraj* v. *Official Liquidators*, supra. See also *Maung Ba Lat* v. *Liquidator, K. T. Co-operative Society*, 8 Rang. 581, 131 I.C. 55, A.I.R. 1931 Rang. 72 (73).

30. No limitation to acts of Courts suo motu:—This section is confined only to litigants and is inapplicable to acts which the Court may or has to perform *suo motu*. Such acts are not subject to any rule of limitation. Thus, section 206 of the C. P. Code, 1882 (section 152 of the C. P. Code of 1908) empowers a Court of its own motion to amend its decree by correcting arithmetical errors, and the Court has power to do so at any time, irrespective of the fact that an application by the party asking the Court to exercise that power may be barred at the time—*Dhan Singh* v. *Basant Singh*, 8 All. 519 (533); *Raghunath* v. *Rajkumar*, 7 All. 276 (280).

Where Court is closed when period expires.

4. Where the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the Court re-opens.

31. General principle:—Section 4 of the Limitation Act has nothing to do with computing the prescribed period and does not alter, extend or add to its length—*Shanti* v. *Harnam*, I.L.R. (1938) Lah. 193, A.I.R. 1938 Lah. 234, 40 P.L.R. 533 (F.B.); *Ram Manorath* v. *Ram Bhulawan*, 21 Luck. 447. *Bhiwani Cloth Mills Ltd.* v. *Parmeshari*, I.L.R. 1946 Lah. 107, A.I.R. 1947 Lah. 168. When the prescribed period expires on a day on which the Court is closed, the only effect of sec. 4 is that the application may

be made or suit filed on the day the Court re-opens—*Maqbul Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85, 39 C.W.N. 640. The section does not in any way extend the period of limitation, nor does it furnish any data for computation of time, it merely embodies a rule of elementary justice that if the time allowed by statute to do an act or to take a proceeding expires on a day when the Court is closed, it may be done on the next sitting of the Court. It gives expression to the general principle of law enunciated by the maxims *Lex non cogit ad impossibilia* and *Actus curiae neminem gravabit*—*Raja Pande* v. *Sheopujan*, I.L.R. (1943) All. 84, 1942 A.L.J. 592, A.I.R. 1942 All. 492 (F.B.). The general principle of law is this: when a party is prevented from doing a thing in Court on a particular day, by the act of the Court itself, as for instance, on account of the closing of the Court, and not by any act of his own, he is entitled to do it at the first subsequent opportunity—*Peary Mohun* v. *Anunda Charan*, 18 Cal. 631 (634); *Shoshee Bhusan* v. *Govind Chunder*, 18 Cal. 231 (234); *Dharamsi Morarji Chemical Co* v. *Ochhavlal*, 51 Bom. 848, 103 I.C. 540, A.I.R. 1927 Bom. 480 (481); *Haji Ismail* v. *Trustees*, 23 Mad. 389 (397); *Aravamudu* v. *Samiyappa*, 21 Mad. 385 (387); *Sambasiva* v. *Ramasami* 22 Mad. 179 (182); *Surendra* v. *Souravini*, 10 C.W.N. 535 (539); *Subramanian* v. *Krishna Iyer*, 26 M.L.J. 307, 23 I.C. 23 (24); *Rambir* v. *Prabhakar*, A.I.R. 1955 Nag. 300; *Waterton* v. *Baker*, (1868) L.R. 3 Q.B. 173; *Mayer* v. *Harding*, (1867) L.R. 2 Q.B. 410. Compare section 10 of the General Clauses Act which lays down that "where any act or proceeding is directed or allowed to be done or taken in Court or office on a certain day or within a prescribed period, then, if the Court or office is closed on that day or on the last day of the prescribed period, the act or proceeding shall be considered as done taken in due time, if it is done or taken on the next day afterwards, on which the Court or office is open." The word "Court" means the proper Court in which the application ought to have been made—*Maqbul Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85, 39 C.W.N. 640; *Deep Chand* v. *Nahar Mal*, A.I.R. 1951 Ajmer 50.

And so, where the decree in a pre-emption suit directs that the purchase money should be paid into Court within a fixed time after the decree becomes final, the decree becomes final when the period prescribed for appeal expires, and if the period of limitation prescribed for an appeal from the decree expires on a holiday, the decree becomes final on the day the Court re-opens—*Ram Sahai* v. *Gaya*, 7 All. 107 (108). An application to set aside an execution sale held by the Collector, is one in respect of which the benefit of this section can be availed of. The fact that the Court of the Collector was open when the limitation expired does not make this section inapplicable —*Veerappa* v. *Iratappa*, 40 Bom.L.R. 152, A.I.R. 1938 Bom. 209. The provisions of this section applies to an application under Or. 21, r. 89, C. P. Code. Thus when the judment-debtor is prevented from making the deposit as required by the aforesaid rule on account of the closing of the Court on the last date of the period prescribed for deposit, he can deposit on the day following—*Hirania* v. *Ram*, A.I.R. 1950 All. 367, 1950 A.W.N. 164. The period of limitation for setting aside an auction sale under O. 21, r. 89, C. P. Code by depositing the amount in Court expired during the vacation, and the application together with a tender of the amount due was presented by the judgment-debtor on the reopening day, but as the tender was not signed by the Judge on that day, the actual payment could not be made on that date but was made on the next day. *Held* that the tender was in time, as the delay in payment was not due to any fault of the judgment-debtor—*Durga Prasad* v. *Babu Lal*, 20 A.L.J. 543, A.I.R. 1922 All. 195 (196), 67 I.C. 321. Similarly, where the applicant preferred his application for setting aside a sale under O. 21, r. 89 together with the deposit money on the last day of limitation, but he was eventually told that his application could not be received as the Judge was busy, and that the money should be deposited the next day, *held*, that although sec. 4 of this Act did not apply (as the

Court was not closed), still the principle of this section applied, as the applicant was refused facilities to carry out his act on the day in question, and the application and deposit made on the next day was not barred—*Raotmal* v. *Amarsingh*, 9 N.L.J. 57, A.I.R. 1926 Nag. 331, 96 I.C. 376. A plaintiff is entitled to wait for the reopening of the Munsiff's Court after the vacation in order to avail himself of this section, though the suit may be cognizable in the Village Court, which might be open on the day the period of limitation expired. The Court of the lowest grade in section 15 of the Code of Civil Procedure refers to the Court subject to the Code and cannot refer to a Village Court—*Subba Rao* v. *Narsiah*, I.L.R. (1940) Mad. 684, (1940) 1 M.L.J. 220, A.I.R. 1940 Mad. 495. But the furnishing of security or the deposit of costs is not an application under this section and failure to furnish security or the deposit within time does not entitle the party to get the benefit of this section—*Lachmeshwar* v. *Girdhari*, 19 Pat. 123, A.I.R. 1939 Pat. 667, 1939 P.W.N. 807 (F.B.).

32. Application of this section to special or local laws:—This section applies although the case is governed by special or local laws. See section 29 (2) (*a*) by which the provisions of section 4 have been made expressly applicable "for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law." Even before the Limitation Amendment Act, X of 1922 was passed, it was laid down in numerous cases that the general provisions of this section (as well as the next section) should apply to cases under a special or local law—*Nizabutoolla* v. *Wazir Ali*, 8 Cal. 910 (911); *Hossein Ally* v. *Douzelle*, 5 Cal. 906 (908).

Thus, if the Court be closed on or before the last of the period allowed under sec. 174 of the Bengal Tenancy Act to set aside the sale, the judgment-debtor may pay the sum of money into Court on the first day the Court re-opens, notwithstanding the absence of express provision to that effect—*Shooshee* v. *Gogind*, 18 Cal. 231 (234). Similarly, if the last day for a suit under sec. 77 of the Registration Act expires on a holiday, a suit instituted on the next re-opening day is not time-barred—*Ahad Baksh* v. *Bahar Ali*, 16 C.W.N. 721 (723, 724), 14 I.C. 173; *Matabbar* v. *Sasi Bhusan*, 16 C.W.N. 20 (22), 12 I.C. 33. So also, an application under sec. 22 of the Provincial Insolvency Act (1907) may be made on the re-opening day, if the 21 days from the decision complained of expire on a holiday—*Bhairon Prasad* v. *Dass*, 17 A.L.J. 787, 51 I.C. 113. An application under sec. 68 of the Provincial Insolvency Act (V of 1920) may be made on the re-opening day, if the period of 21 days mentioned therein expires on a holiday—*Ma Than* v. *Bailiff, Township Court*, 9 Rang. 150. 134 I.C. 223, A.I.R. 1931 Rang. 209 (210). If the last day on which the debt could have been enforced is a public holiday, and on the morning of the re-opening day the debtor is adjudged an insolvent, the debt is provable in insolvency. It is not necessary for the creditor, for the purpose of keeping his debt alive, to file a suit on the re-opening day—*Fatma Bi* v. *Nagoor Khan*, 55 Mad. 630, A.I.R. 1932 Mad. 287 (288), 136 I.C. 822, 62 M.L.J. 256. Similarly, where the last day for filing a suit under sec. 87 of Madras Harbour Trust Act (II of 1886) was a holiday the suit could be filed on the next opening day—*Haji Ismail* v *Trustees of the Harbour, Madras*, 23 Mad. 389 (397). If the last day for filing a suit to set aside a distraint under the Madras Rent Recovery Act, 1865, expires on a holiday, the the plaintiff is entitled to file the suit on the next re-opening day—*Sambasiva* v. *Ramasami*, 22 Mad. 179 (182). The provisions of this section are quite general and apply to an application under sec. 12 (2) of the Oudh Courts Act—*Ram Dass* v. *Chedi Lal*, 14 Luck. 138, 1938 O.W.N. 706, A.I.R. 1938 Oudh 186. Where the period of limitation for an appeal under section 119A of the Oudh Rent Act (XXII of 1886) expired on a holiday, and the appeal was filed on the day following, *held* that the appeal was filed within time—*Binda Parshad* v. *Ram Bhajan*,

17 O.C. 254, 25 I.C. 703 (704). If the period of three months limited for a suit under sec. 111, clause (b) of the U. P. Land Revenue Act (III of 1901) expires on a holiday, a suit instituted on the next Court-day is within time—*Dhanpati* v. *Kandhaiya*, 7 O.W.N. 586, 127 I.C. 28, A.I.R. 1930 Oudh 371 (374).

In some cases, a distinction was drawn between an Act which is *a complete Code* in itself, and an Act which is not so, and it was laid down that the general provisions of the Limitation Act (secs. 4 to 25) would be applicable to proceedings under special or local laws unless the special or local law was a complete Code in itself to which the provisions of the Limitation Act could not be applied without incongruity. Thus the N. W. P. Rent Act (XII of 1881) is not a complete Code in itself and is particularly incomplete as regards provisions regarding limitation; consequently there is nothing to exclude the application of sec. 4 of the Limitation Act to the N. W. P. Rent Act—*Beni Prosad* v. *Dharaka*, 23 All. 277 (279). But the Oudh Rent Act was a complete Code in itself containing rules of limitation complete in themselves and was not affected by the general provisions of the Limitation Act—*Raghubar* v. *Sheo Charan*, 4 O.C. 182. So also the Bengal Rent Act (VII of 1869) being a complete Code as regards limitation, the provisions of section 4 of the Limitation Act did not apply, and if the last day for a suit for rent under the Rent Act was a holiday, a plaint filed on the following day was barred—*Purran Chaunder* v. *Mutty Lall*, 4 Cal. 50. The Registration Act being a complete Code in itself, the provisions of the Limitation Act did not apply to a suit instituted under sec. 77 of that Act—*Appa Rau* v. *Krishnammurthi*, 20 Mad. 249; *Veeramma* v. *Abbiah*, 18 Mad. 99 (F.B.). The Letters Patent (Lahore) together with the rules framed thereunder as to limitation for filing appeals are a complete Code in themselves and therefore the general provisions of the Limitation Act did not apply to appeals filed under sec. 10 of the Letters Patent—*Dial Singh* v. *Buddha Singh*, 2 Lah. 127, 61 I.C. 327; *Fateh Mahomed* v. *Chothu Ram*, 3 Lah.L.J. 361, 60 I.C. 737. See also *Deoki Lal* v. *Ramanand Lal*, 5 P.L.R. 701, 59 I.C. 179.

This distinction will no longer hold good, by reason of the express provisions of section 29 as now amended, and section 4 will apply to all special or local laws, whether they are complete Codes or not.

33. Applicability of section to private agreements:—Section 4 applies where a certain period has been prescribed by a *statute*, and has no application to a case where a certain date has been fixed for payment by *agreement of parties*. Thus, after a sale in execution of a decree, the decree-holder agreed to have the sale set aside on receipt of the decretal amount within two months from the date of sale. The last day of the two months being a holiday, the judgment-debtor deposited the decretal amount in Court on the re-opening of the Court. *Held* that the decretal amount not having been paid to the decree-holder within 2 months from the date of sale, the sale could not be set aside, and the fact that the Court was closed when the two months expired would not entitle the judgment-debtor to get the benefit of section 4 and to deposit the money on the re-opening day—*Adya Singh* v. *Nasib Singh*, 1 P.L.T. 227, 56 I.C. 495 (496). But in a Nagpur case, where the last day of payment of the money under a compromise decree was a holiday, and the appellant deposited the money in Court on the day the Court re-opened, *held* that there was a valid compliance with the decree. The reason is that where the decree directs payment to the decree-holder, payment into Court is a valid compliance with the decree unless the Court directs that payment should be to the decree-holder and not otherwise—*Dhanu* v. *Kesho Prasad*, 19 N.L.R. 116, A.I.R. 1923 Nag. 246, 72 I.C. 388.

34. Period of extension under sec. 6:—The "period of limitation prescribed for any suit" in this section is wide enough to include a period of time contained

in Sch. I, computed according to the provisions of sections 6 and 8. Therefore, if the period of three years after attaining majority, which is extended in favour of an ex-minor by virtue of secs. 6 and 8, expires on a day when the Court is closed, this section enables him to institute his suit on the re-opening day—*Naganna* v. *Krishnamurthi*, 55 Mad. 286 61 M.L.J. 675, A.I.R. 1932 Mad. 139 (141), 135 I.C. 587.

35. Closing of Court:—Whether a Court is or is not "closed" within the meaning of this section is in each case a question of fact and must depend on the practice which prevails in the particular Court—*Gur Bux Singh* v. *Sohanlal*, A.I.R. 1952 Cal. 542, 55 C.W.N. 127, I.L.R. (1952) 1 Cal. 88. A Court is said to be closed even though the Judge holds Court on a Gazetted holiday—*Boyamma* v. *Balajee*, 20 Mad 469 (470); *Kaliyanasundrappa* v. *Chinnasami*, 17 L.W. 413, A.I.R. 1923 Mad. 489, 72 I.C. 13; or if the Court is closed in an unauthorized manner—*Bishen Perkash* v. *Babooa Misser*, 8 W.R. 73. Though the Court offices may be actually open during the vacation for other work, if there is no one lawfully required to be present for the purpose of receiving a plaint or a petition of appeal or application, the Court will be held to be closed for the purposes of this section. See *Nandavallabh* v. *Alibhai*, 6 B.H.C.R. 254, *Akhtari Bibi* v. *Rajlakshmi Debi*, 59 C.W.N. 684.

But if the offices of the Court are open during the holidays and there is also a Judge or an Officer or clerk of the Court at hand *for the purpose of attending to plaints, appeals and applications*, the Court cannot be said to be closed within the meaning of this section; and all plaints, appeals and applications which are about to be barred during the vacation should be presented before the period of limitation actually expires. If they are not presented till the Court fully reopens after the vacation, it cannot be pleaded that the Court was closed at the time they ought to have been presented in the ordinary course of thing—*Shivram* v. *Bhavania*, (1886) P.J. 262; *British India Steam Navigation Co.* v. *Sharafally*, 46 Mad. 938; *Tata Industrial Bank* v. *Abdul Husein*, 25 Bom.L.R. 1296 (1302), A.I.R. 1924 Bom. 144, 89 I.C. 529; *Hira Lal* v. *Sojan Chand*, 34 P.L.R. 338, A.I.R. 1933 Lah. 239, 142 I.C. 307; *Dharamsi Morarji Chemical Co.* v. *Ochhavlal*, 51 Bom. 846, 103 I.C. 540, A.I.R. 1927 Bom. 480 (481). Thus where the time for filing an application for review expires during holidays and the application is filed on the date when the judicial work is taken up by the Judges after the holidays and not on the date when the office of the Court re-opens, the application is barred by limitation and this section has no application—*Immaniyalu*, in re (1948) 1 M.L.J. 49, 1948 M.W.N. 28, A.I.R. 1948 Mad. 521. In an earlier Bombay case it was said that this section would apply even if the office of the Court was working in the vacation for urgent work. Thus, though the Prothonotary's office was open for the receipt of urgent work in the vacation, a plaint could be filed on the opening day of the term, because the receipt of a plaint was not an urgent work—*Ranchordas* v. *Pestonji*, 9 Bom.L.R. 1329. But in a later case of the same High Court it has been decided that the question whether the receiving of a plaint can be regarded as urgent work must be decided with reference to the present practice of the High Court; and as in recent years plaints have, as a matter of fact, been received in the Prothonotary's office during the vacation, whether they are of an urgent nature or not, the plaintiff is not entitled to wait till the Court re-opens, if during the holidays the Prothonotary's office is open for the receipt of plaints—*Dharamsi* v. *Ochhavlal*, *supra*. Where the Court adjourned for two months, but opened twice a week for one hour only, for the reception of plaints, petitions, etc., the Court was not closed within the meaning of this section so as to entitle the appellant to present his appeal on the first day the Court sat after the adjournment—*Nachiyappa* v. *Ayyasami*, 5 Mad. 189 (F.B.). A Court cannot be regarded as closed on dates when arrangements are made and notified for the reception of plaints—*Parvatheesam* v. *Bapanna*, 13 Mad. 447 (at p. 451). If

however, the Court office is open during the vacation and there is some one present who is entitled to receive the plaint, but there is no one who can decide that it shall be admitted and put on the files of the Court, the plaint is in time if presented on the first day on which there is such last mentioned officer present—*Ganpat* v. *Hira*, 29 P.R. 1891; *K. Sinha* v. *Jatindra*, 41 C.W.N. 492; *Khirode* v. *Ramani*, A.I.R. 1937 Cal. 454; *Badri* v. *Kalyan*, A.I.R. 1956 Pat. 522.

A Court is not said to be closed, if the presiding officer is on tour. The plaint, in such cases, is to be presented to such officer in his camp—*Receiver* v. *Surapparazu*, 38 Mad. 295 (F.B.), 29 I.C. 449.

But where a Subordinate Judge of S used to sit for a week every month at L, and during his absence from S (*i.e.*, while he was sitting at L), the plaintiff presented his plaint at S which was accepted by the Naib Sheriff of the Court (who was not authorised to receive plaints under O. 4, r. 1, C. P. Code) but no arrangements were made for the reception of plaints by a proper officer during the absence of the Sub-Judge from S, and it was found that the suit was within time when it was accepted by the Naib Sheriff but became time-barred when it was subsequently placed before the Sub-Judge on his return from L, it was held that though the presentation of the plaint to the Naib Sheriff was not a proper presentation and the suit could not be said to have been instituted on the day of such presentation, still it must be taken that the Court at S was "closed" during the Sub-Judge's absence from S, and applying sec. 4 of the Limitation Act, the suit must be held to be in time when it was placed before the Sub-Judge on his return to S. The plaintiff ought not to be made to suffer for want of proper arrangements for the reception of plaints during the Sub-Judge's absence from S—*Nur Muhammad* v. *Ghulaman*, 15 Lah. 308, A.I.R. 1934 Lah. 622.

36. The Court is closed:—It has recently been held in *Akhtari Bibi* v. *Rajlakshmi Debi*, 59 C.W.N. 684 that offices of the Court are not the same thing as the Court. It would be legislating instead of interpreting if for the words "the Court is closed" are read the words "the office of the Court is closed". So an application filed on the day when the Court as a whole re-opened was held not to be barred by limitation though the office remained open earlier by an order of the Registrar.

37. Closing of wrong Court:—The period during which the Court in which a suit was wrongly instituted was closed, will not be excluded. Thus, where a suit was filed in the Munsiff's Court on the day on which the Court re-opened after the vacation, but the Munsif found he had no jurisdiction, and on the same day the suit was filed in the Small Cause Court, *held*, that the plaintiff could not claim the benefit of this section so as to exclude the time during which the Munsif's Court was closed, because the suit was not instituted in the Small Cause Court on the day on which the S. C. Court re-opened—*Abhoya* v. *Gaur*, 34 W.R. 26. Similarly, a suit was filed in the Sub-Judge's Court at Agra on June 2, 1913. Limitation expired on June 1, which was a holiday. The Agra Court held that it had no jurisdiction and on January 21, 1914 returned the plaint to be presented to the Court of the Sub-Judge at Aligarh. It was so presented on January 22. *Held*, that the suit was barred, for though the plaintiff might be entitled under sec. 14 to deduct the time during which the suit was pending in the wrong Court, he was not entitled to the exclusion of the extra-day, *viz.*, June 1, on which the wrong Court was closed—*Makund* v. *Ramraj*, 14 A.L.J. 310, 35 I.C. 292; *Maqbul* v. *Pateshri*, 1929 A.L.J. 976, A.I.R. 1929 All. 677; *Ramalinga* v. *Subba Iyer*, 24 M.L.T. 214, 47 IC. 624; *Mohideen* v. *Nallaperumal*, 36 Mad. 131, 12 I.C. 58; *Dharman* v. *Ganga Ram*, 11 Lah. 12, A.I.R. 1929 Lah. 425; *Ummathu* v. *Pathumma*, 44

Mad. 817; *W. A. Patel* v. *Deshmukh*, A.I.R. 1937 Nag. 215. The contrary view expressed in *Basvanappa* v. *Krishnadas*, 45 Bom. 443, was overruled by their Lordships of the Privy Council—*Maqbul Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85, 37 Bom.L.R. 533 (P.C.). See also *Karim* v. *Abdul*, I.L.R. 1953 Bom. 565, 55 Bom.L.R. 119, A.I.R. 1953 Bom. 353. See this subject discussed in Note 155 under s. 14.

37A. Application for copy on re-opening date after limitation:—This section has no application where a party applies for copy of decree on the re-opening day when the prescribed period of limitation has run out. The extension granted by this section cannot be combined with an extension under sec. 12 of the Act—*Kamaraju* v. *Saramma*, I.L.R. (1942) Mad. 868, (1942) 2 M.L.J. 104, A.I.R. 1942 Mad. 604; A contrary view has been taken by the Lahore High Court in *Mohammad Zaman* v. *Hans Raj*, A.I.R. 1938 Lah. 707, 182 I.C. 108; *Asa Singh* v. *Hira Singh*, 40 P.L.R. 74, A.I.R. 1938 Lah. 317. According to this High Court the general principle underlying this section must be given effect to, namely, that where an act or proceeding is allowed to be done on a certain day and Court is closed on that day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day on which the Court is opened. But the same High Court has dissented from *Asa Sing* v. *Hira Singh*, supra in *Bhiwani Cloth Mills* v. *Parmeshari*, A.I.R. 1947 Lah. 168, I.L.R. 1946 Lah. 107 where it is held that the proper method is to take what is primarily the prescribed period and then add to it the period excluded by reason of section 12 of the Act. If these periods taken together happen to fall on a day when the Court is closed, the party can wait till the date when the Court re-opens. See also *Sadashivrao* v. *Ramchandra*, A.I.R. 1954 M.B. 18.

38. Acknowledgment made during holidays:—As to whether an acknowledgment given after the period of limitation but during the vacation of the Court can save limitation, see Note 176 under sec. 19.

39. Assignment of debt during holidays:—When the period prescribed for a suit to recover a debt expries during the Court vacation, and before re-opening, the debt is assigned, the suit brought by the assignee on the re-opening day is within time—*Visram* v. *Tabaji*, 15 Bom.L.R. 348, 19 I.C. 820 (821). Even if the assignment takes place on the re-opening day and the suit is filed on that very day, the section applies and the suit is within time—*Thimmanna* v. *Adyanthayya*, (1940) 2 M.L.J. 251, 1940 M.W.N. 777, A.I.R. 1940 Mad. 908.

39A. Payment during holidays:—Payment made after the expiry of the period of limitation but during the holidays when the suit could not be filed, does not save limitation—*Ram Manorath* v. *Ram Bhulawan*, 21 Luck. 447, A.I.R. 1947 Oudh 3; *Puran Chand* v. *Abdullah*, I.L.R. (1938) All. 861, A.I.R. 1938 All. 606; *Shyam* v. *Ram*, A.I.R. 1939 All. 252, 181 I.C. 899; *Laxman* v. *Yadao*, 1940 N.L.R. 227, AI.R. 1940 Nag. 401, 188 I.C. 585; *Prem Chand* v. *Ramdeo*, I.L.R. 1948 Nag. 612 (payment of instalment under decree).

39B. Execution of fresh mortgage during holidays:—Execution of a fresh mortgage after the expiry of the period of limitation but during the vacation of the Court saves limitation—*Adiraja* v. *Beeranna*, A.I.R. 1957 Mad. 14.

40. Pleading:—When the period of limitation for a suit expires on a Gazetted holiday, and the plaint is presented on the day the Court re-opens, it is not necessary for the plaintiff to state explicitly in the plaint that on the day on which the period of limitation expired the Court was closed—*Teckchand* v. *Patto*, 16 N.L.R. 198, 56 I.C. 926.

Extension of period in certain cases.

5. Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by or under any enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.—The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning of this section.

Amendment:—By sec. 2 of the Indian Limitation (Amendment) Act, X of 1922, the words "by or under any enactment" have been substituted for the words "by any enactment or rule." The reason has been thus stated: "We think that the words 'made applicable by any enactment or rule' are, in so far as they apply to rules, vague, inasmuch as there is no definition of the term 'rule.' The intention no doubt is to refer to a statutory rule or a rule having the force of law, *e.g.*, rules contained in the schedule to the Code of Civil Procedure and in particular, Order 22, rule 9. We would therefore amend section 5 by substituting the words 'by or under any enactment' for the words 'by any enactment or rule"—*Report of the Select Committee* (Gazette of India, 1922, Part V, page 73). As to the effect of this amendment see the Full Bench case of *Krishnamachariar* v. *Sirangammal*, 47 Mad. 824, 47 M.L.J. 409, 80 I.C. 877, A.I.R. 1925 Mad. 14.

41. Scope of section:—Under the Act of 1877, this section did not include any other application except an application for review of judgment. Thus it did not apply to an application for leave to appeal as a pauper—*Parvati* v. *Bhola*, 12 All. 79; *Sarat Chandra* v. *Brojeswari*, 30 Cal. 790; *R. C. Roy* v. *Thakur Ram*, 10 C.W.N. 149 (F.B.); nor to an application for leave to appeal to the Privy Council—*In the matter of Sita Ram*, 15 All. 14; *Moroba* v. *Ghanasham*, 19 Bom. 301; *Veerammah* v. *Abbiah*, 18 Mad. 99 (F.B.). The present section will apply to these applications. The words "application for leave to appeal" are wide enough to include an application for leave to appeal as a pauper—*Ram Charan* v. *Bansidhar*, 26 A.L.J. 847, A.I.R. 1928 All. 499; *Ram Dulari* v. *Allian*, 17 Luck. 628, 1942 O.W.N. 106, A.I.R. 1942 Oudh 204; *Jusab* v. *State*, A.I.R. 1951 Sau. 12. Therefore where the delay in filing the application for leave to appeal in *forma pauperis* is due to the fact that copies of judgment and decree appealed from could not be obtained in prescribed time, the delay should be excused—*Ram Charan* v. *Shri Radha*, A.I.R. 1951 All. 242. A contrary view has been taken in *Ram Pheron* v. *Sri Ram*, 15 Luck. 390 where it is held that this section has no application for leave to appeal as a pauper under Or. 44 r. 1 of the Civil Procedure Code.

Or. 22, r. 9 (3), C. P. C. specifically applies the provisions of sec. 5 to applications to set aside abatement—*Budhuran* v. *Ali Shah*, A.I.R. 1935 Lah. 443.

An application for review of judgment must be made within 90 days of the passing of the judgment, and it is only when sufficient cause is shown under sec. 5 that it can be admitted beyond the period of 90 days—*Bhukhan* v. *Piare*, 1931 A.L.J. 103, 130 I.C. 839, A.I.R. 1931 All. 218 (219).

The High Court has power to frame a rule making the provisions of this section applicable to applications for setting aside *exparte decrees—Krishnamachariar* v. *Srirangammal*, supra. In Madras, this section has been made applicable by a Rule of the High Court to application to *set aside an ex parte decree*, whether in ordinary Courts or in Small Cause Courts; and the delay in making the payment required to be made with an application to set aside an *ex parte* decree, under the proviso to section 17 (1) of the Prov. Small Cause Courts Act, can be excused if there be sufficient cause for it—*Sudalaimuthu* v. *Andi Reddiar*, 45 Mad. 628, 42 M.L.J. 484, 66 I.C. 104, A.I.R. 1922 Mad. 186; *Koilpillai* v. *Sappannimithu*, 44 M.L.J. 247, A.I.R. 1923 Mad. 354; *Ramji* v. *Kumarakalathi*, 61 M.L.J. 710, A.I.R. 1932 Mad. 142; *Perumal* v. *Ummar*, A.I.R. 1951 Mad. 472. But in Bengal, Behar,, U. P., Oudh, Bombay, Punjab and Burma this section has not been made applicable to an application to set aside an *ex parte* decree—*Tarasankar* v. *Basiruddi*, 19 C.W.N. 970, 29 I.C. 476; *Munshi Singh* v. *Bansropan*, 14 P.L.T. 20, A.I.R. 1933 Pat. 134 (135); *Gadre* v. *Brijnandan*, 45 All. 332 (334); *Shavaksha* v. *Hogarth*, 12 Bom.L.R. 886, 8 I.C. 616; *Khairati* v. *Umar Din*, A.I.R. 1922 Lah. 266, 66 I.C. 270; *Chowdhury Hiat* v. *Jaikishen*, 32 P.R. 1878; *Pal Singh* v. *Hurnam Singh*, A.I.R. 1927 Lah. 342, 100 I.C. 936; *Ma Naw* v. *Somasundaram*, 2 Rang. 655, 85 I.C. 324; *Ram Autar* v. *Sheo Piarey*, 12 O.L.J. 137, A.I.R. 1925 Oudh 411; *Sitabai* v. *Mata Din*, 2 O.W.N. 440, A.I.R. 1945 Oudh 446; *Sidh Nath* v. *Ganga*, 1943 A.L.W. 517; *Abed Ali* v. *Parfulla*, 56 C.W.N. 97 (F.B.). Where it has been held that this section does not in terms apply to such applications as there is no enactment making this section applicable to such applications. In a Lahore case, Chevis J., has expressed the opinion that section 5 should be made applicable to all applications under Articles 163, 164, 168 and 169—*Lal Devi* v. *Amar Nath*, 57 I.C. 15 (16).

It should also be noted that this *section does not apply to suits.* This section applies only to those proceedings which are specifically mentioned in the section or to which the section may be made applicable by or under any enactment for the time being in force. A suit is not specifically mentioned in this section nor are the provisions of this section made applicable to it by any enactment—*Ram Pher* v. *Ajudhia Singh*, 12 O.L.J. 66, 2 O.W.N. 144, 87 I.C. 17, A.I.R. 1925 Oudh 369. The reason is, that the period of limitation allowed in most of the suits extends from three to twelve years; whereas in appeals and the applications mentioned in this section, it does not exceed six months; therefore it is necessary that some concession should be made in respect of these appeals and applications, to provide for those circumstances which hinder a person from filing his appeal or application within the short period of time allowed.

By section 231 of the Agra Tenancy Act, this section has been made applicable to *suits* under that Act.

This section has not been made applicable by any enactment to an application (under O. 9, r. 9, C. P. Code) to set aside a dismissal for default of appearance (Art. 163)—*Mahadeo* v. *Lakshminarayan*, 49 Bom. 839, 27 Bom.L.R. 1150, 90 I.C. 610, A.I.R. 1925 Bom. 521; *Ma Naw* v. *Somasundaram*, 2 Rang. 655, A.I.R. 1925 Rang. 187; *Sahib Ditta* v. *Roda*, 83 P.R. 1902; *Saba* v. *Dayaram*, 23 N.L.R. 183, A.I.R. 1928 Nag. 91 (92); *Samankatha* v. *James*, (1946) 2 M.L.J. 382, 59 L.W. 683; *Chinappa* v. *Deenadayalu*, (1948) 1 M.L.J. 411, 1948 M.W.N. 400, A.I.R. 1948 Mad. 480 (no inherent jurisdiction to extend the period under this section), or the Court is not entitled to extend the period by taking into consideration circumstances which appear to operate harshly against the plaintiff—*Debendra* v. *Satyabala*, 54 C.W.N. 110, A.I.R. 1950 Cal. 217. So also, this section does not apply to an application to set aside an execution sale under O. 21, r. 89, C. P. Code—*Ram Autar* v. *Sheo Peary*,

12 O.L.J. 137, A.I.R. 1925 Oudh 411, 87 I.C. 722; *Umrao Singh* v. *Beni Prasad*, 92 I.C. 839 or to applications by auction purchasers to set aside execution sales under the Civil Procedure Code—*Amal* v. *Ram Swarup*, I.L.R. (1939) 1 Cal. 452, 69 C.L.J. 138, 43 C.W.N. 383, A.I.R. 1939 Cal. 310. This section does not apply to an application for *substitution* of the name of a defendant or respondent under O. XXII, r. 4, made beyond three months of his death. An application for substitution made beyond the period of limitation must therefore be rejected and the suit will abate. But it is open to the plaintiff or appellant to make an application under O. XXII, r. 9 to have the order of abatement set aside on the ground that he was prevented by sufficient cause from continuing the suit—*Secretary of State* v. *Jowahir*, 36 All. 235, 25 I.C. 48. This section has been made applicable to applications under Order XXII, rule 9 (2) of the C. P. Code. See O. XXII, r. 9 (3); *Lakshmi Chand* v. *Behari*, 54 All. 280, 135 I.C. 159, A.I.R. 1932 All. 459.

This section does not apply to applications for *setting aside awards*; it is not competent for the Court to receive such applications after the expiry of the period prescribed by Art. 158—*Surya Narain* v. *Banwari*, 18 C.W.N. 626 (628), 17 I.C. 7; *Devi Ditta* v. *Babu Ram*, 8 Lah. 274, 100 I.C. 955, A.I.R. 1927 Lah. 273.

This section does not apply to an *application for execution* of a decree, in the absence of any enactment or rule which makes the section applicable to such an application—*Midnapore Zemindary Co.* v. *Deputy Commissioner*, 3 P.L.J. 132, (134, 135), 44 I.C. 570; *Ram Roy* v. *Umraji*, 93 I.C. 292, A.I.R. 1926 All. 345; nor to an *application* under O. XXI, r. 90, C. P. Code *to set aside an execution sale* (falling under Art. 166)—*Asa Nand* v. *Jhangi Ram*, 29 P.L.R. 1919, 50 I.C. 610; *Narotam* v. *Bhagwan*, 1934 A.L.J. 859, A.I.R. 1934 All. 314.

This section does not apply to an application under O. 41, rule 19, C. P. Code for re-admission of an appeal dismissed for default of appearance; and if the application is not made within 30 days (Art. 168), the appeal cannot be re-admitted for any sufficient cause—*Krishnaswami* v. *Chengalroya*, 47 Mad. 171, 45 M.L.J. 813, 76 I.C. 836, A.I.R. 1924 Mad. 114; *Mahi* v. *Jiwan*, 141 P.R. 1879; *Syed Mahomed* v. *Abdul*, I.L.R. (1943) Kar. 409, A.I.R. 1943 Sind. 132; *Arjan* v. *Md. Husain*, A.I.R. 1950 E.P. 255; or to an application under Or. 41, r. 21, C. P. Code; *Sitaramiah* v. *Sarvayya*, (1944) 2 M.L.J. 121, 1944 M.W.N. 522, A.I.R. 1944 Mad. 571.

It does not apply to an application for filing an award (Art. 178)—*Ram Ugrah* v. *Achraj Nath*, 38 All. 85 (91), 13 A.L.J. 1115.

This section has not been made applicable to an application for passing a final decree under Or. 34, r. 5, Civil Procedure Code—*Ramakotayya* v. *Sitharamaswami*, (1946) 1 M.L.J. 192, 1946 M.W.N. 207, A.I.R. 1946 Mad. 381, I.L.R. (1946) Mad. 889.

In *Chetanlal* v. *Purshettam*, A.I.R. 1938 Nag. 233, 175 I.C. 33, a question was raised as to whether the provisions of this section can be applied in second appeal when there was no application to that effect in the lower appellate Court. The point was not however decided.

An order under this section excusing delay is not final, and is liable to be questioned at a later stage—*Krishnasami* v. *Ramasami*, 45 I.A. 25; *Dinabandhu* v. *Jadumoni*, A.I.R. 1954 S.C. 411.

Corporate body:—A corporate body is not entitled to a greater indulgence under this section than a private individual. If a corporate body chooses to embark on a litigation, its officials and advisers must act with at least as much diligence

as is expected from an ordinary litigant—*District Board, Sargodha* v. *Shamas Din*, 123 I.C. 83.

Criminal appeal:—This section applies to criminal appeals, and a criminal appellate Court has power to excuse delay and admit a time-barred appeal, if the Court is satisfied that the appellant had sufficient reason for not preferring the appeal within the prescribed period. But if the Court is not so satisfied, it cannot excuse the delay. If in such a case the appellate Court desires to help the appellant, the proper procedure would be to move the High Court to exercise its powers of revision—*Janakiramyya* v. *Brahmayya*, 48 M.L.J. 457, 88 I.C. 278, A.I.R. 1925 Mad. 709. Where the delay in filing an appeal under section 476B of the Criminal Procedure Code was due to the fact that the charge under sec. 211 of the Indian Penal Code was made without giving any opportunity to the complainant to show cause and the appellant had no knowledge of the same till the expiry of the time prescribed for appeal, the delay was condoned under this section—*Radha Krishna* v. *Emperor*, I.L.R. (1939) Kar. 648, 40 Cr.L.J. 449, A.I.R. 1939 Sind. 76; *Bhikaji* v. *Sambhuram*, 1938 N.L.J. 183.

But in the case of a *Criminal application*, the time cannot be extended, even though the delay arises in consequence of any genuine mistake—*Girimlal* v. *Shewaram*, 20 S.L.R. 90, 95 I.C. 316, A.I.R. 1926 Sind. 215.

An application for special leave to appeal from an order of acquittal has to be filed within 60 days as provided under section 417 (4), Cr. P. Code. To such an an application this section is applicable—*Viswanathan Chettiar*, (1957) 1 Mad.L.J. 150; *P. Venkata Subbareddi* v. *Duvvuru Papireddi*, A.I.R. 1957 Andh. Pra. 406.

42. Application of section to special or local laws:—Under section 29 (2) (*b*) as amended by the Limitation Amendment Act (X of 1922), the provisions of section 5 "shall not apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law." Therefore the decisions in *Reference under the Forest Act*, 10 Mad. 210, *Ram Kishen* v. *Umrao*, 80 P.W.R. 1916, 33 I.C. 730, *Waryam* v. *Wadhava*, 89 P.R. 1918, 46 I.C. 588 (589), and *Mohant Krishna Dayal* v. *Syad Abdul*, 2 P.L.J. 402, are no longer good law in so far they hold that this section should be applied to cases under special or local laws. But where the local or special law does not prescribe any period of limitation different from that prescribed in Schedule of this Act, this section applies to appeals filed under the local or special law—*Venkatramayya* v. *Venkata*, (1946) 1 M.L.J. 271, 1946 M.W.N.. 385, A.I.R. 1946 Mad. 351; *Rameshwar* v. *Matuki*, 12 B.R. 62; *Moti* v. *Thandiram*, A.I.R. 1951 Ajmer 52. Thus the provisions of this section will apply to an appeal under section 25A, Madras Act 4 of 1938—*Venkatramayya* v. *Venkata*, supra; or to an appeal under sec. 9 of the Delhi and Ajmer Marwara Rent Control Act, 1947, *Moti* v. *Thandiram*, supra. So also, where the local or special law is silent on the matter of limitation in respect of appeals or applications contemplated or authorised by it, this section applies—*Province of Bengal* v. *Amulya*, 54 C.W.N. 297, A.I.R. 1950 Cal. 356. So this section applies to an appeal under sec. 3, Calcutta Improvement (Appeals) Act, 1911 against the decision of the Tribunal constituted under the provisions of the Calcutta Improvement Act—*Province of Bengal* v. *Amulya*, supra. But a contrary view has been expressed in *State* v. *C. N. Raman*, A.I.R. 1956 Bom. 447, 58 Bom.L.R. 295 and it has been held that this section does not apply to an appeal under sec. 23, Press (Objectionable Matter) Act, 1951 though the period for filing an appeal prescribed there is the same as under Art. 155 of the Limitation Act, following a decision reported in A.I.R. 1953 Bom. 35; 54 Bom.L.R.

661 and distinguishing the decision reported in A.I.R. 1946 Mad. 351; 1946-1 Mad.L.J. 271.

This section does not apply where the period of limitation for filing an appeal is fixed not under this Act but under the *Rules of the High Court—Baijnath* v. *Doolarey*, 50 All. 865, 26 A.L.J. 1317, A.I.R. 1928 All. 708; or by the rules by the Government—*Surya* v. *The State of Bihar*, 30 Pat. 126, A.I.R. 1951 Pat. 462. Thus this section has no application to an appeal against an award in a land acquisition case made under Rule 75A, Defence of India Rules, read with sec. 19, Defence of India Act as limitation for such an appeal is prescribed by Rule 20, Bihar (War Acquisition of Property) Compensation Rules, 1943—*Surya* v. *The State of Bihar*, supra.

This section does not apply for the purpose of extending the period of limitation prescribed in the Registration Act—*Mafizur* v. *Jamila*, 42 C.W.N. 1174.

This section does not apply to proceedings under the Arbitration Act—*Kawolsingh Akbar* v. *Baldeo Singh Akbar*, A.I.R. 1957 Nag. 57.

This section did not apply to applications under section 22 of the Insolvency Act (1907)—*Thakur Prosad* v. *Punno Lal*, 35 All. 410, 20 I.C. 673. But under sec. 78 of the Prov. Insolvency Act V of 1920, section 5 (as well as sec. 12) has been specially declared to be applicable to all appeals and applications under that Act—*Nur Mahomed* v. *Lal Chand*, 26 P.L.R. 501, 90 I.C. 254, A.I.R. 1925 Lah. 436 (437). Where a third person is aggrieved by an order of adjudication the appellate Court should consider whether a case had been made out for the application of section 5 of the Limitation Act—*Venkataswamy* v. *Ganapathia*, A.I.R. 1953 Mad. 465. But a creditor's "*petition*" under sec. 9 of the Provincial Insolvency Act (1920) praying that the debtor may be adjudged insolvent is not an "application" within the meaning of sec. 78 of that Act, and sec. 5 of the Limitation Act cannot be applied to such a petition—*Gangjee Premjee & Co.* v. *O. L. K. K. N. Firm*, 55 Mad. 766, A.I.R. 1932 Mad. 352 (356), 137 I.C. 740; *Vaithianatha* v. *Baithianatha*, 61 M.L.J. 544, 135 I.C. 613, A.I.R. 1932 Mad. 112; *Ratan Chand* v. *Smail*, A.I.R. 1933 Lah. 821 (822); *Chitaman* v. *Ramgopal*, I.L.R. (1948) Nag. 523, 1948 N.L.J. 589, A.I.R. 1948 Nag. 385, where it has also been held that the period of three months, prescribed under sec. 9 (1) (c) of the Provincial Insolvency Act is not a period of limitation and as such this section has no application. The reason is obvious. Section 5, Limitation Act does not give the Court any power to extend the period of limitation for the institution of *suits*, but it gives the power to extend the time for filing an appeal or application in litigation which has already been properly instituted by a suit. And as a petition under sec. 9 of the Insolvency Act is treated as a plaint in a *suit*, it is clear that sec. 5 of the Limitation Act cannot be applied to such a petition—*Gangjee Premjee & Co.* v. *O. L. K. K. N. Firm*, supra.

Section 5 of the Limitation Act has no application to proceedings under the Land Acquisition Act—*Kristo Singh* v. *Secretary of State*, 8 P.L.T. 710, 103 I.C. 295, A.I.R. 1927 Pat. 333.

This section does not apply to the Bengal Tenancy Act,—*Susamabala* v. *Profullamoyee*, A.I.R. 1951 Cal. 402. Thus where the appellate Court admits the appeal through mistake in spite of the fact that the appellant had not made the necessary deposit under sec. 174 (5) of the Bengal Tenancy Act the appeal is incompetent and the Court has no power to condone the delay in making the deposit under this section —*Susamabala* v. *Profullamoyee*, supra. But it is applicable to appeals under sec. 112B of the Bihar Tenancy Act—*Parmeshwari* v. *Harihar*, 9 B.R. 360.

This section is not applicable to cases of revenue sales under the Bengal Land Revenue Sales Act and appeals arising therefrom—*Udit* v. *Sri Kumar*, (1947) P.W.N. 23.

The provisions of this section can not be invoked in the case of a Letters Patent Appeal—*Harbans* v. *Karam*, A.I.R. 1949 E.P. 299; *Hari* v. *Hazari*, A.I.R. 1951 Pepsu. 132.

This section is not applicable to the case of appeals under the Cantonments (House Accommodation) Act, 1923—*Chheda* v. *Officer Commanding*, I.L.R. (1941) All. 356, 1941 A.L.J. 267, A.I.R. 1941 All. 207.

This section is not applicable to appeals under sec. 23, Press (Objectionable Matter) Act, 1951—*State* v. *C. N. Raman*, 58 Bom.L.R. 295, 1956 Cr.L.J. 864, A.I.R. 1956 Bom. 447.

This section does not apply to an appeal under sec. 12 (1) (b) of the Madras Buildings (Lease and Rent Control) Act, 1946—*Murugesan* v. *Marakayar*, (1956) 1 M.L.J. 238.

This section does not apply to an appeal under section 64 of the Motor Vehicles Act—*Ramnath* v. *State Transport*, A.I.R. 1957 Pat. 117.

This section is not applicable to appeals under Section 27 of the Calcutta Thika Tenancy Act, 1949—*Harendranath* v. *Daulatmani*, 62 C.W.N. 143.

43. Duty of Court:—This section gives the Courts a discretion which in respect of jurisdiction is to be exercised in the way in which judicial power and discretion ought to be exercised upon principles which are well understood; and the Judge must exercise his discretion under this section with reference to the special circumstances of each case—*Krishna* v. *Chathappan*, 13 Mad. 269 (271); *Fakir Chand* v. *Municipal Committee*, 59 P.R. 1913, 18 I.C. 37; *Nrisingha* v. *Trigunand*, 17 Pat. 507, 19 Pat.L.T. 309, A.I.R. 1938 Pat. 413; *Gayaprasad* v. *Kamlakar*, 1948 R.D. 420. When the time for appealing is once passed, a very valuable right is secured to the successful litigant and the Court must therefore be fully satisfied of the justice of the ground on which the appel'ant seeks to obtain an extension of time for attacking the decree and thus perhaps depriving the successful litigant of the advantages which he has obtained—*Karsondas* v. *Bai Gungabai*, 30 Bom. 329 (330); *Karachi Trading Company* v. *Tejbhandas*, 8 S.L.R. 235, 28 I.C. 82; *Tarini* v. *Gopeswar*, 7 I.C. 391, 12 C.L.J. 615 (617); *Dund Bahadur* v. *Deo Nandan*, 17 C.L.J. 596, 20 I.C. 513 (515); *Fakir Chand* v. *Municipal Committee*, supra; *Sarat Chunder* v. *Saraswati*, 34 Cal. 216 (221). The exercise by the Court of its discretion to excuse the delay would to a certain extent be detrimental to the respondent who has in the meantime acquired valuable rights, but the question has to be approached from the point of view of the applicant's conduct rather than of the advantage gained by the respondent—*Kayambu* v. *The Court of Wards*, (1941) 2 M.L.J. 873, A.I.R. 1942 Mad. 170, 1941 M.W.N. 989. When a Court is asked to exercise its discretion under this section, it has to see whether the appellant is asking what is evidently unjust. If it is, he should not have it; if he is asking for what may lead to injustice, he should not have it except on terms which would prevent any injustice possibly being done—*Banamali* v. *Padma*, 16 C.L.J. 366, 16 I.C. 425. "The Court has the power to grant the special leave, and, exercising its judicial discretion, is bound to give the special leave, if justice requires that leave should be given"—*per* Brett M.R. in *In re Manchester Economic Building Society*, 24 Ch.D. 488 at p. 497. But it is not a sound exercise of judicial discretion to extend time in favour of a person who appears to have no substantial point to argue—*Maqbul Ahmad* v. *Murla*, 14 A.L.J. 212, 33 I.C. 546. The period of preferring an appeal cannot be extended simply because the appellant's case is hard and calls for sympathy, nor will the Courts extend the period of limitation merely out of benevolence to the party seeking relief. A Court granting the indul-

gence must be satisfied that there was diligence on the part of the appellant and that he was not guilty of any negligence whatsoever—*Krishna* v. *Trimbak*, I.L.R. (1938) Nag. 409, A.I.R. 1938 Nag. 156, 173 I.C. 369. Delay can be excused only for valid reasons however short the delay might be—*Garasia* v. *Shah Leherchand*, (1948) 1 Sau.L.R. 19.

The Supreme Court has recently held that where there is a conflict of decisions regarding a question the appellant aught to be given the benefit of this section—*Narhari* v. *Shanker*, A.I.R. 1953 S.C. 419, 1950 S.C.R. 754.

44. Reasons to be recorded:—The reasons for admitting the appeal etc. beyond time must be recorded by the Court—*Zaibulnissa* v. *Kulsam*, 1 All. 250; *Chaturbhuj* v. *Md. Habib*, 54 I.C. 36 (38) (Pat.). When an application is made for extension of time under this section, it is desirable that the Court should record its opinion as regards that application, even when it is rejected—*Adarpriya* v. *Rampratap*, 30 C.W.N. 926, A.I.R. 1926 Cal. 1105, 98 I.C. 748. An order which does not state the reasons for admitting an appeal out of time cannot be said to be an order passed without jurisdiction, but still it is desirable that the order should give sufficient indication that the discretion given by the law has been judicially exercised—*Jnanada Sundari* v. *Madhab Chandra*, 59 Cal. 388 A.I.R. 1932 Cal. 482 (484), 138 I.C. 643. See also *Md. Sharifuddin* v. *R. P. Singh*, A.I.R. 1957 Pat. 235.

45. Duty of appellant:—It is the duty of a litigant to know the last date on which he can present his appeal, and if through delay on his part it becomes necessary for him to ask the Court to exercise in his favour the power contained in this section, the burden rests on him of adducing distinct proof of the sufficient cause on which he relies—*Krishnaswamy* v. *Ramasami*, 41 Mad. 412 (417) (P.C.), 22 C.W.N. 481, 21 Bom.L.R. 541, 16 A.L.J. 27, 43 I.C. 493. A person bringing before the Court a time-barred appeal must satisfy the Court that he had sufficient cause for not presenting the appeal within time and must furnish a detailed affidavit explaining the cause of the delay—*Choturbhuj* v. *Mahammad Habib*, 54 I.C. 36; *Bur Singh* v. *Firm Jodha Ram*, 95 I.C. 565, A.I.R. 1926 Lah. 542. An appeal or application filed out of time must show on the face of it the reason for the delay, and there must further be an express prayer for condonation of the delay under this section—*Laurentius* v. *Dukhi*, 4 Pat. 766, 7 P.L.T. 362, 92 I.C. 179, A.I.R. 1926 Pat. 73. He must shew that he has not been negligent and that he has been prosecuting his case with *due diligence*—*Habibullah* v. *Banarsi Das*, 22 O.C. 379, 55 I.C. 837 (838); *Manghoomal* v. *Bibi Sardar*, 24 S.L.R. 415, 132 I.C. 473, A.I.R. 1931 Sind 58 (59). He is bound to give a proper explanation of every day's delay or of a major portion of the delay—*Krishnaswami* v. *Ramaswami*, 19 M.L.J. 209, 1 I.C. 73; *Ramaswami* v. *Venkatanarasimha*, (1916) 1 M.W.N. 277, 32 I.C. 1000; *Kanhaya Lal* v. *Baldeo*, 14 Lah. 656, A.I.R. 1933 Lah. 681 (682), 146 I.C. 45, 34 P.L.R. 937; *Ram Singh* v *Milkiat*, A.I.R. 1934 Lah. 617 (618); *George Gowshala* v. *Balak Ram*, 103 I.C. 498, A.I.R. 1927 Lah. 717; *Hari* v. *Hazari*, A.I.R. 1951 Pepsu. 132. But it is only the delay of those days which are beyond the period of limitation which must be explained by the appellant in making out sufficient cause why the appeal was not presented on the last day; but no explanation is needed of the inaction during the period of limitation antecedent to the last day—*Karali Charan* v. *Apurba*, 34 C.W.N. 1119 (1126), A.I.R. 1931 Cal. 298, 132 I.C. 169; *Taj Mahomed* v. *Mukh Ram*, 20 Lah.L.T. 115; *Sundar* v. *Diwan*, A.I.R. 1947 Lah. 276. But this does not mean that he must conclusively establish his inability on each and every day to come to Court. It means that he must give some explanation of why he did not pursue his remedy—*Raj* v. *Susanta*, A.I.R. 1951 Simla, 209.

46. Sufficient cause:—It is difficult and undesirable to attempt to define precisely the meaning of the words 'sufficient cause' or 'sufficient reason.' To do so would be to crystallize into a rigid definition that judicial power and discretion which the Legislature has, for the best of all reasons, left undetermined and unfettered—*In re Manchester Economic Building Society*, 24 Ch. D. 488. What constitutes sufficient cause cannot be laid down by hard and fast rules. It is capable of a great deal of difference of opinion. It must be determined by a reference to the circumstances of each particular case—*Hussaini Begum* v. *Collector*, 9 All. 11 (17); *Shib Dayal* v. *Jagannath*, 44 All. 636 (640); *Gobind* v. *Shibadas*, 33 Cal. 1323; *Hardhan* v. *Prankrishna*, 10 C.L.J. 39, 2 I.C. 961; *Ram Baksh* v. *Mt. Rajeswari*, 1948 A.L.J. 114, A.I.R. 1948 All. 213; *Arura* v. *Karam*, 48 P.L.R. 325, A.I.R. 1947 Lah. 76. The discretion given by sec. 5 should not be defined and crystallised so as to convert a discretionary matter into a rigid rule of law. But the discretion in each particular case should be exercised on its own facts with a view to secure furtherance of justice—*Ambica* v. *Manikgang Loan Office*, 55 Cal. 798, 32 C.W.N. 372 (374); *Rakhal Chandra* v. *Asutosh*, 17 C.W.N. 807; *Mithoo Lal* v. *Jamma*, 10 O.W.N. 1154 (F.B.), A.I.R. 1933 Oudh 523 (525), 146 I.C. 127. "Sufficient cause" seems to mean not only those circumstances (such as the Court being closed or time spent in obtaining copies, or the party being a minor or insane) which the law expressly recognizes as extending the time, but also such circumstances as are not expressly recognized but which appear to the Court to be reasonable looking to all the facts of the case—*Kichilappa* v. *Ramanujam*, 25 Mad. 166 (171). In finding a "sufficient cause," a man's good faith would have to be kept in view but that "good faith" is more in general sense of the words as gramatically understood rather than in the sense in which it has been defined in sec. 2 (7) of the Act. According to the definition of "good faith" as given in sec. 3 (20), General Clauses Act, an act may be done honestly and in perfect good faith although it may have been done negligently. It cannot, however, be said that an act, however negligent—whether grossly or otherwise —should always be regarded as falling within the term "sufficient cause" employed in this section if it is found to have been done honestly—*Arura* v. *Karam*, supra. The words "sufficient cause" should receive a liberal construction so as to advance substantial justice where no negligence or inaction or want of *bona fides* is imputable to the appellant—*Krishna* v. *Chathappam*, 13 Mad. 269 (271); *Shib Dayal* v. *Jagannath*, 44 All. 636 (640); *Gobinda* v. *Shibadas*, 33 Cal. 1323; *Sarat Chander* v. *Saraswati*, 34 Cal. 216 (219); *Secy. of State* v. *Tirath Ram*, 9 Lah. 76; *Kichilappa* v. *Ramanujam*, 25 Mad. 166 (171); *Dinabandhu* v. *Jadumani*, A.I.R. 1954 S.C. 411; *Ashutosh* v. *Jatindra*, A.I.R. 1954 Cal. 238; *Sitaram* v. *Nagrashna*, A.I.R. 1954 Bom. 537. The Court should not apply too exacting a standard of diligence and if the delay, under the circumstances, is not one that can be considered as unreasonable, the Court should exercise the discretion under this section—*Kamiruddin* v. *Bismupriya*, 33 C.W.N. 76 (78), A.I.R. 1929 Cal. 240, 119 I.C. 383. In exercising the discretion in favour of the applicant under this section, the Court must be satisfied that the applicant was not guilty of unnecessary laches—*Mumtaz Ali* v. *Ugraj*, 12 O.L.J. 94, 86 I.C. 270, A.I.R. 1925 Oudh 371, 28 O.C. 378. In *Brij Inder Singh* v. *Kanshi Ram*, A.I.R. 1917 P.C. 156, 45 Cal. 94 (P.C.) (followed in *Kunwar Rajendra* v. *Rai Rajeswar*, A.I.R. 1937 P.C. 276) the Judicial Committee of the Privy Council confirmed the following general rule to be observed in applying sec. 5 as enunciated by Plowden, J., in *Karm Baksh* v. *Daulat Ram*, (1888) 183 P.R. (F.B.). "All that the section requires in express terms as a condition for the exercise of the discretionary power of admission of an appeal presented after time is sufficient cause for not presenting the appeal within the prescribed period. If such can be shown, the Court may in its discretion, which is of course a judicial discretion and not an arbitrary discretion,

admit the appeal. We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal." That is the general rule, and Lord Dunedin, delivering the judgment of the Board, added: "There may be a general rule as to the exercise of discretion, but each case must, nevertheless, be examined as to its own circumstances to see whether they make it fall within or without the terms of the general rule." (See *per* Page, C.J. in *S. M. Ally* v. *Maung San Nyein*, A.I.R. 1936 Rang. 183, 14 Rang. 155, 162 I.C. 664. If, however, he is responsible for delaying the filing of the appeal even by one day due to his negligence, he is not entitled to get the benefit of this section—*Karora* v. *Kartar*, A.I.R. 1951 Simla 170.

The law as to when and under what circumstances the delay is a bar to legal remedy is very clearly laid down by Sir Barnes Peacock in *Lindsay Petroleum Co.* v *Hurd*, (1874) L.R. P.C. 221, 239:—"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regraded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy". See also the observations of Lord Penzance in *Dalton* v. *Angus*, (1881) 6 A.C. 740, 805.

A Court should no doubt give a liberal construction to the words "sufficient cause" but the interpretation must be in accordance with judicial principles and with due regard to the respondent's side of the question. The period for preferring an appeal must not be extended simply because the appellant's case is hard and cal's for sympathy—*Fakir Chand* v. *Municipal Committee*, 59 P.R. 1913, 18 I.C. 37; *Krishna* v. *Trimbak*, I.L.R. (1938) Nag. 409, A.I.R. 1938 Nag. 156. Courts will not extend the period of limitation merely out of benevolence to the party seeking relief—*Carter* v. *Stubbs*, 50 L.J.C.L. 4; *Krishna* v. *Trimbak*, supra.

Where there was a delay of 44 days in filing the petition for special leave and the only ground urged in support of the application for condonation of delay was that the petitioners had to collect money from amongst a large number of petitioners who were interested in the case, the Supreme Court held that it was not a sufficient ground for for condoning the delay—*Bamarasidas* v. *State of U. P.*, A.I.R. 1956 S.C. 520, (1956) S.C.J. 599.

SUFFICIENT CAUSE, WHAT IS AND WHAT IS NOT:—

47. Illness:—Illness may be sufficient cause, but it must be proved that the man was utterly disabled to attend to any duty—*L. E. H. U.* v. *A. H. Yin*, U.B.R. (1897-1901) 451. High fever, attended with delirium, by reason of which the appellant was confined to bed, in consequence of which the application was delayed by four days, was a sufficient cause for excusing the delay of those days—*Gauri Shankar* v. *Kashi Nath*, 1933 A.L.J. 1631, A.I.R. 1934 All. 367 (368), 148 I.C. 290; or where the applicant suffered from appendicites a week before the expiry of limitation for filing a revision petition and so was unable to file it till 16 days after the period

of limitation, the delay should be excused—*Madho* v. *Sham*, 1942 N.L.J. 311. Illness of the pleader, and the client's ignorance of it might be a sufficient cause—*Anundmoyee* v. *Poornoo*, 9 M.I.A. 226; *Rabiabai* v. *Md. Ismail*, 21 Bom. 723. But in *Bageshwar* v. *Rukmini*, 1940 A.L.J. (Supp.) 18, 1940 R.D. 121 it has been held that it would be a dangerous precedent to allow the benefit of this section because a litigant's counsel filed an affidavit to say that the delay was due to counsel's illness. Illness in the family and consequent delay in making arrangement for the appeal is not sufficient cause—*Elahi* v. *Biswesswar*, 79 I.C. 924, A.I.R. 1925 Cal. 175. Illness is sufficient cause if the appellant was ill at the time when the period of limitation for filing the appeal expired. But if the appellant had recovered from illness before the expiry of the period, he was not entitled to delay the filing of the appeal and to claim a deduction of the days of his illness like the days required for obtaining copies—*Ma Thein* v. *Ma U Byu*, 6 Rang. 271, A.I.R. 1928 Rang. 165. The mere fact that the clerk into whose hands the appellant had made over the memorandum of appeal had been seriously injured in a riot case and was lying in hospital and could not apply for a copy of the decree, would not be a sufficient cause, unless there is something to show that even if the clerk was ill, the pleader could not have done what was necessary and what in fact ought to have been done. Moreover, it must be shown that the clerk was ill and whether in fact his illness put it out of his power to assist the pleader if he required his assistance in getting a copy of the decree—*Abdul Kasem* v. *Chaturbuj*, 3 P.L.T. 110, 64 I.C. 55, A.I.R. 1922 Pat. 47 (49). A mere plea of sickness in itself, unless the effect of the sickness was such that in the circumstances it would afford reasonable excuse for the delay in presenting the appeal, would not justify the Court in exercising its discretion in admitting an appeal under sec. 5. "It is a matter for the Court to consider in each case whether the effect of illness as proved is such that it afforded sufficient cause for the failure to present the appeal within time." (*Per* Page, C.J., in *S. M. Ally* v. *Maung San Nyein*, A.I.R. 1936 Rang. 183, 14 Rang. 155, 162 I.C. 664, *Nazoomali* v. *Panchoo Bibee*, (1864) 1 W.R. Misc. 23 followed).

48. Imprisonment:—Imprisonment in a criminal case may be a sufficient cause and the time spent in jail may be deducted—*Maharaj Narain* v. *Banoji*, 21 P.R. 1904; but the fact that a person imprisoned thought that he had no right of appeal and that his relative would appeal if he had a right is not a sufficient cause —*Q. E.* v. *Bhoni Ram*, 1891 A.W.N. 10.

49. Mistake:—Mistake made by the officer of the Court in not preparing correct copies of the judgment and decree is a sufficient cause, even if there was a contributory delay on the appellant's part in showing the mistake—*Dalgit* v. *Ram Ratan*, 25 I.C. 26 (Oudh). So also where an appellant is misled by a wrong copy of an order supplied to him and files an appeal after getting the right copy, the delay caused by the mistake of the office can be excused—*Suraj* v. *Ram*, 1940 R.D. 556, 1941 O.A. (Supp.) 75. The fact that the necessity for filing a second memorandum of appeal late arose out of the erroneous rejection of the first memorandum filed within time is a sufficient ground for extending time under this section—*Gajadhar* v. *Moti*, 22 Pat.L.T. 549, A.I.R. 1941 Pat. 108. Where an appeal was filed by a prisoner who had been sentenced to imprisonment exceeding 4 years, but the appeal instead of being sent to the High Court under sec. 408 (b), Cr. P. Code was by mistake of the Jail authorities sent to the Sessions Court, and when the appeal ultimately came to the High Court, the period of limitation had expired, *held* that the appeal should be accepted by the High Court, as the prisoner ought not to suffer for the delay which was not due to any fault of his own—*In re Abdulla*, 2 Rang. 486 (487). A *bona fide* omission by the appellants to sign the *Vakalatnamah* is a sufficient cause for admitting the appeal after limitation after allowing the defect to be made good

—*Habeeb* v. *Naush*, 11 A.L.J. 779, 21 I.C. 444 (445). Filing an appeal by a wrong person through a *bona fide* mistake is a sufficient cause to entitle the right person to be admitted as an appellant after the expiry of the period of limitation—*Dwarka Nath* v. *Debendra Nath*, 4 C.W.N. 58 (62). The name of a wrong person was entered as that of the respondent through a mistake which was corrected but after time; it was held that the appeal was properly admitted—*Jamna* v. *Ibrahim*, 1888 A.W.N. 58. Where the name of a respondent was omitted and the omission was due to a *bona fide* mistake on the part of the clerk of the counsel, the Court can allow the name of the respondent to be brought on the record after the expiry of the period—*Gaya* v. *Chottoo*, 12 A.L.J. 941, 26 I.C. 68 (69). In order to determine whether a mistake ought to be excused under this section, the test is this: if the mistake or carelessness is real and unintentional, and no damage has been done to the other side that cannot be repaired by cost or otherwise, the application for excusing the delay must be granted; if, on the other hand, the negligence is culpable, or there are *mala fides* on the part of the applicant or irreparable hurt would result to the other side, the application must be dismissed—*Ramachandram* v. *Sabapathy*, 54 M.L.J. 234, A.I.R. 1928 Mad. 404 (406). Where the provisions of this section are invoked on the ground of *bona fide* mistake, the test is not merely whether the mistake was *bona fide* or not, but also whether in a case of *bona fide* mistake sufficient cause exists for condoning the negligence or other factor which might have led to that mistake—*Chunni* v. *Daya*, 1948 R.D. 433. Where an appeal is filed a day later, through oversight of the counsel's clerk, time may be extended under sec. 5. Thus, where an appeal which ought to have been filed on the 10th was actually filed on the next day, and it appeared on affidavit that the vakil gave two cases to his clerk on the 8th with instructions to put in the appeal on the 10th and the revision petition on the 11th, but by mistake the clerk entered the same wrongly in his diary, and filed the appeal on the 11th, *held* that under these circumstances the Court would be justified in giving an extension of time under this section—*Ichhar Singh* v. *Natha*, 27 P.L.R. 623, A.I.R. 1926 Lah. 693, 98 I.C. 514.

Mistake of counsel:—'Mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the section though there is certainly no general doctrine which saves parties from the results of wrong advice.'—*Kunwar Rajendra* v. *Rai Rajeshwar*, A.I.R. 1937 P.C. 278, 41 C.W.N. 1189, 1937 M.W.N. 937, 39 Bom.L.R. 1021, 1937 P.W.N. 689. It can not be laid down as a general proposition that the delay caused by counsel's mistake can never be regarded as a sufficient cause—*Arura* v. *Kuram*, 48 P.L.R. 325, A.I.R. 1947 Lah. 76, 225 I.C. 291. A mistake on the part of the counsel, if made *bona fide* is sufficient cause—*Pritchard* v. *Pritchard*, (1884) 14 Q.B.D. 55; *Johnson* v. *Warwick*, (1856) 17 C.B. 516; *Gopal* v. *Solomon*, 11 Cal. 767; *Corporation* v. *Anderson*, 10 Cal. 445; *Bishendat* v. *Nandan*, 12 C.W.N. 25 (*per* Woodroffe, J.); *Ahmed* v. *Shamsulnisa*, 1918 P.L.R. 10, 45 I.C. 542; *Resal Singh* v. *Shadi*, 95 P.R. 1917, 43 I.C. 317. And a client preferring a time-barred appeal under the mistaken advice of his counsel is entitled to the benefit of this section—*Anjora* v. *Babu*, 29 All. 638; *Kura Mal* v. *Ram Nath*, 28 All. 414; *Promatha* v. *Bhabataran*, 46 C.L.J. 257, 105 I.C. 217, A.I.R. 1927 Cal. 829; *Azimulla* v. *Gokal*, 32 I.C. 640, 1916 P.W.R. 37; *Shib Dayal* v. *Jagannath*, 44 All. 636, 20 A.L.J. 674, 68 I.C. 812; *Chhotey* v. *Devi Brij Rani*, 6 O.W.N. 1042, A.I.R. 1930 Oudh 49, or making delay in applying for copies by the erroneous advice of the pleader—*Bhansaheb* v. *Sanabai*, I.L.R. (1946) Bom. 431, A.I.R. 1946 Bom. 437. So also, the filing of an appeal in the wrong Court under the mistaken advice of counsel is sufficient cause for filing it afterwards in the proper Court after the period of limitation, provided the appellant acted with reasonable diligence in the prosecution

of the appeal—*Dattatraya* v. *Secy. of State*, 45 Bom. 607, 23 Bom.L.R. 89, 60 I.C. 744; *Ambica* v. *Manikganj Loan Office Ld.*, 55 Cal. 798, 32 C.W.N. 372; *Sundarbai* v. *Collector*, 43 Bom. 376 (P.C.); *Debendra* v. *Nagendra*, 30 C.W.N. 479, A.I.R. 1926 Cal. 688, 43 C.L.J. 106 [following *Brij Inder* v. *Kanshi Ram*, 45 Cal. 94 (P.C.)]; *Parbhu* v. *Jai Mangal*, A.I.R. 1928 All. 144; *Kishan* v. *Mohammad*, 43 P.L.R. 502, A.I.R. 1942 Lah. 94. Thus where connected suits with different valuations were disposed of by a common judgment and owing to a mistake in thinking that the appeals therefrom should be filed in the same Court, the appeal which ought to be filed in a District Court is not filed in time but is filed after the mistake was discovered after the expiry of limitation, there is no gross negligence on the part of the counsel and the mistake is not an unnatural one—*U. P. Government* v. *Church Missonary*, 17 Luck. 467, 1941 O.W.N. 1282, A.I.R. 1942 Oudh 125. But the mistake of counsel must be of such a description that it might arise even amongst practioners of experience —*S. C. Dey* v. *Rajwanti*, 6 P.L.J. 237, 3 P.L.T. 96, A.I.R. 1923 Pat. 140; *Nrisingha* v. *Trigunand*, 17 Pat. 507, 19 Pat.L.T. 309, A.I.R. 1938 Pat. 413. Mistake of a junior counsel is not a sufficient cause within the meaning of this section—*Gaurishanker* v. *Mt. Manaraji*, (1947) A.W.R. (Rev.) 105. The mistake must be *bona fide*, i.e., made in spite of due care and attention—*J. N. Surty* v. *Chettiar Firm*, 4 Rang. 265, 98 I.C. 417, A.I.R. 1927 Rang. 20; *Ma Ngwe Yun* v. *Ma Pa*, 5 Bur.L.J. 227, 101 I.C. 363. Thus where the advocate for the applicant was under the impression that since the applicant was permitted to sue as a pauper in the lower Court there was no necessity to observe the formality of personal presentation of application to file appeal as pauper in the appellate Court it was held that the applicant should not suffer for the omission of his advocate to inform him in time of the requirement of law and delay should be condoned—*Jusab* v. *State*, A.I.R. 1951 Sau. 12. A *bona fide* mistake on the part of the pleader may be condoned, but *gross* negligence on his part cannot justifiably be condoned so as to extend the time under this section. In such a case, the client has his remedy against the defaulting legal adviser—*Maung Po* v. *Pa Tha*, A.I.R. 1931 Rang. 80, 131 I.C. 507. An appellant is not entitled to the benefit of this section even where he has acted in good faith on the advice of his counsel whose advice has been given *negligently even though honestly—Mithoo Lal* v. *Jamna*, 10 O.W.N. 1154 (F.B.), 146 I.C. 127, A.I.R. 1933 Oudh 523 (525). The mistaken advice of counsel is not sufficient to justify extension of time under this section, unless the advice was given in good faith, that is, with due care and attention—*Nazir* v. *Ganga*, 14 Luck. 701, 1939 O.W.N. 755, A.I.R. 1939 Oudh, 245. Where the pleader made a mistake by relying upon an erroneous statement of the clerk of the Court that an application for copy would not be accepted until the decree was signed, *held* that the pleader ought to have known the law, and that the mistake was not made with due care and attention—*Mg. Po Kyaw* v. *Ma Lal*, 7 Rang. 18, 117 I.C. 251, A.I.R. 1929 Rang. 116 (117). The question is whether the error is one which might have easily occurred even if reasonably due care and attention has been exercised by the pleader—*Tin Tin Nyo* v. *Maung Ba Saung*, 1 Rang. 584, A.I.R. 1924 Rang. 148. In a Calcutta case (*Surendra* v. *Mohendra*, 59 Cal. 781, 36 C.W.N. 420, at pp. 431, 436), it has been observed that there is no authority for the view that a mistake of a legal adviser, however gross and inexcusable, if *bona fide* acted upon by a litigant, will entitle him to the protection of sec. 5. This case has been followed in *Phani* v. *Nalinibala*, 67 C.L.J. 107 where it has been held that the facts of each case and nature of the omission or mistake on the part of the legal adviser in each particular case will have to be examined and scrutinized in order to find out whether there has been negligence or gross want of skill in the legal adviser, or whether there was merely a *bona fide* mistake not through misconduct or negligence or want of reasonable skill, but such as even a skilled person might make. It is only in the latter case that the litigant

would be allowed the benefit of this section. The discretion given to Courts under this section cannot be crystallized into a rigid rule of law, but the following rule expressed by Brett, M. R. in *Highton* v. *Treherne*, (1878) 48 L.J.K.B. 167, embodies a sound working formula: "In cases where a suitor has suffered from negligence or gross want of legal skill of his legal adviser, he has his remedy against that legal adviser, and meantime the suitor must suffer. But where there has been a *bona fide* mistake, not through misconduct or through negligence nor through want of reasonable skill, but such as a skilled person might make, I very much dislike the idea that the rights of the client should be thereby forfeited." Even though the pleader might have been guilty of great carelessness, the appellant ought not to be made to suffer where he acted implicitly relying on the advice of his pleader, as for instance in a case where the appellant being seriously ill sent all the necessary papers and costs to his pleader who was a practitioner of over 15 years' standing, and the pleader under a wrong impression filed the apeal in a wrong Court —*Ambica Ranjan* v. *Manikganj Loan Office*, 55 Cal. 798, 32 C.W.N. 372 (376, 377). But although a party relying on the mistaken advice of his legal adviser may be allowed an extension of time, still where there is no doubt as to the law regarding the forum of appeal, as for instance, where it has always been held and it is well-known to all litigants that an appeal in the particular class of suits lies to the High Court, but the appellant prefers his appeal to the District Court, he is not entitled to an extension of time on the ground of erroneous advice of his counsel—*Uttam* v. *Vishan*, A.I.R. 1933 Lah. 568 (569), 144 I.C. 627.

From a review of the above authorities, it is clear that the decisions of the High Courts on this subject are not uniform, and it would serve no useful purpose to try to deduce any general principle from them, because naturally each decision is influenced by its special facts and circumstances.

The trend of decisions in English cases to disallow an extension of time on the ground of mistake of counsel, as *In re Helsby*, [1894] 1 Q.B. 742 (Judgment by Davey, L.J.), was sought to be applied in this country, but in *Shib Dayal* v. *Jagannath*, 44 All. 636 (639) the Judges remarked that although legal education has progressed in this country and the Courts are right in demanding increasing competence in legal practitioners, still having regard to the disadvantages of practitioners in places remote from law libraries, and to the fact that there is in the mofussil some want of knowledge of the procedure of the High Court, the principle of English decisions should not be strictly applied in this country.

By a piece of carelessness, counsel for the appellant omitted to file a copy of the decree appealed against, and instead filed a copy of a deposition. The mistake was detected after the expiry of the period of limitation. It was held that the Court should allow the copy of the decree to be filed—*Harjsa* v. *Kahni*, 85 P.R. 1913, 19 I.C. 438. Where the appellant obtained a copy of the decree to be appealed against, and gave it in time to his Vakil, but by some mistake the Vakil did not file the copy of the decree and died soon after, the High Court excused the delay and accepted the copy at the hearing of the appeal—*Prosanna Kumari* v. *Ram Chandra*, 17 C.L.J. 66, 17 I.C. 155. Where the delay in the production of the first Court's judgment was due to the mistake of the Vakil in applying for a copy of the decree instead of a judgment, the delay in the production of the same must be excused under this section—*Firm of Amba Parshad* v. *Jwala Dat*, 27 P.L.R. 239, 8 Lah. L.J. 101, 94 I.C. 629.

Where the delay is due to the wrong legal advice which though sound was wrong because of later ruling, it would be sufficient cause to excuse the delay—*Rahan* v. *Nanak*, 1949 R.D. 35.

Act XXVI of 1920 which cut down the time for leave to appeal to the Privy Council and for substitution of legal representatives from 6 months to 3 months, came into force on 1st January 1921. In respect of a judgment delivered a few days later, the party on the advice of his local pleaders applied for leave within the six months' period, but after the 3 months' period had expired. There was a delay of only 14 days. *Held* that as the amending Act was very recently passed, it took some time before the curtailed period of limitation came to be generally known, and the amending Act was not available in any of the books on the Indian Limitation Act that might be referred to for the purpose. Under these circumstances the local pleaders might honestly, though mistakenly, be under the belief that the period was six months, and so it was a fit case for excusing the delay under this section—*Nagindas* v. *Nilaji*, 48 Bom. 442, 26 Bom.L.R. 395, 80 I.C. 862, A.I.R. 1924 Bom. 399; *Vaithinatha* v. *Gobindaswami*, 41 M.L.J. 65, 62 I.C. 795. But in a Nagpur and in an Oudh cases the delay was *not* excused on this ground, see *Padamraj* v. *M. B. Kaisha*, A.I.R. 1924 Nag. 279, 78 I.C. 154; *Municipal Board* v. *Kali*, 1944 O.W.N. 118, A.I.R. 1940 Oudh. 135.

A *bona fide* mistake of calculation on the part of the appellant's pleader is a sufficient cause—*Bishandat* v. *Nandan*, 12 C.W.N. 25; *Rakhal Chandra* v. *Ashutosh*, 17 C.W.N. 807, 19 I.C. 931; *Kandasami* v. *Arunachala*, 21 L.W. 24, 86 I.C. 114, A.I.R. 1925 Mad. 462; *Baban* v. *Emp.*, 9 N.L.J. 180, 96 I.C. 857, A.I.R. 1926 Nag. 503. But in *Zaibulnissa* v. *Kulsan*, 1 All. 250, such a mistake was not held to be a sufficient cause. But a mistake of calculation on the part of the pleader who has not acted with sufficient care and attention, coupled with an error in adding up the days, cannot be excused under this section—*Ma Ngwe* v. *Ma Pu*, 5 Bur.L.J. 227, 101 I.C. 363.

If the mistake of the legal adviser is the result of negligence, it cannot afford a ground for giving the benefit of this section—*Asaram* v. *State*, A.I.R. 1956 Madh. B. 127.

Where there is some dispute about the law or the law is in an unsettled state, a mistake by the lawyer can be accepted as a sufficient cause. But when the matter is beyond dispute, a statement that the lawyer did not know the law cannot be accepted as a sufficient cause under this section—*Bijanlata* v. *Bhudhar*, A.I.R. 1955 Cal. 578.

Once a client proves that he had acted *bona fide* and with reasonable care in approaching a particular lawyer who gave him the wrong advice with the result that the period of limitation expired before any step was taken, he is not precluded from showing that it was owing to the reliance placed on such advice that he could not present an appeal in the proper forum within the proper time. If he proves that, it would be a sufficient cause under this section—*Khetramoni* v. *Surendra*, A.I.R. 1955 Cal. 553.

Mistake of Counsel may be a sufficient cause, but a mistaken advice of a stranger is no excuse for delay. And so where the pleader's clerk, acting on the advice of the Stamp Reporter as to the last day of filing the appeal, preferred the appeal beyond time, it was held that the Satmp Reporter was not under any obligation to inform litigants of the last day of filing an appeal, and any mistake of calculation on his part would not save the appellant—*Khaja Habibullah* v. *Abdul Karim*, 57 C.L.J. 39, 145 I.C. 116, A.I.R. 1933 Cal. 462.

49A. Mistake or ignorance of law:—A mistake or ignorance of law is not a sufficient cause. The maxim *Ignorantia legis neminem excusat* (ignorance of law is no excuse) has been so firmly settled both in England and in India that it

would be the shaking of established authority to maintain that ignorance of law or mistakes of law are reasons for the excuse, and as such furnish elements for extending the period of limitation which the statute law has provided—*Ramjiwan Mal* v. *Chand Mal*, 10 All. 587 (597); *Jag Lall* v. *Har Narain*, 10 All. 524 (529); *Brij Indar* v. *Kanshi Ram*, 45 Cal. 94 (106) (P.C.); *Dy. Commissioner* v. *Chhedi*, 1942 O.W.N. 438, A.I.R. 1943 Oudh 57; *Bindeshari* v. *Tetra*, 1949 R.D. 265. Therefore, if an appellant prefers an appeal from a decree for an amount exceeding Rs. 5,000, to the District Judge instead of to the High Court, and after it is returned by the former Court, files it subsequently in the latter Court at a time when the period of limitation has expired, the mistake cannot be excused under this section—*Ibid.* So also, an appellant filing an appeal after the expiry of the period of limitation owing to a stupid misconstruction of the lower Court's order appealed against, is not entitled to the benefit given under this section—*Hasibunnissa* v. *Bishnath*, 13 O.L.J. 172, A.I.R. 1926 Oudh 206, 91 I.C. 867. The fact that the appellant was under the impression that the limitation was 90 days, was no reason for extending the period—*Dial Singh* v. *Buddha Singh*, 2 Lah. 127, 61 I.C. 327. There was not the slighest justification for counsel, in spite of the amended limitation in the matter of appeals to the Privy Council being in force for 23 years, to think or labour under any misapprehension that the old period of limitation was still in vogue—*Municipal Board* v. *Kali* 1944 O.W.N. 118, A.I.R. 1944 Oudh 135. The Bombay High Court also holds that mere ignorance of law cannot be recognised as sufficient cause for delay, for that would be a premium on ignorance—*Sitaram* v. *Nimba*, 12 Bom. 320 (*per* West, J.). And in a Full Bench case of the Allahabad High Court (*Bechi* v. *Ahsanullah*, 12 All. 461 at p. 482) Mahmood, J. expressed an opinion that "speaking with strict accuracy there can be no such thing as a *bona fide* mistake of law, for good faith implies due care and caution" and he quoted with approval the words of West, J. in 12 Bom. 320 cited above.

But it cannot be laid down as a general proposition that ignorance of law can never be considered; in very special cases it may be a sufficient cause—*Gulam Shah* v. *Mallick Mazaffar Khan*, 81 P.R. 1886 (F.B.). Assuming that ignorance of law may sometimes be an excuse, the rule of interference is subject to certain qualifications. There must be no negligence, there must be no inaction, and there must be no want of good faith. Sec. 5 was not provided to encourage negligence, procrastination, and laxity—*Gangaprasad* v. *Mt. Bansappa*, A.I.R. 1936 Nag. 246, 45 Cal. 94 (P.C.), 12 N.L.R 171 followed. If the mistake be *bona fide* it will be considered as sufficient cause within the meaning of this section. The true rule is, whether under the special circumstances of each case the appellant acted under an *honest though mistaken belief formed with due care and attention*—*Krishna* v. *Chathappan*, 13 Mad. 269 (271). Before a mistake of law can be accepted as sufficient cause, it is necessary to satisfy the Court not only that the mistake was honestly made, but also that it was made despite due care and attention on the part of the appellant or his pleader—*Fakir Chand* v. *Municipal Committee*, 59 P.R. 1913, 18 I.C. 37. And so, where the appellant who as a pleader should have known the law on the subject, had the advantage of the advice of a leading pleader of the Chief Court, but for reasons best known to himself went against that advice in preferring the appeal, it was held that the appellant had no sufficient cause for not instituting the appeal within the period of limitation, as he could not possibly have made the mistake had he taken the precaution of discussing the subject with his pleader with reference to the question of limitation, and to the case-law on the point, and that his mistake, though honest, was the result of either carelessness or an erroneous assumption of knowledge which he took no care to verify—*Ibid.*

Where the appellant was an ignorant milkman having no experience of any previous litigation, and though he knew of the respondent's death, he did not know that the substitution of his legal representatives was necessary and he came to know of this when it was too late to apply for substitution of the deceased respondent's legal representatives, *held* that under the circumstances of the case the delay was *bona fide*, and sufficient cause was shown under this section—*Krishna Mohan* v. *Surapati*, 29 C.W.N. 472, A.I.R. 1925 Cal. 684, 94 I.C. 929. See also *Ramachandran* v. *Sabapathy*, 54 M.L.J. 234, AI.R. 1928 Mad. 404 (406), where a minor made a similar mistake and the delay was excused. In *Umrao* v. *Ruhmot*, I.L.R. (1939) Lah. 433, 41 P.L.R. 843, A.I.R. 1939 Lah. 439 it has been held that applications for the extension of time under this section have to be more liberally construed in favour of minors than other litigants. An appeal to the High Court under sec. 476B of the Criminal Procedure Code against an order of the *Civil* Court refusing or making a complaint under sec. 476, is nevertheless a *criminal* appeal governed by the 60 days' period of limitation prescribed by Art. 155, and *not a civil appeal* governed by Art. 156. Where, however, the appellants were under a *bona fide* mistake that it was a civil appeal govened by the 90 days' period of limitation under Article 156, and filed their appeal accordingly, *held* that is was a proper case for excusing the delay—*Rajani Kanta* v. *Bistoomani*, 46 C.L.J. 40, 104 I C. 456, A I.R. 1927 Cal. 718 (720); *Sheo Prasad* v. *Sheo Bans*, 24 A.L.J. 368, A.I.R. 1926 All. 211 (212), 93 I.C. 851. Where an application for leave to appeal under sec. 449, Cr. P. Code against a sentence passed by a Judge of the High Court sitting in sessions was presented after the period of 60 days prescribed by Art. 155, and it appeared that the delay was due to a mistake on the part of the jailor who was under the impression that it was a non-appealable sentence, *held* that there was sufficient cause for excusing the delay under sec. 5—*Gallagher* v. *Emp.*, 54 Cal. 52, 101 I.C. 657, A.I R. 1927 Cal. 307. See also Notes 50 and 52 below.

Where there are conflicting views on a certain point and the delay caused in filing the appeal is caused by one of the views, even though the Court takes a contrary view, it can extend the time under this section—*Shivan* v. *Radha*, A.I.R. 1941 Pesh. 74, 196 I.C. 654.

50. Wrong proceedings taken in good faith:—Where a person *bona fide* thinking that it was the proper course, filed a suit instead of appealing from a decree, and soon after found out the error and preferred the appeal, it was a 'sufficient cause'—*Ghulam* v. *Shahbaz*, 162 P.R. 1888; *Sitaram* v. *Nimba*, 12 Bom. 320.

Similarly, where a person believing in good faith that a petition for revision, and not an appeal, was the proper remedy, and in pursuance of that belief presented the petition, it was a sufficient cause for subsequently preferring an appeal after the period of limitation—*Balwant* v. *Gumani*, 5 All. 591; *Hardwan* v. *Raja Protab*, 5 O.C. 183. But if he does not act in good faith, *i.e.*, if the knows perfectly well that he ought to file an appeal but still he files an application for revision, it will not be considered a sufficient cause for afterwards filing an appeal out of time—*Umed Ali* v. *Municipal Committee*, 2 Lah. 1 (4), 56 I.C. 148.

When a remedy is provided by law, resort to the inherent jurisdiction under sec. 151, C. P. C. is not permissible. And a person wrongly prosecuting an application under sec. 151 cannot be said said to be acting in good faith, and delay due to such prosecution cannot be condoned under sec. 5—*Ladha Ram* v. *Barkat Ali*, A.I.R. 1936 Lah. 67, 38 P.L.R. 868, 165 I.C. 661. The provisions of the section are not to be invoked when a person acts in ignorance of specific provisions of law and thereby misses the remedy—*Ram Autar* v. *Qadir*, 1940 A.W.R. (B.R.) 55, 1940 R.D. 159.

The time taken in applying for a review of judgment may be deducted in calculating the period of limitation for an application for leave to appeal to the Privy Council—*Nariman* v. *Hasham*, 26 Bom.L.R. 1261, 49 Bom. 149, A.I.R. 1925 Bom. 137, 85 I.C. 191.

So also, the preferring of an application for review will be considered as a sufficient cause for delay in filing an appeal, if the appellant can shew that the grounds for review were reasonable and proper and that these grounds could not be grounds for appeal as well—*Ashanulla* v. *Collector of Dacca*, 15 Cal. 242 (243); *Goivnda* v. *Bhandari*, 14 Mad. 81; *Sudhakar* v. *Sadashiv*, 19 C.W.N. 1113, 31 I.C. 705; *Gobind* v. *Shiva Das*, 33 Cal. 1323 (1329); *Haradhan* v. *Prankrishna*, 2 I.C. 961, 10 C.L.J. 39; *Pundlik* v. *Achut*, 18 Bom. 84; *Seshagiri* v. *Venkatesh*, 29 Bom.L.R. 344; A.I.R. 1927 Bom. 221, 101 I.C. 42; *Waryam* v. *Wadhava*, 89 P.R. 1918, 46 I.C. 589; *Shah Mahamed* v. *Md. Roshan*, 26 P.L.R. 456, 88 I.C. 327; *Messadi Lal* v. *Badhawa*, 100 P.R. 1910, 8 I.C. 1156; *Maung Lun* v. *Maung Dun*, 1 Bur. L.J. 154, 74 I.C. 39; *Hanumal* v. *Atma Ram*, 47 P.L.R. 1915, 27 I.C. 799; *Parbhu* v. *Murlidhar*, 22 A.L.J. 365, 78 I.C. 677, A.I.R. 1924 All. 867; *Pridhanmal* v. *Laloo*, 25 S.L.R. 242, 130 I.C. 545, A.I.R. 1931 Sind 3 (4). In *Firm Bishan Das* v. *Firm Brijmohan*, A.I R. 1935 Lah. 844 the appellant was held to have shown sufficient cause within the meaning of sec. 5 for not filing the appeal within time as he was prosecuting with due diligence his application for review in the lower court. But the mere fact that the appellant had applied for review is not a sufficient cause for not filing his appeal within time, and he is not always entitled to be allowed a deduction of time spent in applying for a review of judgment. If there are no reasonable grounds for making the application for review, and the grounds for the application for review are found to be all grounds of appeal and none of them are grounds for review, the presentation of the application for review is not a sufficient ground for not presenting the appeal within time—*Ashanulla* v. *Collector*, 15 Cal. 242 (244); *Mahmud* v. *Wajid*, 15 Luck. 526, 1940 O.W.N. 281, A.I.R. 1940 Oudh 310. The fact that the grounds raised in the review application do not fall under any of the grounds mentioned in Or. 47, R. 1 Civil Procedure Code is no ground by itself to warrant an inference that the review application was made in bad faith to gain time —*Noor* v. *Abdul*, 1944 O.W.N. 46, A.I.R. 1944 Oudh 193. Another test is, whether the appellant has acted with *reasonable diligence* (on the application of the principle of section 14) in prosecuting the appeal; and he ought ordinarily to be deemed to have acted with due diligence when the whole period between the date of the decree appealed against and the date of presenting the appeal does not, after excluding the time spent in prosecuting with due diligence a proper application for review of judgment, exceed the period prescribed by law for presenting the appeal—*Karam Baksh* v. *Daulat Ram*, 183 P.R. 1888; followed by the Privy Council in *Brij Indar* v. *Kanshi Ram*, 45 Cal. 94 (105) (P.C.); *Ram Charita* v. *Ram Narayan*, 52 I.C. 959 (960) (Pat.); *Kunwar Rajendra* v. *Rai Rajeshwar*, A.I.R. 1937 P.C. 276. All that the apellant has to show under this section is that he prosecuted the review application with due diligence, and that there were reasonable grounds for filing such an application for review. But it is not necessary for him to show that his application for review *had a prospect of success*—*Ramdhani* v. *Khakshardas*, 92 I.C. 1031, A.I.R. 1926 Cal. 677. It is wrong to think that the period spent by a party in prosecuting a review application is compulsorily deducted—*Gudar* v. *Chhajge*, 1941 O.A. (Supp.) 893; *Noor* v. *Abdul*, 1944 O.W.N. 46, A.I.R. 1944 Oudh 193. If it appears that the plaintiff had not prosecuted his application for review with *due diligence*, he will not be entitled to get a deduction of time spent in the review proceedings. Thus, where the plaintiff's suit was dismissed on the 15th August, and on the 10th November, *i.e.*, nearly three

months after, he presented an application for review which was rejected on the 15th November, whereupon he preferred an appeal, it was held that the plaintiff-appellant was not entitled to an indulgence under this section, as the application for review was not prosecuted with reasonable diligence—*Azizuddin* v. *Bhag Mal*, 107 P.R. 1918, 46 I.C. 23; *Govinda* v. *Bhandari*, 14 Mad. 81.

Again, immediately after the termination of the wrong proceedings (whether the proceedings be in review or revision) the appeal must be preferred with due diligence in order to get the benefit of this section—*Kuller* v. *Jeewan*, 22 W.R. 79; *Krishnadas* v. *Rahimannisa*, A.I.R. 1926 Cal. 457; *Ganga* v. *Madho*, 89 P.R. 1882; *Sahiba* v. *Hira*, 166 P.R. 1883; *Karam Baksh* v. *Daulat Ram*, 183 P.R. 1888; *Ganda Singh* v. *Jawala*, 140 P.L.R. 1911, 10 I.C. 129. In *Bhuralal* v. *Shrilal*, 1946 A.M.L.J. 26 time spent for taking the copy of the judgment on review was excluded under this section on the ground that it might help in the drafting of grounds of appeal.

If however, the applicant deliberately adopts a remedy which in the end proves to be futile, he is not entitled to the benefits of the section. Thus where on the dismissal of an appeal for non-prosecution, the appellant waits till the expiry of the period of limitation for filing an appeal to the Privy Council and then applies for restoration of the appeal and on its rejection applies for leave to appeal to the Privy Council and prays for excusing the delay in filing it, there is no sufficient cause for extending the time—*Jagdish* v. *Hari*, 1942 O.W.N. 206, A.I.R. 1942 Oudh 362.

Where difficult questions of jurisdiction arise and a party *bona fide* files a revision application instead of an appeal in another Court and subsequently files the appeal in the proper Court but out of time, time can be extended under sec. 5,—it being a case of *bona fide* mistake—*M. Zahur Hussain* v. *Chura Singh*, A.I.R. 1936 All. 266. Where an application originally filed as an appeal, was as such, within time, but on its being decided by a Judge that it ought to be dealt with as a revision, it is found to be beyond time as revision, the reason for the delay being the conflict of decisions as to the proper remedy, it is sufficient cause for the delay being excused—*Anandrao* v *Parwatibai*, I.L.R. (1942) Nag. 487, 1941 N.L.J. 519, A.I.R. 1941 Nag. 308. In case of *bona fide* dispute as to whether an application in revision or an appeal lies, the party is entitled to get the benefit of this section—*Ramdhan* v. *Jagdish*, A.I.R. 1951 Ajmer 54.

51. Proceedings in wrong Court through bona fide mistake:— Where an appellant preferred an appeal to a wrong Court, believing *bona fide* that the appeal lay there, that is a sufficient cause, and the appellant is entitled to deduct the time during which the appeal was pending in the wrong Court—*Balaram* v. *Sham*, 23 Cal. 526; *Dadabhai* v. *Maneksha*, 21 Bom. 552; *Rupa Thakurani* v. *Kumud Nath*, 22 C.W.N. 594, 46 I.C. 116; *Huro Chunder* v. *Surnamoyi*, 13 Cal. 266; *Mahabat Rai* v. *Bharadwaj*, 37 I.C. 818, 15 A.L.J. 200; *Krishna* v. *Chathappan*, 13 Mad. 269; *Indar Lal* v. *Deojit*, 4 A.L.J. 1; *Sardar Partap* v. *Lala Karam*, 184 P.R. 1889; *Mg. Sin* v. *Mg. Po*, 4 Bur.L.T. 224, 12 I.C. 28. Although section 14 does not apply to appeals, still the circumstances mentioned in that section (*viz.*, proceeding in a wrong Court through *bona fide* mistake) may be considered as a sufficient cause within the meaning of section 5 so that the time during which an appeal has been preferred and pending in a wrong Court may be excluded for the purpose of calculating time, and the Court may excuse the delay in bringing the appeal before the proper Court—*Balwant* v. *Gumani*, 5 All. 591; *Kamiruddin* v. *Bisnupriya*, 33 C.W.N. 76 (77); *Kumudini* v. *Kamala Kanta*, 35 C.L.J. 106, 68 I.C. 575; *Kunkar Rajendra* v. *Rai Rajeshwar*, A.I.R. 1937 P.C. 276; *Anadi Ram* v. *Mt. Chaduri*, A.I.R. 1956 Ass. 63. In considering the question of "sufficient cause" under this section, the equities on which secs. 4 and 14 of the Act

are based may be taken into account. The existence of circumstances mentioned in those sections may therefore, be regarded as a sufficient ground for excusing the delay caused by the Courts being closed or by wrong proceedings—*Kayambu* v. *The Court of Wards*, (1941) 2 M.L.J. 873, A.I.R. 1942 Mad. 170. In order to have the time extended the proceeding which a party has been prosecuting with due diligence in another Court should have been a proceeding founded upon the same cause of action. Thus the pendency of the application to set aside the exparte decree cannot be treated as sufficient cause for the delay in filing the second appeal as the causes of action are quite different—*Ujagar* v. *Duni Chand*, A.I.R. 1951 Him. Pro. 68.

Thus, where the appellant acting on the mistaken advice of his counsel was reasonably led into the mistaken belief that the valuation of the suit was such that an appeal lay to the High Court and not to the District Court, *held* that this would constitute a sufficient cause for excusing the delay in presenting the appeal to the proper Court—*Sunderabai* v. *Collector*, 43 Bom. 376 (384) (P.C.); *Tulso Kanwar* v. *Gajraj Singh*, 25 All. 71; *Huro* v. *Surnamoyi*, 13 Cal. 266; *Krishna* v. *Chathappan*, 13 Mad. 269; *Gauhar* v. *Khan Mahammad*, 66 P.R. 1891; *Kunwar Rajendra* v. *Rai Rajeshwar*, A.I.R. 1937 P.C. 276. Where a criminal appeal preferred by the appellant (who was in jail) was erroneously presented by his counsel in the High Court instead of in the Sessions Court, *held* that the mistake made by the counsel should be excused, and the appeal should be allowed to be presented to the proper Court though the period of limitation has expired—*Surta Singh* v. *Emperor*, 1 Lah. 508, 59 I.C. 556. Where the appellant wrongly preferred his appeal to the Commissioner, and the Commissioner himself was also under the impression that the appeal was entertainable by him, *held* that there was a *bona fide* mistake—*Chob* v. *Daryai*, A.I.R. 1924 All. 915, 82 I.C. 594. Where the appellant acting *bona fide* on his counsel's advice filed an appeal in a wrong Court, the counsel acting with due care and attention, there was sufficient cause—*Nawab Mirza Muhammad Bakar Ali Khan* v. *Muhammad Bakar*, 10 O.C. 291 (294).

But where the appellants being themselves pleaders and well acquainted with the facts of the case, preferred an appeal to a wrong Court, owing to a mistaken calculation as to the value of the suit, due to carelessness, it was held that they did not act in good faith but acted with gross negligence and carelessness, and were not entitled to an extension of time—*Sarat Chander* v. *Saraswati*, 34 Cal. 216 (218, 219). So also, where an appeal against a decree for an amount exceeding Rs. 5,000 was first presented to the Divisional Judge who had no pecuniary jurisdiction to hear the appeal, and who therefore returned the appeal for presentation to the Chief Court, where it was subsequently presented but after the prescribed period for limitation, *held* that there was no *bona fide* mistake but gross carelessness and oversight avoidable with due diligence on the part of the pleader, and the delay was not excusable—*Sant Singh* v. *Qaim*, 118 P.R. 1908. Where the memorandum of appeal filed in a wrong Court was returned by that Court on the 11th December, and the appeal was afterwards filed in the right Court on the 20th December, *i.e*, 9 days after, and no explanation was offered was to the nine days' delay, it could not be said that the appellant acted *bona fide*, i.e., with due care and diligence, and he was not therefore entitled to the indulgence of this section—*Ramjiwan* v. *Chand Mal*, 10 All. 587; *Sarat Chunder* v. *Saraswati*, 34 Cal. 216 (221). Where the appellant knew that the appeal lay to the High Court but still he preferred his appeal to the District Judge who returned the petition of appeal which was afterwards presented to the High Court beyond time, *held* that there was no sufficient cause for excusing the delay—*Daudbhai* v. *Emnabai*, 28 Bom. 235; *Umrao Baksh* v. *Malik Md. Khan*, A.I.R. 1923 Lah. 612, 72 I.C. 732.

52. Amendment of decree:—Time should be taken to have run from the date of the decree as originally drawn up, and it is not every amendment which has been made in the decree that entitles a party to claim an extension of time for filing an appeal. Whether there is sufficient cause must depend upon the circumstances of each individual case. If the grounds on which the appeal is based are *intimately connected with the amendment* of the decree, or if the grounds are directed against the decree only in so far as it has been amended, the Court should hold that there was sufficient cause, but if the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, such appeal should not be admitted after time—*Brojo Lal* v. *Tara Prasanna*, 3 C.L.J. 188 (192); *Soudamini* v. *Nabalak*, 35 C.W.N. 251 (253), 133 I.C. 571, A.I.R 1931 Cal. 578; *Sati Kantha* v. *Ram Chandra*, 34 I.C. 566 (Cal.); *Deep Singh* v. *Raghunath*, 7 O.W.N. 882, A.I.R. 1930 Oudh 463 (465); *Sheikh Golab* v. *Janki Koer*, 5 P.L.J. 472 (478) (F.B.), 57 I.C. 236; *Kedar* v. *Gollam*, 40 C.W.N. 83, 165 I.C. 53. Article 182, clause 4 contains a special provision allowing the time for an application for execution to be computed from the date of amendment of the decree, but there is no corresponding provision in Article 156 relating to appeals. Consequently the analogy of Art. 182 should not be applied to appeals, and every amendment made in a decree does not necessarily entitle the appellant to an extension of time under this section. Where the decree was amended by merely adding an order as to costs, it was held that the order as to costs did not make any change in the appellant's position, that it did not give him a new right of appeal, that the order for costs was not a decree nor did it decide any question of a general right such as rights in relation to jurisdiction, limitation and frame of suit, and that the appellant was not entitled to any extension of time so as to enable him to compute the period of limitation of his appeal from the date of the order of costs—*Sheikh Golab* v. *Janki Koer*, 5 P.L.J. 472 (478-480) (F.B.).

The Calcutta High Court has held that on the analogy of clause (4) of Art. 182, time should run for the purposes of appeal from the date of the amendment, whether the amendment be a merely clerical one under sec. 152, C. P. Code or of any other nature. Therefore, if a decree is modified in review, even though to a slight extent, it is the modified decree which is appealable, and if the appellant files an appeal against the decree originally made, the appeal is incompetent, but the Court may, under this section, grant indulgence to the appellant in a fit case by allowing him to prefer an appeal against the amended decree beyond time—*Aditya Kumar* v. *Abinash*, 34 C.W.N. 1002 (1007), A.I.R. 1931 Cal. 323 (dissenting from 5 P.L.J. 472).

In a more recent case the Calcutta High Court has gone so far as to say that even in a case in which the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged by an appeal, circumstances may appear which may justly bring the case within the meaning of the expression "sufficient cause" and entitle the appellant to an extension of time. Thus, where the plaintiff applied for an amendment of the decree in relation to a certain amount of costs, and the appeal preferred by the appellant had no relation to that amendment, the appellant was entitled to wait until the petition for amendment was disposed of before he could be called upon to prefer his appeal—*Nandalal* v. *Dasarathi*, 59 Cal. 1052, 36 C.W.N. 218 (220, 221), A.I.R. 1932 Cal. 534, 138 I.C. 754 (dissenting from 3 C.L.J. 188). But in *Kedar* v. *Gollam*, 40 C.W.N. 83, 165 I.C. 53 it has been held that the time for filing the appeal runs from the date when the original judgment was pronounced.

In a suit for arrears of revenue, a decree was passed for Rs. 125 on the 30th of May; on the 15th August, the plaintiff applied for amendment of the decree, on

the ground that the arrears of revenue amounted to Rs. 374, and the Court amended the decree then and there. On the 11th September the plaintiff preferred an appeal to the District Judge complaining of disallowance of interest in the decree. *Held* that as question of interest could have been raised on the decree as originally passed, and the appeal did not attack the decree in so far as it was amended or raise any question connected with the amendment, the appellant was not entitled to any extension of time and his appeal was time-barred—*Gajadhar Singh* v. *Basant Lal*, 43 All. 380, 19 A.L.J. 152, 61 I.C. 69.

Where a decree which is wrongly drawn up is amended by the Court after the expiration of the time prescribed for appeal against the original decree, the party affected by the amendment can appeal against the decree as amended, and the delay will be excused under this section—*Viswanathan* v. *Ramanathan*, 24 Mad. 646 (649).

Thus, where a decree was wrong as to the name of a party which was incorrectly recorded and was also wrong as to the amount claimed and allowed, it was held that the decree was wrong in a very material particular, and the limitation for appeal should be reckoned from the date of the amended decee—*Amar Chandra* v. *Asad Ali*, 32 Cal. 908 (909). Where a mortgage decree passed on the 30th June 1914 omitted to specify the decretal amount that could be recovered from the house mortgaged, and the plaintiff applied for amendment which was granted on the 19th November 1914, and the defendant appealed on 19th February 1915, it was held that the defendants were not obliged to appeal from the decree of June 1914 at a time when the plaintiff had applied for an amendment, and that in any event an extension of time would be granted under this section; the appeal was not barred—*Har Kishen* v. *Lahore Bank Ld.*, 64 P.R. 1919, 51 I.C. 712 (714).

53. Ignorance of fact:—Where an application for bringing the legal representative of the deceased respondent on record was not made within the period of limitation by reason of the appellant not being aware, till shortly before the application, of the death of the respondent who lived at a great distance from him, it was held that the appellant had sufficient cause for not making the application within time—*Allah* v. *Thakurdas*, 1908 P.L.R. 24; *Sher Bahadur* v. *Abezar*, 95 I.C. 236. Ignorance of the death of a party whose legal representatives have to be brought on record constitutes a "sufficient cause" within the meaning of this section, for excusing the delay in seeking to set aside abatement—*Ramalingam* v. *Koteswara*, (1949) 1 M.L.J. 144, A.I.R. 1949 Mad. 624; *Secretary of State* v. *Kistnamacharyulu*, I L.R. (1938) Mad. 275, (1938) 1 M.L.J. 54, A.I.R. 1938 Mad. 218. Where the appellant was ignorant of the death of the respondent for a long time so that not only the appeal abated but also the period for setting aside the abatement of the appeal expired, but it was not shown that the ignorance was due to any negligence or deliberate omission on the part of the appellant, it was held that there was sufficient cause for extension of the time for filing an application to set aside the abatement—*Lakshmi Chand* v. *Behari Lal*, 54 All. 280, A.I.R. 1932 All. 459 (460), 135 I.C. 159. Where an appeal is filed through *bona fide* mistake against a dead man, and if the time for appealing has passed before the representatives are brought on file, the time for filing appeal may be extended under sec. 5—*Mubarak Shah* v. *Acharaj Ram*, A.I R. 1936 Pesh. 192, 165 I.C. 201. Where of the two appellants, one died during the pendency of the appeal and the application for bringing the legal representatives of the deceased on the record was made after the prescribed period and the explanation of the delay was given as ignorance on the part of the applicant of the death of the other appellant, it was held that this could not be considered to be an adequate ground for extending the period of limitation under

sec. 5—*Pir Baksh* v. *Kidar Nath*, A.I.R. 1935 Lah. 478, 37 P.L.R. 400, 155 I.C. 610. Where a complaint had been filed against the appellant under sec. 476, Cr. P. Code, but he was not aware of the filing of the complaint till after the 30 days prescribed by Art. 154 had expired, *held* that it might be a sufficient cause for excusing the delay in filing the appeal—*Daga Devji* v. *Emp.*, 52 Bom. 164, 30 Bom.L R. 76, A.I.R. 1928 Bom. 64 (65). Where some of the legal representatives have been duly made parties and the appeal did not abate, but others were left out through honest inadvertence, the advantage of this section may be availed of to implead the remaining legal representatives even after the period of limitation—*Poonam Chand* v. *Motilal*, A.I.R. 1954 Raj. 287.

54. Judgment not pronounced in open Court:—Where it appeared that the judgment of the lower Court had not been pronounced in open Court nor had any intimation been sent to the parties of any date for its pronouncement, and the appellant or his pleader did not discover what the decision was till after the expiry of the period prescribed for appeal, it was held that there was sufficient cause for excusing the delay in presenting the appeal—*Lalli* v. *Sain Ditta*, 27 P.R. 1919, 51 I.C. 239 (240); *Ma Hmwe* v. *Daw Win*, 1941 Rang.L.R. 213, A.I.R. 1941 Rang. 194.

55. Pauper appeal—subsequent presentation of fully stamped appeal:—If an application for leave to appeal as a pauper is rejected as being presented more than 30 days after the date of decree (Art. 170), the appellant may afterwards present a properly stamped memorandum of appeal and apply for an extension of time under this section—*Shahzadi* v. *Alak Nath*, 1933 A.L.J. 585, A.I.R. 1933 All. 308 (310), 144 I.C. 79. Where an application for leave to appeal *in forma pauperis* is rejected, but the Court grants time to file an appeal on proper stamp, and the appellant afterwards pays the full Court-fees *within the time granted by the Court*, though after the expiry of the period of limitation, *held* that the properly stamped appeal should not be rejected as barred by limitation, as the Court has granted time to the appellant, in the exercise of its discretion under this section—*Bai Ful* v. *Desai*, 22 Bom. 849; *Buta* v. *Paramanand*, 84 P.R. 1904; *Girwar Lal* v. *Lakshmi Narain*, 26 All. 329 (330, 331); *Jumnabai* v. *Vissondas*, 21 Bom. 576; *Chintamani* v. *Ramchandra*, 34 Bom. 589; *Bhagwan Das* v. *Balwan*, 36 I.C. 84, 74 P.R. 1916; *Intizam Begam* v. *Waziran*, 47 P.R. 1899. Where during the pendency of an application for leave to appeal *in forma pauperis*, the appellant acquires some property, wrereupon he is declared not a pauper and is ordered to pay Court-fee, and he takes time from the Court to pay the stamp, and pays the stamp within the time granted, though beyond the period of limitation, his appeal will be considered as presented on the date of the application for leave to appeal *in forma pauperis*, and therefore not barred. The case comes under this section—*Durga Charan* v. *Dookhiram*, 26 Cal. 925; *Shadi Khan* v. *Umdan Begum*, 52 P.L.R. 1912, 13 I.C. 73.

56. Inability to get stamps:—The last day of filing an appeal was 13th July, but on that day the appellant could not get a stamp. The next day was a holiday. The appeal was filed on the 15th. It was held that the delay was excusable under this section—*Kesho Prosad* v. *Harbans*, 1 P.L.J. 163, 37 I.C. 211. But in a later Patna case it has been laid down that where the party is guilty of procrastination, *e.g.*, where the law has provided a time limit within which any particular step is to be taken, and a party waits until the last moment before beginning to take action, he is not entitled to the Court's indulgence if an unforeseen accident, (*e.g.*, inability to get stamps) prevents the step from being taken within the time prescribed by law—*Seth Jahar* v. *Pritchard*, 4 P.L.J. 381, 52 I.C. 225. In another Patna case the judges have expressed the opinion that although appellants

who are prevented from filing their appeal within time by difficulties encountered in procuring the necessary Court-fee stamps may possibly rely upon those difficulties as constituting sufficient cause within the meaning of this section for not having filed the appeal within time, still it must be remembered that such difficulties are really due to the litigant's inveterate habit of putting off the purchase of the Court-fee and the filing of the appeal to the very last day—*Ram Sahay* v. *Kumar Lachmi Narayan*, 3 P.L.J. 74, 42 I.C. 675. In a Nagpur case also it has been held that an appellant who wilfully leaves the preparation and presentation of the appeal to the last day of the period of limitation is guilty of negligence and is not entitled to an extension of time, if some unexpected or unforeseen contingency, (*e g.*, inability to get stamps) prevents him from filing the appeal within time. This section was not provided to encourage negligence, procrastination and laxity—*Kedarnath* v. *Zumberlal*, 12 N.L.R. 171, 37 I.C. 503.

57. Other cases:—Filing an appeal as from an order, instead of as from a decree—*Manorath* v. *Balak*, 1881 A.W.N. 97; change of practice of a Court in receiving appeals and want of notice of such change to a party—*Sukhdial* v. *Jay Singh*, 101 P.R. 1890; taking proceedings by an appellant to get himself declared a major—*Maharaj Narain* v. *Banoji*, 21 P.R. 1940; accidental loss of the copy of judgment—*Pir Baksh* v *Chaman*, 28 P.L.R. 1, A.I.R. 1927 Lah. 734, 100 I.C. 19; copies of judgment and decree not reaching the appellant in time, owing to unusual delay in the Post Office—*Altri* v. *Ramkishan*, 11 Lah. 111, A.I.R. 1930 Lah. 216 (217), 120 I.C. 169; or delay in making applications or taking delivery of copies of judgment and decree due to the disturbed state of the whole country in 1942—*Jan Muhammad* v. *Shital*, A.I.R. 1946 Pat. 417, 224 I.C. 160; these are sufficient causes. But where a person makes an application for a copy of judgment so late as within three days of the expiry of the period of limitation for filing an appeal and chooses to obtain it by post and gets it after the period of limitation the delay in the transit cannot be excused and time cannot be extended—*Indradeo* v. *Rampat*, 1942 O.W.N. (B.R.) 214, 1924 A.W.N. (Rev.) 131. Where the plaintiff's petition of objection having been dismissed by the Insolvency Court in his absence, without giving him a hearing, the plaintiff made an application to set aside the *ex parte* order but he was sent from Court to Court for four years, but still the matter in controversy was not decided by any Court, and then he filed an appeal, it was held that as he had been prosecuting his case in good faith with due diligence, he had sufficient cause for not filing his appeal within time—*Abid Ali* v. *Kidar Nath*, 9 O.W.N. 1165, A.I.R. 1933 Oudh 83 (84), 142 I.C. 826.

If the memorandum of appeal is filed within time without copies of judgment and decree of the lower Court, but these are filed two days after the expiry of the period of limitation, it is a fit case for an extension of time under this section—*Lal Bhan Partab* v. *Rajab*, 6 O.W.N. 1035, A.I.R 1930 Oudh 184, 124 I.C. 361. Where two appeals were filed from the same order, but a copy of the order was filed in only one of the appeals, and the copy in the other appeal was filed out of time, *held* that it was a fit case in which the period of limitation should be extended—*Domi Lal* v. *Bijoy*, 12 Pat. 36, 13 P.L.T. 612, A.I.R. 1932 Pat. 349, 141 I.C. 37.

Where an application for review was filed out of time but without any negligence on the part of the applicant and soon after the discovery of new evidence, the delay was excused under this section—*Bai Nematbu* v. *Bai Nematullabu*, 42 Bom. 295 (301). Where the rule requiring the appellant in a second appeal to file a copy of the judgment of the first Court had only been published in the Gazettee a few days before the filing of the appeal, so that there had not been sufficient time for the new

rule to become well known to the litigants, and the appeal was afterwards re-filed by the appellant with the first Court's judgment within a reasonable period but after the expiry of the period of limitation, *held* that there was sufficient cause for excusing the delay—*Muhammad Hassamuddin* v. *Saif Ali*, 4 Lah. 122, 74 I.C. 451. Where the question whether the decision of the trial Court amounted to an order only or to a decree was a doubtful one, and therefore insufficient Court-fee was at first paid on the memorandum of appeal, but full Court-fee was made up after limitation, *held* that there was sufficient cause to excuse the delay—*Raghubir* v. *Sohan Devi*, 6 Lah. 233, 86 I.C. 1, A.I.R. 1925 Lah. 381. Omission to sign a memorandum of appeal through oversight, which was otherwise in order and had been duly presented, is a sufficient cause for extension of time—*Firm Mathra Das* v. *Firm Ram Lal*, 84 I.C. 518, A.I.R. 1923 Lah. 402. Where the appellant could not get any information of an order passed against him by the Deputy Executive Officer of the Calcutta Corporation, in spite of repeated efforts made by him through the Ward Councillor and the Bill Collector to get information and inspite of writing repeated letters to the Chief Executive Officer, and he came to know of the order when the period of limitation for filing an appeal against it has expired, it was held that there was no want of *bona fides* on his part, and there was sufficient cause for filing the appeal beyond time—*Corporation of Calcutta* v. *A. C. Pal*, 58 Cal. 793, 35 C.W.N. 283 (285), 133 I.C. 332, A.I.R. 1931 Cal. 506.

Where an uncertified copy of the judgment was filed with the application for review within the period of limitation but as the office required the applicant to produce a certified copy, the uncertified copy was taken back and a certified copy was filed afterwards but by that time the period of limitation for review had expired, and the applicant put in an application under sec. 5, Limitation Act, for extension of time, it was held that the applicant was entitled to the benefit of sec. 5, Limitation Act—*Mahabir Sinha* v. *Baldeo Singh*, A.I.R. 1935 Pat. 386, 16 P.L.T. 595.

Where delay in presenting an appeal was due to the agreement between the parties to end litigation it was held to be sufficient cause and the delay was condoned —*Hakim* v. *Ganga*, 40 P.L.R. 399, A.I.R. 1938 Lah. 836.

58. Application for copy of decree with insufficient folios:—A decree was passed on Dec. 3 and signed on the following day, and an application for a copy was made on the 10th, with insufficient folios; on the 11th, the officer in charge made a report that the folios put in were insufficient and 9 more were required, and the pleader for the appellant got the information the next day when he supplied the necessary folios; the copy was ready for delivery on the 16th, and the appeal was filed on January 8 next, that is, 36 days after the decree; it was held that the Judge should not throw out the appeal as barred, and that under the circumstances he should exercise his discretion under this section—*Dulali* v. *Saroda*, 3 C.W.N. 55. See also *Kali Sankar* v. *Baikantha Nath*, 7 C.W.N. 109. Where the period of filing the appeal expired during the vacation, but the appeal was filed seven days after the opening of the Court, and the delay was due to the fact that the Court-fee paid on the application for copy of the decree was deficient, but the appellant received no information of the deficiency, owing to the defective procedure of the Copying Department, and it appeared that as soon as he knew of this deficiency he took the necessary steps in all haste, it was held that the delay should be condoned—*Rahim Bux* v. *Maiku*, 8 O.W.N. 191, A.I.R. 1931 Oudh 314 (315), 132 I.C. 777.

59. Defective vakalatnama:—Where the pleader's name is not mentioned in the vakalatnama by pure mistake, or the pleader fails to endorse his

acceptance, and the mistakes are due to pure inadvertence and accident and do not proceed from any dishonest intention, there is sufficient cause for accepting a fresh vakalatnama complete in every respect after the expiry of the period of limitation for the appeal—*Md. Qamar* v. *Md. Salamat*, 1930 A.L.J. 394, 121 I.C. 546, A.I.R. 1930 All. 112; *Shambhu Nath* v. *Badri Das*, 43 All. 392, 19 A.L.J. 183, 61 I.C. 410. See also *Ram Rup* v. *Naik Ram*, A.I.R. 1926 All. 252, 91 I.C. 865; *Ram Lal* v. *Budho Mal*, 103 I.C. 537, A.I.R. 1927 Lah. 618; *Lokenath* v. *Sheo Saran*, 102 I.C. 255, A.I.R. 1927 All. 816.

The Court has power to direct the personal attendance of a party to satisfy itself as to the genuineness of his signature in a vakalatnama filed in Court. The inconvenience of party to attend the Court as per its order is not a reasonable cause for extending the time under this section for filing a fresh vakalatnama after the period of limitation—*Kong Hip Lon & Co.* v. *C.A.M.A.L. Firm*, A.I.R. 1938 Rang. 214, 177 I.C. 364.

60. Alteration of law:—A new statement or exposition of the law or altering the view of the law by the High Court or the Privy Council is no sufficient cause for excusing the delay. And so, where a party against whom a decision is given is apparently satisfied for the time being, but subsequently a new statement or exposition of law favourable to his case being given in a judgment in another case, he comes to prefer an appeal or an application for review, his delay will not be excused on that ground—*Mowri* v. *Soorendra*, 10 W.R. 178; *Amra* v. *Gajan*, 11 W.R. 130; *Shama Churn* v. *Bindaban*, 9 W.R. 181 (F.B.); *Bimola* v. *Dangoo*, 19 W.R. 189; *Makhan* v. *Manchand*, 5 B.H.C.R. 107; *Achuta* v. *Mammavu*, 10 Mad. 357 (360); *Basdeo* v. *Murli*, 1942 O.W.N. 439, A.I.R. 1942 Ohdh. 447. Even if an amendment in the law may be a sufficient cause for excusing the delay, it is necessary that the applicant should apply for review of judgment immediately after the Amendment Act is passed. If he makes an inordinate delay (*e.g.*, about 2 months) in filing the application, it cannot be excused—*Gyanaji* v. *Ningappa*, 52 Bom. 434, A.I.R. 1928 Bom. 308 (310), 111 I.C. 633; *Secretary of State* v. *Tirath Ram*, 9 Lah. 76, A.I.R. 1928 Lah. 216 (218), 104 I.C. 281.

61. Ignorance of law:—See Note 49A under heading "Mistake of law." The fact that the appellant was a *pardanashin* lady and did not know that a copy of the decree was required to be filed along with the memorandum of appeal is no sufficient cause for extending the time to enable her to file a copy of the decree after the period of limitation—*Masum* v. *Madan*, 1911 P.W.R. 8, 9 I.C. 222 (223). Ignorance of the effect of the judgment is no justification for delay in filing an application for review—*Golam* v. *Syad*, 8 Bom. 260.

62. Poverty:—The poverty of the appellant in consequence of which he was not able to pay Court-fees in time and had to raise funds, is not a sufficient cause for admitting an appeal out of time—*Moshaulla* v. *Ahmedullah*, 13 Cal. 78 (79); *Husaini Begum* v. *Collector*, 9 All. 11 (18); *Husaini Begum* v. *Collector*, 9 All. 655 (659); *Krishnaswamy* v. *Ramaswamy*, 19 M.L.J. 209; *Balwant* v. *Jagjit*, 48 P.L.R. 393, A.I.R. 1947 Lah. 210. The framers of this Act have not overlooked the fact that the would-be-appellant may be a pauper; and they have enacted in Art. 170 that an application for leave to file an appeal *in forma pauperis* must be made within 30 days. But the appellant is not entitled to any further indulgence under this section on the ground of poverty—*Husaini* v. *Collector*, 9 All. 655 (659). Even the state of poverty coupled with the fact of the appellant being a *purdanashin* lady is no sufficient cause—*Husaini Begum* v. *Collector*, 9 All. 655 (659); and 9 All. 11 (18).

63. Pardanashin lady:—The mere fact of the appellant being a *pardanashin* lady is not a sufficient cause—*Husaini Begum* v. *Collector*, 9 All. 655 (659) (F.B.); *Masum* v. *Madan*, 1911 P.W.R. 8, 9 I.C. 222 (223). It may be conceded that when the fact of the appellant being a *pardanashin* lady has prevented her from presenting the appeal herself or from retaining counsel to do so, it may furnish a ground for applying the discretionary power under this section; but it cannot be laid down that whenever the appellant is a *pardanashin* lady there should be no practical limit to the period during which her appeal must be presented—*Husaini Begum* v. *Collector*, 9 All. 11 (18) (*per* Mahmood, J.); *Benodini* v. *Jagabandhu*, 37 C.W.N. 179 (180). But where the applicant is a *pardanashin* lady whose legal interests are not prosecuted by her legal advisers with all the carefulness which the circumstances demand, in consequence of which delays have occurred in instituting legal proceedings, such delays ought to be excused—*Bai Nematbu* v. *Bai Nematullabu*, 42 Bom. 295 (306).

64. Negligence of pleader or his clerk:—*Bona fide* mistake on the part of the pleader may be excused, but want of care and attention on his part in seeing to the proper presentation of the appeal is no sufficient cause. Thus, where the counsel for the appellant had omitted to present his petition of appeal in due time, although he had been furnished with the necessary papers and the necessary costs, *held* that the negligence on the part of the counsel was not a sufficient cause for extension of time—*Buddhu* v. *Dewan*, 37 All. 267. Negligence of counsel is no ground for giving the benefit of this section—*Chunni* v. *Daya Shankar*, 1948 R.D. 433; and if the pleader who advises the client without due care and attention, the client who acts on such advice is not entitled to the benefit of the section—*Krishna* v. *Trimbak*, I.L.R. (1938) Nag. 409, A.I.R. 1938 Nag. 156. Carelessness on the part of the pleader in filing an appeal of value over Rs. 5,000 in the Divisional Judge's Court instead of in the Chief Court is not a sufficient cause for excusing the delay in the subsequent presentation of the appeal of the latter Court—*Sant Singh* v. *Quaim*, 118 P.R. 1908. So also, where the subject matter of the suit clearly showed that an appeal lay to the High Court but an appeal was filed in the District Judge's Court owing to the carelessness of the pleader, benefit under this section could not be granted —*Amrit* v. *Phool Chund*, I.L.R. (1938) Lah. 37, 40 P.L.R. 986, A.I.R. 1938 Lah. 81. Negligence of the vakil in filing proper Court-fee stamps, when the deficiency of stamps in the memorandum of appeal was pointed out to him by the Court, is not a sufficient cause for excusing the delay in filing the proper stamps—*Jodhon Prosad* v. *Nanku Prosad*, 3 P.L.J. 484, 46 I.C. 509.

Filing of an appeal in a wrong Court through gross carelessness of pleader is not a sufficient cause for presenting the appeal to the proper Court after the expiry of the period of limitation—*Mahammad* v. *Ladha Singh*, 9 P.L.R. 1914, 23 I.C. 86. If the lawyer acted without due care and attention and filed the appeal in a wrong Court, the appellant cannot claim the benefit of this section—*R.M.A.L. Firm* v. *Ko Shan*, 1939 Rang.L.R. 639, A.I.R. 1940 Rang. 14. Where the appellant's mukhtar omitted to file his power-of-attorney and the copy of the first Court's judgment with the appeal, and filed them long after the presentation of the appeal, and no reasons were given for the delay, the appeal was dismissed as barred by limitation—*Dhanna* v. *Wazir*, 1919 P.L.R. 94, 52 I.C. 346. So also where an appeal is filed with no Court-fee stamp owing to the wrong advice of counsel due to the negligence or gross want of legal skill, this section does not apply—*Badrinarayan* v. *Chandanmal*, A.I.R. 1950 Raj. 2. The mere fact that the counsel entrusted with the task of filing an appeal forgot all about it till after the expiry of the period of limitation is not a sufficient cause for extending time—*Dilan* v. *Ram Bharasay*, 1 O.W.N. 880, A.I.R. 1925 Oudh 374, 85 I.C. 693. But where the appellant placed all the necessary papers in the

hands of an Advocate at 9-30 a.m. on the last day for filing the appeal, but the Advocate could not examine the papers because of more pressing engagements till his return from Court in the afternoon when he found that the appeal had been time-barred, and thereafter the appeal was filed on the next day, *held* that though it may be said that there was some negligence or want of proper attention on the part of the Advocate in not looking into the papers as soon as they were handed over to him to find out which was the last day of filing the appeal, still as he was then pressed with other engagements and did not know that his client had come on the very last day, there was sufficient cause under this section—*Karal Chargn* v. *Apurva*, 34 C.W.N. 1119 (1126), A I.R. 1931 Cal. 298.

Similarly, negligence of the pleader's clerk in applying for delivery of the copy of the decree and in filing the appeal would not be a sufficient cause of delay—*Allahdadshad* v. *Mukhlum*, 24 I.C. 977, 7 S.L.R. 201. Mistake of the pleader's clerk in filing the appeal out of time is no sufficient cause—*Ganesh* v. *Hirde Bihar*, A.I.R. 1925 Oudh 189, 82 I.C. 484; *Gopal* v. *Digambar*, 101 I.C. 448, A.I.R. 1927 Pat. 232. But in a Punjab case, where the appellant's counsel prepared the grounds and gave them to his clerk 9 days before the expiry of the period of limitation, but the clerk finding that a copy of the judgment of the first Court was wanting directed the client's agent to get the same and kept the appeal by him till the said copy was obtained and then forgot to file the appeal in time, *held* that sufficient cause had been made out though the pleader was not free from blame—*Bibi Putli* v. *Jawala*, 1912 P.W.R. 126, 16 I.C. 488. Where an appeal is presented after the period of limitation on account of the wrong information given by the pleader's clerk as to the re-opening of the Court after holidays, the appellant is not entitled to the benefit of this section as the information was given recklessly and without due care and attention—*Krishna* v. *Trimbak*, I.L.R. (1938) Nag. 409, A.I.R. 1938 Nag. 156.

Fraud of clerk:—There is a great deal of difference between the case of the period of limitation expiring due to negligence and the case of limitation having expired due to deliberate *fraud* on the part of the pleader's clerk. In the latter case, sec. 5 may be used for extending the time. Where the appeal is not presented in time, owing to a deliberate fraud of the counsel's clerk, and there is no fault on the part of the client who has paid everything he had to pay for the expenses, nor any fault on the part of the counsel who trusted his clerk, there is sufficient reason for an extension of time under this section—*Allah Wadhaya* v. *Haji Mahammad*, 36 P.L.R. 284, A.I.R. 1934 Lah. 986 (987).

65. Negligence of appellant:—Where an appellant obtained an uncertified copy of the decree in which the date of the decree was wrongly given, and the appellant's pleader was misled thereby, it was held that there was no sufficient cause of delay in filing an appeal from the decree—*Karachi Trading Co.* v. *Tejbhandas*, 8 S.L.R. 235, 28 I.C. 82. Where an appellant filed an appeal without a copy of the right decree and it was proved that the whole procedure on the appellant's part was slack to the utmost, it was held that this section did not apply—*Gurprasad* v. *Ram Samajo*, 13 A.L.J. 1101, 31 I.C. 876. Where a copy of the decree, which was in existence at the time of preferring the appeal, was not attached to the memorandum of appeal, *held* that the memorandum was bad, and as no sufficient cause was shown for extending the time under this section, the appeal was dismissed—*Hem Chandra* v. *Jadab Chandra*, 16 C.L.J. 116, 17 I.C. 99 (100). So also, the presentation of a second appeal without a copy of the first Court's judgment is not a proper presentation and time cannot be extended for filing it—*Rajan* v. *Kuria*, 4 Lah.L.J. 475, 39 P.L.R. 1922, A.I.R. 1923 Lah. 95; *Lakhma Das* v. *Mehr Chand*, 73 I.C. 910, A.I.R.

1923 Lah. 144. Where the only reason for delay in filing an appeal was that certain necessary papers were given to a counsel who took no steps for filing the appeal and returned them after the period of limitation had expired, and it was not shown that the appellant took any steps to engage the services of another pleader before the expiry of the period of limitation, it was held that there was no sufficient cause for the delay—*Dewan* v. *Buddhu*, 12 A.L.J. 837, 25 I.C. 30. Where the appeal was field late on account of the delay in getting copies, and the delay was due to the fact that the appellant gave money to the pleader's clerk for getting the copies but afterwards took no steps to enquire of his pleader for the same, *held* that there was no sufficient cause to excuse the delay—*Mahtab* v. *Birhma*, 21 A.L.J. 817, 75 I.C. 254.

An appellant who had waited for applying to obtain the necessary copies up to the last day of limitation, when the Court happened to be closed for some holiday, and who was consequently obliged to apply for them after the period for appeal had expired, is not entitled to get either the indulgence under this section or the benefit of section 12—*Guran* v. *Bindraban*, 79 P.R. 1916, 35 I.C. 233 After the arguments in a case were concluded, but before judgment was pronounced, the defendant died. The case was decided against the defendant His sons, one of whom was an adult, and the other a minor represented by his mother as guardian, presented an appeal 50 days beyond time. It was held that there was no sufficient reason to extend the delay, in as much as the adult son (who was an educated young man) and the mother (who was well able to manage her affairs) who were concerned to prosecute the litigation in their own interests and in the interests of the infant, were grossly negligent, remiss and careless in not prosecuting the appeal in time—*Babu Ganesh* v. *Sitaram*, 41 Bom. 15 (20).

When the defendant died in 1918, and the plaintiff applied to have the name of the legal representative of the defendant placed on the record two years after, on the ground that he was ignorant of the defendant's death, *held* that the plaintiff had failed to show sufficient cause for the delay, for if he had shown the smallest diligence in prosecuting the suit, he must have discovered the fact of the defendant's death much earlier—*Sarat Chandra* v. *Maihar Stone and Lime Co. Ltd*, 49 Cal. 62 (at p. 66). Where the parties live in the same village and there is delay in applying to add the legal representatives on the death of one of the parties, the benefit of this section should not be extended—*Ekadush* v. *Jamuna*, 1940 A.W.R. (B.R.) 128, 1940 O.A. 779.

Where the appellant knows at the time when he files the appeal that a further sum is due on account of the Court-fees it is his business to ascertain the date fixed for depositing the deficit Court-fee and not the duty of the Court to communicate the order. The omission of the Court to communicate its order to the pleader concerned does not entitle the appellant to any indulgence under this section—*Haripada* v. *Sailabala*, 71 C.L.J. 540, A.I.R. 1940 Cal 530 Where the clear provisions of the Court Fees Act were brought to the notice of the party's counsel, and he was asked to make up the deficient Court-fees, but the counsel and the party were both grossly negligent in not paying the deficit Court-fees within the period of limitation, *held* that they were not entitled to any extension of time—*Puran Chand* v. *Emp.*, 27 P.L.R. 91, 92 I.C. 991, A.I.R. 1926 Lah. 343.

Where the appellant relied upon an unauthorised publication known as the 'Legal Diary' and being misled by it as to the duration of the Chief Court's vacation presented his appeal beyond the period of limitation, it was held that the case shown was not sufficient, as the appellant had not acted with due care and attention—*Jai Dial* v. *Amar*, 1917 P.W.R. 27, 37 I.C. 628.

Where due to the laches of the appellant an appeal has been filed without impleading all the necessary parties and an application is made after the period of limitation for impleading them as parties, this section has no application. The reason is that this section contemplates an appeal that is to be instituted and not an appeal which has already been instituted—*Shangara* v. *Imam*, 42 P.L.R. 355, A.I.R. 1940 Lah. 314. See also *Abdul* v. *Banwari*, 1941 A.M.L.J. 57.

Where on the last date of limitation a person though he missed the earliest train fails to avail himself of the time available after he reached the place and presents an appeal after Court hours is not entitled to indulgence of the Court as he has not been prompt in seeking the relief—*Baldeo* v. *Teija*, 1942 O.W.N. 475, A.I.R. 1942 Oudh. 488.

A party who is negligent in complying with the orders of the Court is not entitled to get the benefit of the provisions of this section—*Abdul* v. *Khalik*, 47 P.L.R. 193, A.I.R. 1945 Lah. 233.

66. Negligence of agents or servants:—Negligence of servants is not a sufficient cause. If parties choose to entrust legal affairs (*e.g.*, filing of appeal) to their servants, they must take the consequences of any remissness or negligence which may be exhibited on the part of their servants, and they cannot come to Court after the period of limitation and claim indulgence under this section—*Seth Jahar* v. *Pritchard*, 4 P.L.J. 381, 52 I.C. 225; *Jaleswar* v. *Ram Hari*, 55 I.C. 17 (Pat.); *Mg. Naw* v. *Somasundaram*, 2 Rang. 655, A.I.R. 1925 Rang. 187, 85 I.C. 324.

Where an appellant entrusted all business connected with the filing of his appeal to an unqualified man who made no attempt to take professional advice, which if taken would have avoided the delay in the presentation of the appeal, *held* that it was not a sufficient cause under this section—*Krishnaswami* v. *Ramaswami*, 19 M.L.J. 209, 1 I.C. 73.

Omission by typist to implead the legal representative in the memorandum of appeal is not a good ground for allowing the benefit of this section—*Mazharus* v. *Azizuddin*, 1948 R.D. 410.

67. Notice of delivery of judgment not given to parties:—An application for extension of time for appeal was made on the ground that though arguments were heard on the 15th March. judgment was not delivered until 17th April, and no notice of the delivery of judgment was given to the parties, and it was not until July that the applicant heard that judgment had been delivered. *Held* that in the absence of any indication to the contrary, it must be presumed that the notice required under O. 20, Rule 1, C. P. Code, was given. The application was refused—*Habibullah* v. *Banarsi Das*, 22 O.C. 379, 55 I.C. 837 (838). But in *Ma Me Thin* v. *Maung San Lun*, 8 Bur.L.T. 99, 27 I.C. 784, no such presumption was made, and the negligence of the Court in not giving notice of delivery of judgment was held to be a sufficient cause for extension of time for the appeal.

68. Other cases:—Where the appellant had prosecuted two litigations, the fact that he had preferred an appeal in one case and awaited its result does not entitle him to an extension of time for filing an appeal in the other case—*Dund Bahadur* v. *Deonandan*, 17 C.L.J. 596, 20 I.C. 513 (514); *Husaini Begum* v. *Collector*, 9 All. 11 (16) (per Mahmud J.). But see *Tirath Ram* v. *Municipal Committee, Amritsar*, 27 P.L.R. 841, 96 I.C. 416, A.I.R. 1926 Lah. 101. Two suits were brought at the same time by the executors raising some questions of construction in respect of the same will. Similar decisions were passed in both the suits. On appeal by a defendant in one suit the decree of the Court of first instance was reversed. Thereupon

the plaintiffs applied for leave to appeal in the second suit, although the time limited for appealing had expired; the Court held that no sufficient cause was shown for the plaintiff's delay; the decision in one suit would not abide by the decision of the other, as the suits were independent of each other—*Thucker* v. *Canji*, 14 Bom. 355. The plaintiff brought a suit for partition and possession of his share against his co-sharer Z as well as the vendees of the co-sharer. The first Court gave him a decree. Two appeals (Nos. 19 and 20) were filed against that decree, one (No. 20) by Z, and the other (No. 19) by the vendees. The lower Appellate Court accepted the appeals, dismissed the plaintiff's suit, and passed two connected judgments (one of which referred to the other) and two decrees. The plaintiff-appellant preferred a second appeal to the High Court, and filed copies of judgment and decree of Appeal No. 20, but did not file a copy of decree in Appeal No. 19. On preliminary objection by the respondents the appellant prayed for time for filing the copy of the decree in Appeal No. 19. *Held* that no sufficient cause has been shown for extending the time for filing the copy—*Muhammad Din* v. *Zebunnissa*, 3 Lah. 215, A.I.R. 1922 Lah. 390, 77 IC. 541.

The fact that a person was not aware of a change of rule which had been given ample publicity is no ground for excusing delay—*Gopal* v. *Wallabhdas*, A.I.R. 1925 Nag. 193, 75 I.C. 878.

Where an application to set aside an *ex parte* decree was dismissed on the merits, as the decree had not been passed *ex parte*, the period occupied in the proceeding would not be deducted in computing the period of limitation for an appeal against the decree. The petitioner having failed in his application could not be allowed to fall back upon the remedy by way of appeal, which was open to him at the time when the decree was passed, and of which he did not choose to avail himself, and that there was no sufficient cause under this section for filing the appeal out of time—*Ardha Chandra* v. *Matangini*, 23 Cal. 325 (327); *Rajendra* v. *Kamal Krishna*, 59 Cal. 1057, 36 C.W.N. 352 (353), 138 I.C. 748, A.I.R. 1932 Cal. 588. See also *Ko Tha Lin* v. *Ko Hla*, 8 Rang. 168, A.I.R. 1930 Rang. 41 (42), 124 I.C. 266. The fact that an appellant appealing from an *ex parte* decree against him took proceedings both in the trial Court and in the appellate Court to set aside the *ex parte* decree is not "sufficient cause" within the meaning of this section—*Jotiba* v. *Ramappa*, 40 Bom.L.R. 957, A.I.R. 1938 Bom. 459 But the time taken in prosecuting an application for setting aside an *ex parte* order certifying an adjustment of a decree can be deducted in computing the period of limitation for appealing from the *ex parte* order—*Ghulam Qazam* v. *Qutbuddin*, 30 P.L.R. 512, A.I.R. 1930 Lah. 113 (114), 115 I.C. 467.

If the delay be caused by the appellant's desire to file his appeal on a "lucky day," *held* that that would be no sufficent cause—*Kichilappa* v. *Ramanujan*, 25 Mad. 166 (177). The goodness or otherwise of a case, and a mistake in calculating the time allowed for an appeal do not in themselves constitute a sufficient cause—*Gharib* v *Pohlo Mal*, 92 P.R. 1886. The fact that the subject matter of the litigation is a property of considerable value is not at all a good reason for extension of the time for appeal—*Dund Bahadur* v. *Deo Nandan*, 17 C.L.J. 596, 20 I.C. 513 (515).

The applicant presented an application for review but the Munsarim declared that it was insufficiently stamped. Thereupon a dispute arose between the Government Pleader and the Munsarim as to whether or not the stamp was sufficient. Afterwards the deficiency in stamps was paid, but after the period limitation. *Held* that the dispute between the Government Pleader and the Munsarim as to the quantum of Court-fee was no sufficient cause for excusing the delay. The deficiency should

have been made good as soon as the Munsarim pointed it out—*Munro* v. *Cawnpore Municipal Board*, 12 All. 57 (60).

MISCELLANEOUS:—

69. Withdrawal of appeal—Cross-objection:—The withdrawal of an appeal, by which the respondent lost opportunity under the old C. P. Code (1882) of having his cross-objection heard, afforded no sufficient reason for enlarging the time for his preferring a regular appeal as regards his cross-objection—*Chudasama* v. *Ishwargar*, 16 Bom. 249; *Jafar* v. *Ranjit*, 17 All. 518; but where it appeared that the respondents would have appealed but for the fact that an appeal by the appellant was already on the file, it was held that the respondents showed sufficient cause for not filing their appeal within time—*Hargovindas* v. *Jadavahoo*, 23 Bom. 692; *Gour Hari* v. *Premnath*, 9 Cal. 738.

But under the Civil Procedure Code of 1908, it is provided in O. XLI, r. 22 (4) that if the original appeal is withdrawn or dismissed for default, the memorandum of objections filed by the respondents may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit. Even where the cross-objections filed by one party were dismissed, without going into the merits of the case, on the ground of their being filed after the dismissal of the appeal, and an appeal was filed by him on the same points as the cross-objections, it was held that this appeal was not barred—*Parbhu Dayal* v. *Murlidhar*, 22 A.L.J. 365, A.I.R. 1924 All. 867 (868), 78 I.C. 677.

70. Ex parte admission of time-barred appeal:—An *ex parte* order admitting a time-barred appeal is subject to reconsideration at the hearing of the appeal at the respondent's instance; because an order of admission of a time-barred appeal made in the absence of the respondent and without notice to him purports to deprive him of a valuable right and puts in peril the finality of the decision which was passed in his favour, and if he is precluded from questioning its propriety, it would amount to a denial of justice. Consequently, it is the duty of the Appellate Court to reconsider the question at the hearing of the appeal whether the appellant had sufficient cause for presenting the appeal out of time—*Krishnaswami* v. *Ramaswami*, 41 Mad. 412 (416, 417) (P.C.), affirming 23 M.L.J. 219; *Moshaulla* v. *Ahmedulla*, 13 Cal. 78 (79); *Sarat* v. *Saraswati*, 34 Cal. 216 (221); *Dund Bahadur* v. *Deonandan*, 20 I.C. 513 (514), 17 C.L.J. 596; *Gati* v. *Rachla*, 13 A.L.J. 635, 29 I.C. 1003 (1004); *Saku* v. *Maroti*, 8 N.L.R. 50. 15 I.C. 562 (563)); *Malli Reddy* v. *Peddakka*, 27 M.L.J. 147, 25 I.C. 746; *Venkatrayudu*, v. *Nagadu*, 9 Mad. 450; *Ravji Keshav* v. *Krishna Rao*, 38 Bom. 613; *Mulna Amad* v. *Krishnaji Ganesh*, 14 Bom. 594 (596); *Rajamal* v. *C. Parthasarathi*, A.I.R. 1936 Mad. 600. The *ex parte* order may be reconsidered either by the Court which admitted the appeal or by the Court to which the appeal has been transferred—*Wahid* v. *Hagdod*, 1897 A.W.N. 15; *Chunder Dass* v. *Boshoon Lal*, 8 Cal. 251; *Krishna* v. *Subraya*, 21 Mad. 228; *Mulna* v. *Krishnaji*, 14 Bom. 594 (596); or by the successor of the Judge who admitted the time-barred appeal—*Malli Reddi* v. *Peddakka*, supra; *Saku* v. *Maroti*, supra. A Division Bench of the High Court hearing an appeal is competent to set aside an *ex parte* order of a single Judge of the High Court admitting an appeal beyond time—*Hussaini Begum* v. *Collector*, 9 All. 11 (15); *Husaini Begum* v. *Collector*, 9 All. 655 (658); *Umed Ali* v. *Municipal Committee*, 2 Lah. 1 (4); *Krishnasami* v. *Ramasami*, 41 Mad. 412 (416) (P.C.).

In the Privy Council case cited above (41 Mad. 412 at p. 417) their Lordships of the Judicial Committee, while holding that an *exparte* order admitting a time-barred

appeal is open to reconsideration at the respondent's instance at the time of hearing of the appeal, yet observed that the question of limitation should not however be left open till such a late stage as the hearing of the appeal, although this has been hitherto the usage in India; because it may lead to a needless expenditure of money and unprofitable waste of time, and thus create elements of considerable embarrassment when the Court comes to decide on the question of delay. The Indian Courts should adopt a procedure which will secure, at the stage of admission, the final determination (after due notice to all parties) of any question of limitation affecting the competency of an appeal. This view has also been expressed in *Sunderabai* v. *Collector*, 43 Bom. 376 (383) (P.C.) where their Lordships suggested that when a memorandum of appeal is presented beyond the period of limitation, the proper order which a Judge should endorse upon it would be to the following effect: "Presented for admission on the (date when the memorandum of appeal was handed into the office of his Court). Let notice go to the respondents (date of order)"

Where an appeal which was filed out of time was admitted subject to objections, but the respondent was *not made aware* of the order nor had he any intimation that the appeal had been admitted out of time and no question was raised at the time of hearing as to the legality or propriety of the order, and the appeal was allowed on the merits by the lower Appellate Court, *held* that the admission of the appeal subject to objections by the Lower Appellate Court was irregular, and the respondent could raise the question of limitation in second appeal—*Abdul Kasem* v. *Chaturbhuj*, 3 P.L.T. 110, 64 I.C. 55, A.I.R. 1922 Pat. 47 (48). If an appeal presented out of time is admitted by the Appellate Court *ex parte*, the respondent *as soon as* he is served with notice of the appeal ought to apply by motion for dismissal of the appeal on the ground of delay, and must not wait till the date of hearing. If the respondent sleeps over his right and allows the appellant to incur expenses in bringing the case for hearing, he cannot be allowed at the hearing of the appeal to raise a preliminary objection that the appeal is time-barred—*Murugappa* v. *Thayammal*, 31 M.L.T. 456, 70 I.C. 827, A.I.R. 1923 Mad. 82 (83).

Where a Judge excused the delay in the filing of an appeal without notice to the respondent, and when the appeal came on for hearing, the latter did not object to the order in the course of his argument, the final decision in the appeal cannot be attacked in revision on the ground of delay in filing the appeal—*Bharat* v. *Basant*, 80 I.C. 617, A I.R. 1925 Oudh 148. Where an application for the admission of an appeal which was filed out of time by 2 days, was heard *ex parte* before a Division Bench of the High Court and admitted, it was held that though the order was not conclusive on the respondent and he was entitled to object to the admission of the appeal at a later stage, the order of the Divis on Bench admitting the appeal should not be discharged when no facts which were not before the Bench were urged on behalf of the respondent—*Bishen Dat* v. *Nandan*, 12 C.W.N. 25; *Saku* v. *Maroti*, 8 N.L.R. 50, 15 I.C. 562 (563); especially when the respondent's objection comes before a Judge other than the Judge who admitted the time-barred appeal—*Saku* v. *Maroti*, supra.

It was held in *Jhotee* v. *Omesh*, 5 Cal. 1, that if the District Judge, being satisfied that the appellant had sufficient cause for not being able to file an appeal within time, admitted it, a *Subordinate Judge* to whom the appeal had been transferred for disposal, could not cancel the order. But it has been held in later decisions that this view is not correct, because even if the District Judge upon the representation of the appellant be satisfied that there was sufficient cause, yet the other side would be at liberty at the hearing of the appeal, either before the District Judge or before the Subordinate Judge (if the appeal is transferred to the latter) to show that in fact the representation of the appellant was not true and that really there was no sufficient case for admitting the

appeal beyond time—*Mulna Ahmad* v. *Krishnaji*, 14 Bom. 594 (596, 597); *Bismadeo* v *Sitanath*, 40 Cal. 259; *Mamick* v. *Naibulla*, 2 C.W.N. 461; *Gaya Charan* v. *Jagan Nath*, A.I.R. 1936 Oudh 9.

An order granting leave for filing an appeal under clause 15 of the Letters Patent on an application filed after the period of limitation for filing such appeal, extending the time and allowing such an appeal to be filed and registered without notice to the respondent is irregular and should be vacated—*Bal Chand* v. *Bejoy Chand*, 46 C.W.N. 131, I.L.R. (1942) 1 Cal. 403, 75 C.L.J. 419, A.I.R. 1942 Cal. 606.

71. Interference by High Court:—The High Court has power in second appeal to look into the grounds upon which the Lower Appellate Court has admitted an appeal beyond time—*Chunder Dass* v. *Boshoon Lall*, 8 Cal. 251. It is the duty of the second Appellate Court to see whether the duty cast upon the Judge of the Lower Appellate Court as regards determination of the question whether the appeal is within limitation has been properly discharged by him, and to interfere if by a wrong, improper and judicially unsound exercise of discretion under this section he has admitted an appeal which was barred by limitation—*Bechi* v. *Ahsanullah*, 12 All. 461 (483). The superior Court has power to interfere with a wrong exercise of discretion by the subordinate Courts both in its revisional or in its appellate jurisdiction—*Nrisingha* v. *Trigunand*, 17 Pat. 507, 1938 P.W.N. 818, A.I.R. 1938 Pat. 413. An order rejecting an application under this section is a "case decided." An order of the appellate Court disposing an application under this section in chambers without notice to the applicant constitute both a material irregularity and a breach of a well-established provision of law—*Hafiz* v. *Shafaat*, 1951 A.L.J. 237, 1951 A.W.R. 268, A.I.R. 1951 All. 614.

Where the discretion is exercised in a capricious or arbitrary manner the High Court can interfere—*Bhimrao* v. *Tyyappa*, 31 Bom. 33; *Poti Prasad* v. *Chuni Lal*, 106 P.R. 1885; *Gharib* v. *Pohlo*, 92 P.R. 1886; *Parvati* v. *Ganpati*, 23 Bom. 513; or where discretion has not been exercised at all –*Ram* v. *Debi*, 1945 O.W.N. 1, A.I.R. 1945 Oudh 94. Thus, where the appeal to the lower Appellate Court had been presented beyond time, but of the several appellants one only applied to have the delay excused on grounds personal to himself, with the result that the lower Appellate Court admitted the appeal of all the appellants and varied the decree of the first Court, the High Court interfered and reversed the lower Appellate Court's decree, because there was no sufficient cause on which the delay of *all the* appellants could be excused—*Vishwanath* v. *Vasudev*, 25 Bom. 699. Where the lower Court has exercised its discretion under this section on the strength of a misleading report, and has set up a rigid law of limitation in the exercise of that discretion, the High Court will interfere—*Narain Singh* v. *Bikram*, 8 A.L.J. 793, 11 I.C. 814. Where a Judge who purports to exercise the discretion under this section does so under the view that there is no general rule when in fact there is one, he has misdirected himself as to the law to be applied to the case; he has not exercised a judicial discretion and the superior Court must either remit the case or exercise the discretion itself—*Brij Indar Singh* v. *Kanshi Ram*, 45 Cal. 94 (P.C.). Where the lower Appellate Court has failed to exercise its discretion according to this section and has not considered the question whether there was sufficient cause for extending the period, the High Court may interfere and consider the question in second appeal, and if necessary allow a time-barred appeal—*Gharib* v. *Pohlo Mal*, 92 P.R. 1886; *Nand Singh* v. *Gulli*, 77 P.R. 1917, 42 I.C. 343; *Sripat* v. *Hubdar*, 2 O.W.N. 673, A.I.R. 1925 Oudh 643, 90 I.C. 115; *Lal Bhan Partab* v. *Rajab*, 6 O.W.N. 1035, A.I.R. 1930 Oudh 184. If the lower Court misdirects on a point of law and refuses to extend the time upon the findings arrived at, it will be set aside by the superior

Court—*Nrisingha* v. *Trigunand*, 17 Pat. 507, 1938 P.W.N. 818, A.I.R. 1938 Pat. 413; *Aruna* v. *Karam*, 48 P.L.R. 325 A.I.R. 1947 Lah. 76.

But where the Lower Court after considering all the circumstances of the case has exercised its dicretion one way or the other, and has come to the conclusion that sufficient cause has or has not been established for not filing an appeal within time, the High Court in second appeal will not interfere—*Debi Charan* v. *Mehdi*, 20 C.W.N. 1303, 1 P L.J. 485 (487); *Fatima* v. *Hansi*, 9 All. 244; *Bechi* v. *Ahsanullah*, 12 All. 461 (485) (F.B.); *Hardhan* v. *Mam Chand*, 92 P.R. 1916, 36 I.C. 614; *Tulsa Kunwar* v. *Gajraj*, 25 All. 71; *Hamid Ali* v. *Gayadin*, 26 All. 327, *Rama Shanker* v. *Janti*, 1930 A.L.J. 1256, 130 I.C. 840, A.I.R. 1931 All. 28; *Sripat* v. *Hubdar*, supra; *Abdul Kasim* v. *Chaturbhuj*, 6 P.L.J. 444, 64 I.C. 55; *Ram Rup* v. *Naik Ram*, 91 I.C. 865, A.I.R. 1926 All. 252; *Malak Md. Khan* v. *Het Ram*, 28 P.L.R. 257, 103 I.C. 90; *Ram* v. *Debi*, 1945 O W.N. 1, A.I.R. 1945 Oudh 94; *Gaya Prosad* v. *Kamlakar*, 1948 R.D. 420; *Sambhu* v. *Gobindapriya*, A.I R. 1949 Assam 24.

A mere difference in view as to the mode in which the discretion ought to have been exercised under this section by the lower Appellate Court, is in itself no ground for interference by the High Court; but where facts which are material for the purpose of enabling the lower Appellate Court to exercise the discretion under this section have not been considered, the exercise of discretion is judicially unsound and the High Court can interfere—*Kichilappa* v. *Ramanujam*, 25 Mad. 166; *Hardhan* v. *Mamchand*, 92 P.R. 1916, 36 I.C. 614. Before the High Court interferes, it ought to be satisfied that the exercise of the discretion by the lower Court was judicially unsound. The test is, has the discretion been exercised after appreciation and consideration of all the facts which are material for the purpose of enabling the Judge to exercise a judicial discretion, and after the application of the right principle to these facts?—*Kichilappa* v. *Ramanujam*, 25 Mad. 166. The High Court ought not to interfere with the discretion exercised by the Court below merely because upon the material before it, it might have arrived at a different conclusion. But where the lower Appellate Court admitted a time-barred appeal subject to objections by the respondent, but no notice was afterwards given to the respondents as to the admission of the appeal out of time, the High Court would interfere—*Abdul Kasem* v. *Chaturbhuj*, 3 P.L T. 110, 64 I.C. 55, A.I.R. 1922 Pat. 47 (48). Where the lower Appellate Court has in the exercise of its judicial discretion refused to excuse the delay in the presentation of an appeal, the High Court would not interfere in second appeal with the exercise of that discretion even though it might have taken another view, had it been the lower Appellate Court—*Ahmad Hussain* v. *Fasihullah*, 45 All. 432, 21 A.L.J. 319, A.I.R. 1923 All. 455, 74 I.C. 1039. In a Madras case, where the lower Appellate Court had admitted a time-barred criminal appeal and acquitted the accused, without being satisfied that the appellant had sufficient cause for not preferring the appeal in time, but there had been no gross miscarriage of justice which ought to be remedied, the High Court refused to interfere—*Janakiramayya* v. *Brahmayya*, 48 M.L.J. 457, A.I.R. 1925 Mad. 709, 88 I.C. 278.

72. "Explanation":—An appellant who is misled by a practice which had hitherto been followed by the lower Courts but which had recently been held to be wrong, is entitled to an extension of time under this section—*Ram Asray Singh* v. *Sheo Nandan*, 1 P.L.J. 573 (575); *Nibaran* v. *Martin and Co.*, 32 C.L.J. 127; *Jotindra* v. *Lodna Colliery Co.*, 6 P.L.J. 350 (F.B.). Where the appellant has been misled by the rules of the Court followed for a long time, the provisions of this section can be invoked—*Bheemasena* v. *Venugopal*, 48 Mad. 631, 48 M L.J. 384, A.I.R. 1925 Mad. 725, 88 I.C. 443. So also where the appellant was misled in not preferring an

appeal within the period allowed by law by the practice of the Court in computing the period of limitation prescribed for appeals, the appellant must be regarded as having shown sufficient cause for not preferring the appeal within the period allowed by law—*G. G. in Council* v. *Jesraj*, A.I.R. 1950 Assam 83. But although the appellant may be excused on the ground that he was misled by the past practice of the Court and thus made a mistake of law, he cannot be excused if he makes an undue delay (*e.g.*, 14 months) in filing appeal after he becomes aware of the mistake—*Secy. of State* v. *Tirath Ram*, 9 Lah. 76, A.I.R. 1928 Lah. 216 (219), 104 I.C. 281. Where the applicant was misled by a Full Bench judgment into an erroneous belief, and thereby made a wrong calculation of the period of limitation for his application, *held* that there was sufficient cause for the delay in filing his application—*Harish Chandra* v. *Chandpur Co. Ld.*, 39 Cal. 766 (773); *Mukand Rao* v. *Ragho*, 102 I.C. 123, A.I.R. 1927 Nag. 247.

Legal disability.

6. (1) Where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the first schedule.

(2) Where such person is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or where, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

(3) Where the disability continues up to the death of such person, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

(4) Where such representative is at the date of the death affected by any such disability, the rules contained in sub-sections (1) and (2) shall apply.

Illustrations.

(*a*) The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.

(*b*) A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.

(*c*) A right to sue accrues to X during his minority. X dies before attaining majority, and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.

73. Principle:—"The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right and that they are not capable of taking notice of the rules of law so as to be able to apply them to their advantage. Hence, by the common law, infants were not bound for want of claim and entry within a year and a day, nor are they bound by a fine and five years' non-claim, nor by statutes of limitation, provided they prosecute their right within the time allowed by the statute after the impediment is removed"—Bacon's Abridgment, cited in 37 Mad. 186 (at p. 190). The general principle of law is that time does not run against a minor—*Moro* v. *Visaji*, 16 Bom. 536 (537).

74. Scope of section:—Section 7 of the old Act applied to the case of a person entitled to make *any* application, but now this section has been limited to the case of a person entitled to make only an application for the execution of a decree.

But it was held in an earlier Calcutta case that a right preserved by the old Act would not be taken away by the new one. Thus, under the Act of 1877, the minor judgment-debtor could on attaining majority apply to set aside a sale. If such right accrued to a minor in 1903 before the Limitation Act of 1908 came into force, it could not be taken away by the present Act, that being a privilege which has been preserved by sec. 6 (*c*) of the General Clauses Act, and the application made in January 1909 was not barred—*Fazal Karim* v. *Annada*, 15 C.W.N. 845 (847), 11 I.C. 401. But the correctness of this ruling has been doubted in a later Calcutta case where their Lordships observed that no one has a vested right in any course of procedure, that an application made after the present Act came into force would be governed by the present Act and not by the old one that if in spite of the passing of the new Act the applicant had enough time to apply under the new Act but he did not avail himself of the opportunity and chose to wait longer under the impression that the old Act applied, the application must be held as time-barred—*Khondkar Mahomed* v. *Chandra Kumar*, 56 Cal. 1117, 33 C.W.N. 519 (524, 525), 49 C.L.J. 362 (following *Soni Ram* v. *Kanhaiya Lal*, 35 All. 227 P.C.).

This section will not grant an indulgence to a minor entitled to prefer an *appeal*: it provides only for *suits* or *applications* for execution of decrees.

An application to file an award does not become a suit by the provisions of para. 20 (2) of Schedule II of the C. P. Code, and hence the applicant cannot claim the benefit of this section—*Ma Theiru Tin* v. *Maung Ba Than*, 1 Rang. 256, A.I.R. 1923 Rang. 226, 76 I.C. 493; *Panchimondal* v. *Genamander*, A.I.R. 1936 Pat. 161.

Again, this section is limited to applications *for execution of decrees*: it is not applicable to an application under O. XXII, r 1, C. P. Code for bringing the legal representatives of a deceased appellant on record, or to an application to set aside an order of abatement—*Ma Min Thing* v. *Maung Po Win*, 10 Bur.L.T. 27, 35 I.C. 438. It does not apply to applications for seting aside *ex parte decrees*—*Chidambaram* v. *Karuppan*, 35 Mad. 678, 8 I.C. 543; *Manohar* v. *Sadiqa*, 101 P.R. 1916, 37 I.C. 292 (294). Section 6 does not cover a case of an application under Or. 21, r. 90, C. P. Code to set aside a sale held in execution of a decree—*Bholanath* v. *Mt. Sayedatunnissa*, A.I.R. 1935 Pat. 450, 159 I.C. 253; *Govinda* v. *Sankaralinga*, (1942) 2 M.L.J. 558, A.I.R. 1943 Mad. 55, 1942 M.W.N. 660. Nor does it apply to an application for the re-admission of an appeal under Or. 41, r. 10 of the C. P. Code—*Somubai* v. *Shivji Rao*, 45 Bom. 646, 23 Bom.L.R. 110, 60 I.C. 919.

An application to obtain a final decree for sale in a mortgage-suit is not an application for execution of the preliminary decree for sale, but is a proceeding in

the suit for enforcement of the mortgage. Sec. 6 does not apply to such an application —*Pulin Chandra* v. *Muzaffar Ahmed*, 37 C.W.N. 184 (185), 144 I.C. 768, A.I.R. 1933 Cal. 508; *Govindnaik* v. *Basawannewa*, I.L.R. (1941) Bom. 435, 43 Bom.L.R. 329, A.I.R. 1941 Bom. 203; *Vinayakrao* v. *Baijnath*, 15 N.L.R. 36, 48 I.C. 934; *Nizamuddin* v. *Bohra Bhimsen*, 40 All. 203 (205), 16 A.L.J. 85, 48 I.C. 870. Similarly, an application for a supplementary decree under Or. 34, r. 6 is not an application for execution, and does not fall within the provisions of this section—*Khondkar Mahomed* v. *Chandra Kumar*, 56 Cal. 1117, 33 C.W.N. 519 (521), 49 C.L.J. 362.

An application for leave to appeal to the Privy Council was neither governed by sec. 7 of the Old Act (*Thurai* v. *Jainalabdeen*, 18 Mad. 484, 485), nor falls under the present section.

An application for *restitution* under section 144, C. P. Code, is virtually an application for execution of the appellate decree amending the decree of the first Court, and therefore falls within the purview of this section. This is an enabling section to enable persons under disability to exercise their rights within a certain time, and it should not be construed so narrowly as to exclude an application for restitution —*Kurgodigouda* v. *Ningangouda*, 41 Bom. 625 (629), 19 Bom.L R. 638; *Sant Sahai* v. *Chhutai*, 3 O.W.N 65, 92 I.C. 23, A.I.R. 1926 Oudh 199.

75. Application of section:—This section applies only to cases dealt with by the Act itself *i.e.*, to those suits and applications for execution of decrees which are mentioned in the First Schedule. It is not applicable to cases for which a period of limitation is prescribed by other Acts—*Kartick* v. *Bata*, A.I.R. 1938 Cal. 25. Thus the provisions of this section do not apply to suits instituted under the Indian Registration Act—*Veeramma* v. *Abbiah*, 18 Mad. 99 (F.B.); or Bengal Rent Act, VIII of 1869—*Girija Nath* v. *Patani*, 17 Cal. 263; nor to suits specified in Sch. III of the Bengal Tenancy Act—*Akhoy Kumar* v. *Bijoy Chand*, 29 Cal. 813 (822). Sec. 211 of the Madras Estates Land Act (I of 1908) provides that sec. 6 of the Limitation Act shall not apply to suits under that Act. So also the benefit of this section cannot be claimed in a suit under the U. P. Tenancy Act—*Dharam* v. *Qabool*, 1949 R.D. 169; *Mahomed Ishaq* v. *Chawthi*, 1949 R D 400. The provisions of this section do not apply to a case where a decree is barred by section 48 of the Civil Procedure Code, 1908—*Prem Nath* v. *Chatarpal*, 37 All. 638 (639), 13 A L.J. 826; *Chatarpalman* v. *Prem Nath*, 13 A.L J. 166, 27 I.C. 865; *Ramana Reddi* v. *Babu Reddi*, 37 Mad. 186 (189), 24 M.L.J. 96, 18 I C. 586; *Jhandu* v. *Mohan Lal*, 128 P R. 1894; *Zahuruddin* v. *Amtur*, 46 P.L.R. 26, A I.R. 1944 Lah. 106; *Kartik* v. *Batakrishna*, I.L.R. (1937) 2 Cal. 373, 65 C L.J. 403, A.I.R. 1938 Cal. 25; *Yadoras* v. *Gobindrao*, I L.R. (1939) Nag. 559, 1939 N.L.J. 387, A.I.R. 1939 Nag 245; *Zalikhan* v. *Ram Prasad*, 20 Pat. 1, A.I.R. 1941 Pat. 45. In *Lolit Mohun* v. *Janoky*, 20 Cal. 714 (716) the Calcutta High Court d d not express any opinion on the point. But the Bombay High Court holds that though section 6 of the Limitation Act applies only to cases dealt with by the Act itself a d as such does not apply to cases under the C. P. Code, still the provisions of the C. P. Code must be deemed to be subject to the general principle of law as to the disabilities of minors, *viz.*, that time does not run against a minor. Therefore an application for execution, though barred under sec. 48, C. P. Code, is in time if made within three years after the minor attains majority—*Moro* v. *Visaji*, 16 Bom. 536 (537).

This section applies only to cases in which a period of limitation has been prescribed by law, and not to the case of an order made by a Court for the payment of money by a certain time—*Prema* v. *Jawahir*, 31 P.R. 1884.

Person suing in representative capacity:—The benefit of this section can be availed of by a person suing in a representative capacity, *e.g.*, a *shebait* of an idol, The right of suit is vested in the *shebait*, not in idol; therefore, if, at the time when the cause of action for a suit for recovery of possession of property dedicated to an idol accrued, the *shebait* was a minor, he could bring such suit within three years after attaining majority—*Jagadindra* v. *Hemanta*, 32 Cal. 129 (141) (P.C.), 8 C.W.N. 809. If a shebait is a minor he is entitled to exemption of the period of his minority under this section when he brings a suit in his own name. This principle also applies when the shebait on attaining majority brings this suit as the next friend of the deity—*Gopal Jew* v. *Baldeo*, 51 C.W.N. 383. So the possession of debuttar property under a purchase made during the minority of a shebait, cannot be adverse to the idol until the minor shebait attains majority—*Amode* v. *Girija*, 76 C.L.J. 363, A.I.R. 1944 Cal. 157. It has been held in *Venkateswara* v. *Venkatesa*, I.L.R. (1941) Mad. 599, (1941) 1 M.L.J. 644, A.I.R. 1941 Mad. 449 that in a suit by a succeeding manager seeking to impeach alienations by the previous manager of a Hindu Religious Institution if the succeeding manager happens to be a minor at the date of the election or appointment, he will be entitled to the benefit of this section but where his appointment is made after the period of limitation has started to run, this section will not help him.

76. Computation of period:—In computing the period of limitation for a minor, the date on which he attains majority must be excluded from calculation —*Jugmohun* v. *Luchmeshur*, 10 Cal. 748 (751). But see *Batuk* v. *Rudra*, A.I.R. 1950 Pat. 206 where it has been held that the three-year period must be counted, not from the date of attainment of majority, but from the date of cessation of minority.

The minor when bringing a suit after attaining majority is also entitled to the benefit of sec. 4. Therefore, if on the last day after three years from the date when the minor attained majority, when he ought to have filed a suit, the Court is closed, he is entitled to the privilege of sec. 4 and can file his suit on the re-opening day—*Naganna* v. *Krishnamurthy*, 55 Mad. 286, 61 M.L.J. 675, A.I.R. 1932 Mad. 139 (141), 135 I.C. 587.

77. Duty of litigant to plead minority:—If a litigant claims the benefit of an exceptional rule such as one laid down in this section, it is clearly his duty to do so expressly and to establish his claim. If the question of minority is not raised by him or on his behalf the Court is not bound to consider it *ex proprio motu*. Even the fact that the petitioner is described in the heading of the application as a minor represented by a guardian is not sufficient to entitle him to the benefit of this section, nor is it sufficient to throw upon the Court the duty of protecting his interests by raising a point of this kind on his behalf. The omission on the part of the Court to consider the question of minority of the petitioner does not amount to a failure to exercise jurisdiction so as to invoke the revisional power of the High Court under sec. 115, C. P. Code—*Panchu Mandal* v. *Sheikh Isaf*, 17 C.W.N. 667 (668), 18 I.C. 391. The point about the minority of a party for the purpose of calling in aid the provisions of this section, cannot be raised for the first time in second appeal—*Sheojiram* v. *Gulabchand*, 1940 N.L.J. 607.

78. Accrual of cause of action:—Section 6 only applies when the disability is in existence at the time when the limitation begins to run, but time is not saved where disability does not exist at the point on which limitation begins to run—*Firm Dunichand* v. *Kuldip Singh*, A.I.R. 1935 Lah. 144. The section does not apply to a case of subsequent disability but applies only to a case of initial disability —*Maningappa* v. *Syed Hyder*, 52 My. H.C.R. 332. This section requires that the

plaintiff must have been a minor when the cause of action first accrued, and the cause of action must have accrued to the minor *himself*: otherwise he cannot claim any exemption under this section. Therefore, if the cause of action accrued to the minor's father, the minor son cannot, after his father's death, wait till he attains majority—*Nusheeram* v. *Shushee*, 5 W.R. 169; *Vira* v. *Muruga*, 2 M.H.C.R. 340; *Gyanwati* v. *Nand Behari*, 1943 O.W.N. 321, 1943 A.L.W. 546. The same principle applies where the cause of action accrues not only against the minor but also against his adult brother and mother. The cause of action does not cease on account of the disability of one of the parties and the minor cannot get the benefit of the section—*Fateh Chand* v. *Chheda Lal*, 1943 A.L.W. 160. Similarly, if the cause of action had accrued before his birth, the minor cannot, on coming of age, avail himself of the benefit of this section. The minor must have been in existence at the time when the cause of action accrued—*Siddhesur* v. *Sham Chand*, 23 W.R. 285 (286); *Shahamad* v. *Salabat*, 8 Lah. 19, A.I.R. 1927 Lah. 97, 97 I.C. 435; *Kehr Singh* v. *Hazara*, 173 P.W.R. 1912, 14 I.C. 60 (61); *Lachman Das* v. *Sundar Das*, 1 Lah. 558 (560), 59 I.C. 678; *Rachappa* v. *Madivalawa*, 46 Bom.L.R. 683, A.I.R. 1945 Bom. 63; *Bhagawat Prasad* v. *Debichand*, 20 Pat. 727, A.I.R. 1942 Pat. 99, 199 I.C. 408; *Nandlal* v. *Deorao*, 1939 N.L.J. 591, A.I.R. 1940 Nag. 94. Thus, where a coparcenary property was alienated by all the adult male members living at the time, and the plaintiffs (their sons) who were born after the date of the alienation brought a suit to challenge the sale more than 12 years (Art. 126) after the date of alienation though within three years after attaining majority, *held* that this section could not be pleaded by a plaintiff who was not in existence when the cause of action accrued (*i.e.*, when the alienee took possession, Art. 126). He is entitled to take advantage of an existing cause of action so long as it subsists but he does not obtain a fresh period of 21 years (18 years, and 3 years under sec. 8) from the date of his birth—*Dhanraj* v. *Ram Naresh*, A.I.R. 1924 All. 912 (914), 79 I.C. 1019; *Sankat Narayan* v. *Ram Bharos*, 79 I.C. 1010, A.I.R. 1924 All. 677 (678); *Chokhey Singh* v. *Hardeo*, 24 O.C. 330, 64 I.C. 757, A.I.R. 1921 Oudh 196 (199); *Sita Ram* v. *Cheddi*, 46 All. 882 (883), A.I.R. 1924 All. 798, 22 A.L.J. 809; *Thakur Prasad* v. *Gulab*, A.I.R. 1925 All. 563, 87 I.C. 662; *Ram Krishen* v. *Baldeo*, 86 I.C. 704, A.I.R. 1925 All. 247. (The suit must be brought within the ordinary period of limitation through a next friend—*Shahamad* v. *Salabat*, supra). This view is now fortified by the Privy Council decision in *Ranodip* v. *Parameshwar*, 47 All. 165, 29 C.W.N. 666 (670), 27 Bom.L.R. 175, 23 A.L.J. 176, 48 M.L.J. 29, 86 I.C. 249, A.I.R. 1925 P.C. 33. Consequently, if there are several plaintiffs, and the suit to set aside the alienation is brought more than three years (according to sec. 8) after the first plaintiff has attained majority, but during the minority of the other plaintiffs who were born after the date of alienation, and while the ordinary period of limitation has expired, the suit is barred in respect of all the plaintiffs. It is barred in respect of the first plaintiff, because it is brought more than three years (sec. 6 read with sec. 8) after he has attained majority, and in respect of the other plaintiffs it is barred because they, not having been in existence at the date of accrual of cause of action (*i.e.*, at the date of alienation) cannot claim the benefit of sec. 6—*Ram Kishen* v. *Baldeo*, supra; *Shahamad* v. *Salabat*, supra; *Sita Ram* v. *Cheddi*, 46 All. 882 (883); *Lachman Das* v. *Sundar*, 1 Lah. 558 (560), 59 I.C. 678; *Chokkey Singh* v. *Hardeo*, supra. If the suit is brought within three years of the attainment of majority of the first plaintiff, the suit is within time in respect of the other plaintiffs who were born after the date of alienation, even though in their case the ordinary period of limitation has run out; this is so because the younger brothers have no independent right to sue, but their right is derived from their elder brother's capacity to sue; the time within which they can sue is co-extensive with the time allowed to the elder brother—*Jowala* v. *Sant Singh*, 13 Lah.

520, 33 P.L.R. 808, 140 I.C. 375, A.I.R. 1932 Lah. 605. So also where after the death of the tenant the landlord dispossessed his minor sons, a suit for possession instituted after twelve years from the date of dispossession but within one year of one of the said minors attaining majority is within time as this section applies—*Hit Lal* v. *Ram Oudh*, 1943 O.W.N. 99, A.I.R. 1943 Oudh 296. If however the minor does not choose to institute a suit within three years on attaining majority and the possession has become adverse to the minor, the minor is not entitled to claim any extension of the period of limitation by virture of this section read with sec. 8 in a suit instituted after that period—*Janardan* v. *Nilkantha*, A.I.R. 1952 Orissa 31.

Child in the womb:—What section 6 lays down is that "where a person entitled to institute a suit is *at the time from which the period of limitation is to be reckoned a minor*", etc. But if at the date from which the period of limitation is to be reckoned (*e.g.*, at the date of alienation by the father) the plaintiff was *not in existence* at all, but had only been begotten and was *in the womb*, this section has no application, and he cannot get advantage of this section, but must be governed by the ordinary law of limitation. Minority is a period beginning at birth and does not begin at conception—*Kehar Singh* v. *Hazara*, 173 P.W.R. 1912, 14 I.C. 60 (61); *Muhammad Khan* v. *Ahmad Khan*, 10 Lah. 713, A.I.R. 1929 Lah. 254 (255), 30 P.L.R. 737, 116 I.C. 545; *Madho Ram* v. *Dharm Singh*, 31 P.L.R. 305, A.I.R. 1930 Lah. 394 (396), 127 I.C. 708; *Chuni Lal* v. *Altaf*, 42 P.L.R. 237, A.I.R. 1939 Lah. 290. The Madras High Court adopted the same view in *Venkatarama* v. *Mirthinjaya*, 60 M.L.J. 521, A.I R. 1931 Mad. 456 (457), 132 I.C. 316. But this decision has recently been overruled by a Full Bench case—*Ranganatha* v. *Ramaswami*, A.I.R. 1935 Mad. 839, 58 Mad. 886, 69 M.L.J. 425, 159 I.C. 1. According to this decision a child *en ventre sa mere* can take advantage of sec. 6. The Bombay High Court has taken the same view in *Basayya* v. *Baslingayya*, 49 Bom.L.R. 775, A.I.R. 1948 Bom. 150. The same view has also been taken by the Allahabad High Court in *Audesh* v. *Rajeshwari*, A.I.R. 1951 All. 630.

Reversioners:—Unlike the Hindu widow, the nearest reversioner under the Hindu Law does not represent fully the whole estate, nor does one reversioner claim through or derive his title from another and nearer reversioner, even if the latter happens to be his father, but all the reversioners derive their title from the last full owner; and the cause of action accrues to one reversioner independently of others. Therefore, where a nearer reversioner has neglected to sue for a declaration that an alienation made by the widow is not binding on the estate, and has therefore allowed the claim to be barred, a more remote reversioner who was born after the date of the alienation, or who was a minor at the date of the alienation, is not precluded from claiming the benefit of this section; for although the cause of action to the nearer reversioner accrued from the date of alienation, still *to him* (the remote reversioner) it accrued when he was born or when he was a minor, and not before, and he can enforce his right within three years after he attains majority—*Abinash* v. *Harinath*, 32 Cal. 62 (71); *Bhagwanta* v. *Sukhi*, 22 All. 33 (F.B.); *Das Ram* v. *Tirtha Nath*, 51 Cal. 101 (108), A.I.R. 1924 Cal. 481, 81 I.C. 522. See also, *Harak Chand* v. *Bejoy Chand*, 9 C.W.N. 795 (801). This was also the view of the Madras High Court in *Govinda* v. *Thayammal*, 28 Mad. 57; *Narayana* v. *Rama*, 38 Mad. 396; and *Venkata Row* v. *Tulja Ram Row*, 1917 M.W.N. 30 (36), 38 I.C. 270; but all these cases have been overruled by the Full Bench decision in *Varamma* v. *Gopaladasayya*, 41 Mad. 659. In this case it has been held that if the reversioners existing at the time of alienation are barred, the reversioners born thereafter are equally barred, as the cause of action is but one. Similarly, if the remote reversioner was a minor at the date of alienation, and the nearer reversioners did

not bring a suit to set aside the alienation within time, the remote reversioner could not get an extension of time and his suit was likewise barred—*Neelakantamier* v. *Chinnu*, 52 M.L.J. 13, A.I.R. 1927 Mad. 216, 99 I.C. 668. Thus where the limitation has started against the presumptive reversioner the fact that the reversioner next in rank is a minor or under a disability will not stop the period of limitation running or give him an extended period of limitation prescribed by this section in a suit by the minor reversioner—*Thiruneelakanta* v. *Velayudha*, (1951) 1 M.L.J. 355, 1951 M.W.N. 301, A.I.R. 1951 Mad. 824. The Madras High Court has held in *Srinivasalu* v. *Muniswami*, (1943) 1 M.L.J. 157, A.I.R. 1943 Mad. 378, 1943 M.W.N. 86 that though an after born reversioner cannot claim the benefit of this section in his own right, he cannot be deprived of the extended period of limitation available to the reversioner in existence at the time of alienation. The same view has also been taken by the Lahore High Court in *Harnam* v. *Aziz*, 18 Lah. 769, 40 P.L.R. 188, A.I.R. 1938 Lah. 1; though the same High Court seems to draw a distinction between a remote reversioner who was a *minor* at the date of alienation and a remote reversioner who was *born* after the date of alienation. In the former case, the minor can claim an extension of time under this section and if he brings his suit within three years of his attaining majority, the suit is not barred, notwithstanding the existence of nearer reversioners, including his father, whose right to contest the alienation has become time-barred—*Khushi Ram* v. *Nand Lal*, 147 I.C. 399, A I.R. 1933 Lah. 866 (867); *Wali Chand* v. *Punjab Singh*, A.I.R. 1932 Lah. 39 (40), 132 I.C. 665; *Hari Ram* v. *Sali*, A.I.R. 1934 Lah. 968; *Ilahi Baksh* v. *Umar Baksh*, I.L.R. (1945) Lah. 231, 46 P.L.R. 316, A.I.R. 1944 Lah. 409 (F.B.). In the Full Bench Case it has been held that though time will start running both against the major and minor reversioners they will have their own periods of limitation and in no case will the one provided for a minor reversioner be affected by that of a major reversioner whether of equal or of a different degree. But in the case of a remote reversioner who was *born after the date of alienation*, it has been held (following 41 Mad. 659) that the right to sue for a declaratory decree is vested in the whole body of reversioners in existence at the time of alienation jointly and severally, and time begins to run simultaneously against them all, and a reversioner born after the date of alienation does not obtain a fresh cause of action from his birth; because when the time has once begun to run, no subsequent disability stops it (sec. 9)—*Chiragh Din* v. *Abdulla*, 6 Lah. 405, 90 I.C. 1022, A.I.R. 1925 Lah. 654 (656). A reversioner born after an alienation has been made, can contest its validity if the period of limitation calculated from the date of alienation had not expired before the date of his birth, and his suit is brought within the period prescribed by law. He cannot, if born after the cause of action has already accrued and time begun to run (*i.e.*, born after the date of alienation) claim an extension of time under this section —*Umra* v. *Ghulam*, 22 P.R. 1907, 27 P.L.R. 1908; *Inayat Khan* v. *Shabu*, 108 P.L.R. 1907. A person who is a minor on the date of the alienation by a widow or is born subsequently during the life of the widow is entitled to the benefit of sec. 6, Limitation Act—*Sital Raut* v. *Adalat Raut*, A.I.R. 1935 Pat. 256, 16 P.L.T. 236, 155 I.C. 244.

Bond or promote taken in the name of minor:—If a promissory note is taken in the name of the minor alone, the minor would have three years from attaining his majority within which to sue. Thus, where through the instrumentality of the guardian of a minor a bond was obtained in the name of the minor, time did not begin to run against the minor until the latter attained his majority—*Yeknath* v. *Waman*, 10 Bom. 241. Where any Court is of opinion, on the construction of the document in question, that it is taken in the name of a minor, or in the name of a minor acting by his guardian, then the minor has got three years from attaining his majority within which to bring his suit on the document. But if on the other

hand, the Court is of opinion that the document is taken solely by the guardian, then that extended period would not be open for the benefit of the minor—*Pandharinath* v. *Ajamkha*, 50 Bom. 831, 28 Bom.L.R. 1431, A.I.R. 1927 Bom. 61, 100 I.C. 95. Where the bond or pro-note is taken in the name of the *guardian*, the minor cannot on attaining majority claim the benefit of this section. Thus, a promissory note was given to the guarian of the plaintiff when the latter was a minor, in 1906. The plaintiff attained majority in 1919 and sued on the note within three years therefrom. *Held* that the suit was barred. The pro-note having been given to the guardian, he was the person entitled to sue on it, and not the minor, and the suit would be barred if it was not brought within the ordinary period of limitation. The minor was not entitled to institute a suit on the note—*Vishnu* v. *Keshav*, 26 Bom.L.R. 426, A.I.R. 1924 Bom. 468, 80 I.C. 474; *Ramanuja* v. *Sadagopa*, 28 Mad. 205. So also, a minor heir of a deceased promisee under a promissory note cannot get the benefit of the section, the reason being that in such cases limitation begins to run from the execution of the promissory note and cannot be stopped by the death of the payee—*Gan Wati* v. *Nand Behari*, 1943 O.W.N. 321, 1943 A.L.W. 546.

79. Adopted son:—In case of an adoption by a widow after her husband's death under authority from her husband, the right of the adopted son accrues from the time when he is adopted, and does not relate back to the death of the adoptive father (although by a legal fiction the adopted son is considered to have taken his birth in the adoptive family at the time of the adoptive father's death)—*Harek Chand* v. *Bejoy Chand Mahatab*, 9 C.W.N. 795 (798); *Lakhmana* v. *Lakshmi*, 4 Mad. 160. If he is a minor at the time of adoption, he is entitled to the benefit of this section. Even where a cause of action accrued to a minor Hindu widow and then the widow adopted a son during her minority, the cause of action for the adopted son (a minor) accrued when he was adopted and not before, and in bringing a suit he is entitled to be benefit of this section—*Harek Chand* v. *Bejoy Chand*, 9 C.W.N. 795 (801). But where after the death of an adopted son after attaining majority another son is adopted who brings a suit challenging the alienations made by his adoptive mother, the suit is barred if the right of the former adopted son was barred by limitation, time having already run against him and no further right to sue in respect of the alienations can accrue to the second adopted son—*Annu Bajaba* v. *Dadu*, 43 Bom.L.R. 222, A.I.R. 1941 Bom. 197, 195 I.C. 732.

80. Minor:—'Minor' means a person who has not attained the age of majority under the Indian Majority Act. Section 3 of that Act lays down: "Every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice and every minor under the jurisdiction of any Court of Wards, shall be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before; every other person shall be deemed to have attained his majority when he shall have completed the age of eighteen years, and not before."

If the minor claims the benefit of this section, it is for him to establish affirmatively and clearly that he is under the age of 21 (18+3 years under sec. 8) at the time of institution of the suit; it is not enough merely to show that he is *probably* under that age at the time—*Charanjit* v. *Bishen Sing*, 167 P.L.R. 1914, 23 I.C. 462. See also *Panchu Mandal* v. *Sheikh Isaf*, 17 C.W.N. 667, 18 I.C. 391; *Prem Das* v. *Sarbanand*, A.I.R. 1923 Lah. 41. He will have to prove that his suit is within time, if the date of attaining majority is disputed—*Prahlad* v. *Ramsaran*, 38 C.L.J. 213, A.I.R. 1924 Cal. 420.

Medical evidence is not of any help to prove the age of the minor for the purpose of limitation, because it is based on conjectures only, and cannot give the exact age with precision. In cases where limitation is pleaded in defence, a difference of even a single day decides the fate of the case one way or the other, and no doctor, however competent he may be, can give the precise age of a person so as to determine the exact age of his birth—*Zinda* v. *Roshnai*, 10 Lah.L.J. 183, A.I.R. 1928 Lah. 250 (252).

A person who is of *full age* but whose property is under the Court of Wards, cannot take the benefit of this section—*Uma Kanta* v. *Hiralal*, 20 C.W.N. 852 (854), 34 I.C. 86.

As to the application of this section to a minor who was not born but was merely in embryo at the time of the accrual of the cause of action, see the cases cited in Note 78, *ante*.

Idol:—The only disabilities which save the operation of the Limitation Act are those mentioned in this section, which recognizes only three classes of persons as being under legal disability, namely, a minor, an insane person and an idiot, and does not include an *idol* or a *muth*—*Naurangi* v. *Ram Charan*, 9 Pat. 885, 11 P.L.T. 403, 127 I.C. 817, A.I.R. 1930 Pat. 455 (471). An idol is not a perpetual minor for the purpose of this section; and it is not correct to say that a suit by an idol to set aside an improper alienation made by the shebait would be for ever saved from the bar of limitation under the provisions of this section. Therefore where the manager of a temple alienated the property of the idol in 1905, a suit brought in 1918 to avoid the transfer was barred—*Chitar Mal* v. *Panchu Lal*, 48 All. 348, 24 A.L.J. 35, 93 I.C. 652, A.I.R. 1926 All. 392.

81. Assignee of minor:—This section gives only a *personal* privilege to the minor; it applies to the minor himself or his legal representatives but not to his assignees—*Rudra Kant* v. *Nobokishore*, 9 Cal. 663 (F.B.); *Bhagaban* v. *Ishan*, 22 C.W.N. 831, 46 I.C. 802; *Mahadev* v. *Babi*, 26 Bom. 730; *Imamuddin* v. *Mumtazunnissa*, 18 O.C. 34, 1 O.L.J. 247, 27 I.C. 118; *Mahomed Nur Khan* v. *Lachmi Naran*, 9 O.L.J. 88, 66 I.C. 101, A.I.R. 1922 Oudh 31; *Kukam* v. *Shahab*, 1918 P.W.R. 14, 44 I.C. 890; *Rangaswami* v. *Thangavelu*, 42 Mad. 637; *Sitla Bux* v. *Ram Newaz*, 2 O.W.N. 811, A.I.R. 1926 Oudh 20, 90 I C. 741; *Mariyayya* v. *Chanvirangouda*, A.I.R. 1935 Bom. 420, 37 Bom.L.R. 706, 159 I.C. 272. Therefore, where a person sues to set aside a transfer effected by his father during his minority, within three years of his attaining majority and joins with him as co-plaintiff an assignee to whom he sells a portion of the property in suit, that person may be in time by making use of sec. 6, but his co-plaintiff being only an assignee is not entitled to its privilege, and is beyond time—*Sitla Bux* v. *Ram Newaz*, supra. The benefit of this section can be claimed by an assignee of a person who is entitled to that benefit in a suit where both the assignor and the assignee join in the suit as plaintiffs, so long as the assignor has a subsisting right to sue at the date when the suit is brought, although the benefit would not be available had the assignee alone brought the suit—*Bandu* v. *Yeshwant*, 40 Bom.L.R. 548, A.I.R. 1938 Bom. 358.

A minor in whose favour a decree is assigned is not entitled to the benefit of this section—*Zahur-uddin* v. *Amtur*, A.I.R. 1944 Lah. 106, 46 P.L.R. 26.

82. Suit or application by minor during minority:—The benefit of this section is not absolute; the plaintiff or applicant labouring under the disability is not bound to wait till the disability ceases; he has the option either to take proceedings through his guardian or next friend, or to wait until the expiration of

the period of his minority. The minor can bring a suit or make an application during his minority by his next friend, and can claim the benefit of this section. That is, this section will save such suit from the bar of limitation, even though instituted after the ordinary period prescribed for the suit—*Phoolbas* v. *Lalla Jageswar*, 1 Cal. 226 (243) (P.C.); *Bhagwanta* v. *Sukhi*, 22 All. 33 (42) (F.B.); *Veerayya* v. *Gangamma*, 36 Mad. 570 (572); *Lalit Mohan* v. *Janoky*, 20 Cal. 714 (716); *Sarwan Singh* v. *Basanti*, A.I.R. 1934 Lah 908; *Padha Madho* v. *Ghanaya*, 30 P.L.R. 398, A.I.R. 1929 Lah. 661 (662). If the minor or lunatic brings a suit during the period of his disability, he is always protected under this section, in spite of the fact that the ordinary period of limitation has expired, and the mere fact that there was a guardian who could have sued earlier on his behalf would not deprive him of the protection given by this section. So long as the disability lasts, it is immaterial whether he had a guardian who could have sued earlier or not—*Musi Imran* v. *Collector of Bijnore*, 1934 A.L.J. 803, A.I.R. 1934 All. 434 (435), 148 I.C. 1166. Even if during his minority he makes applications for execution through his guardian, he is not precluded from making applications himself after attaining majority. The general principle is that time does not run against a minor, and the circumstance that he has been represented by a guardian does not affect the question—*Mon Mohun* v. *Gunga Soondery*, 9 Cal. 181; *Moro* v. *Visaji*, 16 Bom. 536 (537); *Jagjivan* v. *Hasan*, 7 Bom. 179; *Zamir Hassan* v. *Sundar*, 22 All 199 (F.B.); *Guneswar* v. *Jagadhatri*, 3 C.W.N. 24. Similarly, the fact that a guardian or next friend might have maintained a suit on behalf of a minor does not take away from the minor the privilege of the section—*Jagadindra* v. *Hemanta*, 32 Cal. 129 (142) (P.C.); *Jagat Narain* v. *Narbada*, 16 O.C. 206, 21 I.C. 365.

83. Suit by guardian:—The privilege given to a minor is not one that could be availed of by *him only*, after he comes of age. Any application or act made or done by his *guardian* on his behalf during his minority is equally exempt from the operation of limitation—*Norendra* v. *Bhupendra*, 23 Cal. 374 (388); *Krishna Raju* v. *Byyappa Chettiar*, 1955 M.W.N. 491, (1955) 2 M.L.J. 456. Therefore, while the minor's disability lasts, his guardian or next friend can bring a suit or make an application, even though the ordinary period of limitation for such suit or application has run out. In *Satyendra* v. *Pitambar*, 18 Pat.L.T. 989, 1937 P.W.N. 1012, A.I.R. 1938 Pat. 92, 174 I.C. 193 it has been held that in spite of prior infructuous application by the guardian of a minor, he is entitled to the benefit of this section and his application after attaining majority is not barred by the prior infructuous application of the guardian, the reason being that this section applies to every minor, whether he has a guardian or not, and the existence of a guardian competent to sue or apply is immaterial.

Acknowledgement made to a minor:—See Note 186 under sec. 19.

84. Insanity:—A state of great mental weakness on account of serious bodily inrury caused by an inhuman assault (throwing sulphuric acid on the face resulting in loss of one eye) is not a state of insanity within the meaning of this section. To hold so would be straining the language beyond reasonable limit—*Abdulla* v. *Abdulla*, 25 Bom.L.R. 1333, A.I.R. 1924 Bom. 290. When insanity is once proved to have existed, it is presumed to continue until it is proved to have ceased; and a very strict burden of proof lies on the party who alleges recovery—Pope on Lunacy, 2nd Ed., p. 408. A lucid interval is a temporary cessation of lunacy and it cannot be treated as a recovery unless it is of sufficient length of time to enable the person to do an intended rational act—*Cartwright* v. *Cartwright*, 1 Phillim, 90 (100).

85. Other disqualifications:—Under the Limitation Act, no other disqualification than those mentioned in the Act can save limitation, and the only disqualifications that sections 6, 8 and 9 of the Act recognise are minority, idiocy and lunacy. A disqualification under the Court of Wards Act is not such a legal disability as is recognised and enumerated in the Act, and the fact that the plaintiff was a disqualified proprietor, whose estate was under the charge of the Court of Wards, is not a ground for extension of the period under this section, because the disqualified proprietor is not exempted from suing during the time his property remains in the hands of the Court of Wards—*Kuarmani* v. *Wasif Ali Mirza*, 19 C.W.N. 1193, 28 I.C. 818; *Rani Kuar Mani* v. *Nawab of Murshidabad*, 46 Cal. 694 (P.C.), 23 C.W.N. 531, 50 I.C. 202; *Umakanta* v. *Hira Lal*, 20 C.W.N. 852 (854), 34 I.C. 86; *Mohammad Azilm* v. *Mohammad Saadut Ali*, 8 O.W.N. 349, A.I.R. 1931 Oudh 177 (225), 135 I.C. 642.

A Court of Wards assuming the superintendence of the property of minor can apply for execution of a decree passed in favour of minor's father after the period of limitation and rely upon the provisions of sec. 6—*Sainbux* v. *Alibux*, A.I.R. 1936 Sind 84, 20 S.L.R. 30, 163 I.C. 379. A contrary view has been taken by the Patna High Court in *Kamakshya* v. *Bhuramull*, A.I.R. 1946 Pat. 154, 226 I.C. 97.

So also, the insolvency of the plaintiff or applicant is not a legal disability within the meaning of this section and there is no reason to hold that the Official Assignee would have a longer time within which to apply than the insolvent himself *Sirur* v. *Mythili Ammal*, 61 M.L.J. 688, 136 I.C. 45, A.I.R. 1932 Mad. 170 (171).

The fact that an adopted son on attaining his majority had to sue to establish his adoption is not a disability, and he cannot be allowed the time which was occupied in establishing his rights. Although his rights were disputed, he still could have sued in the meantime to recover property which devolved on him by virtue of his adoption—*Muddon Mohan* v. *Nund Kishore*, 5 W.R. 295.

A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate is not treated by the Legislature on the same footing as the disability of a minor, an idiot or an insane person; and no extra period can be allowed from the time he succeeds to the estate—*Sesha Naidu* v. *Periasami*, 44 Mad. 951 (952).

85A. Sub-sec. (2):—Where several diabilities co-exist concurrently in the plaintiff, the time does not commence to run against him till all have ceased—*Stuart* v. *Mellish*, (1742) 2 Atk. 610. If the plaintiff is under one disability at the time the action accrues, and afterwards (and while the first disability continues) he comes under another disability, the time will not commence to run till the last of the disabilities has ceased—*Borrows* v. *Ellison*, (1871) L.R. 6 Ex. 128.

85B. Sub-section (3):—Under this sub-section if the disability continues upto the death of the minor, his legal representative is entitled to bring a suit within the same period after his death as would otherwise have been allowed from the time so prescribed—*Subbarayadu* v. *Muthulakshmi*, (1945) 1 M.L.J. 3, A.I.R. 1945 Mad. 149. This sub-section may be explained by an illustrative case. A minor's property was alienated by his mother as guardian in 1873. The minor died in 1880 before attaining majority and was succeeded by his mother. After the mother's death which took place in 1921, the reversionary heir brought a suit to set aside the sale in 1922. It was held that the suit was barred as it was brought more than three years after the minor's death. The cause of action accrued to the minor in 1873, but when the

minor died before attaining majority, sub-section (3) of this section came into play, and the period of limitation must be reckoned from the death of the minor. The fact that on his death the estate was taken by a female heir made no difference—*Ramaliah* v. *Brahmiah*, 59 M.L.J. 196, A.I.R. 1930 Mad. 821 (823), 127 I.C. 801. Similarly, a lunatic's property was improperly sold in 1880. He died a lunatic, and was succeeded by his wife as heir who died in 1910. In a suit brought by the reversioners in 1917, it was held that as the lunatic died without attaining sanity, a suit to recover the property ought to have been filed by his widow within 3 years after the lunatic's death; and that as she failed to do so, the suit by the reversioners was barred—*Seetaramaraju* v. *Subbaraju*, 45 Mad. 361 (369), 42 M.L.J. 262, A.I.R. 1922 Mad. 12. Following the principle enunciated in this case it has been held in *Bibhuti* v. *Girish*, A.I.R. 1950 Pat. 191 that where the period of limitation expires after three years from the date on which the minor attained majority, the minor is not entitled to any extension of time under the combined effect of this section and sec. 8 of the Act. It should be noted that *Ramaliat* v. *Brahmiah*, supra, has been recently overruled by *Alamelu* v. *Krishna*, (1954) 1 M.L.J. 294, A.I.R. 1954 Mad. 585.

Reading sub-section (3) of this section with section 8, the conclusion is that in a suit for possession, where a minor dies before attaining majority, his representatives would have either the total period of 12 years from the date of accrual of the cause of action, or three years from the date of the minor's death, whichever is greater. Thus, a minor died in 1910; the cause of action for a suit for possession had accrued to the minor in January 1909; the 12 years' period from this date expired in January 1921. The period between 1910 and January 1921 being more than three years, the legal representative would be entitled to sue within January 1921. If the legal representative was himself a minor, the rule in sub-section (4) would apply—*Anantoo* v. *Ramrup*, 87 I.C. 315, A.I.R. 1925 All. 692. But if the minor dies after attaining majority but before three years after attaining majority, his legal representatives will not get extension of time upto that period as this sub-section does not apply to such a case—*Dadarao* v. *Jatanbai*, I.L.R. (1942) Nag. 331, 1943 N.L.J. 286, A.I.R. 1943 Nag. 284.

"Where the disability continues"—The expression refers to physical death and to nothing else and the legal representative must be a legal representative whose title depends on the death. An adopted son is not the legal representative of the adopting widow within sec. 6 (3)—*Mariyayya* v. *Chanivirangonda*, A.I.R. 1935 Bom. 420, 37 Bom.L.R. 706, 159 I.C. 272.

Sub-section (4):—This sub-section contemplates a case in which an extension in favour of one person may be tacked on to an extension in favour of a second person. Such a case arises only where the first person dies while still under a disability and the second person is his *legal representative* who is also a minor at the time of the first person's death—*Lachhman Das* v. *Sudar*, 1 Lah. 558 (560), 59 I.C. 678.

Disability of one of several plaintiffs or applicants.

7. Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all: but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving

such discharge without the concurrence of the others or until the disability has ceased.

Illustrations.

(*a*) A incurs a debt to a firm of which B, C and D are partners. B is insane, and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C and D.

(*b*) A incurs a debt to a firm of which E, F and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

This section corresponds to section 8 of the Act of 1877.

86. Sections 6 and 7:—Sections 6 and 7 are not mutually exclusive; the latter section supplements the former—*Rati Ram* v. *Naidar*, 41 All. 435 (441), 17 A.L.J. 649; *Indar Pal* v. *Badri Das*, 45 P.L.R. 345, A.I.R. 1943 Lah. 281, 209 I.C. 257 (F.B.). In other words, the right which the previous section gives to a minor (*viz.*, to wait till he attains majority) can be availed of by him only if the circumstances mentioned in the first portion of the present section do not exist, that is, if there is nobody to give a valid discharge on his behalf without his concurrence. If however a discharge can be given without his concurrence, he cannot take advantage of his minority and wait till he becomes a major. This section is a disabiling section and in so far as it takes away the right conferred by section 6, has to be strictly construed —*Kunhi* v. *Devaki*, (1939) 2 M.L.J. 619, 1939 M.W.N. 984, A.I.R. 1939 Mad. 907.

The combined effect of sections 6 and 7, in cases in which a right of suit resides jointly in a plurality of persons, is that where any one of such joint creditors or claimants is under a disability and a full discharge can be given without his concurrence by all or any of the others, the suit on the claim will be governed by the ordinary law of limitation, and time will run against all; but where no such discharge can be given, time will not run against any of them until all have ceased to be under disability. In the result, such a suit cannot be barred in part in respect of some of the joint claimants, and not-barred in part at the same time in respect of the others—*Ahinsa Bibi* v. *Abdul Kader*, 25 Mad. 26 (38).

The point of time at which the existence of disability is to be recognised is clearly defined in section 6 as "the time from which the period of limitation is to be reckoned", so the joint right of suit dealt with in this section (sec. 7) will also have to exist at the time specified in sec. 6. So this section does not apply to the case of an after-born reversioner non-existent at the time specified in sec. 6—*Indar Pal* v. *Badri Das*, 45 P.L.R. 345, A.I.R. 1943 Lah. 281 (F.B.).

Section 6 contemplates cases where there is only one minor decree-holder or where all the decree-holders are minors.

The second part of section 7 extends the period of limitation to some cases where there is a joint decree in favour of persons some of whom are minors.

Section 7 contemplates a legal capacity to give discharge without the concurrence of the person under disability. The section requires that the co-decreeholder in addition to his capacity as a co-decreeholder must have such a legal capacity as would empower him alone to realize the decretal debt and give a discharge without putting the decree into execution, even if his minor co-decreeholder had been under no disability and had the capacity to give his assent. In other words, the legal capacity must enable him alone to give a discharge, the consent of the other decreeholders not

being necessary at all in the exercise of that legal capacity. The law must clothe him with rights to give a discharge for the whole debt irrespective of the consent of the other decreeholders. Familiar instances of such legal capacities are those of a partner and the *karta* of a joint Hindu family. Their legal capacity to give discharge is derived from the substantive law. They have the power to realize the whole decretal debt amicably and are not required by law to take the consent of the other decreeholders, or the permission of the Court under procedural law before giving a discharge. The legal capacity of a certificated guardian to realize moneys payable to a minor decreeholder under a decree of the Court does not fulfil the test. It is not independent of the rights of a minor decreeholder—See *Abed Hossain* v. *Abdul Rahman*, A.I.R. 1935 Cal. 631, 158 I.C. 567.

Sections 6 and 7 do not give a fresh period of limitation—*Bhagawat Prasad* v. *Debichand*, 20 Pat. 727, A.I.R. 1942 Pat. 99, 199 I.C. 408.

87. Joint right:—This section speaks of a "joint" right, and has no application where the plaintiffs are *severally* entitled to the right. Where several persons belonging to a Dayabhaga family and jointly entitled to a certain property are dispossessed and a suit is brought for the recovery of possession, this section had no application to the case, as each individual plaintiff, according to the Dayabhaga law, is entitled to bring the suit for possession of his *individual* share—*Rakhal Chandra* v. *Mohendra*, 51 I.C. 797 (Cal.). The right to recover the dower of a Mahomedan lady descends to her heirs, but the position of the sons as regards their right to the dower-debt is not that of joint tenants but of tenants-in-common, especially where the right to recover the dower debt is inherited in part by the debtor himself (the lady's husband). This section does not apply to the case—*Md. Zahur* v. *Maimuna*, 1929 A.L.J. 284, A.I.R. 1929 All. 142 (144). Moreover, this section contemplates that the joint claimants or creditors are persons whose substantive right is joint, *i.e.*, where more than one individual possesses the same identical substantive right. Persons whose rights are distinct and different but who are permitted to enforce such separate rights by one judicial process to which all are parties, or by a process instituted by one on behalf of all (*e.g.*, persons entitled to compensation under the Fatal Accidents Act) are not comprehended by this section—*Johnson* v. *The Madras Ry. Co.*, 28 Mad. 479 (485); see also *Harihar* v. *Bholi*, 6 C.L.J. 383. Thus, the mere fact that a person suing for himself and praying for one particular remedy (setting aside a sale-deed) could have joined in the same suit another cause of action (claim for possession) vested in another person for whom the former could have acted as next friend, would not bring such a suit within the ambit of section 7, which contemplates the existence of a joint cause of action in support of a single suit—*Kandasami* v. *Irusappa*, 41 Mad. 102 (107), 33 M.L.J. 309, 40 I.C. 664.

When a father (of a Mitakshara family) alienates property, every one of the sons has a right to impeach the transfer, if it is not binding on the family. It is an *individual* right and is enjoined severally by each of the joint members of the family. A suit by one of the several sons would be maintainable without the other sons joining in the suit. Section 7 does not apply as it cannot be said that the right to sue is claimed "jointly" by the several sons, within the meaning of this section. Therefore, one of the sons can bring a suit (under Art. 44) within three years of his attaining majority, to set aside the alienation made by the father although his elder brother had attained majority long ago—*Sheonandan* v. *Tahiran*, 52 All. 768, 1930 A.L.J. 852, 130 I.C. 691, A.I.R. 1930 All. 661.

88. Discharge:—This section applies only to cases where the joint debt or claim is of such a character that a *discharge* can be given by one creditor or claimant

without the concurrence of others. This section does not apply where the debt or claim, *though joint*, is of such a character that a single creditor or claimant *cannot give a discharge* so as to bind the others. The test to be applied is, whether it is the intention of the parties that each of the persons in whose favour the obligation is created is a creditor for the whole; if so, a payment to one liberates the debtor against all the creditors; if not, each is a creditor for his own share and cannot give a discharge for the whole obligation—*Harihar* v. *Bholi*, 6 C.L.J. 383.

Discharge in respect of immoveable property:—There is no authority for the proposition that this section applies only to cases where there is a question of discharge of *debts* and not to cases involving *immoveable property*. The word "discharge" is wide enough to include any form of quittance, where the rights and liabilities between two parties are put an end to, and therefore this section applies to cases involving immoveable property—*Lal Chand* v. *Gian Chand*, 34 P.L.R. 384, A.I.R. 1933 Lah. 479 (480), 142 I.C. 295, following *Keval* v. *Madhu Kala*, 46 Bom. 535; *Karan Singh* v. *Mt. Tetar Kuer*, A.I.R. 1937 Pat. 435 (F.B.); it includes release of rights in respect of immoveable properties and even the right to institute a suit; *Ramchandran* v. *Narayanan*, A.I.R. 1950 Tra.-Co. 57 (F.B.). See also *Doraisami* v. *Nondisami*, 38 Mad. 118 and *Bapu Tatya* v. *Bala Ravji*, 45 Bom. 446, which relate to cases involving immoveable property. But the Allahabad High Court is of opinion that the use of the words "a discharge can be given without his concurrence" indicates that this section is intended to apply to cases relating to a *debt* or claims of a similar kind where the question of discharge may arise. Where an alienation of the family property is made by the father, and after his death a suit is brought to set aside the alienation by one of the sons within 3 years after attaining majority (Art. 44), the suit is within time; it is not barred by reason of the fact that his elder brother (who could have given a discharge) had attained majority more than three years before the suit. Here there is no question of "discharge" and this section has no application —*Sheonandan* v. *Tahiran*, 52 All. 768, 1930 A.L.J. 852, 130 I.C. 691, A.I.R. 1930 All. 661.

89. Co-heirs:—In a Muhammadan family, the heirs are entitled to definite shares as tenants in common; and the cause of action of such heirs cannot be said to be a *joint* one for the purpose of limitation. One co-heir cannot give a valid discharge to bind other co-heirs—*Alla Pichai* v. *Pappathiammal*, 36 M.L.J. 184, 51 I.C. 748; *Ahinsa Bibi* v. *Abdul Kader*, 25 Mad. 26 (39). Similarly, in a Hindu family, one co-heir cannot give a valid discharge in respect of a debt due to the ancestor without the concurrence of the other co-heirs—*Umakant* v. *Martand*, 35 Bom.L.R. 388, 145 I.C. 164, A.I.R. 1933 Bom. 245 (247).

Co-partners:—The two illustrations show that one of several co-partners can give a valid discharge without the concurrence of others.

Reversioners:—Section 7 does not apply to the case of reversioners. The whole body of reversioners cannot give a discharge, or, in other words, cannot declare (*e.g.*), that an alienation is valid. No doubt if they join in or agree to the alienation, it may be evidence of the alienation being for purposes which could bind the reversion, but they as a body cannot declare that an alienation is valid—*Neelakantamier* v. *Chinnu Ammal*, 52 M.L.J. 13, A.I.R. 1927 Mad. 216, 99 I.C. 668. The nearer reversioner and the remote reversioner cannot be said to have a *joint right* to sue to set aside an alienation, but they have a right to sue independently of each other, and a discharge cannot be given by the nearer reversioner which would bind the remote

reversioner. It is true that a suit by one reversioner is for the benefit of the entire body of reversioners, and it may also be said that a decision in such a suit would bind the entire body; but the converse proposition is not true, *i.e.*, it cannot be said that omission by the nearer reversioner to sue would deprive the right of the remote reversioner to attack the alienation. In such a case, the remote reversioner, if a minor, would get the privilege of sec. 6 and be entitled to bring his suit within three years of his attaining majority—*Wali Chand* v. *Punjab Singh*, 132 I.C. 665, A.I.R. 1932 Lah. 39 (40).

90. Co-obligees:—In the case of co-obligees of a money-bond, in the absence of anything to the contrary, the presumption of law is that they are entitled to the debt in equal shares as tenants-in-common and the major co-obligee cannot give a discharge on behalf of the minor. Hence, where one of two co-obligees is a minor, limitation will run against the other co-obligee who is not a minor in respect of that portion of the debt to which he is entitled, and this section does not affect the case—*Manzur* v. *Mahmudunnissa*, 25 All. 155, following *Steeds* v. *Steeds*, (1889) 22 Q.B.D. 537.

91. Co-trustees:—One of several co-trustees can give a valid discharge without the concurrence of others. Therefore, where an adult joint trustee takes no steps to protect the trust and his right to take steps becomes barred, the rights of the other joint trustees, even though minors, become time-barred—*Thiyagaraja* v. *Ratnasabapathi*, 34 Mad. 284 (287), 20 M.L.J. 421, 6 I.C. 992. A deed of gift executed by the Karnavan of a Malabar tarward on his own behalf and as guardian of the minor member and by the senior anandivaram, who subsequently became the Karnavan of the tarward cannot be challenged after 12 years from the date of the gift by the minor after attaining majority if the senior anandivaram fails to challenge the same when he becomes the Karnavan, the reason being as Karnavan he is in a position to give a discharge of behalf of the tarward—*Devaki* v. *Kannan*, 1941 M.W.N. 632, A.I.R. 1941 Mad. 678, 197 I.C. 245.

92. Co-mortgagors:—The right to redeem is an indivisible right, and one mortgagor cannot give a valid discharge without the concurrence of the other co-mortgagors. In 1895, the plaintiff's father mortgaged his property to the defendants. After his death his widow sold the equity of redemption to the mortgagees in 1901. At that time the mortgagor's eldest daughter (plaintiff no. 3) had attained majority, and his son (plaintiff no. 1) did so in 1908. The youngest daughter (plaintiff no 2) attained majority in 1913. These three plaintiffs sued in 1914 to redeem the mortgage and recover possession of the property from the defendants; the lower Court held that the suit was barred as regards plaintiffs nos. 1 and 3 under Art. 144 read with sec. 6. The High Court held that the right to redeem was an indivisible right, and neither of the plaintiffs who attained majority more than three years before the date of the suit was qualified to discharge or redeem the mortgage, and the suit having been brought within three years from the date when the youngest plaintiff attained majority was within time under this section—*Gulam Goss* v. *Shriram Pandurang*, 43 Bom. 487 (491), 21 Bom.L.R. 353, 51 I.C. 79; *Bai Keval* v. *Modhu Kala*, 46 Bom. 536, 23 Bom.L.R. 1191, 64 I.C. 972, A.I.R. 1922 Bom. 319.

Co-mortgagees:—Ordinarily one mortgagee cannot enforce the mortgage for his share of the debt only, except in cases where there has been a severance of the mortgagees' interests effected with the mortgagor's consent (see sec. 67, Transfer of Property Act). Similarly, the discharge by one mortgagee alone is valid only as

regards his share of the debt, and does not operate as a discharge as to all—*Satish Chandra* v. *Jiwan Lal*, 37 C.W.N. 838 (840), A.I.R. 1934 Cal. 1, 149 I.C. 1062; *Rai Satindra Nath* v. *Rai Jatindra Nath*, 31 C.W.N. 374.

93. Managing member of joint family:—The managing member of a joint Hindu Mitakshara family has an implied authority to bind all the members by a discharge given by him without their concurrence, even though they be minors, and therefore time will run against them all—*Naurang* v. *Sheoraja*, 30 I.C. 75; *Harihar* v. *Bholi*, 6 C.L.J. 383; *Huchrao* v. *Bhimrao*, 42 Bom. 277, 20 Bom.L.R. 161; *Supdu* v. *Bhikaram*, 52 Bom. 441, A.I.R. 1929 Bom. 13; *Vigneswara* v. *Bapayya*, 16 Mad. 436; *Mahableshwar* v. *Rama Chandra*, 38 Bom. 94, 21 I.C. 350; *Duraisami* v. *Venkatrama*, 21 M.L.J. 1088, 12 I.C. 503; *Surju Prasad* v. *Khawahish*, 4 All. 512; *Doraisami* v. *Nondisami*, 38 Mad. 118 (131); *Kuppuswami* v. *Kamalammal*, 43 Mad. 842, 39 M.L.J. 375, 59 I.C. 662; *Narasimha* v. *Krishnachandra*, 37 M.L.J. 256, 52 I.C. 725; *Anna Pillai, In re*, A.I.R. 1936 Mad. 914, 165 I.C. 656; *Karan Singh* v. *Mt. Tetar Kuer*, A.I.R. 1937 Pat. 435 (F.B.). This is so even if the minor is joined as a co-plaintiff in a suit brought by the father as the manager of the joint family to recover a debt due to the joint family. In such a case this section does not apply—*Topamal* v. *Gordhandas*, I.L.R. (1941) Kar. 72, A.I.R. 1941 Sind. 166. In some cases it has been held that if a joint Hindu Mitakshara family consists of *brothers alone*, the elder brother *cannot* give a valid discharge without the concurrence of the others unless he acts as the manager, *i.e.*, unless he takes active steps in the management of the affairs of the family—*Ganga Dayal* v. *Mani Ram*, 31 All. 156, 6 A.L.J. 62, 1 I.C. 824; *Rajagopala* v. *Srinivasa*, 51 Mad. 627, 109 I.C. 572, A.I.R. 1928 Mad. 1055 (1056); *Lal Chand* v. *Gain Chand*, 34 P.L.R. 384, 142 I.C. 295, A.I.R. 1933 Lah. 479 (480); *Shampuri* v. *Ramchandra*, A.I.R. 1925 Nag 385, 88 I.C. 268. Consequently this section has no application to such a case—*Suresh* v. *Bai Ishwari*, 40 Bom.L.R. 127, A.I.R. 1938 Bom. 206; *Shantaya* v. *Mallappa*, 40 Bom.L.R. 1029, A.I.R. 1938 Bom. 500, 179 I.C. 33. In such a case though the right to sue becomes barred so far as the elder brother is concerned, it is not so as regards the minor; *Bhikarchand* v. *Lachmandas*, 40 Bom.L.R. 521, A.I.R. 1938 Bom. 392, 177 I.C. 286. In the case of brothers, who are daughter's sons of the last male Hindu owner the time for a suit on behalf of the daughter's sons to set aside an alienation by the limited owner does not begin to run until all the brothers entitled to sue become majors, it being a case of several persons jointly entitled to institute a suit—*Ramayya* v. *Veerabhadrachari*, (1944) 2 M.L.J. 177, 1944 M.W.N. 516, A.I.R. 1944 Mad. 512. And this view has been approved of by the Privy Council in *Jawahir Singh* v. *Udai Parkash*, 48 All. 152 (P.C.), 30 C.W.N. 698, 24 A.L.J. 97, A.I.R. 1926 P.C. 16, 93 I.C. 216, though the Judicial Committee did not discuss the question of limitation. But several other cases have adopted the view that in a Hindu family consisting of brothers, the elder brother must be deemed to be the managing member of the family, and can give a discharge on behalf of the minor brothers—*Doraisami* v. *Nondisami*, 38 Mad. 118 (133), 25 M.L.J. 405, 21 I.C. 410; *Anna Pillai, In re*, A.I.R. 1936 Mad. 914, 165 I.C. 656; *Karan Singh* v. *Mt. Tetar Kuer*, A.I.R. 1937 Pat. 435 (F.B.); *Venkatarama* v. *Bheema*, A.I.R. 1934 Mad. 103, 148 I.C. 54; *Mahableswar* v. *Ramachandra*, 38 Bom. 94, 15 Bom.L.R. 882, 21 I.C. 350; *Bapu Tatya* v. *Bala Ravji*, 45 Bom. 446, 22 Bom.L.R. 1383, (dissenting from 31 All. 156); *Kuppusami* v. *Kamalammal*, 43 Mad. 842; *Narayya* v. *Subbamma*, A.I.R. 1928 Mad. 42, 53 M.L.J. 677; *Jagdish Narain* v. *Bishun*, 1941 O.W.N. 1237, A.I.R. 1941 Oudh. 165, 191 I.C. 825; *Varada* v. *Venkatanarasimha*, I.L.R. 1940 Mad. 752, 1940 M.W.N. 582, A.I.R. 1940 Mad. 530, (1940) 1 M.L.J. 195 where it has been held that it is incumbent on the person to prove facts rebutting the ordinary presumption that the eldest brother has acted as manager and this view seems to have been adopted by

by the Allahabad High Court also in the cases of *Rati Ram* v. *Noidar*, 41 All. 435; and *Shiamlal* v. *Moolchand*, 87 I.C. 177, A.I.R. 1925 All. 672. The Madras High Court has held in *Subba Rao* v. *Pattabhiramayya*, (1945) 1 M.L.J. 200, A.I.R. 1945 Mad. 498, 1945 M.W.N. 152 that this section will not operate as a bar if the elder brother does not act as manager during the relevant period.

In a joint *Dayabhaga* Hindu family of brothers, the eldest brother cannot give a valid discharge to bind his minor younger brothers—*Nabin Chandra* v. *Chandra Madhab*, 44 Cal. 1 (9) (P.C.); *Jugal Kishori* v. *Butto Kristo*, 55 Cal. 608, 32 C.W.N. 192 (195).

Where, however, the minor is represented by a guardian appointed under the Guardian and Wards Act it cannot be said that the adult member is in a position to act as a managing member and as such he can not give valid discharge under this section—*Gourhari* v. *Sm. Anardia*, 67 C.L.J. 88.

Where the father or the managing member of a joint Hindu family is also appointed as the guardian *ad litem* of the minor members, the powers of the father are controlled by the provisions of O. 32, r. 6, C. P. Code, and he cannot, without leave of the Court, do any act in his capacity as father or managing member of the joint family which he is debarred from doing as guardian *ad litem*. He, therefore, cannot give a valid discharge on behalf of the minor members of the family without the leave of the Court—*Ganesh Ram* v. *Tulja Ram Row*, 26 Mad. 295 (303) (P.C.). Ordinarily, the manager of a joint Hindu family is competent to give a valid discharge by himself without the concurrence of the rest of the family including the minors. If, however, he happens to be the *guardian ad litem* or the next friend of the minor member of his family, it has been held that he would not be competent to give a valid discharge in respect of the subject matter of the suit or decree wherein he occupies such a position without obtaining the permission of the Court under Or. 32, r. 6, C. P. Code, in respect of such interest—*Ganesh Row* v. *Tuljaram Row*, 35 Mad. 295, 19 I.C. 515, 40 I.A. 132 (P.C.). This principle applies even though a decree is obtained by manager in a suit brought in the name of the joint family firm on behalf of himself and as next friend of the minor—*Ram Prakash* v. *Jodh Singh*, 44 P.L.R. 368, A.I.R. 1942 Lah. 208, 203 I.C. 295. The same principle was applied to execution petitions in *Latchmana* v. *Subbiah*, A.I.R. 1925 Mad. 78, 47 Mad. 920; *Krishna* v. *Jayarama*, I.L.R. (1943) Mad. 595, (1942) 2 M.L.J. 736, 1943 M.W.N. 81; *Parameshwari* v. *Ranjit*, A.I.R. 1939 Pat. 33, 177 I.C. 713 where it was assumed that the minor was represented by a next friend in the suit; *Satyaranjan* v. *Kalyani*, 80 C.L.J. 198, 49 C.W.N. 558, A.I.R. 1945 Cal. 387. But as the provisions of Or. 32, rr. 6 and 7 do not restrict in any way the powers of a father or a manager in a joint Hindu family to receive the amount of a decree and to give a valid discharge so as to bind a minor member of his family also, who is a party to the suit without obtaining the leave of the Court, in cases where such father or managing member is not the next friend of the said minor, and as there is no provision statutory or otherwise, imposing such a restriction, those powers of his are not in any way affected by the mere fact that another person is the next friend of the minor—*Administrator-General, Madras* v. *Radhakrishna*, A.I.R. 1936 Mad. 434, 70 M.L.J. 700, 161 I.C. 969. This right is derived from the substantive law and is not affected in any way by any of the formalities which may have to be gone through in enforcing it.

Where one of the decree-holders is a minor and the other decree-holders are in a position to give a valid discharge without the concurrence of the minor, the right of all the decree-holders to apply for execution is barred by reason of the provisions of sec. 7. In such a case the fact that another person is appointed as next friend of

the minor does preclude the manager of the family to which the minor belongs from giving a valid discharge. Where of five joint-decreeholders one is a minor, and is represented by a co-decreeholder who is a certified guardian, and the application for execution of the decree is filed after three years had expired from the date of the decree, the execution is not barred under the second part of section 7. In such a case the certified guardian cannot receive the decretal money amicably and out of Court and give a discharge which would bind the other decree-holders—*Abed Hossain* v. *Abdur Rahaman*, A.I.R. 1935 Cal. 631, 158 I.C. 567. And in *Gangadeo Singh* v. *Ramprasad Singh*, A.I.R. 1937 Pat. 155, relying on *Ganga Dayal* v. *Mani Ram*, 31 All. 156 (approved in 48 All. 152 P.C.), it was held that the mere coming of age of one of the brothers in a joint Hindu family does not raise any presumption that he is the manager of the family in the absence of any evidence.

94. Guardian:—The natural or lawful guardian can give a valid discharge on behalf of his ward. Thus, where a rent decree was obtained by an adult plaintiff and three minors who were described in the plaint as suing through the adult plaintiff as their guardian, it was held that the adult plaintiff being entitled to obtain the decretal amount and give a valid discharge, the matter came direcly under this section, and the minor plaintiffs are not protected by the provisions of section 6 and cannot wait till majority—*Bholanand* v. *Padmanand*, 6 C.W.N. 348 (351). But a contrary view has been taken by the Patna High Court in *Kamaleshwari* v. *Shivachandra*, 26 Pat. 744, A.I.R. 1949 Pat. 212 where it has been held that in such cases the natural guardian not being a co-decree-holder cannot give discharge.

But a *de facto* guardian (*e.g.*, a mother according to the Mahomedan law), is not the lawful guardian of the property of the minor, and cannot therefore give a valid discharge—*Amina Bibi* v. *Bama Shankar*, 41 All. 473.

95. Decree-holders:—Section 8 of the Act of 1877 (corresponding to the present section) used the words "joint creditors and claimants" and did not apply at all to joint *decree-holders*. The reason was, that this section was held to be applicable only to those cases where the act of the joint owner was *per se* a valid discharge, and since the discharge of a judgment-debtor's liability was always given by the order of the Court and never by the mere act of the decree-holder, this section was not applicable to decree-holders. See *Sesha* v. *Rajagopala*, 13 Mad. 236; *Narayanan* v. *Damodaram*, 17 Mad. 189; *Govindram* v. *Tatia*, 20 Bom. 383; *Zamir Hasan* v. *Sundar*, 22 All. 199 (F.B.); *Surya Kumar* v. *Arun Chunder*, 28 Cal. 465; *Periasami* v. *Krishna Ayyan*, 25 Mad. 431.

Now, by reason of the express words "application for the execution of a decree" the provisions of the present section apply to joint decree-holders, wherever one of them can act in the matter on his own authority without the concurrence of the others. As to the cases when one of the joint decree-holders can give valid discharge See Note. 93.

Where a suit for possession of land was instituted by the widow of a deceased brother and a minor brother, *held* that the plaintiffs' interests were distinct and separate, although a joint decree was passed, and that the widow was not entitled to give a valid discharge on behalf of the minor, and that limitation did not begin to run against the minor until he attained majority—*Chiranji* v. *Ram Sarup*, 1929 A.L.J. 72, A.I.R. 1929 All. 267, 118 I.C. 229.

During the pendency of a suit, the plaintiff (a Mahomedan) died. Succesession certificate was applied for, and was granted to five persons, *viz.*, the widow and four sons of the original plaintiff; of these sons one H was a major and the other

three were described as minors represented by their adult brother H as guardian. A bond was taken from H, to secure the interests of the minors. These five persons were brought on the record and a decree was passed in 1913 in their names. *Held*, that the adult decree-holder H was competent, by reason of this certificate, to give a valid discharge to the judgment-debtors. An application for execution made in 1920 was therefore barred, and limitation was not saved by the fact that some of the decree-holders were still minors—*Bilwar Bibi* v. *Habibar*, 51 Cal. 566, A.I.R. 1924 Cal. 710, 84 I.C. 204.

Under the Mahomedan law, the uncle is not legal or natural guardian of the property of a minor, and so if a joint decree is passed in favour of an adult uncle and his two minor nephews, the adult decree-holder is not competent to give a valid discharge so as to bind the interests of the minor decree-holders—*Court of Wards* v. *Abrar Ali*, 78 I.C. 285, A.I.R. 1924 Lah. 681.

96. Receiver:—A receiver was appointed to collect the debts due to a firm, in which some of the partners were minors. One of the assets of the firm was a decree. An application for execution of the decree made more than three years after the appointment of the receiver was held as barred, inasmuch as the receiver was competent to give a valid discharge. When the debts had vested in the receiver, the minority of any of the members would cease to have any importance, for the rights of the minors and the rights of the majors were all absorbed by the receiver—*Girija* v. *Kanhiya*, 18 C.W.N. 138 (140), 20 I.C. 701.

97. Tort:—As a general rule, where a joint right to sue arises out of a tort, one or some of the holders of such right cannot give a discharge without the concurrence of the others, unless they are all partners or executors or members of a joint Hindu family, the manager of which has implied authority to bind all the members by his discharge—*Harihar* v. *Bholi*, 6 C.L.J. 383. But this rule is not an inflexible one, and where two persons have been damnified by the same tortious act, one is entitled to enforce his claim for damages so far as he has been injuriously affected by the tort, although the claim of the other is barred by limitation—*Ibid.*

98. Pleading:—If one of several plaintiffs is a minor, and if the provisions of this section apply, it would not be necessary in the plaint to expressly claim exemption from the law of limitation. The fact is patent on the record—*Gangadhar* v. *Khaja Abdul*, 11 C.L.J. 34, 14 C.W.N. 128, 2 I.C. 77.

Special exceptions.

8. Nothing in section 6 or in section 7 applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.

Illustrations.

(*a*) A, to whom a right to sue for a ligacy has accrued during his minority, attains majority eleven years after such accruer. A has, under the ordinary law, only one year remaining within which to sue. But under section 6 and this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring his suit.

(*b*) A right to sue for an hereditary office accrues to A who at the time is insane. Six years after the accruer A recovers his reason. A has six years, under the ordinary

law, from the date when his insanity ceased within which to institute a suit. No extension of time will be given him under section 6 read with this section.

(*c*) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accruer, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring a suit. Section 6 read with this section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

Scope of section:—This section is ancillary to and restrictive of the concession granted in sec. 6 and 7, and does not confer any substantial privilege—*Rangaswami* v. *Thangavelu*, 42 Mad. 637 (640). This section is in the nature of a proviso to secs. 6 and 7—*Janardan* v. *Nilkantha*, A.I.R. 1952 Orissa 31.

Before the Act of 1877 was passed, sec. 7 applied to suits for pre-emption. See *Raja Ram* v. *Bansi*, 1 All. 207. This is no longer the law.

99. Extension:—This section must be read together with each article in Schedule I, and when the period prescribed by the latter is three years or more, and expires within three years from the date of attainment of majority, the intention is that the late minor should have the full term of three years; but when the prescribed period is less than three years and the minor gets that period (according to sec. 6) from the date of the majority, the prescribed period is not to be enlarged to three years—*Subramanya* v. *Siva Subramanya*, 17 Mad. 316 (323).

The effect of section 6 is that a person under disability may sue after the cessation of the disability within the same period as he would otherwise have been allowed under the Schedule; and the present section adds a proviso that in no case can the period be *extended* to anything beyond three years from the cessation of the disability—*Vasudeva* v. *Magumi*, 24 Mad. 387 (395) (P.C.).

The combined effect of sections 6 and 8 may be stated os follows:—

(1) If the period of limitation prescribed for the suit or application is three years or less, and it expires before the minor attains majority, the minor will get the same period from the date of attaining majority. See Illustration (*a*) to sec. 6. In such a case there is no occasion for section 8 to apply.

(2) If the period of limitation is more than three years (*e.g.*, if the suit is one for possession, for which the prescribed period is 12 years), and it expires before the minor attains majority, the minor will get only three years from the date of attaining majority, under sec. 8.

(3) If the period of limitation is three years or less, and it expires at some date after the minor attains majority (*e.g.*, if the suit is one falling under Art. 36, the period prescribed for which is two years, and the minor attains majority 1½ years after the accrual of the cause of action) the minor will get the full period prescribed for the suit (*i.e.*, 2 years) from the date of attaining majority.

(4) If the period of limitation prescribed for the suit is more than 3 years, and it ordinarily expires within three years (or less) after the minor attains majority, he will get 3 years from the date of majority. See Illustration (*a*) to sec. 8.

(5) If the period of limitation prescribed for the suit is more than three years (*e.g.*, 12 years), and the period ordinarily expires on a date which is more than three years from the date of attainment of majority (*e.g.*, if the right to sue accrues in 1900, and the minor attains majority in 1907, so that ordinarily the period will expire 5 years after the attainment of majority by the minor), the minor will get the remaining period (*i.e.*, 5 years) from the date of majority, but no further extension of time (*viz.*, 12 years from the date of majority) will be allowed under sec. 6.

because in ordinary course he is getting more than three years. *Cf.* Illustration (*b*) to sec. 8.

Under this section the period can be extended upto an extent of three years if under the ordinary law out of the period of limitation prescribed, there remains a period of less than three years for bringing the suit. But if the period remaining is more than three years, no extension can be gronted—*Lok Nath* v. *Rohlu*, A.I.R. 1951 J. and K. 25.

Where the period prescribed for a suit expires three years after the majority of the minor, he is not entitled to any extension of time under the combined effect of sec. 6 and this section—*Bibhuti* v. *Girish*, A.I.R. 1950 Pat. 191. But where the period prescribed by Schedule 1 expires more than three years after the termination of the disability, then upon the date on which the limitation prescribed by that Schedule expires, there is no question of any extension of time. This section has no application to such a case as this section is not intended to curtail the period of limitation—*Chebedilal* v. *Gopinath*, A.I.R. 1948 Oudh 351.

The extended period of three years after attaining majority can only be claimed by a person entitled to institute the suit at the time from which the period of limitation is to be reckoned. A person who was *not in existence* at that time does not come within this description and therefore is not entitled to the three years' extension. Thus, in a suit brought to contest an alienation of joint family property, it is from the date of alienation that the period of limitation is to be reckoned, and a coparcener *born after* the date of alienation cannot claim to bring a suit within three years after mojority; as he was not in existence at the date of alienation, he cannot claim the benefit of this section—*Ranodip* v. *Parameshwar*, 47 All. 165 (P.C.), 29 C.W.N. 666, A.I.R. 1925 P.C. 33, 86 I.C. 240. This subject has been more fully discussed in Note 78 under section 6, *ante*. But a son in mother's womb is entitled to the benefit of this section as for the purposes of this section he is regarded as a "person"—*Basayya* v. *Baslingayya*, 49 Bom.L.R. 175, A.I.R. 1948 Bom. 150. The law nowhere provides that the period spent by a child in womb is not to be regarded as a period of minority. So a child in womb can take advantage of the provisions of sec. 6 and this section—*Audesh* v. *Rajeshwari*, A.I.R. 1951 All. 630.

According to this section a minor can not have more than three years after attaining majority for filing a suit for possession in cases where the period of limitation has already expired during his minority. The combined effect of secs. 6 and 8 is that the plaintiff is not entitled to claim any period longer than twelve years after the possession of the defendant becomes adverse—*Janardan* v. *Nilkantha*, A.I.R. 1952 Orissa. 31.

If a minor acquired a cause of action to sue for possession of property (Art. 142), and after attaining majority died within the three years allowed by this section, his legal representative can institute a suit at any time within the 3 years' period which had already commenced within the lifetime of the deceased, although more than twelve years have elapsed from the accrual of the cause of action—*Arjun* v. *Ramabai*, 40 Bom. 564 (567), 18 Bom.L.R. 579, 37 I.C. 221. *Cf.* Sub-section (3) of section 6, which provides for an extension of time in favour of the legal representative of a person having a cause of action dying under disability.

Computation of three years:—The three-year period mentioned in this section must be counted, not from the date of attainment of majority, but from the date of the cessation of minority—*Batuk* v. *Rudra*, A.I.R. 1950 Pat. 206.

9. Where once time has begun to run, no subsequent disability or inability to sue stops it:

Continuous running of time.

Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

100. Principle:—The rule of this section has been taken from the English Law. "Time when once it has commenced to run in any case will not cease to do so by reason of any subsequent event. Generally when any of the statutes of limitation have begun to run, no subsequent disability will stop this running"—Banning on Limitation (3rd Edn.) pp. 7-8. " When the time has once begun to run, it will continue to do so even should subsequent events occur which render it an impossibility that an action should be brought."—Darby and Bosanquet on Limitation (2nd Edn.), page 25.

Parties to a contract may agree to postpone the accrual of any rights under it, but they cannot postpone the period of limitation in case a suit should have to be filed for its breach; since under section 9, it is clear that when once limitation begins to run, it cannot be stopped by anything that happens subsequently. Therefore, where the period had commenced to run, a reference to arbitration would not prevent the operation of the law of limitation, and the period between the date of agreement to refer to arbitration and the date when the arbitration proceeding terminated should not be excluded from computation—*Ramamurthi* v. *Gopayya*, 40 Mad. 701 (705), 31 M.L.J. 231, 35 I.C. 575; *Sheikh Abdur Rahim* v. *Barira*, 2 P.L.T. 556, 61 I.C. 807, 6 P.L.J. 273 (283). On the principle of this section it has been held that limitation having once commenced to run in the lifetime of a full owner cannot be taken to be suspended if he dies and is succeeded by a limited owner—*Batisa Kuer* v. *Raja Ram*, 5 Pat. 441, 7 P.L.T. 393, 92 I.C. 177, A.I.R. 1926 Pat. 192. When the time has once commenced to run against the absolute owner, no subsequent alteration in the title will postpone the bar—*Lilabati* v. *Bishun*, 6 C.L.J. 621.

Scope of section:—The section applies not only to suits but to applications as well. The words 'to sue' should be taken as including within it 'to apply in execution'—*Muthu Korakki* v. *Madar Ammal*, 43 Mad. 185 (207), 38 M.L.J. 1 (F.B.).

Section 9 contemplates cases where the cause of action continues to exist. It cannot apply to cases where the cause of action is cancelled by reason of subsequent events—*Jateendra Chandra* v. *Rebateemohan*, A.I.R. 1935 Cal. 333 (335), 62 Cal. 66, 158 I.C. 567; *Prabhakar* v. *Chandra Kant*, I.L.R. (1943) Nag. 422, 1943 N.L.J. 159, A.I.R. 1943 Nag. 178. The principle laid down in this section is subject to certain exceptions. Even where time has begun to run, it can be stopped provided the cause of action which has given the right to sue is discharged or in any way disappears—*Sri Niwas* v. *Baleswar*, A.I.R. 1950 All. 526. The period of limitation can be extended in three classes of cases *viz.*, (1) where injustice has been caused by an act of Court, (2) where the cause of action was satisfied and (3) where the cause of action was cancelled —*Midnapore Zemindary Co.* v. *Naba Kumar*, A.I.R. 1950 Cal. 298.

100A. When time runs:—Time runs when the cause of action accrues, and the cause of action accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to

be proved to entitle the plaintiff to succeed—*Coburn* v. *Colledge*, [1897] 1 Q.B. 702; *Gelmani* v. *Morriggia*, [1913] 2 K.B. 549. The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief—*Whalley* v. *Whalley*, (1816) 1 M.R. 436. It is only when the cause of action is complete that the bar of time begins to run; for example, if a previous demand is required before the complete right to sue arises, the time will only run as from the date of demand—*Tidd* v. *Overrell*, [1893] 3 Ch. 184. (Compare Arts. 60, 88, 89). Therefore, if the plaintiff commences his action before his right of action is complete, he must inevitably fail in the action, even though he should be able to acquire and actually acquire the oustanding right during the currency of the action—*Godfrey* v. *Tucker*, (1863) 33 Beav. 280. For example, a remainderman, unless he first gets in the prior subsisting life-estate, will lose his action for a partition, although he should have got in the life-estate during the currency of the action —*Evans* v. *Bagshaw*, (1870) L.R. 8 Eq. 469; L.R. 5 Ch. App. 240. The Statute of limitation does not attach to a claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when the plaintiff could have first maintained his action to a successful result—Angell on Limitations, sec. 42; Story's Equity Jurisprudence, sec. 1521-a. Whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit, the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities—*per* Sadasiva Ayyar J. in *Muthu Korakki* v. *Madar Ammal*, 43 Mad. 185 (F.B.). An useful analogy is furnished by cases where it has been ruled that time cannot be held to run against a person who is not in a position to sue, for such a person has no enforceable cause of action which is extinguished by lapse of time; thus, adverse possession against a tenant does not operate against the landlord during the continuance of the tenancy—Note 613 under Article 144; so also, adverse possession against a mortgagor does not operate against a simple mrtgagee who is not entitled to immediate possession—*Pryyasakhi* v. *Manbodh*, 44 Cal. 425; see Note 616 under Article 144.

In a case of the Calcutta High Court, M. N. Mukherji, J., has remarked that the statement that the cause of action accrues only when the plaintiff could have mainained his action to a successful result, should be accepted with caution. His Lordship observes: "A careful study of the third column of the schedule reveals an outstanding fact which cannot be ignored, namely that the starting point of limitation does not always synchronise with the cause of action; in many cases it does, but in others it dates from some specified events which are either anterior or posterior to the accrual of the cause of action.....In the case of such of the articles of the Limitation Act in which the starting point of time synchronises with the cause of action, I am prepared to hold that the test is to ascertain the time when the plaintiff could have mainained his action to a successful issue. If, in such a case, at the time when the cause of action arises, there is no person capable of suing upon it, the statute does not run. Similarly, it is necessary that there shall be a person to be sued, and it is also necessary that the cause of action should be completed, that is, all the facts must have happened which are material to be proved in order to entitle the plaintiff to succeed.'—*Sarat Kamini* v. *Nagendra*, 29 C.W.N. 973, 43 C.L.J. 155, 89 I.C. 1000, A.I.R. 1926 Cal. 65.

101. Disability, Inability:—Disability is want of legal qualification to act; inability is want of physical power to act—*Purno* v. *Sassoon*, 25 Cal. 496 (504) (F.B.);

Deutsch Asiatische Bank v. *Hira Lal*, 47 I.C. 122 (123). For the purpose of limitation, a disability is the state of being a minor, insane or an idiot; whereas illness, poverty etc., are instances of inability.

The disability or inability contemplated by sec. 9 is confined to such cases as are mentioned in the Act itself, and new exemptions cannot be recognised—*Sarat Kamini* v. *Nagendra*, 29 C.W.N. 973, A.I.R. 1926 Cal. 65 (67), 89 I.C. 1000.

The Legislature has caused some confusion in introducing the word 'inability' into this section, there being no 'inability' mentioned in any portion of the Act. Consequently the inability referred to here must be held to be a personal inability affecting the *plaintiff* himself and having reference to his condition, state or position, and not to the circumstances of the person against whom he is suing. The fact that the plaintiff was unable to sue the defendant owing to the latter's absence from British India would not constitute an 'inability' under this section so as make the period of limitation run continuously. In such a case the rule of section 13 will apply and the period of defendant's absence from British India will be excluded from computation. This section does not in any way qualify section 13—*Hanmatram* v. *Bowles*, 8 Bom. 561 (dissenting from *Narronji* v. *Mugniram*, 6 Bom. 103); *Beake* v. *Davis*, 4 All. 530. The defendant's absence from British India does not amount to inability to sue—*Jivraj* v. *Babaji*, 29 Bom. 68 (70).

In cases where the plaintiff is unable to sue because of the non-appointment of a personal representative to a deceased debtor in whose life-time the period has commenced to run but who has died subsequently, the statute will continue to run—*Rhodes* v. *Smethurst*, 4 M. & W. 42; *Boatwright* v. *Boatwright*, L.R. 17 Eq. 71.

This section contemplates a case of *subsequent* and not of *initial* disability, that is, it contemplates those cases where the disability occurred after the accrual of the cause of action; whereas cases of initial disability have been provided for by section 6. Thus, a decree-holder after making various applications for execution of a decree, each of which was within time, died. His son, a minor, made an application for execution of the decree within three years after his father's death but more than three years after the date of the deceased father's last application. It was held that this section applied and not section 6, and the minor's application for execution was time-barred, it being a case not of initial but of subsequent disability—*Jivraj* v. *Babaji*, 29 Bom. 68; *Kalka Bakhsh* v. *Ram Charan*, 40 All. 630 (F.B.), 16 A.L.J. 633, 46 I.C. 584. Where the father of a joint Hindu family alienated the family property, time began to run from the date of the alienation or from the date of the alienee's taking possession (Art. 126), and a son who was born after the date of alienation could not get an extension of time under sec. 6. Section 9 applied, and the subsequent birth and minority of the after-born son could not stop the running of time—*Shahamad* v *Salabat*, 8 Lah. 19, A.I.R. 1927 Lah. 97, 97 I.C. 435. See also *Dhanraj* v. *Ram Naresh*, A.I.R. 1924 All. 912; *Sankat Narayan* v. *Ram Bharos*, A.I.R. 1924 All. 677 and other cases cited in Note 78 under sec. 6. Where a decree-holder died, leaving a minor son who, on attaining his majority nine years after the date of the decree, applied for execution, it was held that the application was barred, as time had begun to run in the original decree-holder's life-time—*Bhagat* v. *Ramnath*, 27 All. 704; *Bhagwant Ramchandra* v. *Kaji Mahamad*, 36 Bom. 498; *Nusheeram* v. *Shushee*, 5 W.R. 169; *Vira* v. *Muruga*, 2 M.H.C.R. 340.

But where the original decree-holder who obtained a decree in May 1886, died in June 1888, leaving three minor sons, and on 30th April 1889 the sons, still minors, made an application for execution, but no further proceedings were taken till 1st October 1904 when another application was made, *held* that the present application was

within time on the ground that although limitation had commenced to run against the father from May 1886, the application made by the minors on the 30th of April 1889 was a step-in-aid of execution, and time began to run anew from that date and then minority suspended it—*Sri Ram* v. *Het Ram*, 29 All. 279. Cf. *Lalit Mohun* v. *Janoky*, 20 Cal. 714 (716). Similarly, where an acknowledgment of liability of a mortgage was made by the mortgagor at a time when the original mortgagee was dead and his son was a minor, a *new period of limitation* came into existence from the date of acknowledgement, under sec. 19. Section 9 could not apply because "the time which has once begun to run" had come to an end. The minor got a new period of limitation from the date of acknowledgment, and by virtue of sec. 6 time ran from the date of his attainment of majority—*Chandrabhan* v. *Rajkumar*, 54 All. 1019, 1932 A.L.J. 1012, A.I.R. 1933 All. 100 (101), 142 I.C. 794; *Venkataramayyar* v. *Kothandaramayyar*, 13 Mad. 135; *Gangadhar* v. *Dolgovinda*, A.I.R 1956 *Orissa* 193.

The insanity of the decree-holder, which began after the passing of the decree, did not save limitation which had already commenced to run from the date of the decree —*Aya Singh* v. *Gurdyal*, 72 P.L.R. 1906. So also where a judgment debtor is adjudicated an insolvent after passing of the decree the time for applying for execution is not suspended—*Nowbab* v. *Fateh*, 41 P.L.R. 799, A.I.R. 1939 Lah. 270.

An unregistered instalment bond was executed in favour of a Hindu widow. It contained a stipulation that the whole amount would be recoverable in default of payment of two consecutive instalments. Default was made in payment of two instalments in 1899. Shortly after the default, the widow adopted the plaintiff, who was then a minor. In 1908 within three years of attaining majority but nine years after default he sued on the bond but expressly relinquished the amount due in respect of the first two instalments which had fallen due prior to his adoption, on the ground that he had waived payment of the same. On this footing he alleged that the cause of action had arisen during his minority and that therefore the claim for the remaining instalments was not barred. It was held that mere abstinence from suing did not amount to waiver; that limitation had begun to run from the default in 1899, and no subsequent disability, *viz.*, the minority of the plaintiff, could prevent if from running. The suit was barred by the three years' rule under Article 75—*Girindra Mohan* v. *Khir Narayan*, 36 Cal. 394. A suit by a shebait in 1913 to recover possession of a debuttor property held by the defendant under a *mokurari* lease granted by a previous shebait in 1876 is barred by Article 134, as brought more than 12 years after the date of the lease. The representation of an idol by shebaits is a continuing representation, and limitation runs against the idol continuously and not against each shebait individually if and when he succeeds to the shebaitship. Consequently the fact that the succeeding shebait was a minor would not stop the running of time, by virtue of the provisions of this section—*Mammatha* v. *Annada*, 27 C.L.J. 201, 44 I.C. 567. (See Art. 134).

The principle of this section applies to a suit by the reversioners of an adopted son for recovery of possession of properties alienated by the adoptive mother during the minority of the adopted son, who on attaining majority gave a receipt to the adoptive mother indicating his consent to the alienation. The reason is that time began to run against the adopted son in his life-time and his title expired by reason of adverse possession—*Gopal Das* v. *Sri Thakurji*, I.L.R. (1943) Kar. (P.C.) 69, 47 C.W.N. 607, 1943 A.L.J. 292, 46 Bom.L.R. 220, (1943) 2 M.L.J. 51, A.I.R. 1943 P.C. 83.

The plaintiffs, a German Bank, were the endorsees of certain promissory notes drawn by the defendants, dated June 1914. On the 4th August, 1914, war was declared with Germany, and the plaintiffs were debarred from bringing any action to enforce their claim. On 1st November, 1915, the plaintiffs obtained licence from Government

to bring an action, and on 9th May 1918 the present suit was filed. The plaintiffs claimed that the period between the 4th August 1914 and 1st November 1915 should be deducted from computation, and they urged that their suit was within time. It was held that the suit was barred. Under this section, once time has begun to run, no subsequent disability or inability in the shape of suspension of right to sue stops it, and the plaintiffs are not entitled to exclude the period of such suspension—*Deutsch Asiatische Bank* v. *Hira Lal*, 47 I.C. 122 (123); on appeal, 46 Cal. 526, 23 C.W.N. 157, 47 I.C. 398. And so in a case that occurred during the time of the English Civil War, the plaintiff in answer to a plea of limitation replied that a Civil War had broken out and the Government was usurped by certain traitors and rebels which hindered the course of justice and by which the Courts were shut up, and that within six years after the war ended he commenced his action and yet his replication was held to be ill —*Prideaux* v. *Webber*, (1661) 1 Lev. 31: 83 E.R. 282. In the above Calcutta case, the plaintiffs showed utter want of diligence, as they had ample time to sue within the period of limitation after they obtained permission to sue. Their suit was therefore, rightly dismissed.

Voluntary and involuntary disabilities:—There is no distinction between voluntary and involuntary (*e.g.*, caused by minority) disabilities—*Khanjan* v. *Bhikan*, 18 I.C. 306 (Oudh). As the rule stands, it appears to apply strictly to every case of subsequent disability or inability excepting those cases that may be specially exempted from the operation of this rule. Even circumstances beyond the control of the plaintiff have been held not to relax the rigour of the rule in favour of the plaintiff —*Ibid.* In *Doe d Duroure* v. *Jones*, (1791) 4 T.R. 300, 2 R.R. 390, Lord Kenyon observed that it was mischievous to make any refined distinction between voluntary and involuntary disabilities.

102. Suspension and revival of cause of action:—Ordinarily, time begins to run from the earliest time at which an action can be brought; and if the right has been suspended, there may be a revival of the right to sue when a previous satisfaction of the claim is nullified with the result that the right to sue which had been suspended is re-animated—*Dwijendra* v. *Jogesh Chandra*, 39 C.L.J. 40, 79 I.C. 520, A.I.R. 1924 Cal. 600. Thus, certain disputes between a principal and an agent were referred to arbitration, and under the award thereon certain moneys were paid by the agent in satisfaction of the claim. The agent afterwards sued to set aside the proceedings on the ground that they were brought about by coercion, and succeeded in getting back the amount paid. The principal subsequently sued the agent to enforce the original liability to account. The defendant pleaded *inter alia* that the suit was barred. *Held* that the setting aside of the satisfaction in the former proceedings gave rise to a fresh cause of action and that the suit was therefore in time—*Muthuveerappa* v. *Adaikeppa*, 43 Mad. 845, 39 M.L.J. 312, 59 I.C. 472. Plaintiff raised the money due to him from the defendant on an award which had merged in a decree of Court. Subsequently the award was set aside and the plaintiff was directed to refund the money realised by him. In a suit by the plaintiff for recovery of the amount it was held that when the plaintiff's original claim was satisfied in execution, limitation ceased running against him. On the annulment of that satisfaction a fresh cause of action arose and the suit was within time—*Kartar Singh* v. *Bhagat Singh*, 2 Lah. 320, 64 I.C. 454. A sale under the Patni Regulation having been set aside and the partnidars restored to possession, the Zemindar sued them to recover the arrears of rent which had accrued before and during the time they were out of possession; the tenants contended that the claim was barred because the suit had not been brought within three years from the date when each instalment of rent fell due; but the Judicial Committee

overruled the contention and held that the cause of action accrued upon the reversal of the auction sale and the consequent revival of the obligation to pay the rent—*Surnomoyee* v. *Shooshee Mookhee*, (1868) 12 M.I.A. 244 (P.C.). A debtor agreed to convey certain property to his creditor and to set off the debt against part of the consideration for the conveyance. A sale-deed was executed but a dispute arose as to whether it had been executed in accordance with the contract. Litigation was commenced by the debtor to enforce the agreement, but he was unsuccessful. The creditor then sued to recover the debt and was met with the plea of limitation. The Judicial Committee held that the time began to run only when the agreement became wholly ineffectual and that from that date a fresh obligation was imposed upon the debtor to pay his debt—*Bassu Koer* v. *Dhum Singh*, 11 All. 47 (P.C.). See also *Nrityamani* v. *Lakhan Chandra*, 43 Cal. 660 (P.C.), cited in Note 156 under sec. 14; and *Prannath* v. *Rookea Begum*, 7 M.I.A. 323 (P.C.); *Hem Chandra* v. *Kali Prasanna*, 30 Cal. 1033 (P.C.).

But in the following cases the Judicial Committee and the Indian High Courts have strictly applied the principle of sec. 9 that when once time has begun to run, no subsequent liability to sue stops it—*Huro Pershad* v. *Gopal Das*, 9 Cal. 255 (P.C.); *Soni Ram* v. *Kanhaiya Lal*, 35 All. 227 (P.C.); *Juscurn* v. *Pirthi Chand*, 46 Cal. 670 (P.C.); *Hukum Chand* v. *Shahab Din*, 4 Lah. 90, 71 I.C. 495. Thus, when limitation for a suit for redemption once began to run it would not be suspended for the period during which a fusion of the interests of the mortgagor and the mortgagee took place—*Soni Ram* v. *Kanhaya Lal*, 35 All. 227 (237) (P.C.). So also, where a mortgagee is entitled to possession immediately, time begins to run from the date of the mortgage (Art. 135) and the mere fact that the possession of the mortgaged property was subsequently taken by a prior mortgagee does not prevent limitation from running—*Hukum Chand* v. *Shahad Din*, supra.

The Indian Limitation Act is undoubtedly an exhaustive Code governing the law of limtaton in India. The cases in which the running of limitation can be suspended are contained in the sections of the Act. It would be dangerous to lay down generally that there is some principle outside the Limitation Act under which limitation can be suspended. We are therefore unable to accept any universal principle of suspension of limitation outside the Limitation Act—*Ram Charan* v. *Goga*, 49 All. 565, 102 I.C. 96, A.I.R. 1927 All. 446. There can be no suspension of time which has once begun to run except under the heads of deduction specifically recognised and provided for by the statute—*Ramakrishna* v. *Srinivasalu*, A.I.R. 1950 Mad. 552. There is nothing in the Limitation Act which would jdstify the Court in holding that once the period of limitation had begun to run it could be suspended. If the Courts were to hold that by some reason the period of limitation was suspended they would be deciding contrary to the express enactment of sec. 9—*Soni Ram* v. *Kanhaiya Lal*, 35 All. 227 (P.C.), 19 I.C. 291. The Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. The Judicial Committee have drawn attention to secs. 9 and 14 and have held that exemptions not covered by these and other sections should not be imported by Courts to relieve a party from the bar of limitation—*Muthu Korakki* v. *Madar Ammal*, 43 Mad. 185 (F.B.) (*per* Seshagiri Aiyar, J.). In applying the principles of limitation, the Indian Courts are not permitted to travel beyond the provisions embodied in the Limitation Act, and apart from the provisions of that Act there is no principle which can legitimately be invoked to add to or supplement its provisions—*Sarat Kamini* v. *Nagendra*, 29 C.W.N. 973, 89 I.C. 1000, A.I.R. 1926 Cal. 65; *Satyanarayana* v. *Seethayya*, 50 Mad. 417, A.I.R. 1927 Mad. 597, 100 I.C. 766. And so, in computing the period of limitation for a suit against a Ruling Chief (*e.g.*, *the* Gaekwar of Baroda) the plaintiff is not entitled to a

deduction of the time spent by him in obtaining the Government of India's consent under sec. 86, C. P. Code, as secs. 4 to 25 contain no statutory provision enabling the plaintiff to deduct that time—*Sayaji Rao, Gaekwar of Baroda* v. *Madhavrao*, 53 Bom. 12, 30 Bom.L.R. 1463, 115 I.C. 369, A.I.R. 1929 Bom. 14 (19, 23).

For a full discussion on this subject, see the judgments of Sir Ashutosh Mookerjee, J. in *Dwijendra Narain* v. *Jogesh Chandra*, 39 C.L.J. 40, 79 I.C. 520, A.I.R. 1924 Cal. 600. and of M. N. Mukherji, J. in *Sarat Kamini* v. *Nagendra Nath*, 29 C.W.N. 973, 43 C.L.J. 155, A.I.R. 1926 Cal. 65.

103. Proviso:—The principle of the proviso is this: "When after the Statute has commenced to run, the right to sue and the right to be sued meet by act of law (and unite) in the same person, the further running of the Statute will be suspended during the period of the union of the two rights"—*Seagram* v. *Knight*, (1867) 36 L.J. Ch. 918; *Burdick* v. *Garrick*, (1871) L.R. 5 Ch. App. 233. "Where the hand to pay and receive is practically the same a constructive payment is presumed." See *Topham* v. *Booth*, 25 Ch. D. 607; *In re Dixon*, 2 Ch. 561. The general rule that when time has once begun to run, nothing happening subsequently will prevent it from continuing to run, is inapplicable where the debtor takes out administration to the estate of the creditor, for in such a case there is a suspension of the remedy—*Seagram* v. *Knight*, supra. Where the person liable for the payment of a legacy and the person entitled to receive it are the same, no question of limitation under the Statute can arise—*Binns* v. *Nichols* (1866) L.R. 2 Eq. 256; *Narrondas* v. *Narrondas*, 31 Bom. 418 (429). Thus, where a debtor was appointed one of several executors but he did not prove the will until his debt was barred by time, and then he subsequently proved the will, the debt was held to be thereby revived and the debtor-executor was ordered to account for the debt with interest—*Ingle* v. *Richards*, (1860) 20 Beav. 366.

This proviso applies only to an administrator under the grant of letters, where he is a detbtor of the deceased—*Damodar* v. *Dayal*, 11 Bom.L.R. 1187, 4 I.C. 283. It cannot be extended to a case where the rights of the mortgagor and the mortgagee vest in the same person. In such a case, limitation would not be suspended. Thus, a usufructuary mortgage was executed in 1842 in favour of K. The mortgagee died in 1898, but between 1883 and 1898 one M had by assignment acquired the rights of the mortgagor as also the mortgagee's rights and was in possession of the estate. In 1904 the heirs of K sued for and obtained possession of the estate from M (treating him as a trespasser) and in 1907, M's son S sued to redeem the property from the heirs of K. *Held* that the suit was barred by Article 148. Limitation for the suit for redemption had begun to run from 1842, and it was not suspended between 1883 and 1898 owing to the fusion of the mortgagor's and mortgagee's interests in M during that period. The proviso to section 9 did not apply to the case—*Soni Ram* v. *Kanhaiya Lal*, 35 All. 227 (237) (P.C.), 19 I.C. 291, 17 C.W.N. 605.

Suits against express trustees and their representatives.

10. Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, or the proceeds thereof, or for an account of such property or proceeds, shall be barred by any length of time.

For the purposes of this section any property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment shall be deemed to be property vested in trust for a specific purpose, and the manager of any such property shall be deemed to be the trustee thereof.

The 2nd paragraph is new and was inserted by sec. 2 of the Indian Limitation (Amendment) Act, 1929 (1 of 1929).

103A. The rule of this section follows the English law. Section 25 (2) of the English Judicature Act, 1873 (36 and 37 Vict., C. 66) lays down:—"No claim of a *cestui que* trust against his trustee for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitation." It is well settled, both as regards real estate and personal estate that time does not in equity bar the remedy of the beneficiary against the trustee—*Wederburn* v. *Wederburn*, (1838) 4 My. & Cr. 41; *Bridgman* v. *Gill*, (1857) 24 Beav. 302. If there is created in express terms, whether written or verbal, a trust, and a person is in terms nominated to be the trustee of that trust, a Court of equity, upon proof of such facts, will not allow him to vouch a Statute of Limitation against a breach of that trust—*Soar* v. *Ashwell*, [1893] 2 Q.B. 390.

The words of this section mean that when a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust, the person who is beneficially interested in that trust may bring a suit against such trustee to enforce that trust at any distance of time without being barred by the law of limitation—*Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (465). As a result of this section, an apparently fradulent trustee who has put trust-money into his own pocket cannot escape by reason of lapse of time—*Chintaman* v. *Khanderao*, 52 Bom. 184, 30 Bom.L.R. 45, A.I.R. 1928 Bom. 58.

104. Who is not a trustee:—All persons holding a fiduciary relation are not necessarily trustees within the meaning of this section. Thus, the position of agents, managers, factors and benamidars may be and generally is a fiduciary one, but none of them are necessarily trustees—*Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (469); *Kishen Dei* v. *Ram Chand*, 26 P.L.R. 288, A.I.R. 1927 Lah. 773.

A mortgagee in possession after the mortgage has been satisfied is not a trustee for the mortgagor—*Babu Lal Dass* v. *Jamal*, 9 W.R. 187. See sec. 2 (11). A suit against such mortgagee is governed by Art 105.

The position of the sons who manage the estate of a deceased Mahomedan is not, by reason of such management, that of trustees as regards the daughters—*Mahomed Abdul* v. *Amtal Karim*, 16 Cal. 161 (169) (P.C.).

A Mahomedan husband is not a trustee for his wife in respect of her dower—*Mir Mohar* v. *Anani*, 2 B.L.R., A.C. 306.

A person with whom money is kept in deposit is not a trustee—*Mukhta* v. *Gajraj*, 1 A.L.J. 422; *Dalipa* v. *Ladhu*, 47 I.C. 592, 1919 P.R. 4; *Kalyan Mal* v. *Kishen Chand*, 41 All. 643 (645). A mere deposit of moveables or money by A with B would not make B the trustee of A on an express trust, so as to attract the provisions of this section. *A fortiori*, where the person depositing the money received back out of his deposit sums of money whenever required by him for his own purposes, *held* that there was no trust of any specific sum for any specific purpose, but it was only the ordinary case of a customer who deposited property with a banker and was drawing whatever he wanted for his use from time to time—*Rajammal* v. *Lakshmammal*, 1914

M.W.N. 606, 22 I.C. 936 (939). A banker and customer do not stand in the relation of trustee and *cestui que* trust but only for depositee and depositor. Article 60 expressly provides for the case—*Ishur Chunder* v. *Jibun*, 16 Cal. 25 (31).

A depository, or banker, or agent, or a debtor to whom a loan is made and who promises to return the loan, is not an express trustee within the meaning of this section —*Rajammal* v. *Lakshmammal*, 1914 M.W.N. 606, 22 I.C. 936 (939). An agent is not a trustee in relation to his principal, and a suit by a principal against an agent for accounts falls under Art. 89 and not under this section—*Bhaiyalal* v. *Rai Beharilal*, 81 I.C. 505, A.I.R. 1925 Nag. 115 (117).

A *benamidar* is not a trustee—*Wooma* v. *Dwarkanath*, 11 W.R. 72; *Krishna Pattar* v. *Lakshmi*, 45 Mad. 415; see sec. 2 (11).

A surviving partner is not a trustee for the representative of the deceased partner —*Knox* v. *Gye*, L.R. 5 H.L. 656 (676).

The directors of a company are not trustees; see Note 108 below.

A company does not, by reason of the mere declaration of the dividend become a a trustee of the dividend for the share-holders. Banning, p. 35.

Where a mortgagee in contravention of the terms of O. 34, rule 14 of the C. P. Code has attached the mortgaged property and brought it up to sale and purchased it himself, he does not become a trustee for the mortgagor in respect of the latter's equity of redemption so as to enable the latter to bring a suit for redemption at any length of time—*Uttam Chandra* v. *Raj Krishna*, 47 Cal. 377 (414) (F.B.), 24 C.W.N. 299.

Person merely asked to manage and control minor's business is not a trustee—*Khem Chand* v. *Girdhari*, I.L.R. (1947) Kar. 109, A.I.R. 1947 Sind 187; *Kamiruddin* v. *Badrunnissa*, A.I.R. 1940 Pat. 90, 186 I.C. 859. (Case of transferee to manage with power of sale with consent of owner). So also a mere custodian or manager of property handed over by the legal or *de facto* manager is not a 'manager' within the meaning of the section—*Mahadeoji* v. *Baldeo*, I.L.R. (1942) Nag. 92, 1941 N.L.J. 184, A.I.R. 1941 Nag. 181.

If one heir of a deceased person recovers the debt due to the deceased on behalf of all the other heirs, he does not thereby become a trustee for the others. A suit brought against him by the other heirs for their share of money is governed by Art. 62 and not by this section—*Amina* v. *Najmunnissa*, 37 All. 233 (240), 13 A.L.J. 255, 27 I.C. 712. Similarly, if after the partition of the family, one of the members collects any money beloging to all the members, he is not a trustee for the others in respect of the money, and a suit brought by the other members for their share of the money falls under Art. 62—*Banoo* v. *Doona*, 24 Cal. 309 (315); *Arunachala* v. *Ramasamya*, 6 Mad. 402 (403). So also receipt of sale proceeds of a property for distribution to the heirs of the owner does not constitute an express trust—*Hussain* v. *Baquir*, (1945) 2 M.L.J. 422, 1945 M.W.N. 671, A.I.R. 1946 Mad. 116.

105. Who is a trustee:—The mohant of a *mutt* is a trustee of the *mutt* properties—*Deivasikamani* v. *Valliammal*, 37 M.L.J. 231, 52 I.C. 914; *Ram Perkash* v. *Anand*, 43 Cal. 707 (P.C.); *Basudeo* v. *Mohant Jugal Kishore*, 22 C.W.N. 841 (P.C.); *Baluswami* v. *Venkataswami*, 40 Mad. 745. A *Dharmakarata* or manager of a temple is a trustee—*Sethu* v. *Subramanya*, 11 Mad. 274 (277). But a contrary view has been taken by the same High Court in *Chidambara* v. *Chidambaram*, I.L.R. (1944) Mad. 284, (1943) 2 M.L.J. 339, A.I.R. 1943 Mad. 691 where it has been held that this section at it stood before the amendment in 1929 did not apply to heads of mutts and temple. In *Baidyanathji* v. *Urmila*, 21 Pat. 95, I.L.R. (1941) Kar. (P.C.) 176,

46 C.W.N. 377, 44 Bom.L.R. 183, 1942 A.L.J. 53, A.I.R. 1941 P.C. 130, (1942) 1 M.L.J. 8 (P.C.) their Lordships of the Judicial Committe have held that although as a general rule the high priest of a temple or a person in like position is only manager and custodian of the idol or the institution and not a trustee as the property is not conveyed to or vested in him, yet if he is appointed under a decree of Court under sec. 539 of the C. P. Code, 1882 (sec. 92 of the present Code) as a "trustee for all the properties moveable and immovable devoted to the service" of the temple God, this section will apply. Their Lordships overruled the judgment of the High Court—*Urmilla* v. *Baidyanathji*, 19 Pat.L.T. 367, A.I.R. 1938 Pat. 273. See the new second para, and the cases cited under heading "Religious Endowment" in Note 108A below.

A suit for the recovery of balance of money advanced by the plaintiff to the defendant who was his servant for the purpose of erecting buildings, the money having been entrusted to the defendant to be accounted for by him, will not be barred by limitation, for the matter was of the nature of a trust—*Narain Dass* v. *Maharaja Mahtab Chunder*, 10 W.R. 174. So also this section applies where money is entrusted for the specific purpose of investment—*Kalipada* v. *Kalikumar*, 42 C.W.N. 381 (entrustment by verbal agreement). Where property is vested in a person partly for charitable purpose and partly for the benefit of others, and he is bound to use it for such purposes and not for his own advantage, he is a trustee—*Syud Shah Alleh* v. *Bibee Nuseebun*, 21 W.R. 415 (416). Where immoveable property was given possession of to the defendant to sell the crops, to pay the Government dues and to account for the profits to the plaintiff on his claiming them, *held* that the defendant was not a depository but a trustee of the property—*Vital* v. *Ram Chandra*; 7 B.H.C.R., A.C., 149. Where A handed to the defendant the key of his place of business and requested him to take charge of his goods and outstandings, to pay certain specified debts out of them and to apply the residue for the benefit of A's family, a good trust was created at any rate as far as the debts were concerned—*Suddasook* v. *Ram Chunder*, 17 Cal. 620 (628). Where certain jewels were in the possession of the defendant and he agreed under a written instrument that the plaintiff should enjoy the jewels for her life and that after her death they should be divided among the defendant and the other parties to the instrument, *held* that the defendant was an express trustee of the jewels of the plaintiff and that a suit by her for the jewels or their value fell under this section—*Kishtappa Chetty* v. *Lakshmi Ammal*, 44 M.L.J. 431, 72 I.C. 842, A.I.R. 1923 Mad. 578. Where a person sentenced to transportation for life makes over his properties to be managed by his brother or other near relatives, and requests the Revenue authorities to have those properties transferred in the name of the latter, such transfer is in the nature of a trust—*Hait Ram* v. *Durga Prasad*, 5 All. 608 (612).

Under section 69 of the Transfer of Property Act the money received by a mortgagee arising from sale of the mortgaged property in pursuance of a power of sale should be deemed as held by him in trust to be applied in the manner directed in that section. See also *Haji Abdul Rahman* v. *Noor Mahomed*, 16 Bom. 141 (144). In England also, where the mortgagee has exercised the power of sale in good faith and without collusion, he is only a trustee for the mortgagor in respect of the balance of the sale-proceeds—*Warner* v. *Jacob*, 20 Ch. 220.

A trustee *de son tort* is in the same position as an express trustee, and a suit for accounts in respect of trust property in his hands comes under this section—*Dhanpat* v. *Mohesh Nath*, 24 C.W.N. 752 (755), 57 I.C. 805; *Kalipada* v. *Haridasi*, I.L.R. (1938) 1 Cal. 652, A.I.R. 1938 Cal. 671, 181 I.C. 190 where it has been held that the existence of trust must be first established before this section may be applied against them. But

the Allahabad High Court is of opinion that section 10 does not apply to a suit for account against a trustee *de son tort*: such a suit is governed by Article 120—*Behari Lal* v. *Shiv Narain*, 47 All. 17, 22 A.L.J. 866, A.I.R. 1924 All. 884 (dissenting from 24 C.W.N. 752); *Dharam* v. *Suraj*, I.L.R. (1940) All. 815, A.I.R. 1941 All. 1, 1940 A.L.J. 705. The Allahabad view has been followed in *Chandrika Baksh* v. *Bholasingh*, A.I.R. 1937 Oudh 375; and in *Robson* v. *Administrator General*, 30 P.L.R. 503, A.I.R. 1929 Lah. 753, 757.

106. Government:—The Government and the Secretary of State cannot be trustees—*Kinloch* v. *Secretary of State*, L.R. 15 Ch. D. 1, at p. 9. The fact that the Government took possession of a property (a khoti village) originally with the intention of keeping it only until the rival claimants to it established their claim in the Civil Court, cannot imply that the Government agreed to hold the property in trust for an indefinite time on behalf of the rightful owner. This section cannot apply to the case, and a suit brought to recover the property which was for fifty years in the possession of the Government was barred—*Secretary of State* v. *Sakharam*, 24 Bom. 23. The Government by directing the Court of Wards to take charge of an estate during the minority of the next claimant does not constitute itself a trustee for rightful owner —*Palkonda Zemindar* v. *Secretary of State*, 5 Mad. 91 (F.B.) affirmed on appeal in *Viziaramarazu* v. *Secretary of State*, 8 Mad. 525 (P.C.).

This section will not apply to a suit against the Secretary of State to recover the surplus proceeds of a sale for arrears of revenue. The Government is not a trustee in respect of such money—*Secretary of State* v. *Fazal Ali*, 18 Cal. 234; *Secretary of State* v. *Guru Proshad*, 20 Cal. 51 (F.B.). See also *Chandra Kali* v. *E. P. Chapman*, 32 Cal. 799 (at p. 813), where it was held that the Government was not a trustee in respect of certain G. P. notes which were paid into Court under a consent decree and subsequently lost. But under certain exceptional circumstances the Government can be a trustee within the meaning of the section. Thus, it was held in *Secretary of State* v. *Bapuji Mohadev*, 39 Bom. 572, 31 I.C. 277, that money lying in deposit in the Government Treasury as surplus sale-proceeds was money vested in Government in trust for a specific purpose, and a suit to recover the money was not barred by any length of time (following *Walsh* v. *Secretary of State for India*, (1863) 10 H.L.C. 367). The same view has been taken by the Madras High Court in *Secretary of State* v. *Radhika Prasad Bapuji*, 46 Mad. 259, 44 M.L.J. 685, 74 I.C. 785, A.I.R. 1923 Mad. 677.

107. Executor, Administrator:—This section will apply to an executor only if he is a trustee for a specific purpose; the mere appointment of a person as an executor does not make him a trustee—*Damodar* v. *Dayal*, 4 I.C. 283, 11 Bom.L.R. 1187; *Gajanan* v. *Waman*, 12 Bom.L.R. 881, 8 I.C. 189 (190); *Nagarathnammal* v. *Namasivaya*, 5 I.C. 832; *Baroda* v. *Gajendra*, 13 C.W.N. 557; *Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (468); *Hemangini* v. *Anil*, 17 Pat. 350, 1938 P.W.N. 186, A.I.R. 1938 Pat. 600. There is no authority for converting an executor into a trustee by anything like a performance of his duties *qua* executor—*Jamnadas* v. *Damodardas*, 29 Bom.L.R. 418, 103 I.C. 225, A.I.R. 1927 Bom. 424. Whether an executor is a trustee for a specific purpose depends upon the facts of each case—*Damodar* v. *Dayal*, 11 Bom.L.R. 1187; *Gopaldas* v. *Haman*, I.L.R. (1942) Kar. 392, A.I.R. 1942 Sind. 145, 208 I.C. 230. This section will apply if an express trust is created by the will itself—*Satya* v. *Murlidhar*, I.L.R. (1944) Nag. 817, 1944 N.L.J. 458, A.I.R. 1944 Nag. 377. So where the executors in a will were expressly called trustees, and were entrusted with the testator's property for certain definite purpose, *held* that this section applied—*Dhunjishaw* v. *Sorabji*, (1869) P.J.

572. Where certain property was by will vested in executors to pay legacies and the residue to the testator's widow who sued for administration of her share and for a declaration that certain lease granted by the executors to themselves was void against her, it was held that the suit was within this section as the property was vested in the executors in trust for a specific purpose, *viz.*, to pay legacies, etc.—*Nistarini* v. *Nundolal*, 30 Cal. 369. Where a will gave no directions as to the disposition of the residue, the executors were not trustees of the residue for a specific purpose—*Nanalal* v. *Harlochand*, 14 Bom. 476.

In England also, the executor is not an express trustee even for a legatee—*Evans* v. *Moore*, [1891] 3 Ch. 119. An executor is in general a constructive trustee only, although popularly described as a trustee, and while and so long as he is but a constructive trustee, the lapse of time will operate to bar the legacy—*Evans* v. *Moore*, supra; *In re Mackay*, [1906] 1 Ch. 25. That is to say, only an *express* trust, and not a mere constructive trust, will suffice to prevent the bar of time running against a legatee. An executor is always a trustee, in a sense, for creditors and legatees because he holds the personal estate for their benefit and not for his own benefit, but such a trust is not an express trust, and does exclude the application of the bar of time—*Evans* v. *Moore*, supra. The ordinary direction in a will to the executors (whether or not being also trustees of the will) to pay the debts and the legacies, creates no trust for their payment; and the mere use of the word 'trust' in the bequest to the executors ('upon trust to pay the debts and the legacies') will not, without more, create a trust either for the creditors or for the legatees; in either case the lapse of time will be a bar to the legacy—*Cadbury* v. *Smith*, (1869) L.R. 9 Eq. 37. Neither an executor nor an administrator becomes an express trustee for a legatee merely because his duties as such are performed and he retains moneys on behalf of those claiming the estate. He does not become a trustee by the performance of his duties *qua executor*. In other words, when the debts and funeral expenses are paid, he does not become a trustee for the residue—*In re Mackay*, [1906] 1 Ch. 25 (30).

An administrator in whom no special trust is vested for a specific purpose is not a trustee—*Janardhan* v. *Jankibai*, 2 P.L.J. 642 (649), 40 I.C. 860.

108. "Vested":—The words "vested in trust" are equivalent to the words "conveyed or bequeathed in trust" in Article 134. Merely placing the property in the possession or control of a person does not amount to the vesting of property in him; on the other hand, it cannot be that the word "vesting" is to imply ownership, because a trustee cannot be the owner of the trust property. While a transfer of proprietary rights is not intended, mere transference of management or control is not enough to satisfy the requirements of "vesting". A right to call for a transfer and to possess the property for the purposes of the trust and also a power to dispose of it according to the terms of the trust without reference to the owner are the essentials that constitute the vesting—*Bidhu Bhusan* v. *Anadi*, 61 Cal. 119, 58 C.L.J. 502, A.I.R. 1934 Cal. 87 (89), 150 I.C. 398. Vesting implies that some one has an estate in the subject matter of the alleged trust, not merely that he has power to charge it or direct how it should be disposed of—*Dickenson* v. *Teasdale*, (1862) 1 DeG. & S. 52; *Coverdale* v. *Charlton*, 42 Q.B.D. 120. Therefore, the *directors* of a company are not trustees, because they are not persons in whom the property of the company may be said to have been vested under this section—*Kathiawar Trading Co.* v. *Virchand*, 18 Bom. 119; *Daulat Ram* v. *Bharat National Bank*, 5 Lah. 27 (31); *Narasimha* v. *Official Assignee*, 54 Mad. 153, A.I.R. 1931 Mad. 58 (59), 128 I.C. 477; *Bank of Multon Ld.* v. *Hukum Chand*, 71 I.C. 899, A.I.R. 1923 Lah. 58. But see *New Fleming S. & W. Co.* v. *Kessowji*, 9 Bom. 373 (393, 394). Where the properties of the company did not come into the

hands of the directors they could not be said to be trustees—9 Bom. 373 (399). So also, the *liquidator* of a company is not strictly speaking a trustee for the creditors but is merely an agent of the company—*Knowles* v. *Scott*, [1891] 1 Ch. 717. The *karta* of a joint Hindu family is not a trustee, because the property cannot be said to have vested in him—*Biswambhar* v. *Giribala*, 25 C.W.N. 356, 32 C.L.J. 25, 57 I.C. 877, A.I.R. 1921 Cal. 571; *Benoy* v. *Amarendra*, I.L.R. (1940) 1 Cal. 183, 70 C.L.J. 572, 44 C.W.N. 93, A.I.R. 1940 Cal. 51. The word 'vest' is not an appropriate term to describe the position of a Hindu *executor;* the mere appointment of a person as executor to a Hindu does not cause any property to vest in him at all; if as executor he is entitled to hold the property, he holds it only as manager—*Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (468). See Note 107 above. A guardian appointed under the Guardian and Wards Act is not a person in whom the property is vested for a specific purpose; *Mirabai* v. *Kausholyabai*, I.L.R. 1948 Nag. 794, 1949 N.L.J. 154, A.I.R. 1949 Nag. 235. A minor girl inherited property from her maternal grandfather. The father of the minor took charge of the property and managed it. More than six years after attaining majority, the daughter sued her father to recover moneys not accounted for, and claimed that the suit was not barred, as section 10 applied to the case. *Held* that the father simply managed the property, and there was in fact no trust in this case, but by his acts he had only incurred obligations similar to those of a trustee. The property did not 'vest' in him as trustee; the word 'vest' implies that the property becomes in law the property of the trustee—*Ma Thein* v. *U. Po*, 3 Rang. 206, A.I.R. 1925 Rang. 289, 86 I.C. 297. In two cases, the Madras High Court expressed the opinion that the word 'vesting' simply means "properly having control of the property"—*Kishtappa* v. *Lakshmi*, 44 M.L.J. 431, 72 I.C. 842, A.I.R. 1923 Mad. 578 (579); *Pachaiyappa* v. *Sivakami*, 49 M.L.J. 468, A.I.R. 1926 Mad. 109 (110), 91 I.C. 671. But this view has been disapproved of in a more recent case, *Narasimha* v. *Official Assignee*, 54 Mad. 153, 60 M.L.J. 280, A.I.R. 1931 Mad. 58 (59), 128 I.C. 477 where it has been held that directors of companies are not trustees for specific purpose. The words 'vested in trust', if they do not necessarily imply a transfer of ownership in the strict sense, do not at any rate imply something more than mere possession and temporary control of property. So the duty of collecting the money of the rightful owner and paying the same to him does not make the money collected 'vested' on the collector in trust within the meaning of the section—*Malojirao* v. *Keshav*, I.L.R. (1939) Bom. 154, 41 Bom L.R. 215, A.I.R. 1939 Bom. 126.

D executed a trust deed which contained this provision: "In order to prepare a list of my debts, the trustees shall ascertain the same by looking into my books of accounts and they shall not admit any debt without *rokur*, *hat-chitta* or *hundi* bearing the signature of myself or my *gomastas*, or without decree." It was held that in the absence of evidence that this deed was communicated to the creditors, it did not create a trust in favour of the creditors, but enured only for the benefit of the executant; that therefore the plaintiff was not entitled to rank as a beneficiary under it; and that it did not create a trust in his favour so as to take out of the operation of the Limitation Act a claim that otherwise fell within it—*Fink* v. *Moharaj Bahadur*, 25 Cal. 642.

It is open to a person to create a trust empowering another to go to a certain place for the purpose of acquiring land for him, and the land so acquired would become vested in the trustee from the moment of its acquisition, and the trust would fasten to that land exactly as if it had been vested in the trustee at the moment of the creation of the trust. The absence of the property at the date of creation of the trust does not affect the applicability of section 10—*Harihar Prasad* v. *Kesho Prasad*, 5 P.L.T. Supp. 1, A.I.R. 1925 Pat. 66.

108A. Religious endowment:—See the second paragraph, recently added by the Indian Limitation Amendment Act 1929 (Act I of 1929). Prior to this enactment it was pronounced by the Judicial Committee that in case of a religious endowment, whether under the Hindu or the Muhammadan law, the dedicated property could not be said to have been "vested" in the shebait or mutwalli; whatever property he held for the idol or the institution, he held merely as manager with certain beneficial interests regulated by custom or usage. Under the Mahomedan law, the moment a waqf was created, all rights of property vested in God Almighty—*Vidya Varuthi* v. *Balusami*, 44 Mad. 831 (P.C.), A.I.R. 1922 P.C. 123, 65 I.C. 161. Neither the *sajjadanashim* nor the *mutwalli* had any right in the property belonging to the wakf; the property was not vested in him, and he was not a trustee in the technical sense —*Abdor Rahim* v. *Narain Das*, 50 Cal. 329 (P.C.), 29 C.W.N. 121, 25 Bom.L.R. 670, 44 M.L.J. 624, A.I.R. 1923 P.C. 44, 71 I C. 646. These decisions were followed in *Ganga Prasad* v. *Kuladananda*, 30 C.W.N. 415, 94 I C. 235, A.I.R. 1926 Cal. 568; *Jaishth Madho* v. *Thakur Gat Ashdam*, 50 All. 265, 25 A.L.J. 1047, A.I.R. 1928 All. 134; *Rukeya* v. *Nazira*, 55 Cal. 448, 32 C.W.N. 248 (256), and several other cases. The Privy Council rulings, however, did not find favour in India, as they were opposed to the view generally prevalent in the Courts. The Civil Justice Committee thought it necessary to counteract the effect of these rulings, and recommended that "in view of certain recent decisions the alienation of property vested in the head of a religious institution raises special problems for limitation purposes and should be specifically provided for." (Civil Justice Committee Report, p. 496). Accordingly a Bill was prepared in 1927 (Council of State Bill No. 8 of 1927), to make the necessary amendments in the Limitation Act, and this Bill passed into law as Act I of 1929. The *Statement of Objects and Reasons* runs as follows:

"The (Civil Justice) Committee's recommendation refers, it is understood, to the decisions of the Privy Council in *Vidyavaruthi* v *Balusami*, (44 Mad. 831) and *Abdur Rahim* v. *Narain* (50 Cal. 329), which lay down that a *Dharmakarta*, *Mohant* or manager of a Hindu religious property or the *Mutwalli* or *Sajjadanashin* in whom the management of Muhammadan religious endowments is vested are not trustees within the meaning of the word as used in sec. 10 of the Limitation Act, for the reason that the property does not vest in them. The result is that when a suit is brought against a person, not being an assign for valuable consideration, endowments of this nature are not protected. The Committee's recommendation is that section 10 of the Act should be amended so as to put Hindu and Muhammadan religious endowments on the same footing as other trust funds which definitely vest in a trustee. After consulting the Local Government, the Government of India have come to the conclusion that Hindu, Muhammadan and Buddhist religious as well as charitable endowments should be included within the scope of section 10 of the Act. The Bill gives effect to this conclusion" (*Gazette of India* 1927, Part V, p. 223).

Effect of amendment:—*This Amendment Act (I of* 1929) *came into force from* 1*st January*, 1929, *and does not apply to suits brought before that date. Such suits are to be decided according to the unamended provisions of this section and the Privy Council decision in Vidya Varuthi's* case. See *Allah Rakhi* v. *Shah Mohammed*, 56 All. 111 (P.C.), 38 C.W.N. 400, A.I.R. 1934 P.C. 77 (78), 147 I.C. 887. In a recent Oudh case (*Chinkan* v. *Durga Bharthi*, 9 Lah. 384, 11 O.W.N. 39, A.I R. 1934 Oudh 96, 147 I.C. 607), this amendment of section 10 was not noticed and the suit, though brought after the 1st January, 1929, was decided according to section 10 as it stood before the amendment.

In a suit for a declaration that the property in the possession of the mutawalli is

wakf property the Supreme Court has recently held that no question of limitation can arise if it be found that the property is comprised in the wakf estate—*Md. Shah* v. *Fasiluddin*, A.I.R. 1956 S.C. 713.

The right of the plaintiff which has become barred by limitation before the amending Act of 1929 is passed cannot be held to have revived by the mere institution of the suit after 1929—*Biseshwar* v. *Sashinath*, 22 Pat. 133, A.I.R. 1943 Pat. 289, 208 I.C. 129.

109. Specific purpose:—The phrase "trust for a specific purpose" in this section is merely a more extended mode of expressing the same idea as that conveyed by the expression "express trust" in English law—*Vundravandas* v. *Cursondas*, 21 Bom. 646 (665); *Mathuradas* v. *Vandrawandas*, 31 Bom. 222 (231); *Kistappa Chetty* v. *Lakshmi*, 44 M.L.J. 431, 72 I.C. 842, A I.R. 1923 Mad. 578; *Ramacharya* v. *Srinivasacharya*, 20 Bom.L.R. 441, 46 I.C. 19 (20); *Palaniappa* v. *Nachiappa*, (1941) 2 M.L.J. 558, A.I.R. 1941 Mad. 841, 200 I.C. 357. It is used in contradistinction to trusts arising by implication of law, trusts resulting or trusts by operation of law—*Dickinson* v. *Teasdale*, (1862) 1 D.J. & S. 52 (59) (*per* Lord Westbury); *Mathuradas* v. *Vandrawandas*, 31 Bom. 222 (235); *Bhurabhai* v. *Bai Ruxmani*, 32 Bom. 394 (399). See also *Moosabhai* v. *Yacoobhai*, 29 Bom. 267.

The words "in trust for a specific purpose" are intended to apply to trusts created for some defined or particular purpose or object as distinguished from trusts of a general nature such as the law imposes upon executors and others who hold recognised fiduciary positions. They are used in a restrictive sense and limit the character and nature of the trust attaching to the property which is sought to be followed—*Greender* v. *Mackintosh*, 4 Cal. 897. To create an express trust within the meaning of this section, it must appear either from express words or clearly from the facts that the rightful owner of property has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation—*Barkat* v. *Daulat*, 4 All 187. It is not necessary that an express declaration should be proved. In England inferences drawn from the conduct of the parties have been held sufficient to establish an express trust, and the same principle should apply to trust for a specific purpose within the meaning of sec. 10 of the Limitation Act—*Harihar Prasad* v. *Kesho Prasad*, 5 P.L.T. Supp. 1, A.I.R. 1925 Pat. 68. A specific purpose is a purpose that is either actually and specifically defined in the terms of the deed by which the trust is created or a purpose which from the specified terms can be certainly affirmed—*Annamalai* v. *Muthukaruppan*, 8 Rang. 645 (P.C.), 35 C.W.N. 145 (151), 130 I.C. 609, A.I R. 1931 P.C. 9; *Mahomedsa* v. *Khadirsa*, 29 Bom L.R. 241, A.I.R. 1927 Bom. 398, 103 I.C. 418; *Secretary of State* v. *Radhika Prasad Bapuli*, 46 Mad. 259 (290), 44 M.L.J. 685, A.I.R. 1923 Mad. 667; *Khaw Sim Tek* v. *Chuah Hooi*, 49 I A. 37 (43), 26 C.W.N. 495, A.I.R. 1922 P.C. 212, 102 I C. 832; *Soonderdas* v. *Bai Laxmibai*, A.I.R. 1946 Bom. 131; *Chidambara* v. *Chidambaram*, I.L.R (1944) Mad. 284, (1943) 2 M.L.J. 339, A.I.R. 1943 Mad. 691. One useful test for determining whether any particular trust is for specific purpose or not is to see if a suit for the purpose of following the trust property in the hands of the trustee would be to restore it to the trust—*Kali Pada* v. *Haridasi*, I.L.R. (1938) 1 Cal. 652, A I.R. 1938 Cal. 673, 181 I.C. 190. A suit for a declaration and possession of certain properties instituted by the plaintiff against his father whom his maternal grandfather had appointed trustee for the benefit of the plaintiff and his mother, alleging that the defendant had traded with the property and misappropriated it, comes under this section as the property was entrusted to the defendant for a specific purpose, *viz.*, for the benefit of the plaintiff and his mother—*Sethu* v. *Krishna*, 14 Mad. 61. So also entrustment of money for investment is for specific

purpose—*Kali Pada* v. *Kali Kumar*, 42 C.W.N. 381, I.L.R. (1938) 2 Cal. 81, 66 C.L.J. 541, A.I.R. 1938 Cal. 336.

Where a testator by his will dedicated two of his properties to his family deity and at the same time appointed his two wives and his adopted son as shebaits, executrices and executor, they were clearly persons in whom the estate became vested in trust for a specific purpose within the meaning of this section—*Charu Chandra* v. *Nahush Chandra*, 36 C.L.J. 35, 50 Cal. 49 (66), 74 I.C. 630, A.I.R. 1923 Cal. 1. So also where properties have been conveyed to trustees upon express trust for a diety and the trustees fraudulently put an end to the trust and divide the properties amongst themselves this section applies as the property vested in trust for a specific purpose—*Gopal Jew* v. *Baldeo*, 51 C.W.N. 383. Two trusts were imposed upon the defendant; he was first of all under a trust to utilise part of the proceeds of a property for the expenses of a *darga*, and there was a second trust to pay a certain share of the surplus proceeds. *Held* that the second trust was an express trust under this section, as the property was vested in trust in the defendant for a specified purpose, *viz.*, the purpose of division of surplus profits—*Mahomedsa* v. *Khadirsa*, 29 Bom.L.R. 241, 103 I.C. 418, A.I.R. 1927 Bom. 398. Where a widow handed over a certain sum of money to her brother for the benefit and education of her two sons, and the brother applied part of the money for that purpose, but put the balance into his pocket, *held* that the money was vested for a specific purpose, and a suit for account and refund of the balance fell under this section and was not barred by any length of time—*Chintaman* v. *Khanderao*, 52 Bom. 184, 30 Bom.L.R. 45, 107 I.C. 705, A.I.R. 1928 Bom. 58. Where certain G. P. Notes belonging to a joint family stood in the name of G, who was the head of the family, and these Notes were deposited with Raj estate in order to serve as security for G's service in that estate, *held* that the G. P. Notes could be said to have been vested in G, for the specific purpose of serving as security deposit for his service—*Bidhu Bhusan* v. *Anadi*, 61 Cal. 119, 58 C.L.J. 502, A.I.R. 1934 Cal. 87 (90), 150 I.C. 398.

A person who is appointed trustee of a temple is also a trustee of the temple property including the *money* of the temple, *i.e.*, he is a trustee for the specific purpose of applying the money to the use of the temple, for the disposal of it to various purposes to which the property of the temple is usually applied—*Sethu* v. *Subramanya*, 11 Mad. 274 (278); followed in *Jagamba* v. *Ram Chandra*, 31 Cal. 314 (317). The conducting of pujas and ceremonies, and the upkeep of the temple is sufficiently specific to satisfy the requirements of this section—*Chidambara* v. *Chidambaram*, I.L.R. (1944) Mad. 284, (1943) 2 M.L.J. 339, A.I.R. 1943 Mad. 691.

Where a testator made a will bequeathing all his properties to his adopted son A and also entered into an agreement with A's father not a revoke the same, but later he executed a second will by which he revoked the first and bequeathed all his properties to his wife R, who was appointed executrix, and it was contended that by virtue of the agreement there was a trust created in favour of A, it was held that the case did not fall under section 10, as it was impossible to hold that the properties which vested in the executrix under the second will were so vested for the specific purpose of making them over to A—*Rani Chhatra Kumari* v. *Mohan Bikram*, 10 Pat. 851 (P.C.), 35 C.W.N. 953 (962), 133 I.C. 705, A.I.R. 1931 P.C. 196. A sum of money was handed over by the bridegroom's father to the keeping of the birde's father as a fund constituting her *palla* or dowry on the occasion of her marriage in accordance with the usual practice prevailing in the caste. The fund was misappropriated by the lady's father and an action was brought to recover the same. *Held* that the property was vested in him for a specific purpose, *viz.*, as a provision for dowry—*Bhurabhai*

v. *Bai Ruxmani*, 32 Bom. 394 (399), 10 Bom.L.R. 540; *Palaniappa* v. *Nachiappa*, (1941) 2 M.L.J. 558, A.I.R. 1941 Mad. 841 (specific purpose being earning interest and the augmentation of the total fund for the benefit of the children). P, who carried on a money-lending business, entrusted the business to his brother-in-law S, and directed S to hold his property for the benefit of his (P's) wife and daughter. S dealt with the property of P until P's death and even after that date remained in possession of all his property, and it also appeared in evidence that when S died in 1912 he informed P's wife and daughter that his (S's) son would continue to hold the property on their behalf. P's daughter brought the present suit in 1921 against S's son for an account. The contention was that the suit was barred by limitation. *Held* that the property had been legally vested in P in trust, and the specific purpose of the trust was to carry on the money-lending business and to increase the estate by addition of profits by way of interest and to hand over the property when called on to P. Section 10 therefore applied and the suit was not barred—*Pachaiyappa* v. *Sivakami*, 49 M.L.J. 468, A.I.R. 1926 Mad. 109 (110), 91 I.C. 671. L was a partner in the firm of R, and as such was entitled to 35 shares of the Hongkong Mill and to a certain share of the commission earned by the firm as agents of the Mill. L retired from partnership and afterwards died, whereupon the prehent suit was brought by his executors against R to recover the share of L in the agency commission earned by the firm of R as agents of the Hongkong Mill. *Held* that L's share of the commission had become vested in trust for a specific purpose in the hands of R within the meaning of this section, and therefore the plaintiff's suit was not barred by limitation—*Narrondas* v. *Narrondas*, 31 Bom. 418 (427). (The Rangoon High Court in 3 Rang. 206 doubts the correctness of this decision and says that it is clearly a case of constructive trust). A partition-deed entered into between two brothers recited that their deceased elder brother had entrusted a sum of money to them, and one of the two brothers undertook to pay the amount to the son of the deceased brother on his attaining majority, together with interest. *Held*, that there was an express trust created in favour of the deceased brother's son, and a suit brought by him more than three years after attaining majority was not barred—*Md. Mathar* v. *Kara Rowther*, 20 L.W. 546, A.I.R. 1924 Mad. 920, 85 I.C. 508.

An executor who by the will is made an express trustee for certain purposes as regards some of the properties, cannot be regarded as "trustee for a specific purpose" as to the residue of the properties for which no direction was given to the executor and no trust was declared—*Nandlal* v. *Harlochand*, 14 Bom. 476. But where the whole of the testator's property had been vested in the trustees, and after carrying out all the trusts under the will there was left with the trustees a residue undisposed of, in respect of which no trust was declared, it was held that as the whole of the testator's property had been vested in the trustees for a specific purpose, it was not necessary that the trust of the residue should be specified in words in the will, and therefore the residue should be treated as vested in the trustee. A suit by the heir to recover the residue would not be barred at all—*Mojilal* v. *Gaurishankar*, 35 Bom. 49. Where a will vested the whole of the testator's property in executors for certain purposes which eventually *could not be carried out*, it was held that the executors were not trustees for any specific purpose within the meaning of this section—*Vundravandas* v. *Cursondas*, 21 Bom. 646. Where a property is bequeathed to trustees for certain purposes some of which failed or are invalid, the heirs of the testator may be barred by the ordinary law of limitation from recovering the portion undisposed of, though they might still bring a suit against the trustees to compel them to properly administer the trusts that had not failed—*Hemangini* v. *Nobin*, 8 Cal. 788.

Where by a family arrangement certain hundi was vested in a defendant for payment of debts of plaintiff's husband, and any balance that might remain after payment of his creditors was to be paid to the latter, it was held that this arrangement constituted a trust for specific purpose within the meaning of section 10 and the plaintiff's husband was entitled to call upon the defendant to account for proceeds of the hundi—*C. Vairavan* v. *Chettichi*, A.I.R. 1936 Mad. 876. Assuming that such a case does not fall under section 10, the suit for accounts must fall under Art. 89, if not under Art. 120. And in both cases time will run from the date at which the defendant had denied such third person's claim, or in any other manner infringed or threatened to infringe his right—*C. Vairavan* v. *Chettichi Achi*, A I.R. 1936 Mad. 876.

110. Resulting trust:—This section does not apply where the object of the original trust being uncertain or undiscoverable, a resulting trust arises by operation of secs. 81 and 83 of the Indian Trusts Act, 1882—*Mathuradas* v. *Vandrawandas*, 31 Bom. 222 (231). A resulting trust is not an express trust or trust for a specific purpose under this section—*Hemangini* v. *Nobin*, 8 Cal. 788; *Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (470); *Mahammad Habibulla* v. *Sajdar Hussein*, 7 All. 25; *Casamally* v. *Currimbhoy*, 36 Bom. 214 (234); *Vundravandas* v. *Cursonas*, 21 Bom. 646; *Churcher* v. *Martin*, (1889) 42 Ch. D. 312 (318); and a person claiming under a resulting trust may be barred by the ordinary law of limitation (Arts. 142, 144)—*Mahammad Habibulla* v. *Sajdar Hussein*, 7 All. 25; *Mohammad Ibrahim* v. *Abdul*, 37 Bom. 447 (460); *Casamally* v. *Currimbhoy*, 36 Bom. 214.

Where the specific purpose for which the defendant became a trustee *fails* or is *invalid*, a resulting trust arises by operation of law in favour of the settlor or his heirs, and a suit by them to enforce such resulting trust is not within the scope of this section, because the plaintiffs are seeking not to enforce the original trust, but to defeat that trust. They are suing for the purpose of invalidating the disposition in furtherance of which the trust was created—*Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (465); *Hemangini* v. *Nobin*, 8 Cal. 788; *Couasji* v. *R. D. Setna*, 20 Bom. 511; *Mathuradas* v. *Vandrawandas*, 31 Bom. 222 (232); *Gulzari Mal* v. *Kishan Chand*, 132 P.R. 1907; *Mahomed Ibrahim* v. *Abdul Latif*, 37 Bom. 447.

Whether the resulting trust flows from the invalidity of the declared trust or from the impossibility of ascertaining the declared trust, it is equally a substituted trust, that is, a trust which is created by the law *faut de mieux*, that is, as the best arrangement which the law regards as possible in difficult circumstances. But where there is a trust covering the whole estate, and the bequests do not exhaust the estate, the trustees are express trustees of the residue for the heir of the testator—*Mathuradas* v. *Vandrawandas*, 31 Bom. 222 (234, 235).

111. Implied trust:—This section in terms applies to trust "for a specific purpose", *i.e.*, it is confined to express trusts, and has no application to *implied trusts*, *i.e.*, such trusts as the law implies merely from the existence of particular facts or fiduciary relations—*Robson* v. *Administrator-General*, 30 P.L.R. 503, A.I.R. 1929 Lah. 753 (757); *Behari Lal* v. *Shiv Narain*, 47 All. 17, A.I.R. 1924 All. 884, 22 A.L.J. 866; *Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (465); *Lakhraj* v. *Assamal*, 27 I.C. 332, 8 S.L.R. 132; *Hemangini* v. *Nobin*, 8 Cal. 788; *Mathuradas* v. *Vandrawandas*, 31 Bom. 222 (232).

112. Constructive trust:—Section 10 applies to cases of what in English law are called express trusts, and *not to constructive trusts*—*Kesavalu* v. *Perumal*, (1939) 1 M.L.J. 820, 1939 M.W.N. 437, A.I.R. 1939 Mad. 722. The doctrine of the

well known case of *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, *viz.*, that the rule of limitation will not be applied to certain kinds of constructive trusts, has no applicability to India —*Raja of Ramnad* v. *Pannusami*, 44 Mad. 277 (281), 40 M.L.J. 52, 1921 M.W.N. 37; *Ma Thein* v. *U Po*, 3 Rang. 206, 86 I.C. 297, A.I.R. 1925 Rang. 289; *Krishna Pattar* v. *Lakshmi Ammal*, 45 Mad. 415, 42 M.L.J. 119. Thus, where a person directs another to acquire property for him (the person directing) and furnishes some money for the purpose, but after some time he withdraws from the venture completely, but the person directed continues his exertions and entirely as the result of those exertions acquires the property, there is only a constructive trust, and section 10 does not apply—*Harihar Prosad* v. *Kesho Prosad*, (Dumraon Case) 5 P.L.T. Supp. 1, A.I.R. 1925 Pat. 68. Similarly where a vendor of immoveable property leaves a portion of the sale consideration in the hands of the vendee directing him to pay the same to his minor son on his attaining majority and the vendee undertakes to pay interest, there is no trust which will attract the operation of the section—*Kesavalu* v. *Perumal*, supra. In one Allahabad case, however, which was really a hard case, the principle of this section was applied to a constructive trust. In that case, B and D, father and son, were jointly entitled to a moiety of certain property; B's brother E, and E's son K were jointly entitled to the other moiety. B and D were transported for life. Thirty years after (B having in the meantime died), D returned from transportation, and aserted his right to a moiety against a person deriving his title from E and K, who had taken possession of the whole. It was held, looking to all the circumstances of the case, that E and K had taken possession subject to a constructive trust in favour of B and D, and that accordingly D was entitled to assert his right, and no limitation could affect it—*Durga Prasad* v. *Ast Ram*, 2 All. 361. This case should not be treated as laying down any general principle to be applied to all cases of constructive trusts; and Straight J. who gave judgment in this case admitted in a subsequent case (5 All. 608 at p. 614) that his remarks in the previous case should be taken as confined to the particular circumstances of that case—*Vithalrao* v. *Baswant*, A.I.R. 1937 Bom. 433.

In England also, the bar of time runs in favour of a trustee where he is only a trustee constructively—*Hovenden* v. *Lord Annesley*, (1806) 2 Sch. & Left. 633. So also, the bar of time runs in favour of a trustee who is only a trustee by implication of law upon some doubtful equity—*Townshend* v. *Townshend*, (1783) 1 Br. C.C. 550. Where the trust is not an express trust but is only a constructive trust, or the alleged express trust is in fact the point in dispute, the time runs in favour of the trustee—*Attorney-General* v. *Fishmongers' Co.*, (1841) 5 My. & Cr. 16; *Beckford* v. *Wade*, (1811) 17 Ves. 87; *Townshend* v. *Townshend*, supra.

113. Trustee not validly appointed:—This section applies to a suit against a trustee whether the trustee's right to the office is legally valid or otherwise; and the defendant cannot plead the bar of limitation—*Subramania* v. *Subba Naidu*, 25 M.L.J. 452, 21 I.C. 421 (423).

113A. Possession under void or voidable Trust:—Where a trustee has been in possession, for upwards of 12 years, of property under a trust which is void under the law, this section has no application as the property in respect of which the direction in the will is void has not become 'vested in trust for a specific purpose'—*Hem Chandra* v. *Peary Lal*, I.L.R. (1942) Kar. (P.C.) 166, 45 Bom.L.R. 275, 76 C.L.J. 451, 47 C.W.N. 46, 1942 A.L.J. 718, 45 P.L.R. 36, A.I.R. 1942 P.C. 64, (1943) 1 M.L.J. 11 (P.C.). This sertion has no application to a trust declared invalid *ab initio* —*Daw Ein* v. *Daw Chan*, 1940 Rang.L.R. 136. A.I.R. 1939 Rang. 365, 186 I.C. 210. So also, this section does not apply to a case where property is in the possession of a

donee under a voidable transaction of gift—*Ram Chandra* v. *Laxman*, 72 I.A. 21, I L.R. (1945) Bom. 440, 49 C.W.N. 303, A.I.R. 1945 P.C. 54, (1945) 1 M.L.J. 253 (P.C.).

114. Legal representatives:—A new trustee succeeding to the office of a former trustee does not succeed to him *personally* and cannot be said to be his legal representative within the meaning of this section—*Manikkam* v. *Thanikachalam*, (1916) 2 M.W.N. 87, 34 I.C. 945.

If the trustee is dead, a suit brought against his legal representative for following the trust property or for accounts is not barred by any length of time. It should be noted that if the suit against the legal representative is to recover the specific trust property, sec. 10 applies and exempts the suit from the bar of limitation—*Amiya* v. *Debendra*, 46 C.W.N. 865; it is not necessary that the property followed should be identical property in respect of which a breach of trust has been committed. It can be any thing into which the original property has been converted, whatever form the conversion may have taken, provided of course the one can be clearly and definitely connected with the other—*Sahaudra* v. *Deo Radha*, I L.R. (1940) Nag. 94, A.I.R. 1938 Nag. 30; but if the suit is not to recover any specific property but for compensation for loss of the property (the trust property having been sold by the trustee, or having disappeared and not being traceable), Art. 98 applies and the suit must be brought within 3 years. See Notes under Article 98. See also *Chintaman* v. *Khanderao*, 52 Bom. 184, 30 Bom L.R. 45, A.I.R. 1928 Bom. 58.

115. Assigns for valuable consideration:—Section 10 of the Limitation Act applies to a suit against a transferee of the trustee, if the transfer was without consideration, *i.e.*, a gift. See *Jagamba Goswamini* v. *Ram Chandra*, 31 Cal. 314 (316). But this section does not apply to a suit against those who assert their right under a *bona fide* purchase for value—*Maniklal* v. *Manchershi*, 1 Bom. 269; *Hait Ram* v. *Durga Prosad*, 5 All. 608. The period of limitation for a suit to recover trust property from the hands of assigns for valuable consideration is prescribed by Art. 48A in case of moveables, and by Art. 134, in the case of immoveable property. If the property is comprised in a religious or charitable endowment, a suit to recover possession from a transferee for valuable consideration is governed by Article 134B in the case of immoveable property, and by Art. 134C in the case of moveables.

Transfers for consideration are expressly excluded from the operation of section 10 —*Dwarkadas* v. *Rikhiram*, A.I.R. 1936 Lah. 784.

The meaning of this section is to declare that as a general rule trust properties shall not be subject to any law of limitation; that no length of time shall bar an action to recover such property; but that when trust property finds its way into the hands of an assignee for valuable consideration, the ordinary law of limitation shall apply; the assignee shall have the same benefit as an ordinary purchaser of property, not trust property, would have—*Chintamoni* v. *Sarup Se*, 15 Cal. 703 (705).

The words "assigns for valuable consideration" include lessees and mortgagees as well as purchasers—*Behari* v. *Muhammad*, 20 All. 482 (485) (F.B.); *Sri Kissen* v. *Tarachand*, A.I.R. 1940 Cal. 228, 190 I.C. 405 (lessee). The word "assign" in this section is sufficiently wide to cover lessee as well; but the benefit of the section cannot he had where the lease was for valuable consideration. The expression "valuable consideration" is not synonymous with "adequate consideration"—*Sri Jagadguru* v. *Dakshina*, 1953 S.C.J. 730, (1953) 2 M.L.J. 819, A.I.R. 1952 S.C. 514. The assigneee need not be a direct assignee of the trustee, but also includes assigns from the transferee or assignee from the express trustee—*Biseswar* v. *Sashinath*, 22 Pat. 133, A.I.R.

1943 Pat. 289, 208 I.C. 129. The term also includes auction-purchasers. A suit against an auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree is subject to the ordinary rule of limitation—*Chintamoni* v. *Sarup Se*, 15 Cal 703 (706); *Subbaya* v. *Mahammad Mustapha*, 32 M.L.J. 85, 40 I.C. 50 (52) affirmed by the Privy Council in 46 Mad. 751.

A gratuitous transferee is not an assignee for valuable consideration, and a suit for following the property in his hands is not barred by any length of time—*Venkatachala* v. *Sriranga Ammal*, 38 Mad. 1064. The object of inserting the words "valuable consideration" is to distinguish the case of a transferee who is a mere volunteer and in whose favour no equity can be brought to play and to hit only those transferees who are in possession of the trust property without having paid any consideration for it—*Biseshwar* v *Sashinath*, supra.

A suit by one of two co-trustees to recover the land from the purchaser of the right to manage the affairs of the temple and enjoy certain land of the temple sold by the other trustee is barred by Art. 134 when such a purchaser holds possession for more than twelve years as he is assign for valuable consideration—*Kannan* v. *Nilkandan*, 7 Mad. 337. Where the managers of a temple, made a gift of a portion of the temple property to the defendants in consideration of the latter performing certain religious services at the temple, it was held that the latter were assigns for valuable consideration —*Ramacharya* v. *Srinivasacharya*, 20 Bom L R. 441, 46 I.C. 19.

To be an assign for valuable consideration for the purposes of this section or of Art. 134, good faith is not necessary. Therefore, an assign for valuable consideration is none the less an assign for valuable consideration although he knows that he is purchasing trust properties in which his alienor (trustee) had only a limited interest —*Subbaya Pandaram* v. *Mahammad Mustapha*, 32 M.L J. 85, 40 I.C. 50 (52); *Ram Kanai* v. *Sri Sri Hari Narayan*, 2 C.L.J. 546. The words 'good faith' which occured in section 10 in the Act of 1871 have been omitted in the Acts of 1877 and 1908. See this subject fully discussed in Note 564 under Article 134.

117. "Following in his hands such property":—The words "for the purpose of following in his or their hands suh property" mean "for the purpose of recovering the property for *the benefit of the trust* in respect of which it had been given," that is, when property is used for some purpose other than the proper purpose of the trusts in question, it may be recovered, without any bar of time, from the hands of the persons indicated in the section—*Balwant Rao* v. *Puran Mal*, 6 All. 1 (9) (P.C); *Mahomedsa* v *Khadirsa*, 29 Bom L.R 241, A I.R. 1927 Bom. 398, 103 I.C. 418.

Therefore, this section has no application to a suit brought on failure of the object of a trust, to recover the money remaining in the hands of the trustee, for the *plaintiff's own benefit* and not with the object of having such money applied towards the original purposes of the trust—*Jasoda* v. *Parmanand*, 16 All. 256 (258). A suit brought to vindicate the rights of the plaintiffs as co-trustees with the defendants and to protect their own interests, and not, except indirectly, the interests of the temple, cannot be regarded as falling within this section—*Ranga* v. *Baba*, 20 Mad. 398.

A suit to remove the trustees of certain debuttur property, to establish the plaintiff's claim to be appointed trustee, and to recover property improperly dealt with by the defendant in breach of the trust, is one for "the purpose of following the property in the hands of trustees" and therefore limitation does not run—*Sreenath* v. *Radha Nath*, 12 C.L.R. 370. A suit to prevent a specific endowment from being diverted from its legitimate object and to re-attach it to that object, *e g.*, a suit asking the Court to prevent the misappropriation of the endowed property, and to see that

the income of the endowment is applied to its legitimate purposes, as well as to remove the defendant from the management of the endowment on the ground that he has no personal right to administer it, falls under this section and is never barred. The fact that there is an additional prayer for removal of the defendant from his position as trustee does not take the case out of this section. It is a part of the relief claimed in the plaint and is only claimed as necessary to ensure due appropriation of the endowment to its original trusts—*Sathappayyar* v. *Periasami*, 14 Mad. 1 (8). Where a testator by his will directed that some of his properties should be applied for certain charitable objects, but after his death his widow executed a trust-deed by which she conveyed the properties to trustees on trusts which were not strictly in accordance with the testator's will, and a suit was brought by certain members of the community to which the testator belonged, against the widow and the trustees, praying that the charitable objects of the testator's will should be carried out, and seeking for an account, it was held that the suit was one for the purpose of following the trust properties in the hands of the testator's widow and the trustees, and for an account, and therefore fell under this section. It was not a suit for rectification of the trust-deed executed by the widow, or merely a suit for account falling under Art. 120—*Advocate-General* v. *Bai Punjabai*, 18 Bom. 551 (562).

A suit by the present manager of a Hindu temple against the former manager for recovering the money which was mis-appropriated by the latter while in office falls under this section—*Sethu* v. *Subramanya*, 11 Mad. 274 (280). The present manager of a Mutt is entitled to sue the assigns of his predecessor in office on the ground that the assignment was in violation of his trust, and such a suit falls within this section—*Sathinama* v. *Saravanabaji*, 18 Mad. 266; *Mahomed* v. *Ganapati*, 13 Mad. 277; *Jamal* v. *Murgaya*, 10 Bom. 34.

A suit under sec. 42, Specific Relief Act, for a declaration that certain properties are public, religious, trust properties, is not a suit for the purpose of following trust property and this section does not apply to such a suit—*Shamdas* v. *Gurmukh*, I.L.R. (1945) Kar. 40, A.I.R. 1945 Sind 57.

A suit by the *dwaries* of a temple for recovery of certain dues claimed by them as payable as remuneration in respect of their services in connection with the temple is not a suit covered by this section. The plaintiffs are no doubt entitled, out of the proceeds of the property belonging to the temple, to certain payments in the nature of wages and remuneration, but they cannot be said to be bringing the suit for the purpose of following the trust property in the hands of the trustee—*Sri Sri Baidyanath* v. *Har Datt*, 5 Pat. 249, 7 P L.T. 465, A.I.R. 1926 Pat. 205, 94 I.C. 826.

The words "following in his hands such property" do not necessarily mean following the property *in specie* in the hands of the trustee. The trust property may be followed into any other form in which after conversion it may be traceable—*Sahaudra* v. *Deo Radha*, I.L R. (1940) Nag. 94, A.I.R. 1938 Nag. 30; *Hariharbrahman* v. *Janikiramiah*, A.I.R. 1955 Andhra 18. Therefore, it cannot be said that a *money* fund which has been dissipated by a trustee cannot be followed. Otherwise every improper use of trust money in trade or speculation would be beyond the application of the section—*Bhurabhai* v. *Bai Ruxmani*, 32 Bom. 394 (400); *Thackersay* v. *Hurbhum*, 8 Bom. 432 (469). See also *Sethu* v. *Subramanya*, 11 Mad. 274 (279), where the Court disallowed the objection that money could not be followed *in specie*. But a suit for recovery of a sum of money from an estate, of which the defendants are executors and trustees under a will, is not a suit for the purpose of following, in the hands of the defendants, trust property or the proceeds thereof—*Gopaldas* v. *Hemandas*, I.L.R. (1942) Kar. 392, A.I.R. 1942 Sind. 145. If the trustee who dissipated

the trust money died, his legal representative would be liable to the extent of the estate of the late trustee descended to the legal representative—*Bhurabhai* v. *Bai Luxmani*, supra.

The suit contemplated by this section is not necessarily a suit brought by a *cestui que trust* or a beneficiary against the trustee. A suit by the present *trustee* against the previous trustee for rectvery of money alleged to have been misappropriated by the latter falls under this section—*Sethu* v. *Subramanya*, 11 Mad. 274 (276). See also *Jagamba* v. *Ram Chandra*, 31 Cal. 314 (316); *Vinasami* v. *Subba*, 6 Mad. 54; *Subramania* v. *Subba Naidu*, 25 M.L.J. 452, 21 I.C. 421 (423).

"Or the proceeds thereof":—It is not necessary that the suit should be to follow the original trust property only; for if the trust property has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust property so long as the metamorphosis can be traced—*Taylor* v. *Plumer*, 3 M. & S. 574; *Sahaudra* v. *Deo Radha*, I.L.R. (1940) Nag. 94, A.I.R. 1938 Nag. 30.

117A. Suit for account:—Sec 10 of the old Act did not apply to a suit for *account*. Where the object of a suit by a *cestui que trust* was not to follow trust property in the hands of the trustee, but only to have an account of the property or the proceeds, section 10 of the old Act did not apply and such a suit was governed by Art 120—*Saroda Pershad* v. *Brojo Nauth*, 5 Cal. 910. A similar view was adopted in *Advocate-General* v *Bai Punjabai*, 18 Bom. 551 (566, 567). But in *Hurro* v. *Tarini*, 8 Cal. 766, Wilson J. directed an account and in a manner doubted the correctness of the ruling in 5 Cal. 910; and in *Nistarini* v *Nundolal*, 30 Cal. 369 (384), a trustee was directed to render accounts irrespective of any question of limitation. In a Madras case, it was held that a suit for an account of the trust property was the same thing as a suit for following the trust property in the hands of the trustee—*Sethu* v. *Subramanya*, 11 Mad. 274 (279). The present Act expressly extends the application of this section to suits for accounts—*Dhanpat* v. *Mohesh*, 24 C.W.N. 752 (755). In England also, actions against express trustees claiming an account of the trust property cannot be barred by the Statute of Limitation—*Rochefoucauld* v. *Bowstead*, [1897] 1 Ch. 196 (208); *North America Co.* v. *Watkins*, [1904] 1 Ch. 242.

It should be noted that this section presupposes a *breach of the trust, i.e.*, a use of the trust property for some purposes other than the proper purpose of the trust. Where the plaintiff does not allege any beach of trust on the part of the trustee, but the suit is primarily to ascertain whether any trust remained to be administered after the testator's debts and funeral expenses had been liquidated and he claims an account for the administration of the testator's estate, such a claim does not come within section 10—*Shapurji* v. *Bhikaji*, 10 Bom. 242 (246).

This section applies only to a suit for an account of the property which actually came into the hands of the trustee. But where it is sought to render a trustee liable for property which but for his wilful default or negligence would have come into his hands, the ordinary law of limitation applies, and it is not saved by this section—*Tholasingum* v. *Vedachelayya*, 41 Mad. 319; *Official Trustee* v. *Mrs. Racburn*, 1940 Rang.L.R. 273, A.I.R. 1940 Rang. 207, the reason being such a property never became vested in him.

This section prevents the period of limitation running, not only where the defendant had actually received money as trustee for which he had not accounted, but also where he held money in another capacity which he ought to have held as trustee. In such a case he cannot be heard to say that he held it in the other capacity and not in the

capacity of a trustee; and therefore in such a case section 10 will apply and prevent him from relying upon the bar of limitation. But a suit based on the failure of a trustee to reduce trust property into possession is not exempted from the bar of limitation. Such a suit does not fall under sec. 10. A trustee is not liable for the acts or defaults of his predecessors. Trustees are relieved from indefinite liability, except in cases of fraud or fraudulent breach of trust or cases in respect of trust property or the proceeds thereof still retained by trustees or previously received by them and converted to their own use—*Doraivela* v. *Adikesavelu*, 1922 M.W.N. 620, A.I.R. 1922 Mad. 409, 70 I.C. 87.

118. Suits not within this section:—Where there is no claim for following the property in the hands of the trustee, *i.e.*, for the recovery of the property for the purposes of the trust, nor is there any question as to whether the property is being applied or not to the purposes of the trust, but the claim is merely to vindicate the *personal right* of the plaintiff (a trustee) to the possession or management of an immoveable property against another person (defendant) claiming such right in the same character, the suit is not governed by this section—*Balwant* v. *Puran Mal*, 6 All. 1 (9) (P.C.); *Karmsha* v *Nattan*, 7 Mad. 417; *Giyana Sambandha* v. *Kandasami*, 10 Mad. 375; *Nilakandan* v. *Padmanabha*, 14 Mad. 153 (162); *Sankaran* v. *Krishna*, 16 Mad. 456; *Nathe Pujari* v. *Radha Binode*, 3 P.L.J. 327; *Ambalavana Pandara* v. *Minakshy*, 28 M.L.J. 217, 26 I.C. 841. Thus, a suit for a declaration that the plaintiff has the exclusive right of managing the affairs of a temple and that the defendant has no joint right of management, does not fall under this section when there is no claim for recovering any property for the purposes of the trust—*Nilakandan* v. *Padmanabha*, supra. So also a suit for declaration against the defendants not as trustees but as rival beneficiaries does not fall under this section—*Mohammed Ata* v. *Husain*, 19 Luck. 515, 1944 O.W.N. 37, A.I.R. 1944 Oudh 139.

Where a testator bequeathed all his properties to his trustees directing them to convey the properties to certain beneficiaries, and on the death of the last beneficiary, a grand-daughter of the testator brought a suit against the trustees, claiming as the heiress of the testator and not under the will, *held* that the defendants were trustees only under the will but as the plaintiff did not claim under the will it was not a suit against the defendants as trustees; and further as she did not claim the properties for the purposes of the trust, but for her own purposes, claiming a personal right to the properties, the suit did not fall under this section—*Ayeshabai* v. *Ebrahim*, 32 Bom. 364 (373).

A suit by the present trustee of a temple against the defendant who was the previous trustee (now removed) to recover from him certain moneys which the defendant had taken from temple funds to meet the expenses of a litigation to remove him from the trusteeship does not fall under this section, nor under Article 61 or 62, but is governed by Article 120—*Krishna Kudva* v. *Venkataramana Temple*, A.I.R. 1934 Mad. 542 (543).

Certain G. P. Notes belonging to two brothers of a joint family, G and D, stood in the name of G who was the head of the family, and were deposited in a Raj estate as security for the service of G in that estate. After his retirement from service the G. P. Notes were returned to G, and soon after he died. In a suit by the heirs of one of the brothers against the heirs of the other brother for recovery of their share in the G. P. Notes standing in the name of the latter as head of the family and deposited as security for service of the said brother and returned to him after retirement, it was held that after the service of the elder brother was over, the trust (*viz.*, the vesting of the Notes in him for the purpose of serving as a security for his service) came to an

end, and consequently the suit could not be said to be a suit for the purpose of restoring the Notes to that trust which had been completed and was no longer capable of administration, and the suit therefore fell outside the scope of section 10, but was governed by Article 145—*Bidhu Bhusan* v. *Anadi*, 61 Cal. 119, 58 C.L.J. 502, A.I.R. 1934 Cal. 87 (90), 150 I.C. 398.

Where trust property was sold as the personal property of the trustee at an execution-sale, and the auction-purchaser was in possession for more than 12 years, a suit by the successor of the original trustee against the purchaser for recovery of the property does not fall under this section but is barred by the 12 years' rule—*Subbaya Pandaram* v. *Mahammad Mustapha*, 32 M.L.J. 85, 40 I.C. 50 (55) affirmed by the Privy Council in 46 Mad. 751.

A suit by a legatee who has received a portion of the legacy, against the executor, to be put in possession of the remaining portion of the legacy, is not a suit falling under this section but is governed by Article 120—*Gajanan* v. *Waman*, 12 Bom.L.R. 881, 8 I.C. 189 (190).

Section 10 does not apply to the case of an ordinary bailment—*K. R. Kumaraswami Chettiar* v. *Krishnaswami Chetti*, (1955) 2 M.L.J. 266, 1955 M.W.N. 644 A.I.R. 1956 Mad. 96.

The *ratio decidendi* is that section 10 benefits those who sue to enforce express trusts and not those who claim not under express trusts but adversely to them—*Shirinbai Dinshaw* v. *Navroji Pestonji*, A.I.R. 1936 Bom. 34. Thus a person claiming adversely to the trust and on the footing that the trust deed itself is bad cannot contend that the property is held by the trustees for any person and invoke the aid of this section—*Fidahussein* v. *Tyabally*, 43 Bom.L.R. 622, A.I.R. 1941 Bom. 307, 196 I.C. 821.

A claim for damages on the footing of wilful default is not one to follow trust funds, and is not saved by section 10, Limitation Act—*Shirinbai* v. *Navroji Pestonji*, A.I.R. 1936 Bom. 34.

"This (section 10) does not in terms apply to suits for damages on the footing of wilful default, when *ex hypothesi* the money claimed has not come into the hands of the trustees; and the reference to an account does not extend it to such claims. The section read as a whole justifies a decree for any trust funds shown, on an account being taken, to be in the hands of the trustees."—*Per* Barlee, J., in *Shirinbai Dinshaw* v. *Navorji Pestonji*, A.I.R. 1936 Bom. 34.

And consequently any claim to damages for alleged breach of trust in the management of the trust property is governed by Art. 120. Time runs from the breach and not from the date of the consequent loss—*Shirinbai Dinshaw* v. *Navorji Pestonji*, A.I.R. 1936 Bom. 34.

Suits on foreign contracts.

11. (1) Suits instituted in India on contracts entered into in a foreign country are subject to the rules of limitation contained in this Act.

(2) No foreign rule of limitation shall be a defence to a suit instituted in India on a contract entered into in a foreign country, unless the rule has extinguished the contract and the parties were domiciled in such country during the period prescribed by such rule.

The word "India" was substituted for the words "the States" by Act 3 of 1951.

119. Principle:—Sub-section (1) is a legislative enactment of the rule of international jurisprudence that "all suits must be brought within the period prescribed by the local law of the country where the suit is brought, otherwise the suit will be barred"—Story's Conflict of Law, sec. 577, cited in *Lalloobhoy* v. *Ruckmaboye*, 5 M.I.A. 234 (at p. 267). "It is a rule of universal (or almost universal) application that remedies as distinguished from rights are to be pursued according to the law of the place were the action is instituted, which law is commonly called the *lex fori*. And the reason of the rule is, because Courts of law being instituted by every nation for its own convenience, the nature of the remedies available therein and the times and modes of the proceedings therein are regulated by that nation's own views of what is just and proper or expedient; and it is not obliged, out of any comity to other countries, to depart (in a matter of procedure) from its own notions of what is just or proper or expedient. And, therefore, where an action is brought in one country upon a contract made in another, a plea of the statute existing in the place of the contract is not a good bar in the general case"—Banning, 3rd Edn., p. 11; *Huber* v. *Steiner*, (1835) 2 Bing. N.C. 202; *Pardo* v. *Bingham*, (1870) L.R. 4 Ch. App. 735; *Harris* v. *Quine*, (1870) L.R. 4 Q.B. 653; *Alliance Bank of Simla* v. *Carey*, (1880) 5 C.P.D. 429.

"The rule which applies to the case of contracts made in one country and put in suit in the Courts of another country appears to be this, that the interpretation of the contract must be governed by the law of the country where the contract was made, but the mode of suing and the time within which the action is to be brought must be governed by the law of the country where the action is brought"—*Trimbey* v. *Vignier*, 1 Bing.N.S. 151. While the Courts of almost all civilized countries entertain causes of action which have originated in a foreign country and adjudicate upon them according to the law of the country in which they arose, yet such Courts respectively proceed according to the prescription of the country in which they exercise jurisdiction—*Lalloobhoy* v. *Ruckmaboye*, 5 M.I.A. 234 (at p. 266). In matters of procedure all mankind are bound by the law of the *forum*—*Lopez* v. *Burslem*, 4 Moo.P.C. 300.

Although this section speaks of suits on contract only, yet the principle of this section applies to all suits and proceedings. Thus, the execution of decrees of Courts of Native States transferred to a Court of British India for execution is subject to the law of limitation which prevails in the latter Court—*Hukum* v. *Gyanendar*, 14 Cal. 570.

120. Sub-section (2):—This sub-section also follows the English law, according to which a foreign law of limitation is preferred to the *lex fori* on two conditions; (1) that the foreign law extinguishes the right or the obligation itself, and (2) that both the parties have resided in the country where such law prevails for the whole of the prescribed time. See Story's Conflict of Laws, sec. 582.

It is immaterial whether the foreign law allows a longer or a shorter period. Provided that the foreign law does not extinguish the *right* under the contract, no effect can be given to such law—*Huber* v. *Steiner*, 2 Bing.N.S. 202. Where the *remedy* only is barred by the foreign law, but the right is not extinguished, a suit may be instituted in the Court of India if it is not then barred according to the Indian law of limitation —*Nallatambi* v. *Ponnusami*, 2 Mad. 400 (406); *R. A. Dickie* v. *Municipal Board*, A.I.R. 1956 Cal. 216.

Where the parties to a promissory note executed in Sind migrated to Kutch long before the limitation in respect of that note had expired and the suit for recovery of money due under it is filed in Kutch, the suit is governed by the law of limitation in Kutch—*Dhanji* v. *Ramji*, A.I.R. 1950 Kutch. 58.

PART III.

COMPUTATION OF PERIOD OF LIMITATION.

Exclusion of time in legal proceedings.

12. (1) In computing the period of limitation prescribed for any suit, appeal or application, the day from which such period is to be reckoned shall be excluded.

(2) In computing the period of limitation prescribed for an appeal, an application for leave to appeal and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence or order appealed from or sought to be reviewed, shall be excluded.

(3) Where a decree is appealled from or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

(4) In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

Exclusion of time:—This section may be analysed as follows:—

(1) In computing the period of limitation prescribed for a *suit*, the day on which the time begins to run shall be excluded.

(2) In computing the period of limitation prescribed for an *appeal*, the following periods shall be excluded:—(*a*) the day on which the period begins to run; (*b*) the day on which the judgment was pronounced; (*c*) the time requisite for obtaining a copy of the decree, sentence or order; (*d*) the time requisite for obtaining a copy of the judgment.

(3) In computing the period of limitation prescribed for an *application for review*, the following periods shall be excluded:—(*a*) the day on which the period begins to run; (*b*) the day on which the judgment was pronounced; (*c*) the time requisite for obtaining a copy of the decree; (*d*) the time requisite for obtaining a copy of the judgment.

(4) In computing the period of limitation prescribed for an *application for leave to appeal*, the following periods shall be excluded:—(*a*) the day on which the time begins to run; (*b*) the day on which the judgment was pronounced; (*c*) the time requisite for obtaining a copy of the judgment (but not a copy of the decree).

(5) In computing the period of limitation prescribed for an *application to set aside an award*, the following periods shall be excluded:—(*a*) the day on which the time begins to run; (*b*) the time requisite for obtaining a copy of the award.

(6) In computing the period of limitation prescribed for *any other application*, only the day on which the time begins to run shall be excluded.

It should be noted that in cases (2), (3) and (4), the day on which the time begins to run and the day on which the judgment was pronounced are identical.

The rules as to computation of period of limitation laid down in Part III of the Act are not intended by the legislature to apply only to periods of limitation prescribed by the Schedule but apply also to periods of limitation provided for by other enactments —*Durag* v. *Pancham*, I.L.R. (1939) All 647, 1939 A.L.J. 522, A.I.R. 1939 All. 403 (F.B.).

121. Sub-section (1):—The meaning of the first paragraph is that the date of accrual of the causes of action should be excluded—*Chinna* v. *Ramaswamy*, 4 M.H.C.R. 409, *Ganapati* v. *Sitharama*, 10 Mad. 292. "The reason of the rule appears to be this, namely, the law does not as a rule regard the fraction of a day, so much so that the date of the execution of a deed does not mean the hour or the minute or the day when the deed was delivered, but means the whole day; and similarly the day of the death of a testator is the day of the death; and if it is necessary to reckon six months after the death, those six months will commence with the day next following the death"—Banning, 3rd Edn., p. 20; *Lester* v. *Garland*, (1808) 15 Ves. 248; *Webb* v. *Fairmaner*, (1838) 3 M. & W. 473; *Chambers* v. *Smith*, (1843) 12 M. & W. 2; *In re Railway Sleepers Co.*, (1883) 29 Ch. D. 204.

In computing a calendar month or year, it is sufficient to go from one month or year to the corresponding day in the next, and to exclude from computation the day from which the month or the year is calculated, so that two days of the same number are not included—*Deb Narain* v. *Ishan*, 13 C.L.R. 153. In a suit on a bond where a day is specified for payment, the period of limitation is to be computed from and exclusive of the day so specified, as being the day on which the right to sue accrued —*Ram Churn* v. *Ina*, 24 W.R. 463. In case of a pro-note, the date on which the pro-note is executed will be excluded—*Munshi Abdul* v. *Tarachand*, 6 B L.R. 292.

When a debt is acknowledged in writing, a new period of limitation runs under sec. 19 from the date of the acknowledgment, and the day on which the acknowledgment was signed must be excluded in computing the new period of limitation, under sub-section (1) of section 12—*Jainarayan* v. *Vithoba*, 6 N.L J. 281, A.I.R. 1923 Nag. 143, 71 I.C. 556.

The day on which a minor attains his majority must be excluded under this section —*Jugmohan* v. *Luchmesur*, 10 Cal. 748 (751). The Patna High Court has held that the date of the cessation of minority and not the date of attainment of majority is to be excluded under this section—*Batuk Prasad* v. *Rudra Das*, A.I.R. 1950 Pat. 206.

In calculating the period of limitation for appeals and applications, the day on which the judgment was pronounced or order was made should be excluded—*Debicharan* v. *Mehbi Hussain*, 20 C.W.N. 1303, 1 P.L.J. 485 (489); *Gujar* v. *Barve*, 2 Bom. 673. See sub-section (2).

Sub-section (2):—This sub-section does not apply to an application for restoration of a suit dismissed for default. The language of the section is clear—*Mohan Lal* v. *Sher Muhammad*, 93 I.C. 1023, A.I.R. 1926 Jour. 195.

122. "Time requisite for copy":—The 'time requisite for obtaining a copy' does not mean the time requisite by reason of the carelessness or negligence of the applicant. That is, the delay caused by the carelessness or negligence of the party in applying for a copy or in paying the money required for making the copy cannot be

excluded from computation—*Parvati* v. *Bhola*, 12 All. 79 (82). The word 'requisite' is a strong word; it may be regarded as meaning something more than the word 'required.' It means 'properly required,' and it throws upon the counsel or pleader for the appellant the necessity of showing that no part of the delay beyond the prescribed period is due to his default—*J. N. Surty* v. *Chettair*, 6 Rang. 302 (P.C.), A.I.R. 1928 P.C. 103, 32 C.W.N. 845 (849); *Ramaseshayya* v. *Venkatarathnam*, (1938) 2 M.L.J. 283, A.I.R. 1938 Mad. 823; *Bhausaheb* v. *Sonabai*, I.L.R. (1946) Bom. 431, 48 Bom.L.R. 97, A.I.R. 1946 Bom. 437; *Abdul* v. *Abdul*, 56 C.W.N. 4 D.R. 25. The words "requisite" and "obtaining" mean that some definite step should be taken by the appellant or the applicant himself towards the attainment of the copy—*Keshav Sugar Works* v. *R. C. Sharma*, A I.R. 1951 All. 122, 1950 A L.J. 946. Thus, where according to the rules of the High Court (original side) it is incumbent upon the appellant to make a requisition for the drawing up of the order appealed against, and the party who wanted to prefer an appeal applied for a copy of the order, but made no requisition for the order being drawn up, and it was the respondent who requisitioned for the drawing up of the order, *held* that the appellant did not take reasonable and proper steps to obtain a copy of the order, and he was not entitled to a deduction of the period from the date of the application for a copy of the order up to the date of obtaining the copy—*Kamruddin* v. *M. N. Mitter*, 52 Cal. 342, 89 I.C. 277, A.I.R. 1925 Cal. 735; *Charity Commissioner* v. *Padmavati*, A.I.R. 1956 Bom. 86. In determining what is the 'time requisite,' the conduct of the appellant must be considered, and no period can be regarded as requisite which need not have elapsed if the appellant (*from an order of the Original Side*) had taken reasonable and proper steps in making a requisition to obtain the order—*Pramatha* v. *Lee*, 49 Cal. 999 (P.C.), 27 C.W.N. 156, 37 C.L.J. 86; *Nemichand* v. *Chateerbhuy*, A.I.R. 1937 Bom. 64; *M. C. Mya* v. *Mrs. Whittam*, A.I.R. 1936 Rang. 201; *Abdul* v. *Abdul*, supra. Any failure in reasonable diligence which produces unnecessary delay at one or more of the several stages in obtaining a copy of the decree, order or judgment, will disentitle the appellant to claim the whole of the time actually spent in obtaining the copy of the order. The time unnecessarily occupied is not time 'requisite' within the meaning of this section—*Sarat Chandra* v. *Upendra Nath*, 54 Cal. 481, 103 I.C. 235, A.I.R. 1927 Cal. 623; *Lachmibai* v. *Doulatram*, A.I.R. 1936 Sind 53. But a party is not to lose his right of appeal by reason of the neglect or delay of the officials who issue copies or who are required to give notice when such copies are ready—*Sheogobind* v. *Ablakhi*, 12 All. 105.

In cases where the period of limitation for filing the appeal is a very short one (*e.g*, 20 days under Art. 151), the appellant ought to be diligent in applying for copies of the judgment and decree. Where the appellant allowed five days to expire after the decree was signed before applying for a copy, and did not file his appeal, after so obtaining a copy, at the earliest opportunity possible but two days after, when the period of limitation had expired, such a delay, being entirely unaccounted for, was not held to be "time requisite for obtaining a copy of the decree"—*Ramey* v. *Broughton*, 10 Cal. 652 (660).

This section does not authorise the deduction of time occupied in getting a *translation* of the decree. Thus, where the decree of the first Court was drawn up in English, but the appellant wanted and obtained a vernacular copy of the decree, and filed it along with the memorandum of appeal in the lower Appellate Court, it was held that the time spent in obtaining the vernacular copy could not be excluded in computing the period of limitation for the presentation of an appeal, in as much as the practice of the lower Appellate Court required an English copy of the decree to be filed with the memorandum and not a translation thereof—*Muhammad Amin* v. *Chiragh*, 124 P.L.R. 1917, 39 I.C. 617. But if there has been extreme delay in the office in

furnishing the translation, such delay may be a ground for extending the time—*Dya Kour* v. *Amrao Kour*, 145 P.R. 1883.

In calculating the period of limitation for filing an appeal, time requisite for obtaining a copy of the judgment of the appeal and a copy of the decree must be excluded—*Mohammad zaman* v. *Hans Raj*, A.I.R. 1938 Lah. 707, 182 I.C. 108.

An appellant is entitled to deduct the time spent in obtaining a copy of the first judgment of the trial Court as well as of the judgment passed on review. Where the judgment passed on review does not give all the facts of the case but is merely supplementary to the first judgment, inasmuch as it modifies a portion of the first, it is necessary for the appellant to file copies of both the judgments, as the two must be regarded as one judgment, and the time spent in obtaining both the copies must be deducted—*Jagiri* v. *Doulat*, A.I.R. 1928 Lah. 755 (756), 112 I.C. 46.

"Time requisite for obtaining copy" means the time beyond the appellant's control occupied by the copyist department after an application for copy has been duly made, and not an ideally shorter period within which it could be shown that the copyist department could prepare a copy. And so, if within the period of limitation, the appellant applies for a copy a few days before the long vacation, so that it takes 82 days to obtain the copy owing to the intervention of the vacation, that period must be excluded, and the respondent cannot object that the appellant ought to have applied earlier to avoid the vacation and that if he had so applied he could have obtaintd the copy within a much shorter time. The Court will not hear such objection, because the only concern of the Court is the time which was actually occupied by the copyist department. The Court is not concerned with the ideally minimum time within which the copyist department could most expeditiously produce a copy—*Thirumala* v. *Anavemareddi*, 57 Mad. 560 (F.B.), 66 M.L.J. 687, A.I.R. 1934 Mad. (307), 149 I.C. 172. See this case cited under the next heading.

The time taken in the preparation of a copy anywhere except in the copying department cannot be treated as a time requisite for obtaining a copy of decree, even though it is certified to be a true copy by the office of the copying department —*State* v. *Kashi*, A.I.R. 1950 All. 486.

In applying for leave for appeal to the Supreme Court the applicant is not entitled to get any time expended in obtaining a copy of the judgment deducted in computing the period of limitation—*Tej Krishen* v. *Delhi Cloth & General Mills Co.*, A.I.R. 1950 E P. 195; *Dharwar Bank* v. *Deshpande*, A.I.R. 1954 Bom. 525.

Two applications for the same copy:—The appellant at first applied for a copy of the decree, and obtained it after 34 days, and then, before the expiry of the period of limitation, applied again for another copy of the decree, for some reason or other which it is unnecessary to ascertain, but on account of the long vacation, the time occupied by the department for this copy was 82 days. He filed the appeal with the second copy. It appeared that if the time occupied in obtaining the first copy (*i.e.*, 34 days) was deducted, the appeal was out of time, but if the time occupied by the second copy (*i.e.*, 82 days) was deducted, the appeal would be in time. The respondent objected that as the appellant had demonstrated in getting the first copy that the time requisite was only 34 days, he could be allowed to deduct 34 days, but not 82 days. But the Full Bench was of opinion that the second application being a reasonable and proper one, as it was made within the period of limitation, the appellant was entitled to deduct the time taken by the copying department in preparing a copy of the decree upon such application. The time requisite for obtaining a copy means the time requisite for obtaining the copy *actually accompanying the memorandum* of

appeal and not some other copy which the appellant might have got earlier—*Thirumala* v. *Anavemareddi*, 57 Mad. 560 (F.B.), 66 M.L.J. 687, A.I.R. 1934 Mad. 306 (309), 149 I.C. 172; *State* v. *Kashi*, A.IR. 1950 All. 486. The Lahore High Court has taken a contrary view in *Mathela* v. *Sher Mohammad*, 17 Lah. 621; A.I.R. 1935 Lah. 682, where it has been held that the words "time requisite" have nothing to do with the amount of time spent by the appellant in obtaining the copy which he chooses to file with the memorandum of appeal. The words mean the shortest time during which a copy could have been obtained by the appellant.

123. Computation of time requisite for obtaining copies:—The question as to when the period requisite for taking copies should begin, that is, whether on the day the application for copy is made or on the day on which the folios and fees for the copy are deposited, is matter to be determined by the practice of the Court —*Nobin* v. *Brojendra*, 12 C.L.R. 541. The general practice in Bengal is to count the period requisite for copy from the date of the application for the copy and not from the date of deposit of the folios, if there has not been an unreasonable delay in filing folios. Thus, where a party applied for a copy of the decree on the 15th October and the information as to the number of folios required was supplied on the 18th, November, and on the same day the party put in the folios, *held* that the time requisite for obtaining the copy of the decree was to be counted from the 15th October—*Kali Sanker* v. *Baikanta*, 7 C.W.N. 109. But delay in paying the fees after the estimate of the cost of copying has been communicated to the applicant counts against him. In such a case the "time requisite" will be counted from the date of deposit of the fees—*Parbati* v. *Bhola*, 12 All. 79 (82); *Deoki Lal* v. *Ramanand* Lal, 5 P.L.J. 701 (705), 59 I.C. 179; *Topandas* v. *Manager*, 5 S.L.R. 47, 10 I.C. 210. Where requisite stamps and folios as notified are filed on the next day of the application and second requisition for extra stamps is notified before the date given for the delivery of the copy according to the rules made by the High Court but without notifying the same to the applicant or his pleader directly and the applicant comes to know of the second requisition on the date given for the delivery of the copy and supplies the additional stamps and folios on the next Court day, he is entitled to get deduction of the whole period from the date of the application to the date when the copy is ready for delivery —*Jamadar* v. *Naiyab*, I.L.R. (1941) 1 Cal. 536, 74 C. L. J. 121, 45 C.W.N. 498, A.I.R, 1941 Cal. 378. When it was notified by the Court to the appellant as to the number of stamps and folios necessary for preparing copies of judgment and decree, and the appellant supplied them in time, but the Court subsequently asked for more folios which were *not necessary*, and which the appellant supplied after great delay, *held* that this delay in supplying the additional and unnecessary folios should not count against the appellant—*Adarpriya* v. *Ramprotap*, 30 C.W.N. 926, A.I.R. 1926 Cal. 1105, 98 I.C. 748. According to the practice prevailing in Behar, the applicant for copy should deposit the required number of folios the very next day after that on which the number of folios is notified to him, and if he fails to furnish the folios on that day, he is not entitled to deduct the days during which the preparation of the copy was delayed by such neglect—*Ram Asray* v *Sheo Nandan*, 1 P.L.J. 573 (575), 35 I.C. 868. According to the practice of the Oudh Chief Court, it is for the appellant to make the necessary calculation as to the fees necessary for the copy of the judgment, and to deposit the fees accordingly; it is not the duty of the office to make the calculation for the appellant, but only to check the calculation made by the appellant. Consequently, any delay caused by the error of the appellant in making the computation will not be included in the time requisite for obtaining the copy—*Gudar Pal* v. *Nagishar*, 2 Luck. 447 (F.B.), A.I.R. 1927 Oudh 129, 101 I.C. 136. According to the practice of the Nagpur Court, if the application for a copy of the judgment and decree

contains wrong information so that the copying department cannot comply with such application, the time requisite for copy should be counted from the date on which correct information is supplied—*Mohammad Khan* v. *Fatma Bai*, 26 N.L.R. 149, 121 I.C. 647, A.I.R. 1930 Nag. 129. According to the same Court in calculating the time requisite for obtaining a copy the applicant is entitled to exclude the date on which he pays the necessary funds—*Sitaram* v. *Wamanrao*, I.L.R. (1947) Nag. 323, 1947 N.L.J. 206, A.I.R. 1948 Nag. 50; (dissenting from the view taken in *Ramkrishna* v. *Shrawn*, I.L.R. (1944) Nag. 725, 1944 N.L.J. 313, A.I.R. 1944 Nag. 356 where it was held the applicant is entitled to exclude only the day on which he was informed about the insufficiency of funds, but not the day of supply of deficit stamp; *Mt. Thanwarin* v. *Darbarilal*, 1951 N.L.J. 591, A.I.R. 1952 Nag. 9.

The parties cannot, by unnecessary delay in putting in the requisite number of sheets of stamped paper for the copies extend the period prescribed for appeal. But it would be grossly unfair to disallow the application if the requisite papers were not procurable, or if a mistake were made in calculating the number of sheets required—*Gungodass* v. *Ramjoy*, 12 Cal. 30. Sometimes delay might be caused in the receipt by the office of the estimated charges owing to the stamps not being procurable, or to the office not being open to receive payment of those charges when the estimate should have been complied with. Such period of delay, as well as delays arising from similar causes beyond the control of the appellant, and not being the result of any laches on his part, should be allowed in computing the time requisite. Sometimes owing to pressure of work in the copying department, a copy of a decree or judgment cannot be made for some days after the charges for making the copy have been paid. The period of such delay would also be allowed for in computing the time requisite for obtaining the copy—*Bechi* v. *Ashanullah*, 12 All. 461 (478, 491) (F.B.).

In case of an appeal from the original side, the time requisite for obtaining a copy of the order appealed against begins from a date earlier than that on which the application for copy is made; the time begins from the date on which the appellant has made a requisition that the order should be drawn up and filed—*In the goods of Pashupati*, 59 Cal. 1215 (F.B.), 36 C.W.N. 469 (477), 137 I.C. 526, A.I.R. 1932 Cal. 331, overruling *Nibaran Chandra* v. *Martin and Co.*, 32 C.L.J. 127, 58 I.C. 408 (409), and approving *Bani Madhub* v. *Matangini*, 13 Cal. 104 (F.B.); *Jayashankar* v. *Mayabhai*, I.L.R. (1952) Bom. 514, 54 Bom.L.R. 11, A.I.R. 1952 Bom. 122 (F.B.).

Under sub-section (2) the day on which the judgment is pronounced and the time requisite for obtaining copies are excluded from computation. But where an application for copies is made on the same day the judgment is pronounced, that day cannot be excluded twice, once as the day on which the judgment was pronounced, and the second time as one of the days requisite for obtaining copies. In such a case, the day on which the judgment is pronounced is excluded first and then the time requisite for obtaining copies has to be excluded—*Ata Muhammad* v. *Pir Khan*. 75 I.C. 1055, A.I.R. 1924 Lah. 599; *Salam Singh* v. *Hira*, 13 N.L.R. 89, 40 I.C. 425. But in *Balkrishna* v. *Baijnath*, I.L.R. (1939) Nag. 185, 1939 N.L.J. 173, A.I.R. 1939 Nag. 150, it has been held that in such a case, an exceptional one, one day happens to be excluded twice on the ground that the day on which the judgment is pronounced and the days requisite for obtaining copy are distinct and separate in their purpose.

According to the practice of the Patna High Court, when several suits are disposed of in one judgment, in the appeal to the High Court only one copy of the judgment is required to be filed; but the time taken for obtaining a copy of the judgment will be deducted in computing the period of limitation for each of the several analogous appeals —*Bibi Umatul* v. *Ram Charan*, 1 P.L.T. 562, 58 I.C. 991.

The time requisite for obtaining a copy ends on the date when the copy is ready for delivery and not when the applicant chooses to apply for its delivery or actually takes delivery—*Gopal* v. *Brojo Behary*, 9 C.L.R. 293; *Parbati* v. *Bhola*, 12 All. 79 (82, 83); *Kali Sankar* v. *Baikanta*, 7 C.W.N. 109; *Tolaram* v. *Jafferkhan*, 38 I.C. 464, 10 S.L.R. 165; *Ramaseshayya* v. *Venkatarathnam*, (1938) 2 M.L.J. 283, 1938 M.W.N. 847; A.I.R. 1938 Mad. 823; *Raichand* v. *Rahinava*, 40 Bom.L.R. 1211, A.I.R. 1939 Bom. 46, 179 I.C. 645. The important date is not the date on which the appellant takes delivery but the date on which the copy is ready for delivery, provided he had notice that the copy would be ready on that date—*Parbati* v. *Bhola*, supra; *Bechi* v. *Ashanullah*, 12 All. 461 (476) (F.B.); and if an appellant fails to inform himself of the date when the copy would be ready, and in consequence he does not obtain it when it is ready for delivery, the period of such delay is not to be included in the time requisite —*Bechi* v. *Ashanullah*, 12 All. 461 (491) (F.B.). What has to be regarded is not the time actually *spent* in securing the copies, but the time *'requisite'* for that purpose, therefore the appellant was not entitled to reckon out the days during which the copy of the judgment lay undelivered—*Nur Muhammad* v. *Ram Das*, 1919 P.L.R. 4, 50 I.C. 760. Where the appellant was instructed to attend Court on a particular day to ascertain whether the copies were ready or whether any further advance of copying fees was required, and the appellant did not so attend, and did not on that day take any particular steps towards obtaining the copy, it was held that that day could not be deducted from the limitation period as "time requisite for obtaining the copy"—*Luchman* v. *Kalya*, 12 N.L.R. 66, 34 I.C. 458. But where no date was fixed by the officers of the Court either as to the date when the copy would be ready or as to the date on which it would be delivered, the "time requisite for obtaining copy" would extend up to the date when the copy was actually delivered—*Sheogobind* v. *Ablakhi*, 12 All. 105 (109) (distinguished in 12 All. 461). So also, where the delay in obtaining copy is due to the negligence and carelessness of the copying department in preparing the copy and to the omission to inform the applicant as to the date when he should come to take delivery of the copy, the entire period from the date of the application for copy to the date when delivery of the copy is taken, is to be excluded as the time requisite for obtaining the copy—*Pritam* v. *Khushi*, A.I.R. 1951 H.P. 87; (*Fouda* v. *Ganpat*, A.I.R. 1920 Pat. 278; *Sarkhara* v. *Nawab*, 13 I.C. 850 relied on).

No hard and fast rule can be laid down to meet all cases that occur under this section and each case must be decided on its own merits. But it is possible to lay down as a general rule or principle that the "time requisite" means only the interval between the time when the copy is applied for and the time when it is ready for delivery; that during the interval due diligence on the part of the litigant is required by the law; and that no delay, unless such as was caused by circumstances over which the litigant had no control and which he could not by due diligence have avoided, can form part of the time requisite for obtaining a copy—*Bechi* v. *Ashanullah*, 12 All. 461 (478, 479) (F.B.). (1) A 'copying agent' in dealing with an application presented in accordance with the rules, does not act as a private agent of the applicant, but as an official of the copying department, which is entrusted with the duty of preparing and certifying copies. (2) An application for a copy, whether made in person or by post, which bears the necessary Court fees-stamp and is addressed to the proper officer is a valid application, even if it is not accompanied by the full cost of preparing and certifying the copy. (3) Under the rules for the supply of copies referred to above, the time necessary for ascertaining the cost of preparing a copy is time requisite for obtaining the copy within the meaning of sec. 12, Limitation Act, and an applicant is entitled to exclude from the prescribed period of limitation the period between the date of presentation of the application and the date on or by which the full cost of

preparing the required copy is deposited, provided he deposits with reasonable diligence the aforesaid amount as and when required by the copying department and provided further that in the case of an application made by post, he remits Rs. 5 with the application (as required by rules).

"The application is complete when it has been presented to the proper authority duly stamped, and if the applicant complies, with all reasonable diligence, with the requirements of the copying department, he is entitled to the benefit of section 12, Limitation Act, with respect to the whole period which elapses between the time of presentation of his application and the time of receipt of his copies; if delay is occasioned by his conduct between these two points of time, he cannot obtain any benefit in respect of the period of delay...."—*Kishore Chand* v. *Bahadur*, A.I.R. 1936 Lah. 771, 17 Lah. 429, 38 P.L.R. 493 (F.B.) (A.I.R. 1935 Lah. 625, A.I.R. 1925 Lah. 889, overruled). A litigant cannot be made to suffer for the laches and any inaction of any department connected with the administration of justice, and there is no reason why a party should lose his right of appeal for the dilatory methods of copying department. The copying department is not the agent of the applicant for copies but of the particular department of the Government which is in charge of the Deputy Commissioner—*Piare Lal* v. *Karta Ram*, A.I.R. 1936 Lah. 550, 38 P.L.R. 220, 163 I.C. 223, a case from the Punjab—*Rura Mal* v. *Ram Chand*, A.I.R. 1936 Lah. 200. When there has been no mistake of counsel, no negligence nor inaction nor want of *bona fides* imputable to the applicant but the delay in giving a copy is due to the slipshod and negligent procedure of the copying department, the time which the department itself notes as having elapsed between the application and the completion of the copy is to be regarded as the "time requisite" within the meaning of sec. 12 (2)—*Labhu Ram* v. *Bansi Dhar*, A.I.R. 1936 Lah. 120.

Defective application for copy:—A defective application for copy does not entitle the applicant to a deduction of time under this section. Thus, an application for a copy of a decree was returned as the date of judgment or other particulars were not given. A subsequent application was put in. *Held* that the time that could be deducted was not the whole period of time from the putting in of the first application, but only the period during which the second application was pending—*Babu Lal* v. *Rampher*, 91 I.C. 425 (Oudh). See also *B. B. & C. I. Ry. Co.* v. *Firm Ram Sarup*, A.I.R. 1927 Lah. 59, 98 I.C. 942. But if the defect is not discovered and brought to the notice of the applicant immediately, the days between the date of the presentation of the application and the late on which the defect is shown to the applicant at a later stage can be excluded as days requisite for obtaining copies—*Hudas* v. *Banwarilal*, I.L.R. 1948 Nag. 167, 1947 N.L.J. 552, A.I.R. 1948 Nag. 395. The same view has been taken in *Hira* v. *Indrabahadar*, I.L.R. (1940) Nag. 312, 1938 N.L.J. 159, A.I.R. 1938 Nag. 287 where it has been held that though a party gives a wrong suit number, if the office takes time to find out the mistake, the party should not suffer for such delay. Where an application for copies of judgment and decree was struck off for non-deposit of stamp papers and a subsequent application for restoration of the previous application was granted, the subsequent application was a continuation of the former one—*Ramanuja* v. *Narayana*, 18 Mad. 374.

124. Court closed when copy ready:—If the copying department of the Court is working during the vacation to make up arrears, under the special order of the District Judge, and the copy of the decree is ready for delivery on one of these days and notice is posted on the notice-board that the copy is ready, the appellant is not bound to take cognizance of this notice or to take delivery of the copy until the Court re-opens after the vacation; he is entitled to deduct the time up to the date of re-opening of the Court—*Khub Chand* v. *Harmukh*, 34 All. 41, 8 A.L.J. 1905, 12 I.C. 183.

But where in accordance with the High Court's Rules, a notification had been published that arrangements would be made for granting copies during the vacation, *held* that all steps for obtaining copies must be taken during the vacation, and the period between the date on which the copies were ready for delivery during the vacation and the day of re-opening of the Court will not be deducted as time requisite for obtaining copies—*Appalaswami* v. *Narayanaswami*, 36 M.L.J. 62, 49 I.C. 626. Where printing charges for copies were called for on the last Court day before the vacation, and they were paid only on the re-opening of the Court, but there was a notification that arrangements would be made for granting copies during the vacation, *held* that the period of the vacation could not be deemed as part of the period requisite for obtaining the copies—*Kadir Mohideen* v. *Syed Abubakkar*, 36 M.L.J. 122, 50 I.C. 518 (519).

125. Copy sent by post:—Where a copy of the judgment and decree is applied for and sent by post in accordance with the rules for the supply of copies through the post, the period intervening between the completion and the despatch of the copies should be included in the time requisite for obtaining the copies. That is, the time to be allowed for granting copies should be calculated from the date of application up to the date when the copies are despatched, and not up to the date when the copies are ready for delivery—*Allah Baksh* v. *Municipal Committee*, 27 P.L.R. 18, A.I.R. 1926 Lah. 223, 92 I.C. 966; *Ghulla Singh* v. *Sohan*, 3 Lah. 280, A.I.R. 1922 Lah. 219, 69 I.C. 818; *Iqbal Jeehan* v. *Mathura*, 6 O.L.J. 660, 54 I.C. 831 (Oudh); *Krishna* v. *Balia*, 8 N.L.R. 11, 14 I.C. 403; *Paga* v. *Sadasheo*, 8 N.L.R. 172, 17 I.C. 624; *Raghu* v. *Mandgia*, 10 N.L.R. 139, 26 I.C. 819. Even though the applicant could have got his copies several days earlier by presenting himself at the Court, he does not forfeit his claim to indulgence because he arranged to have the copies sent by post. These days cannot be excluded from computation under section 12, but they may be excluded in considering the question of indulgence under sec. 5—*Sripat* v. *Hubdar*, 2 O.W.N. 678, 90 I.C. 115, A.I.R. 1925 Oudh 643. See also *Madan* v. *Puran*, A.I.R. 1926 Lah. 84, 26 P.L.R. 738, 91 I.C. 6. The applicant for copy of the decree was not told when the copy would be ready; and after the copy was ready, it was kept in the office for 15 days, and afterwards sent by post to the applicant, who filed the appeal on the very day he received the copy. *Held* that the appeal ought to be accepted—*Madan* v. *Puran*, supra.

126. Separate applications for copies of judgment and decree:—Where a party applies for copies of judgment and of decree at different times, the aggregate of the periods may be deducted under sub-sections (2) and (3)—*Selamban* v. *Ramanadhan*, 33 Mad. 256; *Vellaiyammal* v. *Koolayanna*, 41 M.L.J. 273; *Narasimhulu* v. *Secy. of State*, 1912 M.W.N. 1001, 17 I.C. 393; *Raman Chetty* v. *Kadirvelu*, 8 M.L.J. 148; *Rajani Kanta* v. *Kali Mohan*, 21 C.W.N. 217, 38 I.C. 66; *Macmillen and Co., Ld.* v. *Cooper*, 48 Bom. 292, 25 Bom.L.R. 1309, A.I.R. 1924 Bom. 185; *Timappa* v. *Manjaya*, 48 Bom. 433, 26 Bom.L.R. 362, A.I.R. 1924 Bom. 425; *Jadunandan* v. *Hanuman*, 4 P.L.T. 619, A.I.R. 1924 Pat. 113, 77 I.C. 701; *Gul Rahman* v. *Mt. Zar Jan*, A.I.R. 1936 Pesh. 179, 164 I.C. 1069; *Girish* v. *Narayan*, 65 C.L.J. 415. The Punjab Chief Court once held that the mere fact that a party applied for copies of judgment and decree at different times, did not entitle him to a deduction of both the periods. An appellant could deduct only the time actually *requisite* for obtaining the copies. The question whether, when it was open to a party to apply for both copies of judgment and decree at once, he could apply first for one and then for the other, and claim to exclude the two periods as both requisite, was held to be a question of fact to be decided on the circumstances of the case, and not a question of law—*Sher Singh* v. *Prem Raj*, 100 P.R. 1918, 48 I.C. 31. But in more recent

cases, the Lahore High Court has held that the appellant is not bound to ask for both copies in the same application; and he is entitled to apply for copies of the judgment and the decree at two different periods, and to deduct the time requisite for obtaining a copy of the decree as well as the time requisite for obtaining a copy of the judgment under sub-sections (2) and (3), respectively—*Ali Muhammad* v. *Nathu*, 163 P.R. 1919, 54 I.C. 879, 1 Lah.L.J. 106; *Kanshi Ram* v. *Karam Narain*, 3 Lah.L.J. 166, 60 I C. 259, A.I.R. 1921 Lah. 124.

Where some portions of these two periods overlap each other, the time overlapped should be excluded only once—*Rajani Kanta* v. *Kali Mohan*, 21 C.W.N. 217, 38 I.C. 66; *Ramzan* v. *Md. Ishaq*, 47 All. 509, A.I.R. 1925 All. 436, 23 A.L.J. 342; *Raman Chetti* v. *Kadirvelu*, 8 M.L J. 148; *Macmillan and Co., Ld.* v. *Cooper*, 48 Bom. 292, 25 Bom.L.R. 1309, A.I.R. 1924 Bom. 185; *Sunder Nag* v. *Raghunath*, 12 I.C. 677; *Badshah Miyan* v. *Pandurang*, 26 N.L.R. 66 (F.B.), A.I.R. 1930 Nag. 113 (116); *Gul Rahman* v. *Mt. Zar Jan*, A.I.R. 1936 Pesh. 179; *Kanji* v. *Velji*, 52 Bom L.R. 405, A.I.R. 1950 Bom. 360; *Manoorai* v. *Keshwarrai*, 26 Pat. 295, A.I.R. 1948 Pat. 260.

Applications for copies of the judgment and the decree must be made before the expiry of the time for filing an appeal. Now, it is settled by authorities that the applications made at different times entitle the appellant to take advantage of the time occupied in obtaining the copies of both judgment and decree. Hence, if the time requisite for obtaining a copy of the judgment extends the time of limitation, then the application made for obtaining a copy of the decree after the time fixed by the law of limitation for filing an appeal but before the extension of time allowed by reason of time required for obtaining the copy of the judgment expires, will entitle the appellant to further extension of time for obtaining the copy of the decree—*Jadunandan* v. *Hanuman*, 4 P.L.T. 619, 77 I.C. 701, A.I R. 1924 Pat. 113; *Ramzan* v. *Md. Ishaq*, 47 All. 509, 23 A.L.J. 342, 87 I C. 484, A.I.R. 1925 All. 436; *Rajani Kanta* v. *Kali Mohan*, 21 C.W.N. 217; *Selamban Chetty* v. *Ramanandhan*, 33 Mad. 256, 21 M L J. 152, 4 I.C. 301; *Raja Ram* v. *Nanhe Mal*, 95 I.C. 302, A.I.R. 1926 Lah. 529; *Harjimal* v. *Dhanpatmal*, 15 S.L.R. 16, 62 I.C. 537; *Din Dayal* v. *Rameshwar*, 18 O.C. 74, 2 O.L.J. 159, 28 I.C. 366; *Badshah Miyan* v. *Pandurang*, 26 N.L R. 66 (F.B.), A.I.R. 1930 Nag. 113 (116) (overruling *Parasram* v. *Likhan*, 7 N.L.R. 67, 10 I.C. 866); *Mathura* v. *Ram*, 1938 R.D. 270. See also *Pannalal* v. *Khemchand*, 40 Bom. L R. 389, A.I.R. 1938 Bom. 288; *Ram Babu* v. *Shyam*, 1938 R.D. 78. The law does not require that the copies of both judgment and decree must be applied for simultaneously; it is a well recognised practice for an unsuccessful litigant to obtain a copy of the judgment first so that he may consider whether he will appeal or not; and then he may apply for a copy of the decree. In such a case, the aggregate period taken in obtaining copies of judgment and decree will be excluded—*Ramachandra* v *Mayaram*, 106 I.C. 57, A.I.R. 1928 Nag. 131 (132).

127. Non-signing of decree:—Where the intending appellant having applied for certified copies of the judgment and decree, the copy of the judgment was delivered to him, and at the same time an unused folio and the Court fee filed for the copy of the decree were also returned because the decree had not been signed, and the applicant had to make a fresh application for a copy of the decree after it had been signed, *held* that the first application for a copy of the decree should be treated as pending all the time, so that the applicant would be entitled to the deduction of the time between the signing of the decree and the date when the copy of the decree was ready for delivery—*Tarabati* v. *Lala Jagdeo*, 15 C.W.N. 787, 10 I.C. 542.

The date of the decree is for the purposes of this Act the date of the judgment. But if the decree appealed against is signed on a date subsequent to the date of

delivery of judgment, the period between the date of the judgment and the date of signing the decree shall not be excluded, unless the appellant *has applied for a copy of the decree before it is signed* and and has been delayed by reason of the decree not having been signed—*Parbati* v. *Bhola*, 12 All. 79 (81, 82); *Maung Po* v. *Ma Lay*, 7 Rang. 18, A.I.R. 1929 Rang. 116; *Topandas* v. *Manager*, 5 S.L.R. 47, 10 I.C. 210; *Khudadad* v. *Moriokhan*, 9 S.L.R. 193, 34 I.C. 867. The principle is that the "time requisite for copy" does not begin until an application for a copy has been made, and the period during which the decree remained unsigned (*i.e.*, the period between the date of judgment and the date of signing the decree) cannot be excluded unless the application for a copy of the decree has been made before it is signed; therefore, where the appellant has made no application for copies of judgment and decree before the decree has been signed, the non-signature of the decree can have no effect at all upon him, and he is not entitled to ask the Court to deduct the period between the date ot the judgment and the date of signing the decree, because in such a case it cannot be said that he was prevented from filing his application for copy by reason of the decree not being signed—*Bechi* v. *Ahsanullah*, 12 All. 461 (F.B.); *Jyotindra* v. *Lodna Colliery Co., Ld.*, 6 P.L.J. 350 (F.B.), 2 P.L.T. 361, 62 I.C. 649; *Yamaji* v. *Antaji*, 23 Bom. 442 (445); *Harish Chandra* v. *Chandpur Co., Ld.*, 39 Cal. 766 (772), 15 I.C. 59; *Dindayal* v. *Anopi*, 22 N.L.R. 60, A.I.R. 1926 Nag. 349, 97 I.C. 307; *Umda* v *Rupchandra*, A.I.R. 1927 Nag. 1, 98 I.C. 1057; *Maung Baw* v. *Maung Yan*, 1939 Rang.L.R. 686; *Shivan* v. *Radha*, 196 I.C. 654, A.I.R. 1941 Pesh. 74; *Jiwan* v. *Rakhmat*, A.I.R. 1941 Lah. 212, 43 P.L.R. 88, 195 I.C. 157; *Governor General in Council* v. *Jesraj*, A.I.R. 1950 Assam 83. "It appears to me upon general principles that it would be defeating the object of limitation to allow the would-be appellant to sleep over his right of appeal for more than the limitation period, and then, by the accidental or unavoidable delay in the decree being prepared, to claim extension of the period of limitation for appealing from a decree, for obtaining a copy of which he had not taken even the first step by filing an application therefor. The words 'requisite' and 'obtaining' as they occur in the context seem to assume that some definite step ancillary to the obtaining is not only intended to be taken but has already been taken. If at the time when the applicaion for copy is made, the decree is not ready, he will of course be entitled to the allowance of the time during which the decree remained unsigned, the reason being obvious that the act of obtaining has already commenced and the delay in such a case could not be referred to any omission or neglect on his part. But when he has made *no application* to obtain a copy, and the decree remains unsigned for a portion of or the whole period of limitation, he cannot claim the benefit of a matter which in no sense and to no extent frustrated or retarded any endeavour on his part to obtain a copy of the decree, the endeavour itself not having yet commenced."—*Bechi* v. *Ahsanullah*, 12 All. 461 (471) (F.B.). This case has been followed in a recent Full Bench case—*Keshar Sugar Works* v. *R. C. Sharma*, 1950 A.L.J. 39, A.I.R. 1951 All. 122. See also *Raja Mahommed* v. *Lal Bahadur*, 12 O.L.J. 144, 2 O.W.N. 420, A.I.R. 1925 Oudh 600, 89 I.C. 479. Where an application for copy of the decree was presented before the signing of the decree, but ubon a wrong statement of the clerk of the Court that the application for copy would not be accepted unless the decree was drawn up, the application was withdrawn, *held* that this was not an active application for a copy of the decree, and the time between the date of judgment and the date of signing the decree could not be deducted —*Maung Po* v. *Ma Lay*, 7 Rang. 18, 117 I.C. 251, A.I.R. 1929 Rang. 116. On the other hand, it has been held that the right of appeal does not come into existence until a proper decree comes into existence, and until a decree has been drawn up there can be no appeal. There can be no legal obligation on a litigant to apply for a copy of the decree which is non-existent: the existence of a decree is a necessary

condition precedent to the accrual of even the right or obligation to apply for a copy. Where a decree is not drawn up within the period of limitation prescribed for preferring an appeal against the decree the suit must be deemed to be pending up to the date on which the decree is actually drawn up, and limitation for preferring an appeal will commence to run only from that date. Where a suitor is unable to obtain a copy of a decree from which he desires to appeal, by reason of the decree being unsigned, he is entitled under sec. 12, Limitation Act, to deduct the time between the delivery of the judgment and that of the signing of the decree in computing the time taken in presenting the appeal—*Bani Madhab* v. *Matungini*, (1886) 15 Cal. 104 (F.B.); *Sarat* v. *Rati*, 43 C.W.N. 1139, A.I.R. 1939 Cal. 711; *Yusuf* v. *Mahomed Kazim*, 15 Luck. 376, 1940 O.W.N. 158, A.I.R. 1940 Oudh 173 (failure to apply before the decree is signed is immaterial); *Jadubir* v. *Sheo Naresh*, 19 Luck. 456, 1943 O.W.N. 408; A.I.R. 1944 Oudh 154. A Full Bench decision of the Patna High Court in *Ram Asray Singh* v. *Sheonandan*, (1916) Pat. 267, 1 P.L.J. 573, 35 I.C. 686 lays down that in appeals the period of limitation should be calculated from the date on which the decree was actually signed. The Full Bench decision in *Ram Asray's case* (1 P.L.J. 573) was held not to express the law correctly by a Full Court in *Jyotindra* v. *Lodna Colliery Co., Ld.*, 6 P.L.J. 350, A.I.R. 1921 Pat. 175, 62 I.C. 640, but the latter case was again overruled (so far as it decided that the period between the date of judgment and the application for the copy of the decree can in no case be excluded) by a Full Court of the same High Court in the case of *Gabriel Christian* v. *Chandramohan*, 15 Pat. 284, A.I.R. 1936 Pat. 45, 16 P.L.T. 849, 160 I.C. 447; *Kameshwar* v. *Kuseshwar*, 1938 P.W.N. 781, A.I.R. 1939 Pat. 135, 20 Pat.L.T. 316. The same view was adopted in *Pandu* v. *Rajeshwor*, A.I.R. 1924 Nag. 271, 20 N.L.R. 131, 78 I.C. 996; and also in *Khan Chand* v. *Gurdit Singh*, A.I.R. 1936 Lah. 976. It is true that under Or. 20, r. 7, Civil Procedure Code, the date of the decree is the date of the judgment, but it is equally true that decrees in many cases are actually prepared and signed long after the date on which the judgments are pronounced and signed. Under these circumstances there is no principle on which a litigant can be penalized when he has done all that lay in his power in the way of making an application promptly and depositing the copying fee on the date on which the decree sheet had been drawn up—*Khan Chand* v. *Gurdit Singh*, A.I.R. 1936 Lah. 976 (13 Cal. 104 (F.B.), 1 P.L.J. 573 (F.B.), A.I.R. 1924 Nag. 271 followed). In order to secure the benefit of the time that elapsed until the date when the decree is signed, it is not necessary for an appellant to apply for a copy of the decree before the expiry of the period of limitation for the appeal if the application is made even a day before the decree is signed—*Tulsidas* v. *Parsram*, I.L.R. (1947) Kar. 76, A.I.R. 1948 Sind. 18. The Full Bench case of *Gabriel Christian* v. *Chandramohan*, supra, has recently been approved of by the Bombay High Court in a Full Bench case—*Muralidhar Shrinivas* v. *Motilal Ramcoomar*, A.I.R. 1937 Bom. 162, 39 Bom.L.R. 32, 168 I.C. 77—an Original Side Appeal. The decision in *Yamji* v. *Antaji*, 23 Bom. 442, and *N. P. G. B. Co.* v. *Jivabhai*, 15 Bom.L.R. 681, 20 I.C. 537 holding that the time required for obtaining copy of the decree cannot be excluded when no application for such copy was made till after the expiration of the time limited for appeal, were overruled; *Balappa* v. *Dyamappa*, 42 Bom.L.R. 872, A.I.R. 1940 Bom 415. And in the recent case of *Sudhansubhusan Pandey* v. *Majho Bibi*, 41 C.W.N. 72, A.I.R. 1937 Cal. 732, Biswas J., has held that in respect of appeal to District Courts the appellant is entitled to a deduction of the period between the signing of the judgment and the signing of the decree; his appeal is within time, it is immaterial that he did not apply for the copy of the judgment within 30 days from when it was available.

The words "time requisite for obtaining copy of the decree appealed from" in section 12 mean "the time which would have been necessary in any case." And no

period which may be under the control of the appellant between the date upon which judgment is pronounced (which is the date of the decree under the Civil Procedure Code) and the date on which the appeal was filed can be considered as the time requisite within the meaning of section 12. In most cases the decree of the trial Court follows upon the judgment without the parties being required to do anything in the interval; and in such cases the appellant will be entitled to the exclusion of the time between the judgment and the decree. In exceptional cases, such (for instance) as cases of partition and mesne profits, the drawing up of the final decree may depend upon the filing of the necessary stamp paper or Court fees; in such cases the exclusion of time in favour of the party who is to file the Court-fees will depend upon the circumstances, but other parties to whom no responsibility attaches for the delay will be entitled to exclude the time; *Gabriel Christian* v. *Chandra Mohan Missir*. 15 Pat. 284, 160 I.C. 447, A.I.R. 1936 Pat. 45 (F.B.). So where the Court does not direct as provided in sec. 29 (g) of the Stamp Act the proportion of stamp to be borne by each party in a suit for partition and in consequence whereof a party has to postpone furnishing the full amount of the stamp paper required, there is no delay on the part of the party in furnishing the stamps and in computing limitation for filing an appeal against the decree the time taken in obtaining the copies of the decree and judgment must be excluded—*Nallendra* v. *Venkatachala*, I.L.R. (1948) Mad. 413, (1947) 2 M L J. 201, 1947 M.W N. 501. But where under order of the Court no decree can be drawn up until stamp duty is paid by the parties or any one of them, and there is delay in such payment the rule of exclusion of time between the date of judgment and the signing of the decree has no application—*Abdul* v. *Abdul*, 47 P.L.R. 193. A.I.R. 1945 Lah. 233. The time occupied in an attempt to obtain a variation of the order as to costs and in an attempt by application to the Registrar to get the order dated as of a particular date is time requisite for obtaining a copy of the order within the meaning of section 12, Limitation Act, although the variation made may have been different from that asked for and the application about the date of the order may have been foredoomed to failure and may have failed—*H. Hodge* v. *Shahebzada Md. Kamgar Shah*, 41 C.W.N. 650, (1937) 1 M.L.J. 702, 65 C.L.J. 289, 1937 P.W.N. 312, A.I.R. 1937 (P.C.) 107, 1937 A.L.J. 440 (P.C.).

128. Time taken in preparation of decree or order:—According to the practice prevailing in the Original Side of the High Court, a decree or order is not drawn up unless one or other of the parties applies for the drawing up of the same, and the appellant is as of right entitled to the exclusion of the time properly *required for the drawing up of the decree or order* (i.e., the period from the date of the judgment to the date when the decree is drawn up) provided that no part of the delay is due to his default or laches; as for instance, where he makes a requisition for drawing up of the order immediately after the order is passed—*In the goods of Pasupati*, 59 Cal. 1215 (F B.), 36 C.W.N. 469 (477), 137 I.C. 526, A.I.R. 1932 Cal. 331 (overruling *Nibaran Chandra* v. *Martin & Co.*, 32 C.L.J. 127); *Bani Madhab* v. *Matangini*, 13 Cal. 104 (F B.); *Arun Chandra* v. *Md. Majib*, A.I.R. 1955 Assam 129; *Jayashankar* v. *Mayabhai*, I L.R (1952) Bom. 514, 54 Bom.L.R. 11, A.I.R. 1952 Bom. 122 (F.B.); *Mohan Singh* v. *Murarilal*, 1957 Mad-B. 188. If the appellant had made no requisition for the drawing up of the order until after the period of 20 days for the filing of the appeal (Art. 151) had expired, there was an unreasonable delay on his part, and the period intervening between the date when the judgment was pronounced and the date when the order was drawn up could not be deducted—*Pramatha* v. *Lee*, 23 C.W.N. 553; on appeal, 49 Cal. 999 (P.C.), 27 C.W.N. 156, 37 C.L.J. 86. See also *Kamruddin* v. *M. N. Mitter*, 52 Cal. 342, A.I.R. 1925 Cal. 735, 89 I.C. 277. In *Sarat Chandra* v. *Upendra*, 54 Cal. 481 (483), 103 I.C. 235, A.I.R. 1927 Cal. 623, it

was broadly stated that an application for a copy of the order must be made within 20 days of the date of pronouncement of the order. But this is no longer correct in view of the Full Bench decision in 59 Cal. 1215 cited above; in this case the appellant filed a requisition for drawing up of the order within 20 days from the date of passing the order, but the order was drawn up more than two months after is was pronounced, and the appellant had applied for a copy of the order before it was drawn up though *more than* 20 days after it was pronounced ,and it was held that the appellant was not guilty of any laches, and that he was entitled to an exclusion of the whole of the time between the date of pronouncement of the order and the date on which the copy of the order was delivered to him (though this time occupied nearly 3 months). (See also *Sudhansubhusan* v. *Majhobibi*, 42 C.W.N. 75 where the difference between the practice of the Original Side of the High Court and that of Courts in the Mofussil in this respect is pointed out.)

Where the appellants made the requisition for the drawing up of a decree in due time, but the decree could not be drawn up because certain amendments in the plaint regarding the addition of some parties were not made and could not be carried out in the cause-title, because of such amendments not having been properly verified during the hearing of the suit owing to neglect on the part of the appellants (plaintiffs) themselves, it was held that this delay in the preparation of the decree could not be excluded—*Brijlal* v. *Girindra Sekhar Bose*, 61 Cal. 306, 38 C.W.N. 702 (706), 151 I.C. 809, A.I.R. 1934 Cal. 543.

129. Closing of Court after delivery of judgment:—Where the Court was closed for the vacation on and from the day following that on which the judgment was pronounced, and the appellant applied for a copy of the judgment on the next re-opening day, *held* that in the circumstances of the case, the time during which the Court was closed should be excluded as it must be taken to be a part of the time requisite for obtaining a copy of the judgment—*Saminatha* v. *Venkatasubba*. 27 Mad. 21; *Sri Chandan* v. *Haroo Sheikh*, 13 C.L.J. 544, 11 I.C. 387; *Abdul Ghaffar* v. *Rasulunnissa*, 25 O.C. 71, 68 I.C. 250, A.I.R. 1922 Oudh 39; *Uma Shankar* v. *Abdul Karim*, 17 Luck. 314, 1941 O.W.N. 1223. There is a difference of opinion as to whether the appellant is entitled to deduct the period of vacation if the application for copy is made not on the re-opening day but a few days later. According to the Madras and Patna High Courts the period is to be deducted on the ground that the date on which the application for copy is made has no bearing on the question whether or not the period of the vacation should be deducted—*Saminatha* v. *Venkatasubba*, 27 Mad. 21; *Subramaniyam* v. *Narasimham*, 43 Mad. 640, 38 M.L.J. 465; *Debi Charan* v. *Mehdi*, 1 P.L.J. 485 (490), 20 C.W.N. 1303, 35 I.C. 888; *Munshi* v. *Lachman*. 10 P.L.T. 545, A.I.R. 1929 Pat. 615. But according to the Allahabad High Court the period of limitation cannot be extended if the application for copy is not filed on the re-opening day—*Puttu Lal* v. *Bhagwan*, I.L.R. (1938) All. 209, 1337 A.L.J. 1279, A.I.R. 1938 All. 106.

Even where a judgment is delivered on the *day preceding the last working day* before the Court's vacation for a month, and an application for a copy is made on the very day on which the Court re-opens after the vacation, the appellant is entitled to the indulgence of having his application for copy being accepted as equivalent to an application made a month earlier. He acts with due diligence and is entitled to have the time extended under the provisions of section 5. The principle is that it is unreasonable to cut down to 24 hours the time for a party to read and consider a judgment delivered against him, to come to a decision whether he would or would not appeal and file an application for copies of the judgment and decree. If the law

is strictly applied, the appellant would have to make his decision all in one day. But it is unreasonable to expect him to get so much down in the time—*Sripat* v. *Hubdar*, 2 O.W.N. 678, A.I.R. 1925 Oudh 643, 90 I.C. 115.

Closing of Court after notifying number of folios required:—If there be any holiday or holidays immediately following the day on which the requisite number of folios and stamps was notified to the appellant, the holiday or holidays must always be excluded in computing the period of limitation, irrespective of the fact whether the stamps and folios are supplied on the re-opening day or on a later day—*Ismail Chowdhury* v. *Kali Charan*, 58 Cal. 939, 35 C.W.N. 451 (452), 134 I.C. 895, A.I.R. 1931 Cal. 731. Judgment was delivered on 30th May. Vacation began on 3rd June, and ended on 2nd July. Appeal was filed on 3rd July, but being not accompanied by copies of judgment and decree, was returned for proper presentation by an order on 7th July. Copies were applied for on 3rd July. They were ready on 12th July, and delivery of same was taken on 13th July. The appeal was again presented on 13th July and was admitted on 17th July. There was a deficiency of Court fee which was on 17th July ordered to be made good within a week. This was done. The appeal was held to be filed within time—*Sukhandan* v. *Raja Ahmad*, A.I.R. 1937 Oudh 26. In *Gondaji* v. *Kisan*, A.I.R. 1921 Nag. 141, 61 I.C. 889, it was held that where the original advance is insufficient and the deficiency is supplied on a day immediately following a holiday credit may be given for the period during which the deficiency could not be supplied. And in *B. Rai* v. *Thunmansingh*, A.I.R. 1936 Nag. 289, the same principle was applied to "supplying correct information."

130. Application for copy made after re-opening while right of appeal subsists:—Provided that copies of judgment and decree *have not been obtained previously*, if the period for the presentation of an appeal expires on a day on which the Court is closed, and if the appellant applies for copies of the decree and judgment on the date of the re-opening of the Court, whilst his right of appeal is still alive (by virtue of sec. 4) he is entitled to the benefit of this section, and if his appeal be presented on the day he gets the copies (or even on the next day) it is not barred by limitation—*Siyadatun-nissa* v. *Muhammad Mahmud*, 19 All. 342 (347); *Megh Baran* v. *Ram Das*, 89 I.C. 956, A.I.R. 1926 All. 111; *Pandharinath* v. *Sankar*, 25 Bom. 586 (588); *Tukaram* v. *Pandurang*, 25 Bom. 584 (585); *Attri* v. *Ramkishan*, 11 Lah. 111, A.I.R. 1930 Lah. 216, 120 I.C. 169; *Naman* v. *Gurditta*, 89 I.C. 437, A.I.R. 1926 Lah. 121; *Ma Dan* v. *Tan Chong*, 6 Rang. 743, A.I.R. 1929 Rang. 96; *Kashibai* v. *Kannoo*, 11 N.L.R. 104, 29 I.C. 833; *Asa* v. *Hira*, 40 P.L.R. 74, A.I.R. 1938 Lah. 317. And the result is the same if the application is made *during the vacation*, after the period of limitation, while the right of appeal still subsists owing to the closing of the Court—*Ram Chand* v. *Ram Rattan*, 10 Lah.L.J. 257, A.I.R. 1928 Lah. 655 (656). In other words, copies can be applied for at any time when the right of appeal is still subsisting, even though the application is made after the expiry of the period of limitation—*Ram Chand* v. *Ram Ratan*, supra (dissenting from *Guran* v. *Bindraban*, 79 P.R. 1916, 125 P.L.R. 1916, 35 I.C. 233).

But if the *copies were obtained before* the commencement of the vacation, and the time requisite for obtaining the copies and the period of limitation prescribed by the 1st schedule added together expired on a day on which the Court was closed, section 4 would enable the appellant to present his appeal only on the day of the re-opening of the Court and not on a later date, and the appeal would not be in time unless presented on the date that the Court re-opened—*Siyadatunnissa* v. *Muhammad Mahmud*, 19 All. 342 (347).

If the judgment was delivered nearly 3 months before the closing of the District

Court for vacation and the application for copy was made on the re-opening day when the right of appeal did not subsist, the appellant was not entitled to a deduction of the holidays because he had sufficient time within which he could have made the application before the Court closed—*Venkata Row* v. *Venkata Chella*, 28 Mad. 452 (453); *Sundaram* v. *Andi*, 1911 M.W.N. 364, 11 I.C. 339.

131. Copy taken by another party:—This section does not require that the application for copy must be made by the party himself—*Rudra* v. *Raghuraj*, 23 I.C. 209. When it appeared that the appellant applied within the prescribed period for a copy of the decree appealed from but allowed the application to be dismissed for non-payment of the copying charges, and subsequently filed the appeal together with a copy of the decree which had been obtained by *another party*, it was held that the appellant was entitled to a deduction of the time taken in obtaining this latter copy. There are no grounds for importing into the section the restriction that the copy of the decree must have been obtained on the application of the appellant himself—*Aminuddin* v. *Pyari*, 43 Mad. 633, 38 M.L.J. 340, 56 I.C. 73 (dissenting from *Ramamurthi* v. *Subramania*, 12 M.L.J. 385). The language of section 12 is very general. It does not say by whom the copy is to be obtained. The time requisite for obtaining copies of decree and judgment should be excluded from computation of the period of limitation, and it is not necessary that the application for the copies should be made by the appellant or some duly authorised agent, nor it is necessary to show for what purpose the copies were obtained—*Ram Kishan* v. *Kashi Bai*, 29 All. 264. In this case the copy had been applied for by the clerk of the appellant's Vakil, in his own name. The same view has been taken in *Majidan* v. *Dalmir*, A.I.R. 1951 Punj. 388; *Chandu* v. *Mast Ram*, A.I.R. 1934 Lah. 135, 149 I.C. 1127.

In *Nafisuddin* v. *Secretary of State*, 9 Lah. 244, 104 I.C. 397, A.I.R. 1927 Lah. 858 (859), however, where a copy of the award did not show who was the applicant for the copy or to whom the copy was delivered, the Court refused to deduct the time required for obtaining the copy of the award, under sub-section (4) of this section.

In *The State* v. *Kaidia*, A.I.R. 1952 H. P. 6 it has been held that in an appeal under sec. 417, Cr. P. Code, the Government is not entitled to the benefit of sec. 12 (2), where the copy of the judgment is applied for and taken delivery of by the father of the person alleged to have been murdered and not by the Government.

132. Criminal appeal:—In computing the period of limitation prescribed for a criminal appeal, the time taken in forwarding an application by the prisoner for a copy of the judgment and in transmitting the same from the Court to the jail must be excluded along with the time taken in the actual preparation of the copies in the office of the Court—*Empress* v. *Lingaya*, 9 Mad. 258 (259). See also *Gallagher* v. *Emp.*, 54 Cal. 52, 101 I.C. 657, A.I.R. 1927 Cal. 307.

But the time spent in obtaining a copy of the diary orders in the case, which were filed with the appeal, should not be excluded. There is no provision of law in the Cr. P. Code nor any rule of the Court requiring to deduct this period—*U. Zagriya* v. *Emp.* 3 Rang. 220, 4 Bur.L.J. 44, 89 I.C. 459, A.I.R. 1925 Rang. 239.

132A. Miscellaneous appeal:—Where a formal decree has been drawn up in a miscellaneous case under sec. 47, C. P. Code, the time requisite for obtaining a copy of such a decree, which embodies the complete adjudication in the case, is to be deducted under section 12, Limitation Act—*Mahesh Kanta* v. *Chowdhury Ram Prasad*, 1 P.L.T. 33, 54 I.C. 630.

The plaintiff after having obtained a decree, applied under sec. 476, Cr. P. Code to prosecute the defendant for having made certain false statements in his written

statement. The Munsif rejected the application on 21st May, 1924, and an appeal was filed in the Sessions Court under sec. 476B, after more than 30 days allowed by Art. 154 of the Limitation Act. But the application of the plaintiff was treated as separate miscellaneous civil case and a copy of the formal order was drawn up embodying the result of the judgment passed in the case, and the plaintiff had applied and obtained a copy of the formal order, according to the rules of the Court, before appealing to the Sessions Court. *Held* that the time taken for obtaining the copy of the formal order should be deducted under section 12 of the Limitation Act, and the appeal was within time—*Daulat* v. *Kanhaiya*, 47 All. 462, 23 A.L.J. 297, A.I.R. 1925 All. 419, 87 I.C. 417.

133. Application for leave to appeal to Privy Council or Federal Court or Supreme Court:—Section 12 of the Act of 1877 was restricted to an application for leave to appeal as a pauper and did not apply to an application for leave to appeal to His Majesty in Council; see *Anderson* v. *Periasami*, 15 Mad. 169; *Moroba* v. *Ghanasham*, 19 Bom. 301; *Shib Singh* v. *Gandharb Singh*, 28 All. 391. But the general language of section 12 of the present Act *does* cover such an application, and the time requisite for obtaining a copy of the decree of the High Court will be excluded from computation under sub-section (2)—*Ram Sarup* v. *Jaswant*, 38 All. 82, 13 A.L.J. 1114, 31 I.C. 906; *Abdulla* v. *Administrator-General*, 42 Cal. 35, 18 C.W.N. 1066; *Eastern Mortgage and Agency Co.* v. *Purna*, 39 Cal. 510, 15 I.C. 497; *Gulabchandji* v. *Gulab Singh*, 24 N.L.R. 97, A.I.R. 1928 Nag. 63; even if it is not necessary under the rules to file a copy of the decree along with the application for leave to appeal—*Keshur Sugar Works* v. *R. C. Sharma*, 1950 A.L.J. 946, A.I.R. 1951 All. 122 (F.B.). But he is not entitled to get any time extended in getting a copy of the decree which he did not apply for—*Tej Krishen* v. *Delhi Cloth and General Mills*, A.I.R. 1950 E.P. 195 (for leave to appeal in Federal Court).

The time spent in obtaining a copy of the *judgment* also will be excluded under sub-section (3), because it is generally necessary that the judgment on which the decree of the High Court is based should be obtained in order that the parties may satisfy themselves by reference to it exactly what its terms are, and further because the Rules of the High Court require a copy of the judgment to be filed with the application for leave to appeal to the Privy Council—*Mahabir Prasad* v. *Jamuna Singh*, 1 Pat. 429 (431), 3 P.L.T. 289, A.I.R. 1922 Pat. 255, 68 I.C. 88. The Rangoon High Court has held that the copy of the judgment should be before the Court. So under sub-section (3) the period spent for obtaining the copy is to be excluded—*R. K. Banerjee* v. *Alagammai*, A.I.R. 1936 Rang. 82. Although sub-section (3) does not in terms apply to an application for leave to appeal, still the words "when a decree is appealed from" may be interpreted to mean "when a decree is sought to be appealed from," and then the words would apply to an application for leave to appeal to the Privy Council; the time requisite for obtaining a copy of the judgment may therefore be excluded—*In re Collector of Changleput*, 48 Mad. 939, 49 M.L.J. 418, 90 I.C. 601, A.I.R. 1925 Mad. 1241; *Mahalakshmamma* v. *Thirunavukkarasu*, (1944) 1 M.L.J. 229, 1944 M.W.N. 160, A.I.R. 1944 Mad. 430; *Hunter* v. *Ehsan*, 16 Luck. 638; A.I.R. 1941 Oudh 247. The Sind Court and Lahore High Court have laid down that since sub-section (3) does not expressly speak of an application for leave to appeal but only of appeal and review of judgment, the time spent in obtaining a copy of the judgment cannot be deducted in an application for leave to appeal to the Privy Council—*Nur Mahomed* v. *Hassonmal*, A.I.R. 1925 Sind 60; 78 I.C. 953; *Ghulam* v. *Abdul*, A.I.R. 1950 Lah. 76. Moreover the Rules of these Courts do not require a copy of the judgment in such a case.

The Allahabad High Court in its recent Full Bench decision in *Baldeo Pershad*

v. *Dwarika, A.I.R. 1957 All. 334* overruled its previous decisions reported in *A.I.R. 1935 All. 99* and *1926 All. 286* and held that in computing the period of limitation for an application for leave to appeal, the time requisite for obtaining a copy of the judgment complained of must be excluded.

Applicant for leave to the Federal Court is not entitled to get any time spent in obtaining a copy of the judgment—*Tej Krishen* v. *Delhi Cloth and General Mills*, A.I.R. 1950 E.P. 195.

In applying for leave for appeal to the Supreme Court the applicant is not entitled to get any time expended in obtaining a copy of the judgment deducted in computing the period of limitation—*Dharwar Bank Ltd.* v. *Vasudeorao*, A.I.R. 1954 Bom. 525; *Neki* v. *Rup Chand*, A.I.R. 1952 Punjab 367. See however *Rajasthan State* v. *Nathmal*, 1952 Raj. 180; *Paokhohen* v. *Konsam Amujao Singh*, 1956 Manipur 33.

133A. Leave to appeal in forma pauperis:—Applications for leave to appeal in *forma pauperis* come under sub-section (2) of this section and time taken for copy of judgment is to be excluded—*Mahalakshmamma* v *Thirunavukkarasu*, A.I.R. 1944 Mad. 430, (1944) 1 M.L.J. 229.

134. Time spent in taking unnecessary copies:—In computing the period of limitation prescribed for an appeal under clause 10 of the *Letters Patent* from the decision of a single Judge, the time requisite for obtainng a copy of the judgment appealed from cannot be deducted, such copy not being required under the Rules framed under the *Letters Patent* to be presented with the memorandum of appeal—*Fazl Muhammad* v. *Phul Kuar*, 2 All. 192; *Deokilal* v. *Ramanand*, 5 P.L.J. 701 (704, 705), 59 I.C. 179; *Mukund* v. *Niranjan*, 15 P.L.T. 301, A.I.R. 1934 Pat. 353 (354). This case has been overruled by *Lalit* v. *Mahaprasad*, 26 Pat. 157, A.I.R. 1947 Pat. 329 where it has been held that this section is applicable to Letters Patent Appeal as the section does not make any reference to the Civil Procedure Code or to any other Act. The section is a general provision which applies to the whole of India. The word "prescribed" must be taken to apply to any Act which may be the subject of consideration in a particular case. Where it is not necessary for the applicant to file a copy of the decree with the grounds of appeal or application, section 12 has no application and the period between the delivery of the judgment and the signing of decree cannot be excluded—*Hari Ram* v. *Prem Nath*, A.I.R. 1935 Lah. 341. But the same High Court has held in *Punjab Co-Operative Bank* v. *P. C. Press Co.*, I.L.R. (1941), Lah. 191, 43 P.L.R. 297, A.I.R. 1941 Lah. 257 (F.B.), that this section is applicable to Letters Patent Appeal. But in cases of appeals falling under sec. 12 of the Limitation Act the positive direction of this section must not be ignored. And so, even though the practice or the rules of the Court do not require that a copy of the judgment or of the decree should be filed with the memorandum of appeal, still the appellant is entitled to deduct the period required for obtaining the copy. It is not within the power of the Court to nullify the effect of sec. 12—*High Hassum* v. *Nur Mahomed*, 28 Bom. 643 (644); *Gangadhar* v *Shekhar Basini*, 20 C.W.N. 967, 35 I.C. 348; *Kirpa Ram* v. *Rakhi*, 114 P.R. 1907. Their Lordships of the Privy Council have laid down that in reckoning the time for presenting an appeal, the time required for obtaining a copy of the decree and judgment must be excluded, even though by the rules of the Court it is not necessary to obtain such copies. The rules of the High Court eliminating the requirement to obtain copies of the documents were no doubt framed to combat the dilatoriness of Indian practitioners, but there are plain words in sec. 12 enacting it as a positive direction that the time requisite for obtaining the two documents is to be excluded from computation—*Jijibhoy N. Surti* v. *T. S. Chettair Firm* 6 Rang. 302 (P.C.), A.I.R. 1928 P.C. 103, 32 C.W.N. 845 (847), 26 A.L.J.

657, 30 Bom.L.R. 842, 54 M.L.J. 696, 109 I.C. 1. (Judgment of the Rang. High Court reported in 4 Rang. 265, A.I.R. 1927 Rang. 20 reversed). See also *Imperial Bucket Co.* v. *Bhagawati*, A.I.R. 1954 Cal. 520; *Jagannath* v. *Amarendra*, A.I.R. 1957 Cal. 479; *Mukandi Ram* v. *Executive Engineer*, A.I.R. 1956 Pepsu 40; *Sehat Ali* v. *Abdul*, A.I.R. 1956 All. 273 (F.B.).

But the time occupied in taking copies which are not mentioned in this section will not be deducted. Thus, in a second appeal, the time requisite for obtaining a copy of the *decree* of the Court of *first* instance cannot be deducted, such copy not being required by this section to be filed along with the memorandum of second appeal —*Pirathi* v. *Vencatramanayyan*, 4 Mad. 419. So also, the time occupied in obtaining a copy of the *judgment* of the Court of *first* instance will not be deducted in computing the period of limitation for a second appeal, because it is not a judgment on which the appellate decree is founded within the meaning of sub-section (3), and a copy of it is unnecessary; even though the High Court makes a rule under which the memorandum of second appeal is required to be accompanied by copies of the judgment and decree of the Court of first instance, such a rule cannot have the effect of altering the period of limitation prescribed by this Act. Those copies may be necessary for other purposes, *e.g.*, for the purpose of correctly ascertaining the amount of Court-fee leviable, but such a rule cannot modify any rule or mode as to computation of limitation prescribed by this Act. Therefore inspite of the existence of such a rule the appellant before the High Court will not be entitled to deduct the period requisite for obtaining a copy of the first Court's judgment—*Narsingh Sahai* v. *Sheo Prasad*, 40 All. 1 (F.B.); *Chunilal* v. *Dahyabhai*, 32 Bom. 14 (25) (F.B.); *Madan Gopal* v. *Malawa Ram*, 68 I.C. 777 (Lah.); *Babu Singh* v. *Mangal Rai*, 9 Lah.L.J. 5, A.I.R. 1927 Lah. 192, 100 I.C. 154; *Chuharmal* v. *Bira Ram*, A.I.R. 1923 Lah. 461, 73 I.C. 919; *Jagiri* v. *Daulat*, A.I.R. 1928 Lah. 755 (756), 112 I.C. 46. This is also the view of the Rangoon High Court, but that High Court is also of opinion that in certain exceptional cases the Court may in its discretion excuse the delay caused in obtaining the judgment of the Court of first instance—*Maung Po Aung* v. *Bya*, 3 Rang. 310, 90 I.C. 910, A.I.R. 1925 Rang. 344. The Lahore High Court also holds in a recent case that although an appellant preferring a second appeal is not entitled as of right to deduct the period spent in obtaining a copy of the first Court's judgment, still where the appellant had applied for such copy before the limitation for filing the second appeal had expired, the High Court *may* allow the deduction of the time spent in obtaining that copy—*George Gowshala* v. *Balak Ram*, 103 I.C. 498, A I.R. 1927 Lah. 717; *Mt. Ghulam* v. *Md. Sharif*, A.I.R. 1936 Lah. 1007; *Prithi* v *Hansraj*, A.I.R. 1939 Lah. 378 (if the copy is filed on the day it is obtained or very soon afterwards).

135. Application for review:—Although it is not necessary that an application for review of judgment should be accompanied by a copy of the decree, order or judgment, still time is allowed by this section for obtaining such copy in order that the person interested in applying for review of judgment might inform himself accurately by a perusal of the copy of the decree or order or judgment as to what its contents are, so that he may not be compelled, for fear of limitation, to hurry into an application for review without having the full opportunity of considering the terms of the decree, order or judgment—*Wajil Ali* v. *Nawal*, 17 All. 213 (216) (F.B.); *Gangadhar* v. *Sekharbasini*, 20 C.W.N. 967, 35 I.C. 348; *Chokkalingam* v. *Lakshmanan*, 38 M.L.J. 224, 55 I.C. 444. Even assuming that the filing of a copy of the decree is not necessary, an applicant for review would be entitled to the benefit of sec. 12 (2), if he has actually obtained and filed such a copy—*Abdul* v. *Jai Ram*, A.I.R. 1951 H P. 67; *Gauri* v. *Kashi*, 56 All. 591, A.I.R. 1934 All. 367.

In the case of an application for review of judgment on the Original side of the High Court, the applicant is entitled to exclude the time between the decree and the filing thereof and also the period required for obtaining a copy of the decree, the reason being under the rules the party against whom a decree or order is made cannot apply for drawing it up unless the other party fails to do so within four days from the date of the decree or order—*Rayfield* v. *Raj Narain*, 41 C.W.N. 129, 170 I.C. 653.

135A. Application to set aside award:—In respect of an application to set aside an award, the time taken for obtaining a copy of the award must be excluded from computation—*Sova Chand* v. *Hurry Bux*, 46 Cal. 721 (727); *Ghulam Khan* v. *Mahammad Hasan*, 29 Cal. 167 (183) (P.C.); *Wazid Ali* v. *Nawal Kishore*, 17 All. 213 (215).

135B. Application for execution of decree:—Section 12 (3) does not apply to an application for execution of a decree. The period of limitation for an execution application therefore runs under Art. 182 of the Act from the date of the judgment and not from the date on which the decree is signed—*Ramdas* v. *Gangasagar*, 24 Pat. 421.

135C. Revision:—This section is not applicable to applications for revision on the ground that there is no period of limitation prescribed in the Act for such an application—*Kalu* v. *Municipal Board*, 1942 O.W.N. 335, A.I.R. 1942 Oudh 392.

136. Cases under special or local laws:—Under sub-section (2) (*a*) of section 29 as amended in 1922, the provisions of this section shall apply for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law. This view was also taken in *Behari Lall* v. *Mungolanath*, 5 Cal. 110 (112). The following decisions are no longer good law:—*Wall* v. *Howard*, 18 All. 215; *Kumara* v. *Sithala*, 20 Mad. 476; *Daulat Ram* v. *Woollen Mills Co.*, 95 P.R. 1908; *Bhagwan* v. *Collector*, 133 P.L.R. 1904, 79 P.R. 1904; *Abu Backer* v. *Secy. of State*, 34 Mad. 505 (F.B.); *Jugal Kishore* v. *Gur Narain*, 33 All. 738; *Duraisami* v. *Meenakshi*, 1914 M.W.N. 831, 25 I.C. 610; *Sivaramayya* v. *Bhujanga*, 39 Mad. 593; *Lingayya* v. *Chinna Narayana*, 41 Mad. 169 (F.B.). The ruling in *Dropodi* v. *Hira*, 34 All. 496 (S.B.) will now stand as correct. This section has been made applicable to all appeals and applications under the Provincial Insolvency Act (V of 1920), by sec. 78 of that Act. The rules under the Letters Patent do not amount to a special or local law. It follows that the time requisite for obtaining a copy of the judgment appealed from, which need not be filed with memorandum of appeal, cannot be excluded —*Jog Dhian* v. *Hussain and another*, 16 Lah. 448, A.I.R. 1935 Lah. 328. But this case has been overruled by the Full Bench of the same High Court in *Punjab Co.-Op. Bank* v. *P. C. Press Co.*, I.L.R. (1941) Lah. 191, 43 P.L.R. 297, A.I.R. 1941 Lah. 257 where it has been held that the statutory rules framed by the High Court under clause 27, Letters Patent under the authority delegated to it by His Majesty who, in turn, was acting under the powers conferred on him by Act of Parliament are a "special law". Therefore this section will apply.

Under the present amendment of sec. 29, the provisions of sec. 12 (2) will apply to an application under a special or local law. But it should be noted that sec. 12 (2) applies only to an application for leave to appeal and an application for review of judgment, but to no other application. And therefore an application to the Collector to make a reference under sec. 18 of the Land Acquisition Act is not covered by the language of sec. 12 (2) of this Act, and consequently the applicant cannot be allowed to deduct the period requisite for obtaining a copy of the Collector's award—*Kashi Parshad* v. *Notified Area*, 54 All. 282, A.I.R. 1932 All. 598 (599);

Nafisuddin v. *Secretary of State*, 9 Lah. 244, A.I.R. 1927 Lah. 858 (859), 104 I.C. 397. The Rangoon High Court, however, is of opinion that the application virtually amounts to an application to set aside an award and therefore falls under sub-section (4) of section 12, and the time taken in obtainin a copy of the award must be deducted—*Burjoriee* v. *Special Collector*, 5 Bur.L.J. 26, A.I.R. 1926 Rang. 135 (136), 95 I.C. 110. But it is doubtful whether an application to make a reference in respect of an award amounts to an application to set aside an award. In the Lahore case, sub-section (4) was not applied on a technical ground.

In computing the period of limitation for an appeal under sec. 3, Calcutta Improvement (Appeals) Act, 1911 the appellant is entitled to deductions under this section, which is applicable either by reason of sec. 29 (2) or otherwise—*Province of Bengal* v. *Amulya*, 54 C.W.N. 297, A.I.R. 1950 Cal. 356. But the time during which the application for the certificate as to fitness for appeal asked for under sec. 3 (b) (1) of the said Act remains pending cannot be excluded under this section—*Ibid.*

An assessee dissatisfied with an order of assessment and applying for a reference under sec. 66 of the Income-Tax Act is entitled to a deduction of the time required for obtaining the copy of the order under sec. 31 or 32, in computing the period of one month prescribed by sec. 66 of that Act—*Mohan Lal* v. *Commissioner, Income-Tax*, 9 Pat. 172, 10 P.L.T. 769, 122 I.C. 810, A.I.R. 1930 Pat. 14 (19); *Muhammad Hayat* v. *Commissioner*, A.I.R. 1929 Lah. 170, 117 I.C. 881; *Ramnatha* v. *Commissioner*, 6 Rang. 175, 110 I.C. 601, A.I.R. 1928 Rang. 152 (153). But the Allahabad High Court is of opinion that sec. 12 of the Limitation Act has no application to a proceeding under sec. 66 (3) of the Income-Tax Act—*In re Gulabchand*, 53 All. 684, 1931 A.L.J. 593, 133 I.C. 621, A.I.R. 1931 All. 673. And this view appears to be the correct one, because the application by the assessee to make a reference under the Income-Tax Act does not fall under any description of the applications mentioned in sec. 12 of the Limitation Act.

In a case under the U. P. Sales Tax Act, 1948, the Allahabad High Court has recently expressed the view that there appears to be no justification for holding that S. 29 enlarges the scope of the provisions made applicable by it to computation of period of limitation prescribed under a special or local law beyond the scope plainly laid down in those provisions when they are applied for the purpose of computing the period of limitation under the Indian Limitation Act itself—*Gopaldas Sarvadayal* v. *Commissioner of Sales Tax*, U.P., I.L.R. (1956) All. 53 (F.B.), 1956 All. L.J. 26, 7 S.T.C. 360, A.I.R. 1956 All. 305.

There is no provision in the Orissa Agricultural Income-Tax Act expressly excluding sections mentioned in section 29 (2), Limitation Act. Consequently section 12 of the Limitation Act must be held to apply to the provisions of the Orissa Agricultural Income-Tax Act—*Satrughan Mall* v. *Revenue Commissioner, Orissa*, I.L.R. 1955 Cut. 258, A.I.R. 1956 Orissa 34.

But an application by the Commissioner of Income-Tax *for leave to appeal* to the Privy Council, under sec. 66A of the Income-Tax Act is governed by sec. 12 (2) of the Limitation Act, and the time between the date on which the judgment of the High Court was pronounced and the date on which the judgment was sent to the Commissioner must be deducted—*Commissioner of Income-Tax* v. *Shaw Wallace & Co.*, 59 Cal. 251, 36 C.W.N. 127 (128, 129), 139 I.C. 236, A.I.R. 1932 Cal. 587.

The Workmen's Compensation Act has not excluded the appeals from the operation of this section and hence in an appeal from an order of the Commissioner the appellant is entitled to the exclusion of the time for obtaining a certified copy of the order—*General Manager, G. I. P. Ry.* v. *Shankar*, A.I.R. 1950 Nag. 201.

Sub-section (2) of this section applies to an application under sec. 73 of the Madras Village Courts Act preferred to the District Munsif against an exparte decree of a Village Panchayat Court. For the purposes of this sub-section the application is to be treated as an appeal and though it is not necessary under sec. 73 to file the certified copy of the decree along with the petition still this sub-section applies because it is applicable even to a case where the application or appeal need not be accompanied by a copy of the decree objected to—*Standard Type Foundry* v. *Venkataramaniah*, (1941) 1 M.L.J. 540, 1941 M.W.N. 349, A.I.R. 1941 Mad. 589.

137. Interference by High Court:—What time is or is not requisite for obtaining a copy of the judgment, etc., is a question of fact to be determined by the Appeal Court, and whether that fact be decided rightly or wrongly, the decision cannot be interfered with in second appeal—*Thana Mal* v. *Nihali*, 6 P.R. 1894; *Ram Sarup* v. *Zorawar*, 73 I.C. 447, A.I.R. 1923 Lah. 696; *Sher Singh* v. *Prem Raj*, 100 P.R. 1918, 48 I.C. 31.

Exclusion of time of defendant's absence from India and certain other territories.

13. In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from India and from the territories beyond India under the administration of the Central Government shall be excluded.

[As adapted to Dominion of Pakisthan].

Exclusion of time of defendant's absence from "all the Provinces of Pakisthan" and certain other territories."

In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from all the Provinces of Pakisthan and from the territories beyond "all the Provinces of Pakisthan under the administration of the Central Government shall be excluded.

Amendments:—The word "India" was substituted for the words "the States" by Act 3 of 1951. The words "the Central Government" were substituted for the words "the Government" by the Government of India (Adaptation of Indian Laws) Order, 1937. The words "or the Crown Representative" were repealed by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948.

The words "all the Provinces of Pakisthan" were substituted for the words "British India," by the Pakisthan (Adaptation of Existing Pakisthan Laws Order, 1947, sec. 4 sub-sec. (2). The words "Or the Crown Representative" were omitted by *Ibid*, sec. 7.

This section is based on the English law, according to which, if the defendant is beyond seas at the time of the right of action accruing to the plaintiff, the time or times appointed by the statute do not begin to run until the defendant returns from beyond seas. See Banning on Limitation, 3rd Edn., p. 65.

The amendment of this section is not retrospective in effect so as to disentitle the plaintiff from excluding the time during which the defendant had resided at a place which is now a part of India but was a foreign country as understood prior to April 1, 1951.

138. Scope:—This section applies only to defendants, and *in favour of plaintiff* so as to prevent limitation from running against the latter, and only in respect of the institution of a *suit;* it is not applicable *in favour of a defendant* who has been absent from India and wants to set aside proceedings in *execution*—*Ashan* v. *Ganga,* 3 All. 185.

This section has reference only to the absence of the *defendant* from the realm, not to that of the *plaintiff.* A plaintiff out of the realm may prosecute a suit by his attorney, but when the defendant is out of the realm it is very hard to call upon the plaintiff to institute a suit which in most cases must be wholly without fruit—*Domun* v. *Shubul,* 10 W.R. 253.

The plaintiff's voluntary absence in a foreign country cannot bar the operation of limitation—*Venkatasubba* v. *Giriammal,* 2 M.H.C.R. 113. And this section is equally inapplicable even if the plaintiff's absence may be involuntary through transportation—*Domun* v. *Shubul,* 10 W.R. 253. In England also, the disability of the plaintiff arising from absence beyond seas and the disability of imprisonment have been abolished by the Mercantile Law Amendment Act, 1856 (19 & 20 Vic. c. 97), sec. 10.

The provisions of this section are attracted only when the cause of action has arisen in British India—*Subramaniam* v. *Maruthamuthu,* (1944) 1 M.L.J. 440, A.I.R. 1944 Mad. 437. So payment towards decree passed by a foreign court does not extend the period of suit on foreign judgment as prescribed by Art. 117 of the Act—*Ibid.*

139. Absent:—The word 'absent' includes a person who had never been present in India. Absence does not necessarily imply a previous presence—*Maharaja* v. *Provincial Bank,* 72 P.R. 1891; *Atul Krishto* v. *Lyan,* 14 Cal. 457; *Poorna* v. *Sassoon,* 25 Cal. 496. Even where the defendant pays occasional visits to India, this section will apply—*Janki* v. *Manahar Lal,* 26 P.R. 1897.

If the defendant actually returns to India, the plaintiff's ignorance of the fact of such return does not prevent the operation of limitation—*Mahomed Museehooddeen* v. *Clarajene,* 2 N.W.P. 173.

Strict proof of absence is necessary. Where a plaintiff says that the defendant was out of India for a certain period, and that he is entitled to deduct this period, all this should be specifically pleaded and the plaintiff would be required strictly to prove the duration of the period of the defendant's absence—*Periyanna* v. *Arasu,* 9 M.L.T. 217, 9 I.C. 568. A plaintiff seeking to take advantage of the extension of time allowed by this section must bring himself within the terms of the section. The burden is upon him to prove both that the defendant has been absent from India and from the territories under the administration of the Government of India—*Ezra Sion & Co.* v. *Kailas,* 39 Bom.L.R. 263, A.I.R. 1937 Bom. 242: 169 I.C. 651.

140. Defendant:—The definition of "defendant" in sec. 2 (4) of the Act must be read into this section. So the expression "the time during which the defendant has been absent from British India" must be read as "time during which the defendant or any person from or through whom the defendant derives his liability to be sued has been absent from British India"—*Akkandi* v. *Rethinagiri,* (1945) 1 M.L.J. 275, A.I.R. 1945 Mad. 315.

140A. Defendant represented by agent:—This section applies even where to the knowledge of the plaintiffs, the defendants (partners in a firm) are during the period of their absence carrying on business in India through an agent, who is empowered to institute and defend suits—*Poorna Chunder* v. *Sassoon,* 25 Cal. 496 (F.B.) (over-

ruling *Harrington* v. *Ganesh*, 10 Cal. 440 where a contrary view was taken). See also *Atul* v. *Lyon*, 14 Cal. 457.

141. Several defendants—Absence of one:—Under the English law, where there are several defendants and one of them is beyond seas at the time of the right of action accruing to the plaintiff, the time does not begin to run against the absent defendant until he returns, but as against the defendants who are not beyond seas at the time of the right of action accruing to the plaintiff, the time begins to run equally as if they were the persons solely liable to be sued as defendants. See Banning on Limitation, 3rd Edition, p. 66. In India also, in a suit against partners, where one of the partners is absent from India, it has been held that the fact of his absence does not entitle the plaintiff to deduct the time against *all* the defendants, but against the absentee defendant only; and the fact that the plaintiff has allowed the suit to be barred against the other partners who are present in India during the absence of the absentee is not a ground for holding that the claim against the absentee is also barred by limitation—*Palaniappa* v. *Veerappa*, 41 Mad. 446 (451), 34 M.L.J. 41, 44 I.C. 466. See also *Muthukanni* v. *Andappa*, I.L.R. (1955) Mad. 116, (1954) 2 M.L.J. 731, A.I.R. 1955 Mad. 96 (F.B.).

142. Absence after accrual of cause of action:—It was held in *Narronji* v. *Mugniram*, 6 Bom. 103 (105, 106), that this section must be read subject to section 9, that the absence of the defendant from British India was to be regarded as the plaintiff's 'inability to sue' within the meaning of sec. 9, and therefore if the defendant's absence took place after the accrual of the cause of action the period of limitation would not be suspended during such absence but would run continuously according to the provisions of that section. But it has been pointed out in subsequent cases that the 'inability' referred to in sec. 9 must be a personal inability affecting the *plaintiff* himself and having reference to *his* condition, state or position, and not to the circumstances of the *defendant*; consequently, the absence of the defendant is not an 'inability' within the meaning of sec. 9, and therefore that section would not apply to the case, but the period of limitation would be suspended during the defendant's absence. Section 9 should not control sec. 13, and the period of defendant's absence would be deducted from computation, no matter whether such absence took place before or after the accrual of the cause of action—*Hanmantram* v. *Bowles*, 8 Bom. 561; *Beake* v. *Davis*, 4 All. 530; *Janki* v. *Manoharlal*, 26 P.R. 1897. In all these cases the Judges have dissented from 6 Bom. 103. In another Bombay case also it has been held that the absence of the defendant from British India does not amount to an 'inability to sue' within the meaning of sec. 9—*Jivraj* v. *Babaji*, 29 Bom. 68 (70).

143. 'Territory under administration of Government':—A place outside British India (*e.g.*, *Basra*) which is merely in military occupation by an army despatched by the Government of India is not a 'territory under the administration of the Government' of India within the meaning of this section, but is a foreign territory under military occupation, the object of which is much more restricted than that of an administration Therefore the period during which the defendant was staying in Basra should be excluded under this section, as the defendant was 'absent from British India and from the territories beyond British India under the administration of the Government'—*Fakhrullah* v. *Ramsarup*, 45 All. 18, 20 A.L.J. 786, 68 I.C. 978, A.I.R. 1923 All. 64. Secunderabad cantonment is under the administration of the Government of India within the meaning of this section. So the period during which the defendant has been living there cannot be excluded under this section—*Ezra Sion & Co.* v. *Kailas*, 39

Bom.L.R. 263, A.I.R. 1937 Bom. 242, 169 I.C. 651; *Risaldar* v. *Ahmad*, 40 P.L.R. 92, A.I.R. 1938 Lah. 225.

Exclusion of time of proceeding *bona fide* in Court without jurisdiction.

14. (1) In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance, or in a Court of appeal, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

Explanation I.—In excluding the time during which a former suit or application was pending, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation II.—For the purposes of this section, a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding.

Explanation III.—For the purposes of this section misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.

144. Scope:—The three essential requisites for the application of this section are (1) identity of the cause of action, (2) good faith of the plaintiff, and (3) absence of jurisdiction or other cause of a like nature in the court which entertained the prior litigation—*Satyanarayanamurthi* v. *Maharaja of Pithapur*, (1939) 2 M.L.J. 329, 50 L.W. 139, A.I.R. 1939 Mad. 724. The tendency has been not to restrict the operation of this section, but to follow its principle, in suitable cases even in proceedings which cannot strictly be called proceedings in a court of Law. If the conduct of the person claiming its benefits has been *bona fide*, that is he has established his good faith, if he has been prosecuting with due diligence another civil proceeding, he is entitled to its benefits. If any of these elements is lacking, he cannot take advantage of it—*Maqsood* v. *Hokshiar*, I.L.R. 1945 All 394, 1945 A.L.J. 185, A.I.R. 1945 All. 377. The section must be liberally construed—*Maneklal* v. *Shivlal*, I.L.R. (1939) Bom. 9, 40 Bom.L.R.

1169, A.I.R. 1939 Bom. 26; *The Muslim Bank* v. *Hasan*, A.I.R. 1951 Hyder. 57. Indulgence should be granted under this section only in cases where an error was an error that might be committed by a reasonable and prudent man exercising due diligence and caution—*Maya* v. *Udham*, 40 P.L.R. 631, A.I.R. 1938 Lah. 708, 181 I.C. 290. The High Court will not interfere with the discretion exercised by the lower appellate Court under this section, when such discretion has not been exercised improperly—*Jagdeo* v. *Peary*, 14 Luck. 4, 1938 O.W.N. 257, A.I.R. 1938 Oudh 100 (S.B.).

This section is not controlled by Art. 182(5) of the Act. There is in fact no question of either provision being controlled by or subject to the other. The two provisions deal with quite distinct matters—*Bishundeo* v. *Raghunath*, 19 Pat. 345, 1940 P.W.N. 504, A.I.R. 1940 Pat. 677. So, time spent for proceeding with successive execution petitions in the original side of the District Munsif though the decree was passed by the District Munsiff as a Small Cause Court Judge should be excluded under this section—*Akkal* v. *Kumarasami*, (1949) 1 M.L.J. 432, 1949 M.W.N. 219, A.I.R. 1949 Mad. 849. Section 48 of the Code of Civil Procedure is not controlled by this section as the period mentioned in sec. 48, C. P. Code cannot be described as a period of limitation prescribed for any proceeding—*Makhan* v. *Firm Madan Mohan*, 50 C.W.N. 12.

This section is not applicable for the purpose of computation of time for *appeals*—*Ardha Chandra* v. *Matangini*, 23 Cal. 325 (327); *Beni Singh* v. *Berhamdeo*, 19 C.W.N. 473 (474). But its reasonable principle may be applied, and the circumstances contemplated in this section may and ordinarily would constitute a sufficient cause within the meaning of sec. 5 for not presenting an appeal in time—*Balwant* v. *Gumani*, 5 All. 591; *Ramjiwan* v. *Chandmal*, 10 All. 587 (596); *Karam Baksh* v. *Daulat Ram*, 183 P.R. 1888; *Kamiruddin* v. *Bismupriya*, 33 C.W.N. 76 (77); *Kumudini* v. *Kamalakant*, A.I.R. 1922 Cal. 247, 35 C.L.J. 106. The Privy Council have observed that although sec. 14 does not apply to appeals, it is relevant for the purpose of considering a case under sec. 5—*Brij Indar* v. *Kanshi Ram*, 45 Cal. 94 (103) (P.C.). Thus, the *bona fide* prosecution of a proceeding in a wrong Court has been regarded as a proper ground or a 'sufficient cause' within the meaning of section 5 for extending the time for filing the appeal—*Rupa Thakurani* v. *Kumudnath*, 22 C.W.N. 594. Where the appellant through *bona fide mistake* preferred his appeal in a wrong Court, but lost no time in refiling it in the proper Court after it was returned to him, *held* that it would not be improper to apply the provisions of sec. 14, and the appeal should be heard—*Kishan Lal* v. *Tika*, 49 All. 555, A.I.R. 1927 All. 719, 101 I.C. 750. So also, on the analogy of section 14, the time spent in a suit wrongly filed for getting an order set aside might properly be deducted in computing the period of limitation for subsequently filing an appeal from such order—*Sitaram* v. *Nimba*, 12 Bom. 320. See Notes 50 and 51 under sec. 5.

This section applies to an application for execution of a decree—*Kala Singh* v. *Gehna Singh*, 33 P.L.R. 740, 138 I.C. 646, A.I.R. 1932 Lah. 531; *Bishundeo* v. *Raghunath*, 19 Pat. 354. A.I.R. 1940 Pat. 677, 191 I.C. 695; *Abhoy* v. *Gopinath*, 76 C.L.J. 183, A.I.R. 1943 Cal. 460 or to an application to set aside an *ex parte* decree—*Raghunandan* v. *Bhuwal*, 54 All. 423, A.I.R. 1932 All. 340. But in two Allahabad cases (*Gadre* v. *Brijnandan*, 21 A.L.J. 205, 45 All. 332 and *Ram Raj* v. *Umraji*, 93 I.C. 292, A.I.R. 1926 All. 345) it has been held (without any reason being assigned for it) that this section does not apply to applications. This view, it is submitted, is incorrect, as sub-section (2) *does* apply to applications. See *Raghunandan* v. *Bhuwal*, 54 All. 423, A.I.R. 1932 All. 340 (342), 140 I.C. 178, 1932 A.L.J. 257. See also *Bishundeo* v. *Raghunath*, supra.

This section does not prescribe any period of limitation but provides only a method of calculation of that period when a suit has been ihstituted bonafide in a Court without

jurisdiction. The effect of this section is not to render the suit after refiling in the proper court a continuation of the original suit, and consequently the period of limitation has to be determined as if it was a new suit, and the period will be that which was prescribed for the original suit, but excluding the period during which the suit was being prosecuted bonafide in a wrong court—*Anil* v. *Promotho*, 52 C.W.N. 316.

145. Same plaintiff in both suits:—A plaintiff can claim the benefit of this section only where the previous proceeding had been brought by himself or by some person through whom he derives title to sue—*Barodakant* v. *Sookmoy*, 1 W.R. 29. If the former proceeding had been instituted by a wrong plaintiff, no deduction can be made. Thus, where manager of the plaintiff brought a suit in his own name for the value of trees cut down by the defendant on the plaintiff's ground and the suit was dismissed as he had no cause of action, the plaintiff himself in bringing a subsequent suit could not deduct the time occupied in the previous suit—*Rajendra* v. *Bulaky*, 7 Cal. 367. Where the plaintiff and another person had brought the previous suit in one capacity, and the plaintiff alone brought the present suit in another capacity, no deduction of time spent in the previous suit can be made—*Hossein* v. *Asha Bibi*, 1 Rang. 402, A.I.R. 1924 Rang. 123, 76 I.C. 639 (see this case fully cited in Note 150 below). Where the plaintiff in the second suit was not prosecuting the first suit and was not associated with the plaintiffs of the first suit, no deduction of time can be made—*Niranka* v. *Atul Krishna*, 28 C.W.N. 1009, A.I.R. 1925 Cal. 67, 83 I.C. 110. Where the previous suit was originally filed by two of the partners of a firm, and the third partner being unwilling to join as a plaintiff was impleaded as a formal defendant, and the second suit was filed by the third partner alone and the other two partners withdrew from the suit, *held* that the two suits were not brought by the same parties, and this section did not apply—*Nadesan* v. *Sankaran*, 5 Rang. 600, A.I.R. 1928 Rang. 21, 105 I.C. 701. Four members of a firm brought four separate suits for a debt due to the firm, each claiming a one-fourth share of the debt; the suits having been dismissed, the firm brought the present suit on the consolidated debt; *Held* that the plaintiff in the present suit and the plaintiffs in the previous suit were not the same, and this section could not apply—*Firm Ram Lochan* v. *Jagat Narain*, A.I.R. 1927 All. 181, 98 I.C. 1050 The Official Receiver prosecuting the proceeding under secs. 53 and 54 of the Provincial Insolvency Act and a creditor, who files a suit under sec. 53 of the Transfer of Property Act for a declaration that certain alienations made by a debtor are void, are not same plaintiffs as though the Official Receiver may represent the creditor, a creditor, who is the plaintiff in the later suit under sec. 53 of the Transfer of Property Act cannot be said to be prosecuting the proceedings under the Insolvency Act—*Rama* v. *Gangi*, I.L.R. (1942) Mad. 862, (1942) 1 M.L.J. 588, A.I.R. 1942 Mad. 483.

A plaintiff is entitled to claim the benefit of the provision of section 14 whether he comes up on the second occasion with the original plaint or a new plaint—*Brijlal* v. *Janendra*, A.I.R. 1935 Pat. 82, 183 I.C. 155.

146. 'Prosecuting a proceeding':—It is not necessary that plaintiff must have been prosecuting the previous proceeding as a *plaintiff*. He is entitled to a deduction of the period of pendency of a former suit in which he *as defendant* was urging the same claim as he afterwards prefers as plaintiff—*Jugetendra* v. *Din Dayal*, 1 W.R. 310; *Madhavdas* v. *Jan Mahomed*, I.L.R. 1941 Kar. 495, A.I.R. 1942 Sind. 37. This section no where lays down that before a plaintiff or an applicant may claim exemption under this section he should have been described as plaintiff or applicant in the previous proceedings. All that is required of him to prove is that he prosecuted the previous civil proceedings in good faith, and if he proves that he may avail himself of this section, even though he was not described as a plaintiff or as an applicant in the

previous proceedings—*Aildas* v. *Sobhomal*, 32 S.L.R. 151, A.I.R. 1938 Sind. 50, 174 I.C. 172. Similarly, the plaintiff is entitled to deduct the period during which he as respondent has been opposing a previous appeal brought against him by the present defendant —*Lakhan Chandra* v. *Madhusudan*, 35 Cal. 209. (See Explanation 2). So also, a plaintiff who in a previous insolvency proceeding had been filing a proof of his debt before the official assignee will be said to have been prosecuting a proceeding, and the time spent in such proceeding will be excluded—*N. K. M. M. Chetty* v. *Lutchman Chetty*, 52 I.C. 934 (935), 12 Bur.L.T. 83. The decree-holder making an application for execution is entitled to deduct the time occupied by him in resisting a previous suit brought by the judgment-debtor for stay of execution of the decree—*Navalchand* v. *Anichand*, 18 Bom. 734. But in later cases it has been held by the Bombay High Court that merely defending a suit does not amount to prosecuting a proceeding. Explanation 2 speaks of resisting an *appeal* and does not speak of resisting a suit—*Som Sekhar* v. *Shivappa*, 25 Bom L.R. 863, 76 I.C. 557, A.I R. 1924 Bom. 39; *Narayan* v. *Gurunathgouda*, (I L.R) 1939 Bom. 173, 40 Bom.L.R. 1134, A.I.R. 1939 Bom. 1. The Lahore High Court has held, on an application to file an award beyond the period of limitation prescribed by Article 178, that under the circumstances of the case the applicant would not be entitled to deduct the time spent by him *as defendant* in setting up the award in bar of a prior suit instituted by the plaintiff—*Nazim Khan* v. *Alam Khan*, 89 P.R. 1919, 52 I.C. 561. The Nagpur Court also holds that where in the prior suit the defendant was defending a money suit and nothing that he did would have entitled him to a decree in his favour and there was nothing to restrain him from filing his own suit, the defendant when bringing the later suit was not entitled to an exclusion of time under this section—*Hiralal* v. *Kripal*, 28 N.L.R. 348, A.I.R. 1933 Nag. 13.

147. Civil proceeding:—In order to decide whether a proceeding should properly be termed a civil proceeding in a Court, it is necessary in each case to examine the precise nature of the proceeding and the constitution of the authority before whom such proceeding is taken—*Laxman* v. *Keshav*, 43 Bom. 201, 20 Bom.L.R. 918, 48 I.C. 467.

An Insolvency proceeding before an Official Assignee is a civil proceeding. The word 'civil proceeding' is used in this section as opposed to a criminal proceeding—*N. K. M. M. Chetty* v. *Lutchman*, 12 Bur.L.T. 83, 52 I.C. 934 (935). A proceeding under the Bengal Public Demands Recovery Act (Bengal Act III of 1913) is a civil proceeding within the meaning of this section: see sec. 57 of that Act.

A proceedng before a settlement officer for mutation of names in the revenue records is not a *civil* proceeding in a Court within the meaning of this section. Even if the proceeding be considered to be a civil proceeding, still as it was not before a *Court* but before a purely *executive officer*, it did not fall under this section—*Muhammad Subhanullah* v. *Secretary of State*, 26 All. 382. A civil proceeling before a *Revenue Court* (as distinguished from a Revenue *officer*) falls under this section. Thus, where a suit was brought in the Revenue Court for arrears of rent but it was dismissed as the case did not fall under the Bengal Act VIII of 1869, *held* that in a subsequent suit in the civil Court on the same cause of action the plaintiff was entitled to deduct the time occupied by the suit in the Revenue Court—*Govindo* v. *Manson*, 15 B.L.R. 56. (*Contra*—A proceeding in a Revenue Court is not a *civil* proceeding—*Govinda* v. *Santa*, 83 P.R. 1914, 26 I.C. 441). So also, where the plaintiff tried to get an invalid certificate granted under section 8 of the Bengal Act VII of 1880 set aside by the Revenue Court, which however had no jurisdiction to grant him relief, it was held that the time spent in the Revenue Court should be deducted in computing the time for a subsequent suit—*Girijanath* v. *Ram Narain*, 20

Cal. 264, following *Ram Logan* v. *Bhawani*, 14 Cal. 9. An application under sec. 28, 29 or 42 of the Bengal Land Registration Act is not a civil proceeding, and the Land Registration Collector is not a Court—*Ramjee* v. *Rai Bishen Dutt*, 7 P.L.T. 61, 90 I.C. 244, A.I.R. 1926 Pat. 194.

An application to a Collector to take action under Sec. 11A of the Bombay Hereditary Offices Act,is not a *civil* proceeding in a Court, and the time taken up in such proceeding cannot be excluded under this section—*Laxman Ganesh* v. *Keshav Govind*, 43 Bom. 201, 20 Bom.L.R. 918, 48 I.C. 467.

This section is in terms restricted to civil proceedings and cannot be availed of in respect of proceedings under Child Marriage Restraint Act,—*Venkatanarasimham* v. *Satyanarayana*, (1939) 1 M.L.J. 775, 49 L.W. 547, A.I.R. 1939 Mad. 512 or to proceedings under Cattle Trespass Act—*Padma* v. *Rangadhar*, A.I.R. 1951 Orissa 40.

The expression "another civil proceeding" indicates that there should be *two* proceedings. Where a plaint was filed against a person who was in fact dead at that time, and an application by way of amendment or bringing on record the legal representatives was made and granted, and then the suit was *continued* against the representatives who contended that the suit was now barred, it was held that the contention was right and that the plaintiff was not entitled to deduct the period between the date of filing of the plaint and the date of the Court's order allowing the legal representatives to be brought on the record, because those proceedings were absolutely void, and also because sec. 14 could not be applied, since there were not two proceedings but one, the *same suit* having been continued—*Municipal Council* v. *Kunhipathumma*, 37 L.W. 489, A.I.R. 1933 Mad. 454 (455), 143 I.C. 596. But if the plaintiff does not continue the same suit, but brings a *second* suit against the legal representatives of the deceased, the period of pendency of the first suit may be deducted, as the Court had no jurisdiction to decide the first suit brought against a dead man—*Mohun Chunder* v. *Azar*, 12 W.R. 45. Several creditors had obtained decrees against a debtor. Another creditor filed an administration suit impleading the creditors who had obtained decrees as defendants. The administration suit was ultimately dismissed. The assets of the debtor had, in the meantime, been realised by the receiver who had been appointed in the suit. One of the creditors managed to keep his decree alive, while the others allowed their decrees to become barred by limitation. All the decree-holder creditors applied to attach the assets in Court and claimed rateable distribution of the assets. On the question whether the creditors whose decrees had become barred would get the benefit of this section by deducting the period of the pendency of the administration suit it was held that this section had no application as none of the creditors whose decrees were barred had filed suits, *i.e.*, "another civil proceeding"—*Chidambaram* v. *Mayappa*, I.L.R. (1944) Mad. 410, (1943) 2 M.L.J. 510, A.I.R. 1944 Mad. 67. Proceedings in the insolvency Court are "civil proceedings" within the meaning of sec. 14—*Lorind Chand Parma Nand & Sons* v. *Bahadur Khan*, A.I.R. 1935 Lah. 736, 156 I.C. 378. Where the plaintiff went to the Insolvency Court with a petition for adjudication of the debtor (defendant) on the mistaken advice that the conduct imputed to the defendant amounted in law to an act of insolvency, and he fought out the matter up to the High Court with due diligence and when his petition ultimately failed he filed a suit for recovery of the amount, it was held that the plaintiff was entitled to a deduction of the period during which the insolvency proceedings were pending—*Lorind Chand Parma Nand & Sons* v. *Bahadur Khan*, A.I.R. 1935 Lah. 736, 156 I.C. 378.

Arbitration proceedings:—The Privy Council have held that a proceeding before an arbitrator is a civil proceeding, and in computing the period of limitation, an arbitrator should exclude the time spent in prosecuting in good faith the same claim

before another arbitrator who was without jurisdiction—*Ram Dutt Ram Kissen* v. *E. D. Sassoon and Co.*, 54 Cal. 1048 (P.C.), 33 C.W.N. 485 (492), 49 C.L.J. 462, 115 I.C. 713, A.I.R. 1929 P.C. 103. It should be noted in this case that the Judicial Committee applied sec. 14 of the Limitation Act only *by analogy*, and what their Lordships held was that in a subsequent *application* for arbitration the period taken in prosecuting a former application for arbitration could be excluded. But in a *suit* brought in a civil Court the time taken in previous arbitration proceedings relating to the subject matter of the suit cannot be excluded, and for three reasons—(1) because the proceedings before arbitrators were not proceedings in a *Court;* (2) because the proceedings before the arbitrators were not based upon the *same cause of action* as a civil suit, the reason being that primarily the cause of action in arbitration proceedings is the agreement of parties to refer the matter in dispute to arbitrators, whilst in a civil suit there is no such agreement, and the cause of action is upon the right or title which the plaintiff alleges in himself; (3) because when there has been a valid reference to arbitration, the arbitrators have full power to decide the matter and labour under no *defect of jurisdiction—Maharaj Sai* v. *Kedar Nath*, 29 N.L.R. 272, 144 I.C. 948, A I.R. 1933 Nag. 130 (132). But a contrary view has been taken in *Behari* v. *Punjab Sugar Mills Co. Ltd.*, I.L.R. (1943) All. 467, 1942 A.L.J. 69, A.I.R. 1943 All. 162 where it was held that the proceedings before the arbitrators were proceedings in a Court and that this section would apply to a suit filed by a party to the reference to enforce his right under the contract when the arbitration was closed on the withdrawal of one of the arbitrators. The reason is that defect of jurisdiction—even if only temporary, clearly occurred when one of the arbitrators withdrew and even if the defect was curable, there was at least a "cause of like nature" to defect of jurisdiction within the meaning of this section and the requirements of this section would be equally satisfied whether such defect as to jurisdiction existed at the beginning or whether it occurred at any later stage.

Proceeding before Conciliator:—A Conciliator is not a Court; and the proceedings before a Conciliator for obtaining a certificate under the Dekhan Agriculturists' Relief Act is not a civil proceeding before a Court. Consequently, the time occupied in a proceeding before a Conciliator for obtaining a certificate as a condition precedent to a suit cannot be deducted. See *Laxman* v. *Keshav*, 43 Bom. 201. But in some cases, under the peculiar circumstances, the High Court granted an extension of time. Thus, the money due on a bond became payable on 31st May 1910; the plaintiff applied to the Conciliator for a certificate on the 28th March 1913; but before he could obtain it, Government abolished the conciliation system with effect from 30th May 1913. The plaintiff filed the suit on the 30th June 1913, and claimed to exclude the time between 28th March and 30th May 1913, from the period of limitation. It was held that though the plaintiff was not entitled to deduct the time claimed, he was entitled to a reasonable extension of time, on the principle that where the law creates a limitation and the party is disabled to conform to that limitation without any default on his part, and he has no remedy over, the law will ordinarily excuse him—*Satyahamabai* v. *Govind*, 38 Bom. 653, 16 Bom.L.R. 447, 25 I.C. 66. So also, where after the plaintiff obtained the certificate, and before the institution of the suit the Civil Court was closed for the vacation, during which the conciliation system was abolished and the period of limitation expired, and the plaintiff filed his suit on the re-opening day, it was held that the plaintiff was entitled to deduct the period between his application to the Conciliator and the grant of the certificate, and as upon such deduction the period of limitation expired during the vacation, the suit instituted on the re-opening day was in time—*Rupchand* v. *Mukunda*, 38 Bom. 656, 25 I.C. 67 (68).

148. Court:—The 'Court' only refers to a Court in India, and does not include a foreign Court. The time spent in proceedings before such a Court cannot be deducted—*Chanmalappa* v. *Abdul Wahab*, 35 Bom. 139, 12 Bom.L.R. 977, 8 I.C. 645; *Parry* v. *Appasami*, 2 Mad. 407. *Rajanna* v. *Narayan*, A.I.R. 1923 Nag. 321; *Hari Singh* v. *Muhammad Said*, 8 Lah. 54, 102 I.C. 523, A.I.R. 1927 Lah. 200.

An arbitrator whom the parties have substituted for the Court of law to be the judge of the disputes between them is a Court, and the time spent in prosecuting in good faith the same claim before an arbitrator can be deducted—*Ramdutt Ramkissen* v. *E. D. Sassoon & Co.*, 56 Cal. 1048 (P.C.), cited in Note 147, *ante*; *Abdul Rahim* v *Ojamshee*, 56 Cal. 639, A.I.R. 1930 Cal. 5 (8); *Fatechand* v. *Wasudeo*, I.L.R. (1947) Nag. 477, 1947 N.L.J. 417; A.I.R. 1948 Nag. 334; *Behare* v. *Punjab Sugar Mills Co. Ltd.*, I.L.R. (1943) All. 467, 1943 A.L.J. 69, A.I.R. 1943 All. 162. But it is evident that what the Legislature had in mind were judicial Courts, and not Courts in the wider sense of domestic formus or tribunals—*Purshottamdas* v. *Impex (India) Ltd.*, I.L.R. (1954) Bom. 602, 56 Bom.L.R. 214, A I.R. 1954 Bom. 309.

A proceeding before an Official Assignee is a proceeding in an Insolvency Court—*N K. M. M. Chetty* v. *Lutchman*, 12 Bur.L.T. 83, 52 I.C. 934 (935).

The Settlement Officer, the Commissioner and the Board of Revenue are not Courts but executive officers of Government—*Muhammad Subhanullah* v. *Secretary of State*, 26 All. 382.

Under the rules framed by the Bombay High Court, the Collector is not a Court for the purpose of setting aside a sale under section 311, C. P. Code (1882), and the period during which proceedings were pending before him cannot be deducted—*Narayan* v *Rasulkhan*, 23 Bom. 531; *Tipangavaba* v. *Ramangavde*, 44 Bom. 50 (54), 22 Bom.L.R. 35, 54 I.C. 670. Under this section time spent in a proceeding before the Collector to whom a decree is transferred for execution cannot be excluded, as the Collector is not a Court—*Radha* v. *Uttamchand*, I.L.R. (1945) Nag. 427, 1944 N.L.J. 391, A.I.R. 1944 Nag. 313.

A Conciliator acting under sections 10, 11, 11B of the Deccan Agriculturists' Relief Act is acting purely as an administrative officer and not as a Court—*Laxman Ganesh* v. *Keshav Govind*, 43 Bom. 201 (205). A Collector appointed under the Deccan Agriculturists' Relief Act, RVII of 1879, is not a Court. The time occupied by proceedings before him cannot be excluded in computing the time for proceeding in the regular Court—*Manohar* v. *Gebiapa*, 6 Bom. 31. The time occupied in proceedings before a Revenue *officer* (*and not before a Revenue Court*) cannot be deducted under this section—*Abbas Ali* v. *Yasuf Ali*, 28 P.L.R. 158, 101 I.C. 254, A.I.R. 1927 Lah. 186 (overruling 26 P.L.R. 27). But see *Govinda* v. *Santa*, 83 P.R. 1914, 26 I.C. 441.

In C. P., the Deputy Commissioner is not invested with power to dispose of objections under O. 21, r. 58, C. P. Code or to dispose of applications under O. 21, r. 100. He is not a Court in connection with those objections and applications, and the time spent in taking those proceedings before him cannot be deducted—*Bandappa* v. *Shankar*, A.I.R. 1924 Nag. 309, 78 I.C. 580.

As to the applicability of this section to proceedings which cannot strictly be called proceedings in a Court of Law see *Massood* v. *Hoshiar*, I.L.R. (1945) All. 394, 1945 A L J. 185, A.I.R. 1945 All. 377.

"Whether in a Court of first instance or in a Court of appeal" :—The period spent in prosecuting a suit in a wrong Court and an appeal from the decision therein shall be excluded in computing the period of limitation for a subsequent suit brought in

the proper Court—*Hari Prassad* v. *Sourendra Mohan*, 1 Pat. 506; *Kasturchand* v. *Mt. Wazir Begam*, A.I.R. 1937 Nag. 1.

The expression "Court of appeal" shall be taken as being used in the broad sense of any Court which has the power to bring under review the decision of an inferior Court, whatever may be the extent of jurisdiction that the superior Court may possess in reviewing the decision of the inferior Court. Therefore, an application for *revision* in the High Court should be included in the expression "civil proceeding in a Court of appeal"—*Venkatragayya* v. *Mutyala*, 17 I.C. 593 (594) (Mad.); *Seth Mulchand* v. *Seth Samir*, 1882 A.W.N. 59; *Chhuttan* v. *Dwarka*, I.L.R. (1938) All. 192, 1937 A.L.J. 1308, A.I.R. 1938 All. 78, *Meghmala* v. *Sadoy*, 42 C.W.N. 1051, 68 C.L.J. 261, A.I.R. 1938 Cal. 577; *Lal Behari* v. *Bani*, A.I.R. 1949 Pat. 293, 30 P.L.T. 201 (F.B.), *Perumal* v. *Pandaram*, A.I.R. 1951 Trav-Co. 26. The Bombay High Court seems to have doubted whether the High Court in revision is a Court of appeal within the meaning of this section—*Narayan* v. *Hari Ganesh*, 32 Bom.L.R. 1186, 128 I.C. 621, A.I.R. 1930 Bom. 505 (506).

Section 14, Limitation Act, is not applicable to appeals. But under sec. 5, Limitation Act, it is competent to a Court to admit an appeal after the expiry of the period of limitation if the appellant satisfies the Court that he had sufficient cause for not preferring an appeal within the prescribed time—*Sudamarai* v. *Bisheshar*, A.I.R. 1935 All. 92. See also *Gopi Nath* v. *Bhukhan*, A.I.R. 1955 Pat. 301.

Although sec. 14 does not in terms apply to appeals, as it deals with suits and not appeal, yet sec. 14 is relevant in considering application under sec. 5 and may be availed of in excluding the period taken by the appellant in applying to the lower Court for review of judgment—*Pevibai* v. *Matumal*, A.I.R. 1936 Sind. 43, 30 S.L.R. 301, 162 I.C. 257.

149. "Against the defendant":—The defendant must be the same in both the proceedings. This section excludes the time taken in proceeding *bona fide* in a Court without jurisdiction against the particular defendant—*Ram Pher* v. *Ajudhia*, 12 O.L.J. 66, A.I.R. 1925 Oudh 369, 87 I.C. 17. Where there are several defendants in the second suit, and the former suit was instituted against only one of them, no exclusion of time will be allowed—*Nilmadhab* v. *Krishtodoss*, 5 W.R. 281. But where the first suit was brought against two defendants and the second against only one of them, the case may under particular circumstances come under this section. See *Seth Kahandas* v. *Dahibhai*, 3 Bom. 182.

The plaintiff who had purchased a patni at a sale under the Patni Regulation in 1908 and had paid rent to the Zeminder in 1910, instituted a suit in 1916 against the Zeminder, after the patni sale was set aside in 1912, for recovery of the amount paid as rent, and claimed to deduct the period which was occupied by a proceeding for assessment of mesne profits as between himself and the original patnidar on the basis of the decree for cancellation of the sale. *Held* that the plaintiff was not entitled to a deduction of the period, because the proceedings for assessment of mesne profits were between himself and the original patnidar whereas the present suit was between himself and the Zeminder—*Janki Nath* v. *Bijoy Chand Mahatab*, 26 C.W.N. 271, 60 I.C. 698.

Where a plaintiff brings two suits against two different branches of the same family to recover a share of the property in the possession of each, and the suits are dismissed as improperly framed, he cannot be allowed any deduction for the time occupied in these suits when he subsequently brings a consolidated suit against both branches of the family—*Jaitaram* v. *Bai Ganga*, 8 B.H.C.R. 228.

Where the previous suit was brought against a certain person, and the second suit was brought against another who derived his liability to be sued from the defendant in the first suit, a deduction of time will be allowed, because the defendants in both suits are virtually the same, according to the definition in section 2 (4)—*Hari Prasad* v. *Sourendra*, 1 Pat. 506 (521), 3 P.L.T. 709, A.I.R. 1922 Pat. 450, 65 I.C. 945. Where the previous suit was against a firm, and the subsesuent suit was against the surviving partners of the firm and the heirs of a deceased partner, *held* that the two suits were substantially against the same defendants—*Firm of Baldeo Prasad* v. *Firm of Haji Ali*, 1929 A.L.J. 73, 112 I.C. 715.

150. Same cause of action:—The essential point to be considered is that the previous proceeding was founded upon the same cause of action which is the foundation of the subsequent suit—*Dund* v. *Deo Nandan*, 17 C.L.J. 596, 20 I.C. 513. Where the first suit and the second were not substantially based on the same cause of action, this section would not apply—*Manghu* v. *Kandhai*, 8 All. 475. Thus, where a suit was originally brought by the landlord in the Revenue Court to eject the defendants as tenants, a subsequent suit by him in the Civil Court treating the defendants as trespassers would not be saved from limitation by the operation of this section, because the cause of action in both the suits is not the same—*Dondoo* v. *Sheo Narain*, 36 I.C. 770 (Oudh). Where the cause of action in the first suit was an alleged loan, and the cause of action in the second suit was a claim on a promissory note, *held* that the causes of action in the two suits were different, and this section did not apply—*Nagesan* v. *Sankaran*, 5 Rang. 600, 105 I.C. 701, A.I.R. 1928 Rang. 21. Where a suit is dismissed for want of prosecution under O. 9, r. 2, the period covered by restoration proceedings cannot be excluded in computing limitation for a fresh suit brought under O. 9, r. 4, because the cause of action in the restoration proceedings is not the same as that in the subsequent suit, nor can it be said that the restoration proceedings failed for want of jurisdiction—*Chintaman* v. *Kisan*, 25 N.L.R. 99, A.I.R. 1929 Nag. 219, 116 I.C. 509. Where M. on dismissal in default of his claim under O. 21, r. 58 filed an application under s. 151 for setting aside the dismissal order and on dismissal of the same, filed a regular suit under O. 21, r. 63 wherein he claimed the advantage of s. 14, Limitation Act, so as to exclude the period spent in prosecuting the application under s. 151, it was held that none of the facts which would go to establish M.'s proprietary right in the suit under O. 21, r. 63 could be necessary for the success of the application under s. 151, C. P. Code. The facts on which the reliefs in both the proceedings were claimed were not identical or even practically identical. Therefore it could not be said that the application under s. 151, C. P. Code, was founded on the same cause of action on which the suit under r. 63 was founded. Hence M. could not take the advantage of s. 14, Limitation Act—*L. Behu Mal* v. *Murli Dhur*, 1955 All.L.J. 692, A.I.R. 1956 All. 5. The defendant was a shareholder of a company. His shares were forfeited and afterwards the company was wound up. On 10th October 1924 the liquidator filed his list of contributories in which he put the name of the defendant, but the Court held on 13th October 1925 that the defendant's name had been wrongly entered in that list, and directed a suit to be filed. A suit was accordingly filed. *Held* that in computing limitation for this suit the period between 10th October 1924 and 13th October 1925 could not be excluded, because the liquidator's action in putting the defendant on to the list of contributories was based on the ground that he was a shareholder, whereas in the present suit the defendant was proceeded against as a debtor. The liabilities of the defendant in the two proceedings are different, based on different causes of action; and the previous proceeding failed not because the Court was unable to entertain it for defect of jurisdiction but because the proceeding was utterly wrong and misguided

—*Maneklal* v. *Suryapur Mills Co., Ltd.*, 52 Bom. 477, 30 Bom.L.R. 549, 110 I.C. 33, A.I.R. 1928 Bom. 252 (257). The cause of action in winding up proceedings under sec. 163 (1), Companies Act is the inability of the Company to pay its debts and not, as in action for recovery of the debt. The question of recovery does not arise until the winding up order has been made and a liquidator appointed—*Kashinath* v. *N. A. C. G. & P. Co.*, I.L.R. (1950) Nag. 562, A.I.R. 1951 Nag. 255.

Proceedings taken by the Official Receiver to get the alienation annulled under secs. 53 and 54 of the Provincial Insolvency Act and a suit by a creditor under sec. 53 of the Transfer of Property Act for a declaration that certain alienations made by a debtor are void are based on different causes of action—*Rama* v. *Gangi*, I.L.R. (1942) Mad. 862, (1942) 1 M.L.J. 588, A.I R. 1942 Mad. 483. The causes of action in a petition for insolvency and in an application for execution are not the same—*Jaikishen* v. *Peoples Bank*, A.I.R. 1944 Lah. 136, 217 I.C. 65 (F.B.).

A plaintiff who wrongly sues a tenant in *ejectment* and loses his case cannot have the benefit of the time spent in that suit when he afterwards sues for *rent* which accrued due while the first suit was pending—*Hurro Pershad* v. *Gopal Chunder*, 9 Cal. 255 (P.C.). A claim for rent based on the ground of subsisting relationship between landlord and tenant and for recovery of rent on that basis can not be held to be founded on the same cause of action as a claim for mesne profits which is based essentially on trespass; where a prior suit for possession and mesne profits presented to a Civil Court is returned by it for presentation to the Revenue Court on the finding that the defendant was an occupancy raiyat not liable to ejectment and the suit is thereupon re-presented to the Revenue Court, after being amended so as to make it a suit for rent, this section does not apply as the identity of cause of action is absent—*Satyanarayanamurthy* v. *Maharaja of Pithapur*, (1939) 2 M.L.J. 329, 50 L.W. 139, A I.R. 1939 Mad. 724. So also, a proceeding under sec. 46 of the Bengal Tenancy Act for assessment of fair and equitable rent is not a suit based on the same cause of action as a suit for recovery of rent at the old rate from the raiyat—*Port Canning Co.* v. *Achhiruddi*, 43 C.L.J. 45, 92 I.C. 37, A.I.R. 1926 Cal. 693. But where the plaintiff sued for land and mesne profits, and the claim for mesne profits was dismissed on the ground that a separate suit should be brought on it, *held*, in a second suit brought for the mesne profits, that the plaintiff would get a deduction of the time occupied in the first suit, as the cause of action in the two suits was the same—*Hurro Chunder* v. *Shoorodhonee*, 9 W.R. 402 (F.B.).

The plaintiff had originally applied to the Court to enforce an award. The Court holding that the award was too inadequate to be capable of execution remitted the award to the arbitrators for reconsidertion and they amended it accordingly; subsequently the plaintiff brought a regular suit on the amended award. *Held* that the plaintiff was entitled to a deduction of time under sec. 14, because the cause of action was the same in the previous and subsequent suits, as in both cases the ground on which the plaintiff came into Court was the alleged settlement of the disputes between him and the defendants by an award made by the arbitrators who were the same in both cases, and the substantive award was the same in both—*Niadar Mal* v. *Shankar Das*, 67 (P.R.) 1889. In a partition suit an order was made appointing an arbitrator to decide "all matters at issue between the parties." The arbitrator with the consent of the parties allocated several items of property to one or other of the parties in severality. Each party was treated as the purchaser of the items allocated to him and therefore liable to pay a certain price to others. The arbitrator filed an incomplete award as no agreement as to certain items of property was arrived at. The plaintiff regarded this incomplete award as binding on the parties and tried to enforce its terms in the partition suit. The defendants, on the other hand, contended that the partition

proceedings formed no part of the award. The contention of the defendant was upheld by the appellate court. Thereupon the plaintiff brought a separate suit to recover moneys payable under the award, *held*, that the cause of action was precisely the same in the previous suit as in the later suit—*Nitya Nand* v. *Lala Karamchand*, I.L.R. (1939) Kar. (P.C.) 211, 1939 A.L.J. 738, 43 C.W.N. 648, A.I.R. 1939 P.C. 128, 50 L.W. 708 (P.C.). Where a decree-holder who had attached in 1913 a book-debt due in 1911 to his julgment-debtor, sold it in auction and purchased it himself in February 1915, and sued in March 1915 to recover it from the defendant who pleaded the bar of limitation, *held* that the suit was barred. The time of pendency of the attachment proceedings would not be deducted under this section, as those proceedings were not based on the same cause of action as the suit to recover the debt—*Rangaswamy* v. *Thangavelu*, 42 Mad. 637.

The time occupied by a trustee *de son tort* in defending a suit brought by the lawful trustee for the recovery of the trust estate cannot be deducted in favour of the trustee *de son tort* in a subsequent suit brought by him for the recovery of the out-of-pocket expenses incurred by him for the management of the trust estate, because the causes of action in the two suits are not the same, the trustee *de son tort* having made no counter-claim as regards those moneys in the previous suit—*Abkan Sahib* v. *Soran Bibi*, 38 Mad. 260.

A proceeding in a Revenue Court for mutation of names and an application for filing an award of arbitrators in respect of title of the parties are two different proceedings founded on separate causes of action, and the time spent in the former proceeding cannot be excluded in computing the period of limitation for the latter proceeding—*Ram Ugrah* v. *Achraj Nath*, 38 All. 85 (91), 13 A.L.J. 1115.

Different reliefs :—Although sub-section (1) does not contain the words "for the same relief" which occur in sub-section (2), still it must be said that for the applicability of sub-section (1) of sec. 14, not only the cause of action should be the same, but the relief sought also should be the same. Therefore, where the same cause of action entitles the plaintiff to several reliefs, and he chooses to sue only for one of them, he cannot claim the benefit of sec. 14 in respect of limitation when he brings the subsequent suit for another relief—*Ramakrishna* v. *Jayarama*, 38 L.W. 595, A.I.R. 1933 Mad. 778 (779), 146 I.C. 361. A contrary view has been taken by the same High Court in *Vengannan* v. *Ramaswami*, I.L.R. (1944) Mad 104, (1943) 1 M L.J. 362, A.I.R. 1943 Mad. 498 on the ground that this section does not say anything about reliefs If the causes of action in the suits are same, this section will apply though reliefs claimed are different. The plaint in a suit on an unregistered mortgage was amended by scoring out the relief to sell the mortgage property and the plaint was returned as the valuation was within the cognizance of the Court of Small Causes, where it was refiled. On the question whether the plaintiff was entitled to the benefit of this section it was held that the question whether the two proceedings were based upon the same cause of action or not could not be decided on the terms of the reliefs claimed in either proceeding and that there was no justification for holding that the proceeding on the Small Cause Court side was based upon some cause of action different from that upon which the proceeding on the regular side was founded—*Dal Singar* v. *Chandi*, 1939 A.L.J. 1075, A.I.R. 1940 All. 145. An application for review of judgment of the High Court is substantially for the same relief as that prayed for in an application for leave to appeal to Supreme Court, the objertive in each case being the reversal of the judgment of the High Court—*Janki* v. *Ramkripal*, 30 Pat. 131, A.I.R. 1951 Pat. 486.

151. Good faith and due diligence:—"Good faith" as used in this section means "exercise of due care and attention"—*Dinkarrao* v. *Ratansi*, I.L.R. (1939) Nag.

422, 1938 N.L.J. 107, A.I.R. 1938 Nag. 300; *Phayagdas* v. *Mt. Indira*, I.L.R. (1947) Nag. 497, 1947 N.L.J. 376, A.I.R. 1948 Nag. 189; *Feroze* v. *Gopal*, 38 P.L.R. 311; *G. S. Pathak* v. *Nisal*, A.I.R. 1955 Bom. 93. It is not diligence but *bona fides* which should be considered when judging the mistake in selecting the forum—*Gobardhan* v. *Special Manager, Court of Wards*, 1941 O.W.N. 713. The burden is on the plaintiff to prove that he acted in good faith in instituting the earlier proceedings—*Kasikananda* v. *Saravana*, I.L.R. (1941) Mad. 347, (1941) 1 M.L.J. 257, A.I.R. 1941 Mad. 319 (F.B.); *Firm Lalchand* v. *Firm Balaram*, A.I.R. 1957 M.P. 95. The establishment of good faith is a pre-requisite condition before the benefit of this section can be allowed. Where the good faith of the party prosecuting his remedy in a different proceeding was open to grave doubt, the benefit of this section cannot be claimed—*Sahib Bux* v. *Deokali*, A.I.R. 1941 A.W.R. (Rev.) 1041. Institution of suits in any of the Courts having jurisdiction does not constitute lack of good faith even if such choice causes inconvenience to the defendant—*Kaluram* v. *Janistha*, 20 Pat.L.T. 898, A.I.R. 1939 Pat. 86. A finding as to good faith or the absence of it is a question of fact—*Raghavayya* v. *Vasudevayya*, (1943) 2 M.L.J. 375, A.I.R. 1944 Mad. 47. When there is absence of charge of lack of good faith, benefit of this section is available—*Mangamma* v. *Maharaja of Pithapuram*, (1944) 1 M.L.J. 205, A.I.R. 1944 Mad. 253. Ultimate result of proceeding cannot determine bonafides of a party—*Janki* v. *Ram Kripal*, 30 Pat. 131 A.I.R. 1951 Pat. 486.

It has been held in *Ramjiwan* v. *Chand Mal*, 10 All. 587 (598) that this section contemplates only those cases where the party had been misled into litigating in a wrong Court through *bona fide mistake of fact* as distinguished from *ignorance of law*. But in a later Full Bench case of the same High Court (*Brij Mohun* v. *Mannu*, 19 All. 348) it has been laid down that a *bona fide* mistake of *law* may be a sufficient foundation for the grant of indulgence under this section. The Patna High Court holds that proceedings coming under section 14 must be such as are recognised by law as legal in their initiation, though a party has carried the proceedings to the wrong Court. But a party who is proceeding in *ignorance of law* cannot be said to proceed with due diligence or in good faith. Thus, where the first proceeding was one which was not recognised by law, no deduction of time spent on such proceeding can be made —*Sheo Dhari* v. *Gupteswar*, 78 I.C. 482, A.I.R. 1924 Pat. 716. Ignorance of or inattention to the law by persons who should be well aware of its provisions cannot be regarded as a *bona fide* mistake— *Deputy Commissioner* v. *Devi Ditta*, 34 P.L.R. 780, A.I.R. 1933 Lah. 589, 144 I.C. 690; *Birendra* v. *Jageshwar*, 1940 O.W.N. 818, 1940 O.A. 1106.

But ignorance of law or the ill-advice of a pleader does not necessarily or *prima facie* establish a want of good faith. Therefore where a plaintiff instituted a suit in a wrong Court, engaged a pleader and took the usual steps which a litigant is compelled to adopt, it was held that although it was a stupid though not unaccountable blunder, still as it was made *bona fide*, the plaintiff was entitled to deduct the time under this section—*Ram Ravji* v. *Pralhabdas*, 20 Bom. 133. In *Achal Das* v. *Sundaram*, 1940 A.M.L.J. 120 it has been held that it would be most vicious principle to decide that for the failure of a counsel to cite an important authority, the party should be held to have not prosecuted the proceeding with due diligence. Proceeding in a wrong Court through the *bona fide* mistake of the counsel may be excused under this section, where the party has throughout prosecuted his case with due diligence—*Kishan Lal* v. *Tika*, 49 All. 555, A.I.R. 1927 All. 719, 101 I.C. 750 and specially where the wrong remedy adopted is considered by one of the courts to be the proper one—*Birendra* v. *Jageshwar*, 1940 O.W.N. 818, 1940 O.A. 1106. Although a party acting on the advice of his advocate may be presumed to act in good faith if the advocate himself does not

act in good faith the party cannot rely upon that advice as establishing his own good faith. Whether an advocate has shown due care and attention is a question of fact to be decided on the evidence adduced in any particular case—*Raghavayya* v. *Vasudevayya*, (1943) 2 M.L.J. 375, A.I.R. 1944 Mad. 47. But the fact that a litigant acted on the mistaken advice of a pleader will not entitle him to get the benefit of the provisions of this section, if the error made is so patent that it could have been avoided with the exercise of due care—*Ram Sahu* v. *Imdad*, 22 O.C. 39, 51 I.C. 590. Where the decree-holder's pleader without caring to read the recitals in the decree referred only to the heading of the decree and advised the decree-holder to file his application in a wrong court, and the court returned it for presentation to proper court, the plaintiff is not entitled to the benefit of this section as the negligent advice on the part of the pleader does not amount to good faith—*Sam Narain* v. *Raghubans*, A.I.R. 1952 Pat. 4. A litigant who takes action without going to the trouble and expense of taking legal advice cannot be said to have exercised due diligence and must take the consequences if he makes mistake. A litigant who consults a legal practitioner of inferior standing and little experience is in no better position. But when the advice is that of a pleader of the Bar, and is given after due deliberation and is followed, the Court cannot, simply because the advice was utterly wrong, hold that the litigant has not exercised due care and diligence—*Fuzhur Ali* v. *Sahib Nur*, 254 P.L.R. 1913, 20 I.C. 3.

Where the law gives no jurisdiction to a Court or officer in a certain matter, there can be no *bona fide mistakes* as to its or his jurisdiction in relation to that matter, and the time spent in a proceeding before such Court cannot be deducted. Thus, under the rules of the Bombay Government, a Collector executing a decree has no jurisdiction to set aside a sale made by him, and a party who makes an application to him to set aside a sale cannot be allowed to deduct the time spent in so doing in computing the period of limitation for a subsequent application to the proper Civil Court—*Narayan* v. *Rasulkhan*, 23 Bom. 531. A proceeding for execution of a decree taken erroneously but *bona fide* and with due diligence before a Court, which had no jurisdiction but which the decree-holder believed to have jurisdiction, is a *bona fide* one within the meaning of this section, and the time occupied in such proceeding will be deducted—*Jahar* v. *Kamini*, 28 Cal. 238; *Hiralal* v. *Badridas*, 2 All. 792 (P.C.). See also *Pandu* v. *Jamna Das*, 26 Bom.L.R. 470, A.I.R. 1925 Bom. 113, 85 I.C. 778. But a proceeding contrary to a clearly expressed provision of law cannot be said to be prosecuted in good faith. Where the High Court in Rangoon has repeatedly said that it does not ordinarily interfere in revision with orders of removal of attachment made under O. 21, r. 60, C. P. Code, and that the party should file a suit, but the party filed a revision petition on the advice of his counsel, and after the petition was dismissed, subsequently filed a suit under O. 21, r. 63, C. P. Code *held*, that the time taken up during revision could not be excluded—*S. R. M. M. A. Firm* v. *Maung Po Saung*, 7 Rang. 466, A.I.R. 1929 Rang. 297 (298), 120 I.C. 236; *Tun U* v. *Chettyar Firm*, 8 Bur.L.T. 93, 27 I.C. 829; *Hasanar* v. *Kandan*, A.I.R. 1938 Rang. 318, 177 I.C. 923. The Madras High Court has taken a contrary view on the ground that revision petitions in such cases are entertained by that High Court; *Venkata Swami* v. *Sura Bai*, (1943) 2 M.L.J. 41, A.I.R. 1943 Mad. 633; *Kesavan* v. *Theva*, A.I.R. 1938 Mad. 41, 175 I.C. 767. Similarly, where a party against whom an order has been made under O. 21, r. 99, C. P. Code does not file a suit under O. 21, r. 103, but chooses to apply for revision of such order, he cannot get an exclusion of the time taken up in the revision proceedings, because it could not be said that the proceddings were taken in good faith. as the proceedings were contrary to the express provision of the law—*Narayan* v. *Hari Ganesh*, 32 Bom.L.R. 1186, A.I.R. 1930 Bom. 505 (506), 128 I.C. 621. When in proceedings in execution of a decree for rateable distribution, payment was wrongly made to the defendant, and the plaintiff instead of prosecuting a suit, filed a revision

petition in the High Court against the order of wrongful distribution, *held* that the revision petition was not prosecuted in good faith because no revision could lie while there was another remedy by way of suit; and he was not entitled, in a subsequent suit under section 73 (2) of the C. P. Code, to deduct the time taken by the revision petition—*Baijnath* v. *Ramadoss*, 39 Mad. 62 (66), 26 I.C. 219. Where a person recklessly disregards the provisions of Or. 21, r. 16 of the C. P. Code and starts to execute a decree without any authority from the Court which passed it, is not entitled to deduct the time spent in that proceeding—*Brijmohandas* v. *Sadasiva*, 41 Bom.L.R. 1190, A.I R. 1940 Bom. 5. Where a person in ignorance of the provisions of the Agriculturists Relief Act relating to the special forum prescribed by the Act, files a suit in a wrong Court and on its being returned files it in proper Court, the time thus spent can be deducted as the plaintiff should be deemed to have been prosecuting with due diligence and in good faith—*Ram Shankar* v. *Bechan*, 1940 O.W.N. 657, A.I.R. 1940 Oudh 412. But where there is no clear indication in the law as to the proper procedure to be followed, the person carrying on abortive proceedings, is entitled to claim the benefit of the sec. 14—(*M. C. Firm* v. *S. V. Chettyar*, A.I.R. 1936 Rang. 184, 162 I.C. 865, 7 Rang. 466 distinguished).

In execution of a decree a sum in excess was realised from the defendant. He filed a *suit* to recover back the amount but it was dismissed on the ground that no suit could lie, and the proper remedy was to file an *application* under section 47, C. P. Code. Thereupon he made an application to obtain refund of the money recovered in excess. *Held* that in computing the period of limitation for the application the time taken up in prosecuting the suit ought to be deducted, as the suit was brought with due diligence under a *bona fide* mistake—*Gampatrao* v. *Anandrao*, 44 Bom. 97.

This section has no application when *bad faith* is established. Where the plaintiff fraudulently obtained an *ex parte* decree for rent, brought the holding to sale, but the sale was set aside at the instance of the defendant, and thereupon the plaintiffs brought a second suit for rent, *held* that limitation should be computed from the date of the institution of the suit, and that the cause of action could not be deemed to have been in suspense during the pendency of the prior proceeding, as the plaintiff cannot take advantage of his own fraud—*Narpat Singh* v. *Mahidhar*, 8 Pat. 851, A.I.R. 1930 Pat. 54 (57, 58), 122 I.C. 241.

This section has no application when the first suit has failed owing to the laches and negligence of the plaintiff or his lawyer. Thus where the plaintiff brought a suit without asking for leave to sue giving jurisdiction to the Court to hear the suit, it can not be said that he was prosecuting the suit in good faith—*Ghisulal* v. *Gumbhirmull*, 62 Cal. 510, 39 C.W.N. 606, A.I.R. 1938 Cal. 377; or without giving proper notice to the official receiver, a party to the suit—*Amar* v. *Basant*, 43 P.L.R. 530, A.I.R. 1941 Lah. 256. The plaintiff filed a suit for damages for malicious prosecution against a Magistrate. The defendant pleaded want of notice under section 80, C. P. Code. The plaintiff went to trial on this issue and his suit was dismissed. Thereafter the plaintiff gave the required notice and again brought a suit and claimed to deduct the time spent in the previous suit. *Held*, that in view of the well known and old standing procedure requiring previous notice and the clear words of section 80, C. P. Code, the plaintiff could not be said to have acted in good faith in the previous suit, and was therefore not entitled to an exemption under this section—*Manghammal* v. *Fernandez*, 5 S.L.R. 181, 13 I.C. 260. But where a plaintiff withdraws the suit with leave of Court to sue afresh on ground that it was filed within two months of service of notice under sec. 80, C. P. Code he is entitled to exclude the period of pendency of suit in

computing limitation for fresh suit—*G. G. in Council* v. *Gouri*, 28 Pat. 621, A.I.R. 1951 Pat. 382.

Where a plaint was returned by the Sub-judge to be filed in the Munsiff's Court on the ground that the suit had been overvalued, and there was nothing to show want of *bona fides* in the plaintiff, the time spent in the Sub-Judge's Court was deducted—*Obhoy* v. *Kritartha*, 7 Cal. 284; *Brij Mohan* v. *Mannu Bibi*, 19 All. 348 (F.B.). Similarly, where a plaint was returned by the Court on the ground that the plaintiff had under-valued his claim, and there was nothing to show that the under-valuation was deliberate, reckless or *mala fide*, it was held that the time taken up in the wrong Court should be excluded—*Ramdayal* v. *Saraju*, 17 O.C. 210, 25 I.C. 403; *Seshamma* v. *Shankar*, 12 Mad. 1; *Rahatulla* v. *Ibadulla*, 18 I.C. 92; *Bhawani* v. *Industrial Bank*, 50 I.C. 645, 70 P.R. 1919, 31 P.L.R. 1919; *Chandi* v. *Jankiram*, 1 B.L.R.S.N. 12. Where a suit was rightly valued and was presented to the proper Court, but the Court mistakenly believing the suit to be under-valued returned the plaint, and then the plaintiff was driven from Court to Court for a period of 6 months after which he could file his suit again in the right Court, *held* that he should be given the benefit of this section, as there was no want of good faith or diligence on his part, and he ought not to suffer owing to the mistake of the Court —*Raghubar* v. *Kanhaiya*, 12 O.L.J. 297, 2 O.W.N. 383, A.I.R. 1925 Oudh 493, 89 I.C. 443.

Where a suit on a promisory note was originally filed in the Civil Court as an ordinary money suit and not as a Small Cause Court suit within the period of limitation, but the plaint was returned after that period and on the very next day it was filed in the Small Cause Court, it was held that the suit was not barred by limitation—*Gopal* v. *Bepin*, A.I.R. 1955 Cal. 353, 58 C.W.N. 1047.

A claim cannot be said to be not *bona fide* when two Courts concur in decreeing the claim, although the final Court of appeal holds the decree to be erroneous. Therefore the time occupied in the previous suit in which that claim was preferred, from the date of institution of the suit up to the date of the decree in second appeal, should be deducted—*Dinanath* v. *Jadu Nath*, 29 C.W.N. 202, A.I.R. 1925 Cal. 456, 86 I.C. 130.

A suit was brought in the Presidency Court of Small Causes against defendants not resident within the local limits of its jurisdiction, with the leave of the *Registrar* of the Court, who exercised the powers of the Court. Suddenly it was ruled by the High Court that the leave of the Registrar was not the leave of the Court. The plaintiff's suit was thereupon rejected by the Small Cause Court. Subsequently, he instituted a fresh suit after obtaining the leave of the *Court*, and claimed to deduct the period occupied by the first suit. It was held that he was so entitled. The fact that he instituted the first suit with the leave of the *Registrar* instead of with the leave of the Court did not amount to any negligence or want of *bona fides* on his part, because up till then the Registrar had been for many years exercising the powers of the Court to grant such leave under a Rule passed by the High Court. The former suit was therefore prosecuted in good faith and with due diligence within the meaning of this section—*Subbarau* v. *Yagana*, 19 Mad. 90.

Where the decree on the face of it showed that it was passed by the Court of the Subordinate Judge, and there had been two previous execution applications both in the Court of the Subordinate Judge, and some money also had been realised, and the heading of the decree showed that it was one of the Subordinate Judge's Court, but still the decree-holder filed the next execution application in the Munsiff's Court, and subsequently re-filed it in the proper Court after the limitation period.

held that the decree-holder was not entitled to the protection of sec. 14 as such an act cannot be said to have been done with due care and attention—*Fazlul* v. *Halaluddin*, 8 P.L.T. 561, A.I.R. 1927 Pat. 256, 101 I.C. 674. So also, where a decree in the nature of a foreclosure decree is passed by an Additional Subordinate Judge and the application for making it final is made to another of co-ordinate jurisdiction, the applicant is not entitled to the benefit of this section as it is a case of gross negligence; *Ram Dutt* v. *Mahpal*, 1938 O.W.N. 360, A.I.R. 1938 Oudh. 112. Where an appellant should have known that the High Court and not the District Court had jurisdiction to hear an appeal, and yet persisted in appealing to the District Court, *held* that there was no good faith on his part, and therefore the Court refused to excuse the delay when he afterwards filed his appeal in the High Court—*Daudbhai* v *Emmabai*, 28 Bom. 235.

A plaintiff cannot be said to have prosecuted the previous suit with due diligence when it was filed almost on the last day of limitation—*Benomali* v. *Fakir*, 46 C.L.J. 452, A I R. 1928 Cal. 46 (47); a contrary view has been taken in *Sharifjan* v. *Vishnupriya*, I.L.R. (1949) Nag. 743, 1949 N.L.J. 586, A I R. 1950 Nag. 37 where it has been held that the law allows a particular period of limitation and the plaintiff is allowed to file his claim on the last day; or when owing to his own negligence the suit was so framed that the Court could not try it; as for instance, where he omitted to set out certain boundaries of the land in the plaint—*Chunder* v. *Bissessuree*, 6 W.R. 184 (F.B.); or where he neglected to register a compulsorily registrable certificate and to produce it in Court—*Bai Jumna* v. *Bai Ichha*, 10 Bom. 604.

The plaintiff brought a suit in a wrong Court on 20-5-1913, and that Court ordered the return of the plaint to the proper Court. But the plaintiff refused to take it back and in 1914 filed a revision against the order to the High Court, which was dismissed on March 16, 1915. On June 15, 1915, the plaintiff having applied for return of the plaint, it was returned to him on June 30 and he filed it on the same day in the proper Court. *Held* that the plaintiff was not entitled to a deduction of the time between May 20, 1913 and June 30, 1915, in as much as he could not be deemed to have been prosecuting the case with due diligence in view of the fact that he waited for three months after the dismissal of the revision petition before he applied for the return of the plaint—*Hemeda* v. *Fatima*, 16 A.L.J. 429, 45 I.C. 991.

A plaint was rejected on the ground of limitation as the plaintiff omitted to set out certain payments of interest by the defendants, which payments if so set out would have saved the suit from being barred by limitation. Thereupon the plaintiff brought a fresh suit setting out all those payments. It was held that the period of pendency of the first suit was not to be deducted as the omission of the plaintiff in that suit to set out the facts of payment amounted to a want of due diligence—*Nobin* v. *Rajomoyi*, 11 Cal. 264.

Where each of two plaintiffs came into Court originally to sue separately in respect of a contract which gave them a *joint* but not a *several* right, and this error was pointed out to them and they were given every opportunity of rectifying it, but they elected to proceed with their suits as then framed, and by the time that those suits were dismissed, the period of limitation for a fresh suit had expired, it was held that in these circumstances the plaintiffs did not exhibit that degree of diligence which would entitle them to the benefit of this section—*Kalu* v. *Mehru*, 41 P.R. 1916, 32 I.C. 497.

The plaintiffs applied for execution of their decree upon which there was objection preferred by the judgment-debtor under sec. 47, C. P. C. and the execution proceedings started by the plaintiff was held to be not maintainable in view of the order

passed by the Court recording full satisfaction. The order was appealed against and there was a further appeal by the plaintiffs to the High Court, and the order against the plaintiffs holding that the execution proceedings were not maintainable was affirmed. The plaintiffs then brought a suit for rectification of the petition of adjustment. The suit to which the provisions of Art. 96 was applicable was filed out of time, and was *prima facie* barred by limitation, unless sec. 14 could be invoked in aid of the plaintiffs. It was held that the plaintiffs were entitled to invoke the aid of the provisions of sec. 14 for saving the bar of limitation—*Abdul Sattar* v. *Abdul Rusan*, A.I.R. 1936 Cal. 400, 40 C.W.N. 914, 165 I.C. 756.

152. Defect of jurisdiction:—The words "defect of jurisdiction" mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken, and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie *in any Court*—*Moti Singh* v. *Maghan*, 22 P.R. 1912, 244 P.L.R. 1911, 11 I.C. 880; *Govinda* v. *Krishna*, A.I.R. 1955 Trav. Co. 51. The benefit of this section can be availed of only where there is initial want of jurisdiction—*Hariprasad* v. *Babulal*, A.I.R. 1948 Cal. 226. The Allahabad High Court has taken a contrary view and has held that want of jurisdiction may arise at any stage of the suit and there is nothing in this section that the defect of jurisdiction must be in existence at the very institution of the suit—*Dal Singar* v. *Chandi*, 1939 A.L.J. 1075, A.I.R. 1940 All. 145. In order to get benefit under this section the applicant need not show that the Court in which the proceeding was taken has actually refused to give relief on the ground of want of jurisdiction. If the Court in fact has no jurisdiction but assumes jurisliction —either acting from a wrong view or without applying its mind at all to the question— this section applies—*Prasanna* v. *Kamrup Co-operative Land Mortgage Bank Ltd.*, 48 C.W.N. 821. It is not necessary that there should be a formal order of the Court in which the proceedings were prosecuted dismissing the same on the ground that it had no jurisdiction. This section does not require any order of the Court which had no jurisdiction recognising the fact. All it requires is that the Court which has to decide the question of limitation must find that the other Court was unable to entertain the proceeding because it had no jurisdiction—*Vaithilinga* v. *Narayanaswami*, (1943) 1 M.L.J. 323, A.I.R. 1943 Mad. 457. This section does not apply when there is no want of jurisdiction and when the competent tribunal refuses to interfere with the order of a lower Court—*Sheo Rajdhari* v. *Kameshwar*, 23 Pat.L.T. 263, A.I.R. 1942 Pat. 378, 200 I.C. 409 or when the Court has got to go into the merits before a case can be dismissed, the defect cannot be said to be defect of jurisdiction—*Bhai Jaikishen* v. *Peoples Bank*, A.I.R. 1944 Lah. 186, 217 I.C. 65 (F.B.); *Shanti* v. *Daulat*, 50 P.L.R. 185, A.I.R. 1948 E.P. 68; *Rajabapayya* v. *Basavayya*, (1942) 2 M.L.J. 515, 1942 M.W.N. 820, A.I.R. 1942 Mad. 713; *Sri Madan Mohan* v. *Bejoyabati*, A.I.R. 1954 Cal. 202. It has been held in *Janki* v. *Ram Kripal*, 30 Pat. 131, A.I.R. 1951 Pat. 486 that where an application for leave to appeal to Supreme Court is rejected on the merits on the ground that the petitioner had failed to satisfy the conditions precedent for granting of such leave, it can be said that the Court was unable to entertain it from a defect of jurisdiction.

An application to the Court which passed the decree, for the transfer of the decree to another Court for execution was dismissed on the ground of limitation besides other grounds. It was held that in computing the period of limitation for a subsequent application to the same Court for attachment of the judgment-debtor's property, the time between the filing of the previous application and its dismissal could not be deducted under this section, because the previous application was dismissed on grounds other than defect of jurisdiction, and also because the relief sought in the second application was not the same as that sought in the first—*Theerthaswamigal* v. *Venkata-*

rama, 33 M.L.J. 682, 45 I.C. 460. Where a person misconceived his remedy and instead of proceeding by way of an application to set aside an execution sale, brought a suit which was eventually dismissed, the time taken in prosecuting the suit (and an appeal therefrom) cannot be deducted under this section in computing the period of limitation for an application, because the failure of the applicant in the prosecution of his claim by suit cannot be attributed to anything connected with the jurisdiction of the Court—*Ganapathi* v. *Krishnamachari*, 43 M.L.J. 184, 70 I.C. 743, A.I.R. 1922 Mad. 417; *Murugesa* v. *Jataram*, 23 Mad. 621 or where a person instead of filing a suit under Or. 21 r. 103 of the C. P. Code files a petition for revision in High Court, the time spent in the unsuccessful revision petition cannot be excluded as the refusal of the High Court to interfere is not due to want of jurisdiction—*Radha* v. *Sriniwas*, 23 Pat. 14, A.I.R. 1944 Pat. 225. Where a Court rejects a proceeding not because it is unable to entertain it on account of defect of jurisdiction but because the proceeding is utterly wrong and misguided as to the liability of the defendant, this section does not apply—*Maneklal* v. *Suryapur Mills Co., Ld.*, 52 Bom. 477, A.I.R. 1928 Bom. 252 (257). So also, where the relief asked for is found by the Court to have been misconceived either because it is not warranted by the facts mentioned by them or because the facts stated in the plaint or petition do not disclose a good and complete cause of action and the plaint or petition is consequently dismissed or rejected, the provisions of this section cannot be applied—*Bhai Jaikishen* v. *Peoples Bank*, A.I.R. 1944 Lah. 186, 217 I.C. 65 (F.B.).

Where the Court in which the wrong proceeding was instituted *had* jurisdiction, but erroneously held that it had no jurisdiction to grant the relief claimed, the time spent in the Court may be deducted under this section—*Abdulla* v. *Kalumpurath*, 33 M.L.J. 463, 43 I.C. 6. Where a Court has jurisdiction to try a suit, but wrongly holds that it has no jurisdiction to try the suit and returns the plaint for presentation to 'proper Court,' the decision that it has no jurisdiction though right or wrong, is binding on the parties if it is not set aside in appeal or revision. The plaintiff who files the suit in the 'proper Court' on such return of plaint is entitled under sec. 14 to deduct the period spent in prosecuting the suit in the Court in which it was first presented—*Firm Motilal Madanlal* v. *Firm Musa Md. Adenwala*, A.I.R. 1937 Nag. 69. The same principle will apply also in execution proceedings and if the Court erroneously decides its inability to entertain the question, this section will apply. In such a case it is not open to the second Court to say that there was no want of jurisdiction in the first Court—*Abhoy* v. *Gopi*, 76 C.L.J. 183, A.I.R. 1943 Cal. 460. Where the plaintiff chooses to withdraw his suit under Or. 23, r. 1, C. P. C., he is not entitled to the benefit of sec. 14, Limitation Act, in a subsequent suit founded upon the same cause of action, because it cannot be considered that the previous suit failed on account of a defect of jurisdiction or other cause of a like nature—*Ram Manohar* v. *Baboo Singh*, A.I.R. 1937 All. 124. But where the Court in which the previous suit was rightly instituted declined to entertain the suit not because it had no jurisdiction, but because that Court (Union Court) thought that it was desirable that the suit should be conducted in a Civil Court in which the question of law would be properly decided, *held* that this section did not apply—*Bonomali* v. *Fakir Chand*, 46 C.L.J. 452, A.I.R. 1928 Cal. 46, 106 I.C. 324.

Where a suit which was triable by the ordinary Court was instituted in a Small Cause Court, but that Court rejected it for want of jurisdiction, the plaintiff was entitled to a deduction of the time during which the suit was pending in the Small Cause Court—*Kullayappa* v. *Lakshmipathi*, 12 Mad. 467 (471). Conversely, where the plaintiff filed a suit in the District Munsiff's Court, but the suit was dismissed as being cognizable by the Court of Small Causes, it was held that the period of

pendency of the first suit in the District Munsiff's Court should be deducted under this section—*Saminadha* v. *Samban*, 16 Mad. 274. If a suit which is triable by the Revenue Court is brought in a Civil Court, and the latter returns the plaint for presentation to the proper (Revenue) Court, this section applies—*Ram Pati* v. *Phool Singh*, 1932 A.L.J. 421, A.I.R. 1932 All. 377 (378), 138 I.C. 108. Where a suit was instituted in the Presidency Small Cause Court against defendants not resident within the jurisdiction, with the leave of the Registrar, and it was subsequently ruled that the *Court* and not the *Registrar* was empowered to give such leave, and the suit having been dismissed, a similar suit was then instituted, the leave of the Judge having been first obtained, it was held that this section applied and the plaintiff was entitled to deduct the time during which the first suit was pending, as the Court had no jurisdiction to entertain that suit until its leave was obtained for proceeding against defendants not resident within the Court's jurisdiction—*Subbarau* v. *Yagana*, 19 Mad. 90. So also, a plaint was filed in the High Court with leave under clause 12 of the Charter, such leave having been obtained from the Registrar. Subsequently in another case it was decided that the leave of the Registrar was bad in law. Thereupon the Court rejected the plaint and ordered it to be returned to the plaintiff, who afterwards brought a fresh suit on the same cause of action. *Held* that section 14 should be applied in calculating the period for the second suit—*Ramdeo* v. *Ganesh*, 35 Cal. 924. An application was made before a Sub-Judge's Court for execution of a decree passed by itself, but that Court after executing the decree in part transferred it to the Presidency Small Cause Court which proceeded to execute it. Afterwards it was discovered that the transfer of the decree was a mistake as the amount exceeded Rs. 2,000, and the decree was returned to the Sub-Judge's Court. A fresh application for execution was thereafter made. *Held* that the time during which the decree was in the Presidency Small Cause Court should be deducted in computing the period of limitation for the second application—*Barrow* v. *Javerchand*, 19 Mad. 67. S obtained a mortgage decree against P in March 1887, in the Hajipore Munsiff's Court. On the 9th September he applied for execution and on 7th November 1887 the mortgaged property was sold by the Hajipore Court. On appeal the High Court set aside the sale on the 2nd September 1890 on the ground that the Hajipore Court had no jurisdiction. On the 6th September 1890 S applied to the Hajipore Court to transfer the decree to the Muzaffarpur Court, and on the 19th December 1890, S applied for execution to the Mazaffarpur Court. *Held* that the decree-holder was entitled to a deduction of all the time occupied in executing the decree in the Hajipore Court, from 9th September 1887 to the 2nd September 1890, if not to the 6th September 1890—*Rajbullubh* v. *Joy Kishen*, 20 Cal. 29. Where, however, the plaintiff deliberately undervalues his suit and the plaint is refiled in the proper Court after amendment, the plaintiff is not entitled to get the benefit of this section; *Chandrayya* v. *Seethanna*, (1940) 1 M.L.J. 590, A.I.R. 1940 Mad. 689; *Ramchandra* v. *Mt. Khodaijatul*, 24 Pat. 462, 26 Pat. L.T. 245, A.I.R. 1945 Pat. 369. Where a defendant is found after the issue of summons in a suit to have been dead before the filing of the plaint, the Court has no jurisdiction to decide the suit against him, and the plaintiff may have a deduction of the time occupied in that suit when he subsequently sues the defendant's representatives—*Mohun Chunder* v. *Azam Gazee*, 12 W.R. 45.

Where a plaintiff, relying upon the defendant's representation as to the latter's place of residence, brought his suit in a Court which had no jurisdiction, the time of the pendency of the suit in such Court could be properly excluded—*Banee Madhab* v. *Bipro Dass*, 15 W.R. 69. Where a plaintiff files a suit on a promissory note in a Court within the jurisdiction of which the defendant was employed, and where the money was borrowed and the suit note was actually executed and the plaintiff had no reason to

think that the defendant had his residence elsewhere, but it is found as a fact that he lived elsewhere at the time of filing the suit and that the Court in which a suit was filed had no jurisdiction, the plaintiff would be entitled to exclude the time taken in prosecuting the suit in the wrong Court—*Abdulla* v. *Tribhuan*, 16 Luck. 402, A.I.R. 1941 Oudh 161, 1940 O.W.N. 1212.

The plaintiff was allowed under this section to deduct the period during which he was *bona fide* seeking redress from the Revenue Court which had no jurisdiction to deal with the question raised by him—*Girijanath* v. *Ram Narain*, 20 Cal. 264.

A suit for recovery of price of bricks was brought in the Munsiff's Court which passed an *ex parte* decree; the *ex parte* decree was set aside and the suit was reheard. The Court then being of opinion that the suit was cognizable by the Small Cause Court, returned the plaint for re-presentation to that Court. It was held that the plainiff was entitled to the benefit of this section—*Ford* v. *Meyer*, 15 A.L.J. 573, 40 I.C. 447.

153. Other cause of a like nature:—The expression "defect of a like nature" means and connotes something which is quite distinct from defect of jurisdiction. What is a 'defect of a like nature' depends upon the facts of each case—*Maneklal* v. *Shivlal*, I.L.R. (1939) Bom. 9, 40 Bom.L.R. 1169, A.I.R. 1939 Bom. 26. Misjoinder of causes of action was held to be a cause of a like nature with want of jurisdiction—*Deo Prasad* v. *Pertab*, 10 Cal. 86, followed in *Mullick Kefait* v. *Sheo Pershad*, 23 Cal. 821; *Mathura Singh* v. *Bhawani*, 22 All. 248 (F.B.); *Venkiti* v. *Murugappa*, 20 Mad. 48 (F.B.); *Assan* v. *Pathumma*, 22 Mad. 494 (500); *Venkataratnam* v. *Ramaraju*, 24 Mad. 361; *Narasimma* v. *Muttayan*, 13 Mad. 451. The contrary rulings in *Ram Sabhag* v. *Bobin*, 2 All. 622, *India Publishers* v. *Aldridge*, 35 Cal. 728 and *Tirtha Sami* v. *Sheshagiri*, 17 Mad. 299 are no longer good law in view of Explanation III added to this section. The words "or other cause of a like nature" should be liberally construed. They must be construed *ejusdem generis* with defect of jurisdiction, that is to say, the defect must be of such a character as to make it impossible for the Court to entertain the suit or application and to decide it on merits—*Janki* v. *Ram Kripal*, 30 Pat. 131, A.I.R. 1951 Pat. 486.

Misjoinder of *parties* must also be deemed to be a cause of like nature with defect of jurisdiction. See Explanation III, and *Mathura Singh* v. *Bhawani*, 22 All. 248 (F.B.). The cases of *Jema* v. *Ahmed*, 12 All. 207, *India Publishers* v. *Aldrige*, 35 Cal. 728, *Krishnaji* v. *Vithal*, 12 Bom. 625, in which the contrary view was held, must be deemed as overruled by Explanation III.

The word 'misjoinder' in Explanation III includes 'non-joinder'. For the purposes of this section there is no distinction between misjoinder and non-joinder. They are only variations of the same defect. Therefore, where one of several decree-holders applied to execute the decree without impleading the other decree-holders as parties, and the application was dismissed, whereupon a subsequent application for execution was properly presented, *held* that the time occupied in prosecuting the earlier application in good faith should be deducted under this section—*Seth Ibrahim* v. *Firm of Ghulam Husain*, 15 S.L.R. 11, 62 I.C. 507.

A misconception of the plaintiff as to the Court in which he ought to sue, coupled with the action of the Court in which he instituted the suit on such misconception, in admitting the suit, was held, under the special circumstances of the case, to be a cause similar to defect of jurisdiction—*Seth Kahandas* v. *Dahiabhai*, 3 Bom. 182. See this case cited in Note 149, *ante*.

The words "or other cause" refer to cases where the action of the Court is prevented by some unavoidable circumstance over which no one has any control, or something incidental to the Court itself and not due to any negligence of the plaintiff —*Chunder Madhub* v. *Bissessuree*, 6 W.R. 184; *Raja of Faridkote* v. *Sardar Gurdayal*, 34 P.R. 1898. Therefore, this section does not apply where the previous suit was dismissed for plaintiff's default or negligence in prosecuting it—*Chintaman* v. *Kisan*, 25 N.L.R. 99, A.I.R. 1929 Nag. 219, 116 I.C. 509 or for misconception of remedy—*Ramanand* v. *Gaya*, 27 Pat. 137; *Chettiar* v. *Mudaliar*, (1955) 1 M.L.J. 414, A.I.R. 1955 Mad. 288. The plaintiff was not entitled to deduct the time during which she was engaged in prosecuting the first suit which was dismissed owing to the non-production of a certificate due to her own laches—*Bai Jumna* v. *Bai Ichha*, 10 Bom. 604; nor can the plaintiff claim exemption when his first suit was dismissed on account of failure to give notice under sec. 80, C. P. Code—*Manghanmal* v. *Fernandez*, 5 S.L.R. 181, 13 I.C. 260. The Patna High Court has held that where good faith and due diligence are given a cause is not prevented from being of a like nature to defect of jurisdiction, merely because it was in the plaintiff's own power to avoid or resulted from his own act or from a bonafide mistake of law or procedure which prevented the Court *in limini* from entertaining the suit—*Lal Bihari* v. *Bani*, 30 Pat.L.T. 201, A.I.R. 1949 Pat. 293 (F.B.).

Where a suit was dismissed as premature on the ground that the cause of action had not accrued, the section will apply as it was a "defect of like nature"—*Maneklal* v. *Shivlal*, I.L.R. (1939) Bom. 9, 40 Bom.L.R. 1169, A.I.R. 1939 Bom. 26. So also, where the jurisdiction of a Court to entertain a suit depends upon leave being granted by that Court, and leave is so granted, the subsequent recalling of the leave brings the case within the words "other cause of a like nature"—*Kaluram* v. *Janistha*, 20 Pat.L.T. 893, A.I.R. 1939 Pat. 86, 182 I.C. 632. The expression "for other cause of a like nature" includes dismissal of a suit by partners in firm name on account of non-registration of firm; *Rochaldas* v. *Uttamchand*, I.L.R. (1945) Kar. 293, A.I.R. 1946 Sind 14. In *Fatechand* v. *Wasudeo*, I.L.R. (1947) Nag. 477, 1947 N.L.J. 417 it has been held that even if the failure of arbitration proceedings may not be due to defect of jurisdiction nevertheless the section would apply on the ground that there was a 'cause of like nature' to a defect of jurisdiction.

This section applied where the Court in which the previous proceeding was instituted was unable to entertain it on account of the Court's defect of jurisdiction or some cause of like nature, that is, on some such technical ground, and therefore rejected it. This section does not apply where the previous proceeding was dismissed after adjudication *on its merits*, and not because the Court was unable to entertain it—*Issureenund* v. *Parbutty*, 3 W.R. 13; *Ardha Chandra* v. *Matangini*, 23 Cal. 325 (327); *Abbas Ali* v. *Yusuf Ali*, 28 P.L.R. 158, A.I.R. 1927 Lah. 186; *Sat Bhirai* v. *Ahmed*, 28 P.L.R. 403, 104 I.C. 726, A.I.R. 1927 Lah. 786; *Rajani Bandhu* v. *Kali Prasanna*, A.I.R. 1924 Cal. 419, 74 I.C. 279; *Bhai Jaikishen* v. *Peoples Bank*, A.I.R. 1944 Lah. 186, 217 I.C. 65 (F.B.), *Shanti* v. *Daulat*, 50 P.L.R. 185, A.I.R. 1948 E.P. 68; *Rajabapayya* v. *Basavayya*, (1942) 2 M.L.J. 515, 1942 M.W.N. 820, A.I.R. 1942 Mad. 713. This section will entitle a plaintiff to claim exclusion of time when his previous suit was dismissed without any trial and simply on the case set up in the plaint. Where the previous suit was dismissed on the findings arrived at by the Court, it cannot be said that the suit was dismissed without trial, and consequently this section cannot apply—*Narayanan* v. *Kannammal*, 28 Mad. 338 (341, 342). Therefore, in calculating the period of limitation prescribed for a suit brought by the adopted son to set aside an alienation made by his adoptive mother, the period of pendency of suits brought by or against him to prove or disprove the validity of his adoption will not be deducted,

because such suits were properly brought and adjudged on their merits—*Kishen* v. *Muddun*, 5 W.R. 32.

Where the previous suit was dismissed not on any technical ground of misjoinder of parties or of causes of action but on the ground that having regard to the frame of the suit no cause of action had been established against the defendants, *held* that this section would not apply and the time taken up by the previous suit would not be deducted—*Commercial Bank* v. *Allavoodeen*, 23 Mad. 583 (590).

Where a previous application for execution of a decree was dismissed on the ground that it was superseded by the decree in appeal it cannot be contended that the execution failed on account of a defect of jurisdiction of the Court or of some cause of a like nature—*Anis* v. *Daughter of Jamunabai*, A.I.R. 1949 Pat. 117.

Where an application for revision of an order passed under O. 21, r. 99, C. P. Code was dismissed by the High Court on the ground that the proper remedy was not by way of revision petition but by way of a suit under O. 21, r. 103, it could not be said that the High Court was unable to entertain the application through defect of jurisdiction or other cause of a like nature—*Narayan* v. *Hari Ganesh*, 32 Bom.L.R. 1186, A.I.R 1930 Bom. 505 (506), 128 I.C. 621; *Radha* v. *Srinath*, 23 Pat. 13, A.I.R. 1944 Pat. 225.

Plaintiff at first instituted a suit in 1893 for possession and mesne profits from 1889 to 1893 (the date of the suit) as well as from 1893 to the date of recovery of possession. The suit was decreed in January 1895 but the mesne profits were awarded only up to 1893 (the date of suit), the decree being silent as to the mesne profits from 1893 to 1895. Plaintiff thereupon instituted in April 1898 a second suit for mesne profits from 1893 to January 1895. *Held* that the suit was barred; the time of pendency of the previous suit would not be deducted, because it could not be said that the former Court was unable to entertain the former suit from defect of jurisdiction or other cause of like nature. In fact, the Court did entertain the former suit and there was no defect of jurisdiction which prevented the Court from awarding the mesne profits claimed, but it did not decree the mesne profits either through inadvertence or because the claim was not specially pressed—*Hays* v. *Padamanand*, 32 Cal. 118.

Plaintiff's suing by mistake on a foreign judgment, which was a nullity, cannot be held to be a cause of like nature with defect of jurisdiction—*Raja of Faridkote* v. *Sardar Gurdayal*, 34 P.R. 1898.

Where, relying upon a decision of the High Court, a decree-holder instituted proceedings in the Insolvency Court, and then by a subsequent Full Bench Decision of the High Court it was declared that those proceedings must be taken in the Revenue Court and not in the Insolvency Court, whereupon the decree-holder applied to the Revenue Court, *held* that the time during which the proceedings were pending in the Insolvency Court would be deducted—*Parbati* v *Raja Rikh*, 44 All. 296 (300), 20 A.L.J. 147, 66 I.C. 214.

Res judicata does not constitute a "cause of like nature." Thus, a decree-holder made an application for execution of his decree on 6th December 1915 which was dismissed for default. Thereupon the judgment-debtor who also held a decree against the decree-holder applied for execution of his decree against him, and the decree-holder made an application on 15th November 1916 for being allowed to set off his decree against the decree of the judgment-debtor, but the decree-holder's application was disallowed on 23rd May 1918 on the ground of *res judicata*. Subsequently the decree-holder made an application for execution of his decree and claimed to

deduct the time between 15th November 1916 and 23rd May 1918. *Held* that he was not entitled to get the deduction—*Braja Gopal* v. *Tara Chand*, 6 P.L.J. 593, 63 I.C 593, A.I.R. 1921 Pat. 225.

Where a prior suit for declaration of title was dismissed as not maintainable because it contained no prayer for possession, the time taken in prosecuting that suit can be deducted as the defect was of a nature similar to a defect of jurisdiction—*Venkamma* v. *Parthasarathi*, 51 M.L.J. 391, A.I.R. 1926 Mad. 1081, 98 I.C. 14. An application for execution of a decree was dismissed because the relief asked for was not in conformity with the decree, the legitimate prayer for the execution of the decree being joined with a prayer which the Court was not competent to grant. *Held* that the time occupied in this application should be deducted in calculating the period for a subsequent application, as the former application was dismissed for a cause of a nature similar to defect of jurisdiction—*Keshore Mal* v. *Jagdish Narain*, 3 Pat. 42, 75 I C. 312, A.I.R. 1924 Pat. 471.

154. Withdrawal of previous suit:—This section applies only to cases where the previous suit was *dismissed* by the Court itself where it was unable to entertain it; it does not apply where the previous suit was voluntarily abandoned or *withdrawn* by the plaintiff, and then he brings a fresh suit *after* the expiry of the period of limitation. When the previous suit had been terminated not by any action of the Court but by the act of the plaintiff, he cannot claim the benefit of this section—*Arunachalam* v. *Lakshman*, 39 Mad. 936; *Imperial Bank* v. *Veerappa*, 67 M.L.J. 189, A.I.R. 1934 Mad. 593 (595); *Varajlal* v. *Shomeswar*, 29 Bom. 219; *Upendra* v. *Surya Kanta*, 20 I.C. 205; *Krishnaji* v. *Vithal*, 12 Bom. 625; *Bai Jumna* v. *Bai Ichha*, 10 Bom. 604; *Pirjade* v. *Pirjade*, 6 Bom. 681; *Sadayatan* v. *Ram Chandra*, 1934 A.L.J. 535 (F.B.), A.I.R. 1934 All. 688 (691); *Achut v Parshram*, I.L.R. (1938) Bom. 327, 40 Bom.L.R. 377, A.I.R 1938 Bom. 281; *Mohanlal* v. *Tabizuddin*, I.L.R. (1939) 2 Cal. 316, 43 C.W.N. 1074, 69 C.L.J. 540, A.I.R 1939 Cal. 625; *Pankala* v. *Venkatasubbayya*, (1947) 2 M.L.J. 337, 1947 M.W.N. 616. If a suit is withdrawn by the plaintiff under O. 23, r. 1 with permission to bring another suit, and a fresh suit is instituted, the plaintiff is bound by the law of limitation in the same manner as if the first suit had not been instituted (O. 23, r. 2)—*Varajlal* v. *Someshwar*, supra; *Rahim Ali* v. *Yehia*, A.I.R. 1928 All. 402; *Rampati* v. *Phool Singh*, 1932 A.L.J. 421, 138 I.C. 108, A.I.R. 1932 All. 377 (378), *Ram Manohar* v. *Baboo Singh*. A.I.R. 1937 All. 124. This is so even if the Court granting permission to withdraw the suit expresses an opinion that sec. 14 of the Limitation Act will apply and the plaintiff will not be prejudiced on the question of limitation—*Virupakshappa* v. *Veerabhadra*, (1942) 2 M.L.J. 442, 1942 M.W.N. 622, A.I.R. 1943 Mad. 80. But if the Court was not *competent to entertain* the suit, and the suit was withdrawn with the leave of the Court, the order of withdrawal might be treated as an order returning the plaint, and the provisions of sec. 14 would apply to the suit when re-instituted—*Ramdas* v. *Ganesh Narain*, 35 Cal. 924, 12 C.W.N. 921.

O. 23, r. 2, C. P. Code which lays down that in any fresh suit instituted by the plaintiff with the permission of the Court, after withdrawing the previous suit, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted, appears to be in conflict with sec. 14 of the Limitation Act, which gives a privilege to the plaintiff by deducting the time spent in the previous suit. But there is no real conflict in the two provisions. O. 23, r. 2 deals with a case in which the suit is terminated by the voluntary act of the plaintiff; whereas sec. 14 refers to a case where the Court itself terminates the suit owing to defect of jurisdiction. The two provisions deal with entirely different cases—*Sadayatan*

v. *Ram Chandra*, 1934 A.L.J. 535 (F.B.), 150 I.C. 135, A.I.R. 1934 All. 688 (691); *Kaliandas* v. *Mahomed*, I.L.R. (1940) Kar. 225, A.I.R. 1940 Sind. 125.

155. Deduction of time:—Where there is ground for excluding certain periods under sec. 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded have to be added to what is primarily the prescribed period—*Maqbul Ahmad* v. *Pratap Narain*, A.I.R. 1935 P.C. 85; 39 C.W.N. 640. Where a plaint which had been presented to the wrong Court on the last day of the period of limitation, was subsequently returned by the Court for presentation "within a week" to the proper Court, and then the plaint was filed in the proper Court within a week, it was held that the suit when so presented was barred by limitation, as only the time during which the suit was pending in the wrong Court should be excluded; and the fact that the Court had given a week's time should not be taken into account—*Haridas* v. *Sarat*, 17 C.W.N. 515, 18 I.C. 121. The principle is that a Court in returning a plaint to a plaintiff in a suit in which it had no jurisdiction had no authority to fix a time within which the plaint was to be presented to a Court having jurisdiction, and if it does so, that fact will not in any way affect the time to be allowed to the plaintiff—*Gauri Nangiah* v. *Piadatala Venkatappa*, 5 M.H.C.R. 407.

Delay in subsequently filing suit in proper Court :—So also, where a plaint was returned to be re-presented to another Court, and no steps were taken for several days or months thereafter, by which time the suit was barred, *held* that the delay could not be excused—*Fateh Mahammad* v. *Raja*, 26 P.L.R. 342; *Madho Ram* v. *Dharm Singh*, 31 P.L.R. 305, A.I.R. 1930 Lah. 394 (396), 127 I.C. 708; *Narayan* v. *Hari Gonesh*, 32 BomL.R. 1186, A.I.R. 1930 Bom. 505 (506), 128 I.C. 621; *Sheo Narain* v. *Ram Prasad*, 8 N.L.J. 76, A.I.R. 1923 Nag. 241, 74 I.C. 317.

Closing of wrong Court:—The last day for filing a suit was 14th June 1908. But as the Court in which the suit was sought to be filed was closed from 14th June to 5th July, the suit was filed on 6th July 1908. On 17th February 1909, the Court found that it had no jurisdiction and returned the plaint to the plaintiff for presentation to the proper Court. The plaintiff presented it to the proper Court on the next Court day, *i.e.*, 19th February 1909. It was held that under sec. 14 the plaintiff was entitled to the deduction of time between 6th July 1908 and 17th February 1909, *i.e.*, the time during which the suit was *actually prosecuted* in the wrong Court, but not to a deduction of the period between 14th June and 5th July 1908, during which the wrong Court was closed; *held* further, that the plaintiff could not invoke the aid of section 4 for deducting the latter period, as the word 'Court' in that section does not include a wrong Court—*Mira Mohideen* v. *Nallaperumal*, 36 Mad. 131; *Ummathu* v. *Pathuamma*, 44 Mad. 817 (823); *Seshagiri* v. *Vajra Velayudam*, 36 Mad. 482; *Govindasami* v. *Sami Padayachi*, 43 M.L.J. 579, 69 I.C. 724; *Makund* v. *Ramraj*, 14 A.L.J. 310, 35 I.C. 292 (293); *Bano Mal* v. *Bano Mal*, 55 I.C. 55 (Lah.); *Maqbul* v. *Pateshri*, 1929 A.L.J. 976, A.I.R. 1929 All. 677, 118 I.C. 670; *Dharma* v. *Ganga Ram*, 11 Lah. 12, A.I.R. 1929 Lah. 425, 116 I.C. 314, 31 P.L.R. 396; *W. A. Patil* v. *U. T. Deshmukh*, A.I.R. 1937 Nag. 215. The contrary view expressed in *Basvanappa* v. *Krishnadas*. 45 Bom. 443, was overruled by their Lordships of the Privy Council—*Maqbul Ahmad* v. *Onkar Pratap*, A.I.R. 1935 P.C. 85, 37 Bom.L.R. 533 (P.C.). See also *Karim* v. *Abdul*, I.L.R. 1953 Bom. 565, 55 Bom.L.R. 119, A.I.R. 1953 Bom. 353.

The time taken in obtaining certified copies of the judgment or order of the first Court for the mistaken institution of the appeal which ultimately proved infructuous, should also be deducted from calculation, because the plaintiff could

be said to have been prosecuting a civil proceeding during the period he was taking the preparatory steps for the filing of the appeal by way of applying for copies of judgment and decree—*Lakshmiram* v. *Sonatan*, 15 C.L.J. 160, 7 I.C. 775. But the plaintiff is not entitled to deduct the time in obtaining a certified copy of the order of rejection of the plaint passed by the Court in which the suit had been wrongly filed—*Bonomali* v. *Fakir Chand*, 46 C.L.J. 452, A.I.R. 1928 Cal. 46, 106 I.C. 324.

Closing of proper Court:—Where a plaint presented within time in a wrong Court was returned to the plaintiff on a date after limitation had expired, and the next three days being holidays, it was presented before the proper Court on the fourth day, *held* that in the circumstances the suit was not barred by limitation, as the plaintiff could not present the plaint to the proper Court before the date on which he did, owing to the holidays of that Court—*Bejoy Kumar* v. *Kusum Kumari*, 33 C.W.N. 221 (225); *Harkubai* v. *Shankerbhai*, 45 Bom.L.R. 1014, A.I.R. 1944 Bom. 37, 215 I.C. 12. Section 4 of the Act can be tacked on to the time excluded under this section—*Chudamsao* v. *Seth Ram Kuwar*, I.L.R. (1947) Nag. 375, 1947 N.L.J. 209, A.I.R. 1948 Nag. 15. In computing the period of limitation the proper method is to take what is primarily the prescribed period and then add to it the period excluded by reason of this section. If these periods all taken together happen to expire on the date on which the court is closed, the party can wait and file the appeal on the date when the court reopens—*Bhiwani Cloth Mills Ltd.* v. *Parmeshari*, I.L.R. (1946) Lah. 107, A.I.R. 1947 Lah. 168. A contrary view has been taken in *Anil* v. *Dhirendra*, 41 C.W.N. 956 where it has been held that the plaintiff is not entitled to add the holidays to the prescribed period. The reason is that sec. 4 of the Act contemplates that the suit should be instituted in the proper court, that is, the court which has jurisdiction to entertain it.

156. Suspension of right of action:—Two out of three brothers were dispossessed of their shares in certain properties by the third brother. One of the brothers who were dispossessed brought a suit for the recovery of his share as against the other two brothers as defendants. One of the defendants supported the plaintiff and set up his own right to one-third share in the property. An issue was raised between the co-defendants as to whether the defendant who supported the plaintiff was entitled to a certain share. The Court passed a decree not only in favour of the plaintiff but also declared that that defendant had one-third share. On appeal the decree of the trial Court was set aside so far as the defendant was concerned. He then filed a suit for the recovery of his share. It was held that he was entitled to deduct the period from the date of the decree of the first Court to the date when that decree was set aside on appeal, *i.e.*, the period during which there was the judgment of the lower Court in his favour in the previous suit; that a Court should relieve parties against injustice occasioned by its acts and oversights; that where the plaintiff could not have sued for some relief which had been decreed to him by mistake, his right of action should be considered as suspended; and that the time during which his right was suspended should be deducted, although it was doubtful whether this section covered the case or not—*Lakhan Chandra* v. *Madhu Sudhan*, 35 Cal. 209, affirmed by the Privy Council in *Nrityamoni* v. *Lakhan*, 43 Cal. 660 (663), 20 C.W.N. 522, 33 I.C. 452, where their Lordships laid it down as a general principle that limitation would remain in suspense whilst the plaintiffs were *bona fide* litigating for their rights in a Court of Justice. And so, where the plaintiff obtained a decree for rent which was reversed on appeal on the ground that the provisions of sec. 12 of the Rangoon Rent Act had not been satisfied, and thereafter the plaintiff again sued for rent, *held* that as long as the previous decree was

in existence, *i.e.*, until it was set aside by the Appellate Court, the plaintiff could not file another suit for rent, and therefore in the second suit the plaintiff was entitled to deduct the whole of the period during which he had been litigating his claim in the previous suit, *viz.*, the period from the date of institution of that suit (and not from the date of the decree) up to the date of the appellate decree—*Bhandari* v. *Nihalchand*, 6 Rang. 691, 117 I.C. 52, A.I.R. 1929 Rang. 55 (57). So also where an award was made under the Arbitration Act in favour of the plaintiff and the arbitrator filed the award in the Court and upon that Court holding that it had no jurisdiction to entertain the award the plaintiff presented the award in another Court, limitation was "in suspense" as no proceeding could be taken in any other Court for the purpose of enforcing the award; *Aildas* v. *Sobhomal*, 32 S.L.R. 151, A.I.R. 1938 Sind. 50.

In computing the period of limitation for a suit against a Ruling Chief (*e.g.*, the Gaekwar of Baroda) the plaintiff is not entitled to deduct the time spent by him in obtaining the Government of India's consent under sec. 86, C. P. Code. Secs. 4 to 25 contain no statutory provision enabling the plaintiff to deduct that time—*Sayaji Rao, Gaikwar of Baroda* v. *Madhavrao*, 53 Bom. 12, 30 Bom.L.R. 1463, A.I.R. 1929 Bom. 14 (19, 23), 115 I.C. 369.

The plaintiff purchased a *patni* at a sale under the Patni Regulation in May 1908. The patnidar instituted a suit for cancellation of the sale which was decreed in May 1912. In the interval, on the 14th October 1910 the plaintiff had paid rent to the defendant to prevent further sale under the Regulation. The plaintiff now brought a suit in 1916 for recovery of the money paid by him to the Zeminder as rent, and claimed to deduct the time which was occupied by a proceeding for assessment of mesne profits as between himself and the original patnidar on the basis of the decree for cancellation of the sale. *Held* that the plaintiff was not entitled to a deduction of the period. There was not since the 14th October 1910 any period or time during which the right of the plaintiff to institute the present suit was suspended by reason of circumstances over which he had no control, so as to entitle him to invoke the aid of the rule recognised by the Judicial Committee in 7 M.I.A. 323 (*Prannath* v. *Rookia Begum*), 12 M.I.A. 244 (*Surnomoyee* v. *Shooshee*), and 43 Cal. 660 (*Nrityamoni* v. *Lakhan*), and to deduct the period—*Janaki Nath* v. *Bejoy Chand Mahotab*, 26 C.W.N. 271, 60 I.C. 698, 33 C.L.J. 366. For other cases, in which the principle of the suspension of cause of action has been discussed, see *Niranka* v. *Atulkrishna*, 28 C.W.N. 1009, A.I.R. 1925 Cal. 67, 83 I.C. 110; *Dina Nath* v. *Jadu Nath*, 29 C.W.N. 202, 86 I.C. 130, A.I.R. 1925 Cal. 456; *Abdul Rahim* v. *Ojamshee*, 56 Cal. 639, A.I.R. 1930 Cal. 5 (9, 10); and the cases cited in Note 102 under sec. 9.

156A. Sub-section (2):—An application to set aside an *ex parte* decree passed by a Small Cause Court was originally presented on 29th March before a Munsiff where it remained pending for some days. The Munsiff returned the application for being filed in the Court which passed the decree, whereupon it was filed in the Court of the second Munsiff by whom the decree had been passed, but by mistake the application was registered as an ordinary application to set aside an *ex parte* decree in an ordinary money suit, and the mistake was discovered on 7th August, *i.e.*, several months afterwards. *Held* that in computing the period of limitation for the application under Art. 164, the judgment-debtor was entitled to a deduction of the time from 29th March to 8th August, during which he has been wrongly but diligently prosecuting his application—*Basiruddin* v. *Sonaulla*, 15 C.W.N. 102 (106).

Under the Act of 1877, in computing the period of limitation for an application, the time during which the applicant had been prosecuting an *application* in a wrong Court could be deducted; but no time was deducted where the applicant had been prosecuting a *suit* in a wrong Court. See *Sheoji Ram* v. *Sheo Chand*, 63 P.R. 1886. But this is no longer good law, because under sub-section (2) of the present section, the time during which the applicant had been prosecuting *another civil proceeding* (which includes a *suit*) will be deducted. See *Ganapathi* v. *Krishnamachari*, 43 M.L.J. 184, A.I.R. 1922 Mad. 417, 70 I.C. 743.

"For the same relief" :—The words "the same relief" have reference to the precise relief sought and cannot be construed in a liberal sense so as to look to the ultimate object with which that relief is sought—*Moiden* v. *Chidambaram*, (1944) 2 M.L.J. 338, 57 L.W. 582, A.I.R. 1945 Mad. 86. In computing the period of limitation for an application for a final decree for sale upon a mortgage, the applicant is not entitled to deduct the period during which he had been prosecuting a previous application for execution of the preliminary decree (treating it as a simple money-decree by a mistake caused by the Court in the form in which the decree was prepared), because the relief claimed in the two proceedings was not the same. In the former proceeding the relief claimed was execution and realisation of the decretal amount by attachment and sale of the property; while in the present application the prayer is not for execution but preparation of the final decree—*Maqbul Ahmad* v. *Pateshri*, 1929 A.L.J. 976, A.I.R. 1929 All. 677 (679), 118 I.C. 670. An application for a final decree in a mortgage suit and an application for execution of a decree are not applications for the same relief. Hence a prior application for a final decree though made *bona fide* can be of no avail to save limitation in respect of the subsequent application for execution—*Awappa* v. *Datta*, 49 Bom.L.R. 846, A.I.R. 1948 Bom. 185.

There can be no exclusion under this section of time occupied by the insolvency proceedings against the judgment debtor, in computing the period of limitation for a decree against him, as the proceedings are not for obtaining the same relief—*Yeshwant* v. *Walchand*, A.I.R. 1951 S.C. 16; (on appeal from *Walchand* v. *Yeshwant*, 51 Bom.L.R. 608, A.I.R. 1949 Bom. 379); *Jaikishen* v. *Peoples Bank*, A.I.R. 1944 Lah. 136, 217 I.C. 65 (F.B.); *Magandas* v. *Bhalchandra*, I.L.R. (1954) Bom. 840, 56 Bom.L.R. 414, A.I.R. 1954 Bom. 436. The contrary view taken in *Vaithilinga* v. *Narayanaswami*, (1943) 1 M.L.J. 323, A.I.R. 1943 Mad. 457 is superseded by the Supreme Court decision.

An application under sec. 167 of the Bengal Tenancy Act and the resistance to the proceedings under sec. 174 (3) of the Act are not for the same reliefs—*Chunnu* v. *Amluk*, 46 C.W.N. 706.

157. Explanation 1:—*Termination of proceedings*—Where a plaint is ordered to be returned for presentation to the proper Court but is actually returned several days later, the suit in the wrong Court is said to terminate on the day on which the plaint is actually returned and not on the day on which it is ordered to be returned. The reason is that a party cannot always get back his plaint on the same day on which it is ordered to be returned; and as long as the plaintiff has exercised ordinary diligence in pursuing his claim, there is no reason why the period up to the day when he gets back his plaint should not be deducted. A litigant party cannot suffer on account of the laches or delay of the Court or its officers—*Mahomed Din* v. *Gurbaksh*, 34 P.L.R. 634, 144 I.C. 5, A.I.R. 1933 Lah. 611; *Nagindas* v. *Maganlal*, 46 Bom. 211, 64 I.C. 160, A.I.R. 1922 Bom. 160; *Basvanappa* v. *Krishnadas*, 45 Bom. 443; *Mohendra* v. *Nanda*, 17 C.W.N. 1043, 20 I.C. 183; *Neerendrabhushan* v. *Berhampur Oil Mills*, 60 Cal. 1122, A.I.R. 1933 Cal. 914; *Ishwar* v. *Badri*, A.I.R. 1938 Pat. 203; *Zafaruddin* v. *Debi*, I.L.R. (1939) All. 709, 1939 A.L.J. 460, A.I.R. 1939 All. 590; *Gurdit* v. *Mata*,

41 P.L.R. 371, A.I.R. 1939 Lah. 47; *Muslim Bank* v. *Hasan*, A.I.R. 1951 Hyder. 57. The Madras High Court has held in *Subbu* v. *Varadarajulu*, I.L.R. (1947) Mad. 694, (1947) 1 M.L.J. 90 that the plaintiff is not entitled to any deduction after the date of the endorsement on the plaint required by r. 10(2) of Or. 7, C. P. Code except perhaps where he can show that the Court delayed the return of the plaint in spite of his endeavour to take it back. The period between the pronouncement in court of the want of jurisdiction and the return of plaint to the plaintiff or his pleader would be allowable if during that period the plaintiff was prosecuting his suit with due diligence—*Bubanna* v. *Channappa*, 48 Bom.L.R. 788, A.I.R. 1947 Bom. 140, 231 I.C. 282; *Harkubai* v. *Shankerbai*, 45 Bom.L.R. 1014, A.I.R. 1944 Bom. 37, 215 I.C. 12.

A suit was filed in the Munsiff's Court which he dismissed as being beyond his jurisdiction, and this order or dismissal was upheld on second appeal by the High Court which directed the lower Appellate Court (District Judge) to ascertain the value of the land in dispute and pass a fresh order. After that inquiry was held the Judge passed an order (on 30th October 1883) confirming the original order of the Munsiff. The plaintiff thereupon filed a second suit. *Held* that the plaintiff was entitled to be allowed the whole of the time occupied in the first suit up to the date of the final order of the District Judge (30th October 1883); that the order of the High Court did not terminate the prior suit; and that the suit terminated only when the District Judge passed an order after holding the inquiry—*Sankaran* v. *Parvathi*, 12 Mad. 434; *Gurdit* v. *Mota*, 41 P.L.R. 371, A.I.R. 1939 Lah. 47. So also, the plaintiff is entitled to deduct the time spent in moving a revision petition in High Court against the appellate order of return of plaint—*Perumal* v. *Pandaram*, A.I.R. 1951 Trav-Co. 26.

Where a plaint was returned on the 27th June with a permission to refile it in the proper Court, and with a direction to the plaintiffs to pay costs, and an order fixing the amount of costs was recorded on the 30th June, it was held that the return of plaint on June 27 terminated the connection of the Court with the suit, and though the costs were calculated later, the plaintiffs could not be said to have been prosecuting their suit in that Court after the plaint had been returned—*Ganga Charan* v. *Okhil Chandra*, 24 C.L.J. 355, 35 I.C. 595.

Where an application for execution is returned for filing in proper court and the same is filed on the next day to the proper court, no question of limitation arises—*Debi* v. *Indra*, A.I.R. 1938 Cal. 791, 179 I.C. 160.

158. Application of section to special or local laws:—According to section 29 as now amended by the Indian Limitation Amendment Act (1922), this section applies although the case is governed by a special or local law of limitation, unless it is expressly excluded by the special or local law. Thus, it applies to a suit under the Bengal Tenancy Act. Section 185 of that Act which excludes certain sections of the Limstation Act, does not mention sec. 14—*Raja Sati Prosad* v. *Gobinda*, 33 C.W.N. 227 (229), A.I.R. 1929 Cal. 325. The section is applicable to cases governed by the Bengal Tenancy Act—*Fatima* v. *Chota*, 53 C.W.N. 159. See also *Chunnu* v. *Amluk*, 46 C.W.N. 706. So also this section would apply to a suit under the Agra Tenancy Act (1926), because sec. 231 of that Act neither expressly nor impliedly excludes sec. 14—*Ananti* v. *Chhonnu*, 52 All. 501 (F.B.), 1930 A.L.J. 256, A.I.R. 1930 All. 193 (200, 205), 124 I.C. 540 (*per* Boys and King, JJ.) So also this section applies to suits under C. P. Tenancy Act—*Sharifjan* v. *Vishnupriya*, I.L.R. (1949) Nag. 743, 1949 N.L.J. 586, A.I.R. 1950 Nag. 37. Even before the Amendment, this section was applied to a suit or application under a special or local law, *e.g.*, to a suit under sec. 78 of the Madras Rent Recovery Act (VIII of 1865)—*Kullayappa* v.

Lakshmipathi, 12 Mad. 467 (471); or to a suit under the Madras Boundary Act (XXVII of 1860)—*Seshamma* v. *Sankara*, 12 Mad. 1; or to a suit under sec. 86 of the Bombay District Municipal Act (VI of 1873)—*Guracharya* v. *President*, 8 Bom. 529; or to a proceeding u der the Provincial Insolvency Act—*Dropadi* v. *Hira*, 34 All. 496 (F.B.).

Section 5, Limitation Act, has not been extended to local and special laws by sec. 29 of that Act as amended in 1922.

Section 14, however, has been made applicable to local and special laws by sec. 29. But sec. 14 will apply only when it is shown that the previous proceedings were prosecuted in good faith—*Jhanda Ram* v. *Allah Yar*, A.I.R. 1936 Lah. 857.

The following cases in which this section was held inapplicable to suits or applications under special or local laws on the ground that those laws were complete codes in themselves, are no longer good law in view of recent amendment of section 29:—*Nagendra* v. *Mathura*, 18 Cal. 368 (suit under Oct X of 1859); *Abdul Hakim* v. *Latifunnessa*, 30 Cal. 532; *Kalimuddin* v. *Sahibuddin*, 47 Cal. 300 (F.B.); *Khagendra* v. *Ramani*, 24 C.W.N. 29 (cases under sec. 77, Registration Act); *Trasi Deva* v. *Parameshwaraya*, 39 Mad. 74 (case under Provincial Insolvency Act); *Chowdhury Kesri* v. *Giani Ray*, 29 Cal. 626 (application to set aside sale under sec. 310A, C. P. Code, 1882); *Lakshman* v. *Keshav*, 6 N.L.J. 205, A.I.R. 1923 Nag. 306 (suit under C. P. Land Revenue Act).

In *Fatelal* v. *Siti*, A.I.R. 1926 Nag. 126 (decided in 1923), this change in the law has been overlooked.

Section 14 does not apply where the special Act provides a special rule of limitation which derogates from the provisions of the general rule embodied in sec. 14—*Ram Lochan* v. *Jagat Narain*, A.I.R. 1927 All. 181, 98 I.C. 1050.

Exclusion of time during which proceedings are suspended.

15. (1) In computing the period of limitation prescribed for any suit or application for the execution of a decree, the institution or execution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

(2) In computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of such notice shall be excluded.

159. Scope:—The words "or application for the execution of a decree" have been added in the Act of 1908. Sub-section (2) is new.

Under the Act of 1877 this section applied only to *suits;* and therefore where the *execution* of a decree was stayed by an injunction, it was held that the time during which the injunction was in force was not to be excluded in computing the period of limitation—*Rajarathnam* v. *Shevalayammal*, 11 Mad. 103 (105); *Kalayanbhai* v. *Ghanashamlal*, 5 Bom. 29; *Lachmi Chand* v. *Ballam*, 17 All. 425 (427); *Lutful* v. *Sambhudin*, 8 Cal. 248; *Amulya* v. *Preo*, 7 I.C. 886.

But the Court in many cases relieved the decree-holder from this "monstrous injustice" by treating the application for execution made after the withdrawal of an

injunction as an application to *revive or continue* the previous application (Article 181). See *Kalyanbhai* v. *Ghanashamlal*, 5 Bom. 29; *Basant Lal* v. *Batal Bibi*, 6 All. 23; *Sakina* v. *Ganesh*, 3 P.L.J. 103, 44 I.C. 560; *Narayan* v. *Sono*, 24 Bom. 345; *Chintaman* v. *Balshastri*, 16 Bom. 294; *Issur* v. *Abdul*, 4 Cal. 877; *Oshrafuddin* v. *Bepin Behari*, 30 Cal. 407; *Gurudeo* v. *Amrit*, 33 Cal. 689; *Lakshmi* v. *Ballam*, 17 All. 425; *Rungiah* v. *Nanjappa*, 26 Mad. 780. See these cases in Note 694 under Article 181.

But now, under the present section as amended by the Act of 1908, the time during which the *execution* is stayed by an injunction or order shall be excluded. See *Bai Ujam* v. *Bai Rukhmani*, 38 Bom. 153, 21 I.C. 713; *Ghulam* v. *Hardeo*, 34 All. 436. Section 15 refers to a suit or an application for execution of a decree. An application for delivery of possession by the auction purchasers may be treated as an application in an execution proceeding, but it cannot be treated as an application for execution—*Jateendrachandra* v. *Rebateemohan*, A.I.R. 1935 Cal. 333.

But the law as amended by the Act of 1908 does not prohibit either expressly or by necessary implication the making of an application for *revival* which the Courts both before and after the commencement of the Act of 1908 have treated as competent. It is not correct to say that the amendment of sec. 15 was intended to sweep away and replace the old doctrine of revival. The principle of allowing a right of revival of the previous application is different and distinct from that permitting exclusion of time during which execution was stayed by an injunction. The two principles are not co-extensive or identical. In cases where there has been no previous application for execution, but proceedings in execution have been stayed, sec. 15 may be of help, whereas the doctrine of revival would have no application. Similarly there may be cases where after the removal of the bar a previous application has been properly and finally disposed of. In such cases also, no question of revival can arise, but the decree-holder will be entitled to deduct the period of suspension in consequence of the stay order or injunction. On the other hand, there may be cases to which sec. 15 cannot apply, and yet the doctrine of revival may be of utility. For instance, execution proceedings may be postponed by an agreement between the parties under some arrangement for payment during a definite period after which the decree-holder may request the Court to revive it. There is an essential difference between a fresh application for execution of a decree after a previous execution has been stayed by an injunction, and an application to a Court asking it simply to revive a previous application made for the execution of a decree. Section 15 would apply to the application of the former class; while an application of the latter class would be governed by Article 181. Suppose the decree-holder seeks the execution of a money-decree by the arrest of the judgment-debtor. The judgment-debtor institutes a suit to obtain a declaration that the decree was obtained by fraud, and he obtains an injunction staying the execution of the decree. If, after the dismissal of the suit, the decree-holder does not ask the executing Court to proceed with his application for the arrest of the judgment-debtor but makes an application to it to attach the property of the judgment-debtor, and to execute the decree in that way, this application would be a fresh application and would be governed by Art. 182 read with sec. 15. If, on the other hand, the decree-holder should apply to the executing Court to proceed with the arrest of the judgment-debtor, he would be simply asking for a revival of the proceedings which were still pending, and his application would not be governed by the rule contained in sec. 15—*Chattar Singh* v. *Kamal Singh*, 49 All. 276 (F.B.), 25 A.L.J. 201, 100 I.C. 692, A.I.R. 1927 All. 16. See also *Sundaramma* v. *Abdul Khadir*, 56 Mad. 490 (F.B.), A.I.R. 1933 Mad. 418 (422, 423), 64 M.L.J. 664, 143 I.C. 1.

160. Application of section to special laws:—Before sec. 29 was amended by Act X of 1922, it was held that the provisions of section 15 could not be applied to a special period of limitation prescribed by the Bengal Tenancy Act; and therefore sub-section (2) could not apply to a suit instituted under the term of section 104H of the Bengal Tenancy Act. Such a suit was to be brought within six months as specified in that section, and the plaintiff was not entitled to exclude the period of notice to the Secretary of State (under sec. 80, C. P. Code) whom he had made or joined as a defendant—*Secretary of State* v. *Gangadhar*, 45 Cal. 934; *Gangadhar* v. *Janakimani*, 22 C.W.N. 817, 47 I.C. 524; *Secretary of State* v. *Shib Narain*, 46 Cal. 199, 22 C.W.N. 802. See also *Jurawan* v. *Mahabir*, 40 All. 198 (203), 16 A.L.J. 71, where it was held that the word 'prescribed' in this section referred to a period 'prescribed by the Limitation Act.' These rulings are no longer good law in view of the present amendment of sec. 29. See *Srinivasa* v. *Secretary of State*, 38 Mad. 92, where sub-section (2) of this section was applied to a suit under sec. 59 of the Madras Revenue Recovery Act (II of 1864). So also in *Jaydeo* v. *Babulal*, 1941 P.W.N. 183, A.I.R. 1941 Pat. 499 this section was applied to Bihar Tenancy Act.

161. Section 48, C. P. Code:—There is a difference of opinion as to whether this section controls sec. 48 of the Code of Civil Procedure. It has been held in some cases that the general provisions of this section are intended to periods of limitation prescribed by the Civil Procedure Code and are not confined in their operation to periods prescribed by the Limitation Act or by Schedule I thereof. Section 48 of the Code of Civil Procedure does prescribe a period of limitation. So section 48 of the Code is not uncontrolled by the provisions of this section. In other words, section 48 of the Code does not impose a complete bar to the execution of a decree after the expiry of the period of 12 years irrespective of the provisions of this section—*Kandaswami Pillai* v. *Kannappa Chetty*, A.I.R. 1952 Mad. 186 (F.B.), overruling earlier contrary decision, in A.I.R. 1922 Mad. 268, A.I.R. 1945 Mad. 70; *Durag* v. *Pancham*, I.L.R. (1939) All. 647, 1939 A.L.J. 522, A.I.R. 1939 All. 403 (F.B.); *Sitaram* v. *Chunnilalsa*, I.L.R. (1944) Nag. 250, 1944 N.L.J. 127, A.I.R. 1944 Nag. 155; *Bisimilla* v. *Jagannath*, I.L.R. (1947) Nag. 25, 1947 N.L.J. 33, A.I.R. 1947 Nag. 101; *Amarendra* v. *Manindra*, 59 C.W.N. 695, A.I.R. 1955 Cal. 269, *Sinnaru* v. *Nachiappa*, (1955) 1 M.L.J. 51, A.I.R. 1955 Mad. 67; *Krishna Chandra* v. *Paravatamma*, A.I.R. 1953 Orissa 13. The point was raised in *Rango* v. *Gopal*, I.L.R. (1939) Bom. 87, 40 Bom.L.R. 1278, A.I.R. 1939 Bom. 75 but was not decided. But in *Ramgopal* v. *Sidram*, 45 Bom.L.R. 234, A.I.R. 1943 Bom. 164 it has been held that it is not correct to say that sec. 48 of the Code does not provide a "period of limitation" within the meaning of this section and the words "period of limitation" in this section cannot be confined to periods given in the Schedule to the Limitation Act. On the other hand it has been decided in *Gomeshi Lal* v. *Imtiaz Ali*, A.I.R. 1931 Oudh 351, 1932 I.C. 257 that the Civil Procedure Code is not a special law and it can not be argued that s. 15 of the Limitation Act applies to s. 48, C. P. Code by force of s. 29 of this Act.

162. Injunction or order:—In computing the period of limitation for execution of a decree the period during which the execution has been stayed or suspended will have to be excluded though no execution proceedings were pending at the time when the order of stay was made, for the Court can suspend the execution of a decree in anticipation of an application for execution—*Govindarajulu* v. *Ranga Row*, 40 M.L.J. 124, 62 I.C. 255 (256). But it is doubtful whether this proposition can stand as correct in view of the Privy Council decision in 12 Pat. 195.

The execution must have been stayed by an express injunction or order; *Akkayya*

v. *Appayya*, I.L.R. (1947) Mad. 661, (1947) 1 M.L.J. 4, A.I.R. 1947 Mad. 238; *Ramaiya* v. *Suryanarain*, (1948) 2 M.L.J. 314, 1948 M.W.N. 631 and not by an implied order or a collateral litigation. Thus, where during the pendency of an execution application by the mortgagee decree-holder for sale of the mortgaged property a suit by a third party is filed impleading the mortgagee decree-holder as a party for a declaration that the mortgaged property belongs to a religious endowment and is inalienable and the mortgage-decree is unenforceable and the said suit is dismissed on appeal this section does not apply, as no express injunction or order staying the execution of the mortgage-decree was passed in the collateral suit, and it cannot be said that the execution was stayed by implication, and therefore the time during which the decree in that suit was in force cannot be deducted—*Sundaramma* v. *Abdul Khadir*, 56 Mad. 490 (F.B.), 64 M.L.J. 664, 143 I.C. 1, A.I.R. 1933 Mad. 418 (424). So also, a decree declaring that the plaintiff is in possession of lands as sole owner and ordering defendant not to deprive plaintiff of his possession or to obstruct plaintiff from enjoying the crops etc., does not amount to a stay of suit for possession by the defendant or as an injunction restraining him from filing a suit for possession, especially when the plaintiff in the previous suit does not ask for injunction—*Narayan* v. *Gurunathgonda*, I.L.R. (1939) Bom. 173, 40 Bom.L.R. 1134, A.I.R. 1939 Bom. 1; *Murlidhar* v. *Ram Saran*, I.L.R. (1946) All. 633, 1947 A.L.J. 170, A.I.R. 1947 All. 256. A temporary injunction subsequently embodied in the decree passed in a suit restraining the defendant from interfering with the possession of the plaintiff does not prevent him from instituting a suit for possession even though the title of the contending parties is involved in the suit. Therefore, in computing the period of limitation he is not entitled to deduct the whole period from the date of the temporary injunction to the date of dissolution of the permanent injunction by the Privy Council under this section; *Narayan* v. *Puttabai*, I.L.R. (1945) Kar. (P.C.) 43, 49 C.W.N. 6, A.I.R. 1945 P.C. 5, (1944) 2 M.L.J. 358 (P.C.); *Ramaiya* v. *Suryanarayana*, A.I.R. 1949 Mad. 279. This section does not contemplate the case of one decree being rendered impossible of execution by a subsequent decree inconsistent therewith passed in another suit—*Lakhmi* v. *Kalsumannissa*, I.L.R. (1939) All. 207, 1939 A.L.J. 29, A.I.R. 1939 All. 82. Preliminary decrree in an administration suit can not be regarded as amounting to an injunction order—*Chidambaram* v. *Mayyapa*, I.L.R. (1944) Mad. 410, A.I.R. 1944 Mad. 67.

An adjournment of the hearing does not amount to an injunction or order staying execution of the decree—*Thakamani* v. *Nadiar*, 36 I.C. 939 (Cal.). An order merely giving time to the judgment-debtor for payment is not an order staying execution or an injunction, and sec. 15 does not apply—*Amin Chand* v. *Khiali*, 28 P.L.R. 93, 100 I.C. 475, A.I.R. 1927 Lah. 106; *Jurawan* v. *Mahabir*, 40 All. 198 (203). But an order of the executing Court granting time to the judgment debtor to pay the decretal amount by certain date operates as an order for stay within sub-section (1) of this section—*Bismillah* v. *Jagannath*, I.L.R. (1947) Nag. 25. Again where upon an application for execution by the decree-holder, the judgment-debtor paid a portion of the decretal amount and asked for time to pay the balance, whereupon the Court granted him a certain time, it was held that as the decree-holder was not entitled to execute the decree during the time granted by the Court, the order granting time was an order staying execution, and the time could be deducted under sec. 15—*Ganga Singh* v. *Sheo Prasad*, 7 Pat. 829. A.I.R. 1929 Pat. 36 (37), 119 I.C. 890. Where the stay of the execution-sale of the attached property is due entirely to the decree-holder, the order staying the sale cannot be said to be a legal stoppage of the execution proceedings, and the decree-holder is not entitled to any deduction of time under this section—*Kesho Prasad* v. *Harbans*, 2 P.L.T. 22, 53 I.C. 85 (89). Where on an application by the decree-holders seeking

leave to proceed against property in the hands of Receiver, the Court passed an order that the decree-holders were to wait for some time for payment, and this order was made at a time where there was no application for execution pending at all, the order did not amount to a stay of the execution by an injunction or order—*Kirtyanand* v. *Prithi Chand*, 12 Pat. 195 (P.C.), 37 C.W.N. 548 (553), 141 I.C. 760, A.I.R. 1933 P.C. 52, 64 M.L.J. 599, 1933 A.L.J. 359, 35 Bom.L.R. 526.

In an appeal to the Privy Council, the appellant whose suit has been dismissed by the High Court offered as security for costs a rent decree in another suit obtained by him against the respondent. It was held that the acceptance of the rent decree as security did not involve any order staying its execution so as to enable the appellant to deduct the time that elapsed between the acceptance and his subsequent application for execution of the rent-decree—*Midnapore Zamindari Co.* v. *Deputy Commissioner*, 3 P.L.J. 132, 44 I.C. 570. This is so even if the judgment debtor who gives a decree in his favour as security not to accept the decretal amount of his decree directly and the judgment-debtor of that decree is directed to deposit the decretal amount in Court —*Shankar* v. *Hazarimal*, I.L.R. (1940) Nag. 627, 1939 N.L.J. 40, A.I.R. 1939 Nag. 81.

An order of adjudication adjudging the defendant as an insolvent is not an order staying suit against the defendant, because its effect is not to stay proceedings against the defendant insolvent, but merely to impose on the plaintiff the necessity of obtaining leave from the Court to sue under section 16 (2) of the Provincial Insolvency Act. Therefore, the period during which the insolvency proceedings were pending could not be executed—*Ramaswami* v. *Gobindaswami*, 42 Mad. 319, 36 M.L.J. 104, 49 I.C. 625; *Sidhraj* v. *Alli Haji*, 47 Bom. 244, A.I.R. 1923 Bom. 33, 67 I.C. 757; *Nandlal* v. *Ramdatta*, I.L.R. (1942) Nag. 306, 1942 N.L.J. 294, A.I.R. 1941 Nag. 60; it is only when the leave is refused that it can be said that there is an injunction or order staying the institution of the suit—*Sidhraj* v. *Ali Haji*, supra; *Nandlal* v. *Ramdatta*, supra. (In *Parameswaran* v. *Seshan*, 51 Mad. 583, A.I.R. 1928 Mad. 627, the question was raised but not decided). An order staying execution of decree on application of one of the judgment debtors, who has applied for insolvency does not stop running of time against the other judgment-debtors as against them the order does not impose any bar—*Nathuni* v. *Radha*, 21 Pat.L.T. 618, A.I.R. 1940 Pat. 149; *Ram* v. *Nageshwar*, 19 Pat.L.T. 831, A.I.R. 1938 Pat. 395, 176 I.C. 876. But where a person was adjudged an insolvent and the Judge passed an order directing the Nazir to take possession of the property, and then the insolvent died childless, after which a lengthy litigation followed as to the succession to his estate, and this and other litigations between various parties continued for 17 years, after which the Court restored the property to one of the parties, and then the creditors brought a suit for possession of the property, it was held that sec. 15 applied because during the whole period of 17 years the plaintiffs could not have instituted any suit—*Umrao* v. *Ram Kishen*, 13 Lah. 70, 137 I.C. 820, A.I.R. 1932 Lah. 281 (288). An order striking off an execution petition on the ground that the judgment-debtor had been adjudicated an insolvent and the decretal amount had been entered in the schedule of debts, amounts to an injunction within the meaning of this section—*Firm of Tara Chand* v. *Jugal Kishore*, 1919 P.W.R. 17, 51 I.C. 64. An application for execution by a *secured creditor* against the judgment-debtor who has been declared insolvent prior to the passing of the decree, must nevertheless be presented within the same period of limitation as against an ordinary judgment-debtor. Sec. 28 (6) of the Provincial Insolvency Act does not affect the right of a secured creditor. The execution of the decree cannot be considered to have been stopped by reason of the judgment-debtor being declared insolvent. An application for execution by a secured creditor made more than three years after the date of

the decree is barred—*Sri Ram* v. *Prasad*, 4 Luck. 241, A.I.R. 1929 Oudh 71 (72), 113 I.C. 86, 5 O.W.N. 1134. Where a decree is passed against the judgment-debtor before the order of adjudication of the judgment-debtor as an insolvent the decree-holder can apply to the Insolvency Court for permission to sue. If he does not avail of this remedy this section does not apply—*Nawab* v. *Fateh*, 41 P.L.R. 799, A.I.R. 1939 Lah. 270, 184 I.C. 573.

The proceedings under the Agriculturists 'Debtors' Relief Act do not extend time for the purpose of limitation and when no stay order is passed under sec. 10 of the Act this section has no application; *Jawahar* v. *Md. Rafiq*, 212 I.C. 628, A.I.R. 1944 Pesh. 17; a letter by the Chief Court requesting the District Judge to stay all execution proceedings in Civil Court decrees passed against agriculturists cannot extend the period of limitation under this section—*Gurdin* v. *Ghhedi*, 1940 O.W.N. 1202, A.I.R. 1941 Oudh 93. But if the prodeedings in execution are stayed on receipt of an intimation from a Debt Relief Court against all the judgment debtors on the application of one of them to that Court, the decree holder is entitled to claim the benefit of this section. The question of validity or propriety of the order for stay against all judgment-debtors is immaterial and so long as it is not set aside. it is binding on the parties; *Sitaram* v. *Chunnilalsa*, I.L.R. (1944) Nag. 250, 1944 N.L.J. 127, A.I.R. 1944 Nag. 155.

Where the tenants instituted a suit against the landlord to set aside the Collector's order passed under sec. 70 of the Bengal Tenancy Act and obtained an injunction restraining the landlord from executing the Collector's order pending the disposal of the suit, and upon that suit being finally dismissed the landlord applied for execution of the Collector's order, *held* that limitation for execution did not run for the period during which the injunction subsisted—*Balukchand* v. *Nathuni*, 2 P.L.J. 24 (29).

In computing the period of limitation for execution of a decree the decree-holder is entitled to deduct the period during which the execution is stayed by an injunction, and the fact that the injunction related only to a *part of the decree* is immaterial—*Bai Ujam* v. *Bai Rukhmani*, 38 Bom. 153 (156). But this case has been distinguished in *Virchand* v. *Marualappa*, 46 Bom.L.R. 666, A.I.R. 1944 Bom. 303 on the ground that the execution of the whole decree was stayed and not any part of the decree. In *Virchand* v. *Marualappa*, it has been held that if execution is not completely and absolutely stayed, this section does not come into play. Where it is open to the decree-holder to apply for execution against the portion of the property which was not affected by the stay order, this section cannot apply. The same view has been taken by the Lahore High Court in *Kundo Mal* v. *Firm Daulat Ram*, A.I.R. 1940 Lah. 75. But where there are several joint judgment-debtors, and there is a stay order as against only one of them the period should be excluded from computation as against that judgment-debtor only but not as against the others—*Parameswaran* v. *Seshan*, 51 Mad. 583, 55 M.L.J. 156, A.I.R. 1928 Mad. 627 (630), 110 I.C. 518, dissenting from *Vellayyan* v. *Muthayya*, 1921 M.W.N. 188, 61 I.C. 901, A.I.R. 1921 Mad. 116.

S. 15(1) applies also to cases of a partial stay, but only so as to allow exclusion of the period of the stay in the computation of time for a further execution against the person or the property as against whom or which execution was previously stayed and not so as to allow exclusion of that period for the purposes of a future execution against persons or properties not affected by the stay order.—*Baijnath* v. *Nursingdas*, A.I.R. 1958 Cal. 1.

As to applicability of this section to an application for execution of instalment rent decree see *Kedar* v. *Parsidh*, 24 Pat. 222, A.I.R. 1945 Pat. 398.

The 'order' mentioned in this section refers to an order of a Civil Court, and not to an order of Government or Royal Proclamation by which the plaintiffs (a German Bank) were debarred from bringing a suit owing to declaration of war with Germany—*Deutsche Asiatische Bank* v. *Hira Lal*, 47 I.C. 122 (125); on appeal, 46 Cal. 526 (533), 23 C.W.N. 157, 47 I.C. 398.

This section is not confined to cases of direct stay or injunction, but can be extended to orders which indirectly but very approximately and *effectually* cause a delay. Thus, where pending an appeal to the Privy Council by the judgment-debtor the High Court made an order allowing the decree-holder to execute the decree on his furnishing security for the amount of the decree, but the decree-holder being unable to find the required security, his application for execution was dismissed, *held*, that the order of the High Court, whatever be the form of it, did in fact stay the execution of the decree; as the condition of furnishing security could not be performed, the effect was to stay execution altogether, and under this section the time during which the order was in force should be deducted in reckoning the period of limitation for filing a second execution-petition—*Pandey Satdeo Narain* v. *Radha Kuar*, 5 P.L.J. 39 (43, 44), 53 I.C. 9. So also an order passed under sec. 6 of the U. P. Encumbered Estates Act is such an order as contemplated under this section having an effect of staying all suits in Civil Courts against the debtor and a creditor is entitled to have the time between the date of an order under sec. 6 of the U. P. Encumbered Estates Act and the date of the rejection of the debtor's application excluded for purposes of computing the period of limitation for his suit against the debtor—*Radhey Shyam* v. *Syed Ibne*, A.I.R. 1947 Oudh 147. An order under sec. 6 of the U. P. Encumbered Estates Act is tantamount to an order staying the filing of a suit and this section is applicable; *Hulas* v. *Dataram*, I.L.R. (1943) All. 569, 1943 A.L.J. 258, A.I.R. 1943 All. 291. The rule contained in this section applies to suits and applications for execution stayed under the U. P. Encumbered Estate Act—*Umrao* v. *Behari*, I.L.R. (1946) All. 709, 1946 A.L.J. 394, A.I.R. 1947 All. 187. See also *Deep Narain* v. *Bhagauti*, A.I.R. 1952 All. 116.

Although this section does not apply to an application for restitution, the principle on which the section is based can be extended to such an application. Therefore, the time during which a party is prevented from making an application under the order of the Court has to be excluded in computing the period of limitation; *Ram* v. *Dhayan*, 47 P.L.R. 201, A.I.R. 1945 Lah. 227 (F.B.). So also though this section does not apply in terms to a suit stayed under Or. 32, r. 10, of the Code of Civil Procedure by reason of death of next friend of the minor plaintiff, the principle of the section ought to be applied and the period during which the suit stands stayed ought to be excluded in computing the period of limitation—*Govindnaik* v. *Basawannewa*, I.L.R. (1941) Bom. 435, 197 I.C. 30, 43 Bom.L.R. 329, A.I.R. 1941 Bom. 203.

Under this section, the decree-holder is entitled to exclude not only the period during which he was restrained by an injunction from executing the decree, but also the period during which the decree was not in existence, owing to an order of the Court declaring the decree to be null and void—*Ram Gulam* v. *Raj Kumar*, 6 Pat. 635, 102 I.C. 327, A.I.R. 1928 Pat. 86. But where tht decree is declared void as against some of the judgment-debtors and as against some of the properties this section does not apply; *Chanda* v. *Nathu*, I.L.R. (1944) All. 197, 1944 A.L.J. 98, A.I.R. 1944 All. 88.

Where pending an appeal from a preliminary decree for foreclosure, a Receiver is appointed for the management of the mortgaged properties with a direction to pay interest, then so long as the order appointing the Receiver stands, the defendants are entitled to pay off the decretal amount and consequently the order of

appointment of the Receiver operates as a stay of the plaintiff's right to apply for a final decree or for possession; therefore the period between the making of the order and the date on which the Receiver is discharged must be excluded in computing the period of limitation for an application for a final decree for foreclosure—*Chhotey Narain* v. *Kedar Nath*, 1 Pat. 435 (442), 3 P.L.T. 565, A.I.R. 1922 Pat. 201, 66 I.C. 97. In a suit brought by the widow of a deceased partner to wind up the partnership, the surviving partner was prohibited by the Court, at the instance of the plaintiff, from collecting debts due to the firm. Subsequently a Receiver was appointed to get in the assets of the firm. It was held that in a subsequest suit by the Receiver against a debtor, the time between the date of the injunction and the appointment of the Receiver must be deducted from the period of limitation—*Shunmugan* v. *Moidin*, 8 Mad. 229.

An order staying execution of the decree must be a clear one, but it is not necessary that the order should be in writing—*Vishvanath* v. *Narsu*, 23 Bom.L.R. 107, 60 I.C. 916.

An order under sec. 2 of the Chota Nagpur Encumbered Estates Act bringing the estate under protection is a vesting order staying all proceedings, and if the estate is restored to the owner under the circumstances mentioned in clause (2) of sec. 12, all proceedings are revived, and in calculating the period of limitation for such revived proceedings, the provisions of sec. 15 of the Limitation Act will apply and the perod during which the estate was under protection will be excluded—*Mathura Prasad* v. *Jageshwar Prasad*, 5 Pat. 404, 9 P.L.T. 247, A.I.R. 1926 Pat. 260 (262), 94 I.C. 624; *Tikait Mahabir Prasad* v. *Chota Nagpur Banking Association*, 8 P.L.T. 189, A.I.R. 1927 Pat. 105. But if the estate is restored to the owner not under the circumstances mentioned in clause (2) of sec. 12 of the Chota Nagpur Encumbered Estates Act, there is no revival of proceedings; the injunction or stay of proceedings is still in force, and the consideration of sec. 15 of the Limitation Act does not arise —*Khairullah* v. *Panday Lachmi Ram*, 7 Pat. 109, A.I.R. 1928 Pat. 179 (182), 105 I.C. 643, 9 P.L.T. 252.

Attachment:—An order of attachment of a debt under sec. 268 of the C. P. Code (1882) is not an injunction or order staying a suit on the debt within the meaning of this section, because the order does not prevent the creditor from bringing a suit on the debt, but only from receiving from the debtor the amount thereof; if therefore the creditor does not bring a suit on the debt within the prescribed period, it will be barred—*Shib Singh* v. *Sita Ram*, 13 All. 76; *Beti Maharani* v. *Collector of Etawah*, 17 All. 198 (P.C.); *Rangasami* v. *Thangavelu*, 42 Mad. 637, 50 I.C. 380. And the result is the same whether the attachment of the debt be *before* or after judgment—*Beti Maharani* v. *Collector of Etawah*, 17 All. 189 (P.C.). See also *Kuruvilla Kuruvilla* v. *Ouseph Joseph*, A.I.R. 1957 T.C. 40.

An attachment before judgment of a decree and a consequent order issued by the Court attaching the decree amounts to an absolute prohibition of the execution of the decree by anybody; it amounts to an injunction and the period of the pendency is excluded under this section in computing the period for executing a decree—*Rajitagiripatty* v. *Bhavani Shankaran*, 47 Mad. 641, 47 M.L.J. 4, 80 I.C. 103, A.I.R. 1924 Mad. 673.

According to the Calcutta High Court, an attachment of a decree under O. 21, r. 53, C. P. Code, has the effect of staying the execution of the decree, and the period occupied by the pendency of such attachment will be excluded in calculating the period of limitation for execution of that decree—*Kiranshashi* v. *Chandrika*, 30 I.C. 587 (Cal.). But the Bombay High Court holds that sec. 15 only applies to

an absolute stay, and not to a limited stay as would be ordered under O. 21, r. 53. The stay does not prevent the holder of the decree sought to be executed, or his judgment-debtor, from seeking to execute the original decree, and that being the case, time must be taken as running against them—*Chanbasappa* v. *Holibasappa*, 48 Bom. 485 (491), 26 Bom.L.R. 317, 80 I.C. 239, A.I.R. 1924 Bom. 383.

163. Deduction of time:—Under this section, the decree-holder is entitled to deduct the period between the day on which the injunction is issued and the day on which it comes to an end. Limitation will commence to run as soon as the order granting the injunction is withdrawn. If the injunction comes to an end by the order of the Court of first instance, limitation will run from the date of the order of that Court, and the fact that there has been an appeal from that order will not entitle the decree-holder to deduct the time of the pendency of the appeal. Thus, an application for execution of a decree was made on the 18th April 1914, and while this application was pending a suit was instituted for a declaration that the decree had been obtained by fraud, and on 9th December 1914 a temporary injunction was obtained in this suit restraining the decree-holder from executing the decree. On the 26th April 1915 that suit was dismissed and with that dismissal the bar of injunction came to an end. An appeal was filed and it was dismissed on the 19th April 1917. Thereafter the decree-holder again applied for execution on 11th June, 1918. *Held* that the application was barred, because limitation ran from the time when the injunction came to an end by the order of the first Court on 26th April 1915, and not from 19th April 1917—*Balwant* v. *Budh Singh*, 42 All. 564 (566), 18 A.L.J. 642, 56 I.C. 1006. During the execution of a decree, a stranger claimed the property attached, and applied for an injunction restraining the execution sale. He also brought a suit for a declaration that the property was not liable to sale. The execution Court granted a temporary injunction, pending the final decision of the suit. The suit was eventually dismissed on 25th November 1913, but an appeal was filed therefrom, which appeal was likewise dismissed on 2nd May 1917. *Held* that the injunction came to an end on the 25th November 1913, the date on which the first Court dismissed the suit, and not on the 2nd May 1917 when the appeal was dismissed—*Madho Prasad* v. *Draupadi*, 43 All. 383 (386). If the injunction comes to an end by the order of the lower Appellate Court, limitation will run from the date of the order of that Court, and the fact that there was an appeal to the High Court will not entitle the decree-holder to calculate the period of limitation from the date of the order of the High Court—*Ruddar* v. *Dhanpat*, 26 All. 156 (159).

Where a stay is ordered subject to giving security, and the security is furnished subsequently, the stay order should be held to commence from the date of the original order, and in deducting the period under this section the period from the date of the order and not from the date of furnishing the security should be taken into consideration—*Thayyamuthu* v. *Odayapan*, 25 L.W. 108, A.I.R. 1927 Mad. 391, 99 I.C. 632.

164. Sub-section (2)—Notice:—Where a plaintiff, in a suit against the Government, is required to give notice to the Government under Section 80, Civil Procedure Code, he is entitled under sub-section (2) to exclude the period of notice (*i.e.*, two months) in computing the period of limitation prescribed for the suit—*N. W. Ry.* v. *Ramdhan*, 52 P.R. 1917, 38 I.C. 600; *Shri Bhagwan* v. *Secy. of State*, I L.R. (1939) All. 392, 1939 A.L.J. 154, A.I.R. 1939 All. 277; *Laxmi Chand* v. *Dominion of India*, A.I.R. 1955 Nag. 265. In a suit falling under Article 16, the plaintiff is entitled to deduct the period of two months' notice which he has to give to the Government before bringing the suit—*Secretary of State* v. *Venkataratnam*, 46 Mad. 488. A person suing a Municipality, after giving notice under sec. 167 of the Bombay

District Municipal Act is entitled to the benefit of sec. 15 (2), Limitation Act, as regards the time of such notice—*Municipality of Tatta* v. *Assammal*, 8 S.L.R. 294; 29 I.C. 597. So also, in computing the period of limitation prescribed under sec. 320 (2) of the Assam Municipal Act, the plaintiff is entitled to exclude the period of one month's notice prescribed in that section—*Tinsakia Municipal Board* v. *Bankim*, A.I.R. 1950 Assam 101, the reason being that as the operation of this section is not excluded by anything contained in that Act, sec. 29 (2) of this Act comes into operation. Where the plaintiff brings a suit against a State Railway, he is entitled to deduct the period of two months' notice given to the Secretary of State—*B. & N. W. Ry.* v. *Ram Sarup*, 3 P.L.T. 643, 70 I.C. 109, A.I.R. 1922 Pat. 549. If in a single suit against several defendants jointly, the plaintiff is required to give notice under sec. 80, C. P. Code to one of the defendants, he is entitled to a deduction of time not only as against the defendant to whom notice is given, but is entitled to a deduction against *all* the defendants—*Muhammad Sharif* v. *Nasir Ali*, 1930 A.L.J. 1443, A.I.R. 1930 All. 742 (744); *B. & N. W. Ry.* v. *Ram Sarup*, supra; *Khanderao* v. *Chanmallappa*, 26 Bom.L.R. 364, A.I.R. 1924 Bom. 364, 81 I.C. 750; *E. I. Ry.* v. *Rahimullah*, 9 Lah. 519, A.I.R. 1928 Lah. 349 (350), 111 I.C. 749.

But where no notice under sec. 80 of the C. P. Code is necessary to be given, the fact that it has been given will not entitle the plaintiff to exclude the period of such notice—*Weston* v. *Peary Mohan*, 40 Cal. 898 (949). Thus as no notice under sec. 49 of the Madras Court of Wards is necessary in the case of a suit in respect of properties of an institution of which the Ward of the Court of Wards is only a *dharmakarta* or *manager* or trustee the period of notice cannot be deducted under subsection (2) of this section in computing the period of limitation for the suit—*Sevagan* v. *Zamindar of Sivaganga*, (1938) 1 M.L.J. 763, 1938 M.W.N. 435, A.I.R. 1938 Mad. 612, 178 I.C. 880. And so, if a plaintiff, under a mistake of law or fact, conceives that he has a cause of action against the Secretary of State or a public body in addition to his cause of action against a private person, and joins without reason the Secretary of State or the public body, he shall not be entitled to invoke the assistance of this section and to extend the period by two months—*Ladli Prasad* v. *Nizamuddin*, 22 O.C. 342, 54 I.C. 535.

The plaintiff is entitled to exclude the period of two months' notice required to be served under section 31 of the Bombay Court of Wards Act on defendants who were Government wards at the time when the cause of action arose, and the extension cannot be refused on the ground that they ceased to be wards before the suit came on for hearing—*Khanderao* v. *Chanmallappa*, supra. But a notification of a claim under sec. 17 of the U. P. Court of Wards Act is merely an information to the Collector of the particulars of the claim. It is not necessarily a *notice of a suit* on the basis of the claim, because the proviso to sec. 20 of that Act indicates that when there is a good or sufficient cause a suit may be filed even without the claim being notified under sec. 17. Section 15 (2) of the Limitation Act does not apply to the notifying of the claim, and the period intervening between the date of notifying the claim and the date on which the claim was disallowed connot be deducted —*Borada Kant* v. *Court of Wards*, 1931 A.L.J. 949, A.I.R. 1931 All. 752 (754), 133 I.C. 537.

Sub-section (2) must not be read into the provisions of sections 6 and 8. This sub-section has nothing to do with the extension of time allowed to persons under disability under sections 6 and 8. Thus, section 49 of the Court of Wards Act requires two months' notice to be given before the institution of a suit under that Act; but this period of two months shall not be added to the extension of time allowed to

persons under disability under secs. 6 and 8—*Narasimha* v. *Krishna Chandra*, 37 M.L.J. 256, 52 I.C. 725.

Where a suit is brought in Delhi against a ward on giving two months' notice to the Collector as required by sec. 54, U. P. Court of Wards Act and the suit is brought after the prescribed period of limitation and the question arose whether the plaintiff was entitled to take advantage of sec. 15 (2), Limitation Act, it was held that sec. 15 (2) had no application and the case was barred by limitation. The words of section 15 (2) exclude cases where notice is not required by any enactment for the time being in force. There is no enactment in force in the Province of Delhi which requires giving of notice to the Collector or other persons in charge of a ward under the United Provinces Court of Wards Act—*Hargulal Mal* v. *Md. Ata Elahi Khan*, A.I.R. 1937 Lah. 41. *Per* Coldstream and Monroe, JJ.—Contra, Jai Lal, J.

Exclusion of time during which proceedings to set aside execution-sale are pending.

16. In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which a proceeding to set aside the sale has been prosecuted shall be excluded.

165. The period of limitation for a suit for possession by an auction-purchaser referred to in this section is prescribed by Articles 137 and 138.

The word "proceeding" in this section is not restricted to a proceeding other than a suit, *i.e.*, to an *application* to set aside a sale, but is comprehensive enough to include a suit as well as an application; the obvious intention of the Legislature is to allow an exclusion of the period during which the validity of the sale is in controversy, whether the sale is impeached by a suit or by an application—*Promotho* v. *Kishore*, 21 C.W.N. 304 (309), 38 I.C. 547; *Shripat* v. *Dattatraya*, A.I.R. 1957 Nag. 24. "If Art. 144 applies, the plaintiff is not entitled to any deduction of time under sec. 16 of the Limitation Act"—*Brojendra* v. *Ashutosh*, 26 C.W.N. 367.

This section does not apply so as to entitle an auction-purchaser obtaining symbolical possession to deduct the period taken in proceedings for setting aside the sale. The section can only be helpful to a plaintiff where he has not gone to the executing Court to obtain possession—*Balgobind* v. *Lila Kuar*, 24 Pat. 717, A.I.R. 1946 Pat. 202; *Bireswar* v. *Sadhiram*, A.I.R. 1950 Assam 50.

Effect of death before right to sue accrues.

17. (1) Where a person, who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

(2) Where a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

(3) Nothing in sub-sections (1) and (2) applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.

166. Principle:—This section adopts the general rule that a complete cause of action cannot accrue unless there be a person in existence capable of suing another person in existence capable of being sued. It clearly assumes the existence of the general law that the legal representative holds the property in the right of the deceased, and that it is the duty to sue in respect of a cause of action that has accrued after the death of the testator, and it further provides that the time shall not begin to run until the question as to who is the legal representative of the deceased has been solved—*Kesho Prasad* v. *Madho Prasad*, 3 Pat. 880 (907), 83 I.C. 812, A.I.R. 1914 Pat. 721. The principle of this section is that in order that a right of suit or cause of action may exist, there must be in existence a person capable of suing and another capable of being sued. Until both these persons exist, there cannot be a perfect cause of action—Darby and Bosanquet on Limitation, 2nd Edn., pp. 49, 50. There can be no limitation until there is a person in existence competent to sue—*Seeti Kutti* v. *Kunhi Pathumma*, 40 Mad. 1040 (1064); *Manikkam* v. *Thanikachellam*, 4 L.W. 369, 34 I.C. 945; *Palaniandi* v. *Vadamalai*, 2 L.W. 723, 28 I.C. 956. Therefore where no trustee was appointed for a temple by the committee for 24 years from 1883 to 1907, and the defendant had been in adverse possession of the office of trustee before 1907, the adverse possession by the defendant commenced only from 1907, the year in which the plaintiff was appointed to the office of trustee—*Palaniappa* v. *Vadamalai*, 18 I.C. 373. On the same principle, so long as there was no Receiver appointed for the management of a temple, there was none competent to sue on behalf of the temple, and the right to sue accrued to the temple from the time when the plaintiff was was appointed Receiver—*Annamalai* v. *Gobinda Rao*, 46 Mad. 579. In a suit by a legal representative of the principal against the agent, time would not run until there was a legal representative of the principal constituted—*Murray* v. *East India Co.*, (1821) 5 B. & A. 204.

The intention of sec. 17 is to limit the time during which an action may be brought and not to take away the rights of a person who is a possible defendant to an action, and it was not intended to accelerate any right of action against such a person—*Murugesam Pillai* v. *Minakshisundaram Ammal*, A.I.R. 1936 P.C. 309, 63 I.A. 429, 41 C.W.N. 22, 71 M.L.J. 831, 38 Bom.L.R. 1233, 17 P.L.T. 914, 164 I.C. 337.

167. 'Before the right accrues':—To bring this section into operation, the death must occur *before* the right to sue or make an application accrues. If the right accrues in the life-time of the deceased, the period of limitation begins to run from the date of accrual, and it matters not, as far as limitation is concerned in that case, whether by a will proved or by any other means a legal representative comes into existence or not—*Rhodes* v. *Smethurst*, 4 M. & W. 42; *Boatwright* v. *Boatwright*, L.R. 17 Eq. 71. See section 9.

168. Capable of suing:—The expression '*capable of suing*' is the equivalent of '*not being under legal disability to sue.*' It cannot refer to incapacity arising from want of means or absence or other physical causes. What legal disabilities incapacitate from suing are pointed out in section 6, among which infancy is the foremost—*Rivett Carnac* v. *Goculdas*, 20 Bom. 15 (at p. 44); *Jamnabai* v. *Jethmal*, A.I.R. 1937 Sind 318.

Section 6 of the Limitation Act must be read in conjunction with this section; and the operation of the earlier section must be regarded as qualified by and subject

to the rule prescribed in the latter section. Thus, where a partner died in 1896 leaving a widow and infant sons, and the widow took out letters of administration to the deceased's estate in June 1896, limited during the minority of the sons, and the eldest of the minors who attained majority in 1903 instituted the present suit in 1904 against the surviving partner, on behalf of himself and his infant brothers, for an account and share of the profits of the dissolved partnership, *held* that their infancy did not save limitation because the effect of the grant of the letters of administration to the widow was that the entire estate of the deceased vested in her, and she represented in every respect the estate of her husband; and therefore time began to run from the date on which the plaintiff's mother obtained letters of administration—*Mohit* v. *Raj Narain*, 9 C.W.N. 537. All that this section contemplates is that if there is no legal representative who is capable of suing, the statute of limitation would not run. The heir-at-law may be a minor on which case limitation would not run by virtue of sec. 6, but as soon as an administrator of the estate is constituted, limitation would begin to run against him, and the fact that there is an heir-at-law who is a minor would not prevent the operation of the law of limitation. The section does not have the effect of preventing the estate from vesting in the heir-at-law where the executor leaves a will, though the executor under the will declines to accept office; *Sivasankara* v. *Amaravathi*, I.L.R. (1938) Mad. 533, A.I.R. 1938 Mad. 157, (1938) 1 M L.J. 146, 174 I.C. 638.

169. Legal representative:—For definition, see C. P. Code, sec. 2 (11).

An executor or administrator of a deceased person is his legal representative for all purposes.—Sec. 211, Indian Succession Act (XXXIX of 1925). The executor is a legal representative within the meaning of this section even though he has not yet taken probate, for the taking of probate is not a condition precedent to the filing of suits but is only necessary before getting a decree. Time therefore begins to run against the executor from the date of the testator's death—*Balakrishnudu* v. *Narayanasawmy*, 37 Mad. 175, 24 I.C. 852.

The executor of a will is a legal representative capable of instituting a suit from the date of the testator's death and not from the date when he obtains probate. The title and authority of the executor are derived from the will and not from the probate. An administrator on the other hand derives his title solely under his grant, and cannot sue before he gets the letters of administration—*Meyappa Chetty* v. *Subramania Chetty*, 20 C.W.N. 833 (P.C.) 35 I.C. 323; *Nagaranjan* v. *Hotz*, A.I.R. 1954 Punj. 278. A certificate of administration under Bombay Reg. VIII of 1827 only confers a right of management and does not constitute the holder of such certificate the representative of the estate for the purpose of distributing it among the co-sharers; consequently he is not a person against whom a sharer can institute a suit for his share—*Keshav* v. *Narayan*, 14 Bom. 236. The person in possession of the estate of a deceased Hindu must, till some other claimant (*e.g.*, under a will of which no probate has been granted) comes forward, be treated for some purposes as his representative —*Prosunno* v. *Krishto*, 4 Cal. 342. Where, after the death of one of the partners in a partnership business, the Administrator-General obtained letters of administration and instituted a suit on behalf of the infant heir of the deceased partner for partnership-accounts and recovery of assets, it was held that the Administrator-General must be treated as the legal representative, and the period of limitation as regards the suit would run from the date of the issue of the letters of administration and not before—*Bhagwandas* v. *Rivett-Carnac*, 23 Bom. 544 (P.C.), affirming 20 Bom. 15. In a suit for an account brought by the employer, on the death of his manager, against the manager's representatives, limitation will not commence to run until administration

has been taken out to such manager's estate—*Lawless* v. *Calcutta Landing and Shipping Co.*, 7 Cal. 627.

Legal representative includes an heir—*Sivasankara* v. *Amaravathi*, I.L.R. (1938) Mad. 533; A.I.R. 1938 Mad. 157, (1938) 1 M.L.J. 146, 174 I.C. 638.

Sub-sec. (3):—The third sub-section provides that the rule of this section shall not apply to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office, because the application of the rule to such cases would tend to create insecurity of title—*Kesho Prasad* v. *Madho Prasad*, 3 Pat. 880, A.I.R. 1924 Pat. 721, 83 I C. 812.

Effect of fraud.

18. Where any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded,

or where any document necessary to establish such right has been fraudulently concealed from him,

the time limited for instituting a suit or making an application—

(*a*) against the person guilty of the fraud or accessory thereto, or

(*b*) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

The principle is that the right of a party defrauded cannot be affected by lapse of time or by anything else done or omitted to be done by him, so long as he remains, without any fault of his own, in ignorance of the fraud which has been committed—*Rolfe* v. *Gregory*, 4 DeG. J. & S. 576 (579); Darby and Bosanquet, 2nd Edn., pp. 261, 262.

169A. Scope:—This section does not apply to criminal cases; a complaint of a criminal offence is not a 'suit' or an 'application'; and therefore a complaint of an offence under sec. 11 Salt Act (1882), which must be made within six months, cannot be admitted after that time on the ground that by means of fraud the prosecution was kept in ignorance of the offence—*Emp.* v. *Nageshappa*, 20 Bom. 543 (547). So also, this section does not apply to a person having a right of appeal under sec. 25 of the Bengal Land Revenue Sales Act, the reason being that this section applies only to a person having the right to institute a suit or make an application—*Sabdeo* v. *Nathuni*, 8 B.R. 397; *Azizur* v. *Girwardhari*, 10 B.R. 89.

The rule of equity based on general principle of jurisprudence that fraud stops or suspends the running of time can have no application where there are definite statutory provisions specifying the grounds on the basis of which alone the stoppage or suspension of running of time can arise. While the courts necessarily are astute in check-

mating or fighting fraud, it should be equally borne in mind that statutes of limitation are statutes of repose—*Yesh Want* v. *Walchand*, A.I.R. 1951 S.C. 16.

170. Fraud:—In order to constitute fraud, it is not sufficient that there should be merely a tortious act unknown to the injured party, or enjoyment of property without title while the rightful owner is ignorant of his claims; there must be some abuse of a confidential position, some intentional imposition or some deliberate concealment of facts—*Dean* v. *Thwaite*, (1855) 21 Beav. 621; Darby and Bosanquet, p. 193; *Swarnamoyee* v. *Probodh*, 36 C.W.N. 758 (765). Mere non-disclosure of a transaction does not amount to 'fraud.' This term means *active* deceit in defrauding or endeavouring to defraud a person of his rights by artful device or concealment of fact —*Ghulam Raza* v. *Sardar Khan*, 4 P.L.R. 1903, 86 P.R. 1902; *Gauhri Mal* v. *Jainti Mal*, 73 P.R. 1885; *Ghiba* v. *Hayat*, 120 P.R. 1883.

If the defendant, by reason of the relation in which he stands to the plaintiff or otherwise, is bound to give him certain information, the withholding of such information, though not an active concealment, may amount to fradulent concealment. Brown, 505, 506. A co-sharer coming into exclusive possession of property belonging to himself and his co-sharer will be presumed to have done so not only for himself but for his co-sharer as well, until there is ouster. If the plaintiff was unaware of the fact that the defendant (his co-sharer) had the property, there is a duty on the defendant to speak, and if he remained silent, it amounts to concealed fraud on his part on which the plaintiff can justly rely to get over the bar of limitation—*Swarnamoyee* v. *Probodh*, 36 C.W.N. 758 (766). See also 52 Cal. 63 cited under Note 171 below.

This section applies only to such fraud as amounts to *concealment* and is intended to keep from the injured party the knowledge of the wrong or its remedy. This section therefore can have no application where the fraud alleged by the party applying to set aside an execution sale is mere under-statement of the value of the properties in the sale proclamation—*Rai Kishori* v, *Mukunda*, 15 C.W.N. 965 (969), 11 I.C. 295; *Narayan* v. *Damodar*, 16 C.W.N. 894, 16 I.C. 464; *Sarat* v. *Abdul*, 49 C.W.N. 731; *Sobhan* v. *Gangadhar*, 211 I.C. 533, A.I.R. 1944 Pat. 40; *Abdul* v. *Ambica*, I.L.R. (1939) 2 Cal. 163, 43 C.W.N. 862, A.I.R. 1939 Cal. 663; *Baswali* v. *Matangi*, 61 C.W.N. 468. A mere misstatement of the value of the property in the sale proclamation is not necessarily a fradulent act. But a wilful mis-statement by a decree-holder in the sale proclamation of the value of the property may be sufficient evidence, in particular cases, to justify an inference of fraud—*Ramdhari* v. *Deonandan*, 2 Pat. 65, 77 I.C. 957, A.I.R. 1922 Pat. 507. So also, where the disparity between the value of the property as stated in the proclamation for sale and real value of the property is so great as to shock the conscience, fraud in the service of processes may be presumed—*Sobhan* v.*Gangadhar*, supra. Where the defendant wrongfully collected the money due to the plaintiff, and not only did he not inform the plaintiff of it but even brought a false suit to cover his tricks, *held* that there was fradulent concealment which brought this section into operation, and in a suit brought by the plaintiff to recover the moneys, time did not run until he was aware of those collections—*Sahib Ram* v. *Govindi*, 43 All. 440.

The fraud contemplated in this section is the fraud committed by the *party* against whom a right is sought to be enforced, *i.e.*, the fraud of the defendant or some person through whom he derives his title; it does not mean the fraud of a third person—*Ramdoyal* v. *Ajoodhia*, 2 Cal. 1; *McCallum* v. *McCallum*, [1901] 1 Ch. 143. If it is alleged that the fraud was committed by the servant or agent of the defendant, it must be shown that it was committed for the general or special benefit of the principal and not for the private purposes of the servant or agent—*British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.*, 18 Q.B.D. 714,

"Kept from the knowledge of such right":—This section applies only when the plaintiff has been kept from the *knowledge* of his right to do a certain thing by fraud of the other party, and not where he is to kept from *exercising* his right—*Golam Muzafar* v. *Goloke*, 25 I.C. 884. Unless the knowledge of his right was fraudulently concealed from him, this section has no application—*Ramdhari* v. *Deonandan*, 2 Pat. 65, A.I.R. 1922 Pat. 507. By the enactment of this section the Legislature has distinctly contemplated that for the Limitation Act the starting point is changed on the ground of fraud only when the knowledge of the right to make the application is prevented by the fraud of the judgment-debtor. Having the knowledge that he had the right to make the application, if the judgment-debtor prevents the decree holder from knowing the existence of certain properties against which the decree could be enforced the case is clearly not covered by the words of this section. Moreover, to read this section as referring to an application for execution to proceed against a particular property would be destructive of oneness of the decree and would lead to multiplicity of periods of limitation—*Yeshwant* v. *Walchand*, A.I.R. 1951 S.C. 16. The *knowledge* of a right and the *exercise* thereof are fundamentally different things. Where a judgment-debtor paid the amount of decree out of Court but the decree-holder did not certify the payment under O. 21, rule 2, C. P. Code, and consequently the judgment-debtor was kept from the *exercise* of his right to make an application under O. 21, rule 2 (2), this section did not apply, because it could not be said that the judgment debtor was kept from the *knowledge* of his right to make the application—*Biroo* v. *Jaimurat*, 16 C.W.N. 923 (927), 16 C.L.J. 174, 13 I.C. 63. Where it was alleged that the decree holders had fradulently kept the judgment-debtor from exercising his right to apply to the Court to certify an adjustment under O. 21, r. 2, by giving him assurances, no extension of time was granted—*Chetty Firm* v. *Lon Pow*, 1 Bur.L.J. 226, 68 I.C. 924, A.I.R. 1923 Rang. 103.

The mere act of fraud is immaterial. In order to avail himself of the benefit of this section, the plaintiff or applicant must show that he has by means of the fraud been kept from the knowledge of his right to institute a suit or make an application —*Asanand* v. *Jhangi*, 29 P.L.R. 1919, 50 I.C. 610; *Nand Ram* v. *Ishar*, 27 P.L.R. 24, 92 I.C. 597; *Jatindra* v. *Brojendra*, 19 C.W.N. 553; *Biman Chandra* v. *Pramotho*, 49 Cal. 886 (891); *Bowrammah* v. *Chettiar*, 7 Rang. 104, A.I.R. 1929 Rang. 62 (63), 117 I.C. 63; *Das Narayan* v. *Mir Mahammad*, 6 P.L.J. 319 (323), 61 I.C. 823; *Payidanna* v. *Lakshminarasamma*, 38 Mad. 1076 (1086); *Ramchandra* v. *Hardeo*, 20 N.L.R. 23, A.I.R. 1924 Nag. 94. Thus, in an applicatiin to set aside a sale on the ground of fraud, the applicant will have to prove that his right to set aside the sale has been kept concealed from his knowledge by the fraud of the decree-holder or an auction-purchaser; it is not enough for him to show that the execution-proceedings were irregular and fradulent—*Kailash* v. *Bissonath*, 1 C.W.N. 67; *Narayan* v. *Mohonth Damodar*, 16 C.W.N. 894, 16 I.C. 464; *Bajrang* v. *Sonejhari*, 6 P.L.T. 567, 85 I.C. 622, A.I.R. 1925 Pat. 521; *Nabin Chandra* v. *Bipin Chandra*, A.I.R. 1926 Cal. 229, 87 I.C. 555.

The mere ignorance of the plaintiff as to his right to sue is no excuse under this section. It is only where such ignorance has been brought about by the fraud of the other party that this section applies—*Swarnamoyee* v. *Probodh*, 36 C.W.N. 758 (765), 55 C.L.J. 420; *Lokenath* v. *Chintamoni*, 16 I.C. 547. Thus, where an application to set aside a sale on the ground of fraud is made beyond the period of limitation, it is incumbent on the applicant to show that not only had he no knowledge of the sale but that he was kept from that knowledge in the manner and by the act of the person specified in this section—*Purna* v. *Anukul*, 36 Cal. 654 (657, 658).

On the other hand, if it is proved that the plaintiff was fully aware of his right,

inspite of the fraud practised upon him, he is not entitled to the benefit of this section, inasmuch as he was not kept from the knowledge of his right—*Jotindra* v. *Brojendra*, 19 C.W.N. 553, 24 I.C. 249; *Abdul Rahman* v. *Parshotam*, 5 Luck. 492 (P.C.), A.I.R. 1931 P.C. 12 (15), 128 I.C. 275.

Where the judgment-debtor had been fradulently kept from the *knowledge of the sale*, he was necessarily kept from the *knowledge of the right* to have the sale set aside, and section 18 would apply—*Jotindra* v. *Brojendra*, supra. Thus, where for the purpose of having a sale deed registered at a particular place where a very small portion of property is situate is included in the sale deed while the major portion of property is situated at a different place, and the vendee does not apply for mutation or obtains possession for more than one year after the date of the sale and the witnesses to the sale deed are neither residents of the locality where the major portion of the property is situated nor where the vendee resides, held, these are circumstances which lead to the inference that the vendee is guilty of fradulent concealment of the fact of sale from the person entitled to pre-empt and the latter can avail himself of the benefit of this section *Jagdish* v. *Suraj*, 180 I.C. 525, A.I.R. 1939 All. 113.

Where a decree-holder fradulently sells property not belonging to the judgment-debtor and realises rent from the auction purchaser for some years, and the auction purchaser brings a suit for refund of purchase money after the period of limitation on the dismissal of his suit for possession against the judgment-debtor, he is entitled to to get the benefit of this section as the acts on the part of the decree-holder amount to fraud keeping the auction purchaser out of his right to institute the suit within the proper period of limitation—*Chaitanya* v. *Ranjit*, I.L.R. (1938) I Cal. 512, 67 C.L.J. 16, A.I.R. 1938 Cal. 263.

171. Evidence—Burden of proof:—Fraud must be proved as laid. When one kind of fraud has been charged, another kind of fraud cannot, on failure of proof, be substituted for it—*Abdool* v. *Turner*, 11 Bom. 620 (P.C.). If a suit is on the face of it time-barred, O. 7, r. 6, C. P. Code requires that the plaint shall show the ground on which exemption from the law of limitation is claimed. Therefore, if the plaintiff claims exemption on the ground of fraud on the part of the defendant, he must prove the fraud—*Kalyan Mal* v. *Ahmaduddin*, 1934 A.L.J 909 (P.C.), 38 C.W.N. 1157, A.I.R. 1934 P.C. 208 (210). In such a case, it is for the plaintiff to give in the first instance clear proof of the fraud alleged by him; *Abdul* v. *Ambica*, I.L.R. (1939) 2 Cal 163, 43 C.W.N. 862, A.I.R. 1939 Cal. 663; *Sobhan* v. *Gangadhar*, 211 I.C. 533, A.I.R. 1944 Pat. 40. The Court will not presume it from the mere existence of suspicious circumstances—*Bhagwan* v. *Ida*, 1903 P.L.R. 27; *Biman Chandra* v. *Promotha*, 49 Cal. 886, 36 C.L.J. 295, 68 I.C. 94; *Ramesh Chandra* v. *Birajasundari*, 32 C.W.N. 519 (522); *Bhagwana* v. *Shadi*, 36 P.L.R. 114, A.I.R. 1934 Lah. 878 (879).

Where fraud is charged against the defendant, it is an acknowledged rule of pleading that the plaintiff must set forth the *particulars* of the fraud which he alleges; general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud—*Wallingford* v *Mutual Society*, 5 App. Cas. 685 (*per* Lord Selbourne); *Gunga* v. *Tiluckram*, 15 Cal. 533 (P.C.); *Chenvirapa* v. *Danava*, 19 Bom. 593 (601); *Krishnaji* v. *Wamanaji*, 18 Bom. 144. The allegations must be specified in particulars and detail, and the *finding of the Court* ought to be precise as to the particular acts and intentions constituting the fraud—*Nihal Chand* v. *Faujdar*, 3 P.R. 1882; *Ghulam Raza* v. *Sardar Khan*, 86 P.R. 1902. It is not necessary for the Court to state in so many words that it was due to the fraud of the decree-holders that the judgment-debtors were kept out of the knowledge of the sale; if the Judge discusses the evidence and comes to the conclusion that there was a suppression of the

writs of attachment and sale proclamation and other processes for execution, and that the judgment-debtor had no knowledge of the sale until there was delivery of possession to the auction-purchaser, it amounts to saying that the judgment-debtor was kept out of the knowledge of the sale by the fraud of the decree-holder—*Ramesh Chandra* v. *Birajasundari*, 32 C.W.N. 519 (521), 108 I.C. 33, A.I.R. 1928 Cal. 349. Where the judgment-debtor applies to have the execution sale set aside on the ground of fraud, and seeks to take advantage of this section, the Court is bound to find when and how the fraud was committed and as to whether the judgment-debtor was kept from the knowledge of the execution-proceedings and sale. There must be a distinct allegation of fraud in the petition, and the party relying upon fraud must state seriatim and in detail the facts constituting the fraud, vague or general allegations of fraud being of no avail. He must state further as to how the fraud was practised, how he was kept out of the knowledge of the execution proceedings and the sale, and how he came to know of the sale—*Das Narayan* v. *Mir Mahammad*, 6 P.L.J. 319 (323), 2 P.L.T. 401. In order to take advantage of the extended period of limitation under this section, the petitioner will have to allege and prove that by means of fraud he has been kept from the knowledge of his right to make an application. Vague allegations of fraud, when facts alleged do not bear out the case of fraud, will not enable the petitioner to get out of the bar of limitation—*Venkata* v. *Kanakaraju*, 1950 M.W.N. 464, (1950) 2 M.L.J 290, A.I.R. 1950 Mad. 801. He must also prove that the other party was himself guilty of the fraud or was an accessory thereto—*Purna* v. *Anukul*, 36 Cal. 654 (657).

This section has no application where there is no suggestion of fraud but only of a mistake—*Azizur* v. *Girwardhari*, 10 B R. 89; where the allegations in the plaint do not of themselves necessarily imply fraud on the part of the defendant, nor suggest any such imputation, sec. 18 would have no application. On the other hand, if the facts stated in the plaint necessarily suggest fraud on the part of the defendant, the mere omission in the plaint to expressly stigmatise the defendant's conduct as fradulent would be no bar to the plaintiff's relying on the provisions of this section—*Radha Kishen* v. *Delhi Cloth Mills*, 32 P.R. 1913, 16 I C. 804.

When once the fraud has been established by the plaintiff, or where the circumstances are such that fraud may be presumed, the burden is on the defendant (who sets up limitation) to show that the plaintiff had clear knowledge of the facts constituting the fraud at a time which is too remote to allow him to bring the suit—*Rahimbhoy* v. *Turner*, 17 Bom. 341 (P.C.); *Arjun* v. *Gunendra*, 18 C.W.N. 1266; *Ramesh Chandra* v. *Birajsundari*, 32 C.W N. 519 (522), A.I.R. 1928 Cal. 349; *Ram Kinkar* v. *Sthiti Ram*, 27 C.L.J. 528; *Bhushan Moni* v. *Profulla*, 48 Cal. 119 (123); *Vithappa* v. *Basgowda*, 14 Bom.L.R. 771, 17 I.C. 10; *Gordhan Das* v. *Ahmed*, 34 P.R. 1904; *Bhagwana* v. *Shadi*, 36 P.L.R. 114, A.I.R. 1934 Lah. 878 (879); *Biman Chandra* v. *Promotha*, 49 Cal. 886, 36 C.L.J. 295, A.I.R. 1922 Cal. 157; *Ram Chandra* v. *Hardeo*, 20 N.L.R. 23. A.I.R. 1924 Nag. 94; *Krishna* v. *Daserathu*, A.I.R. 1951 Orissa 149; *Mst. Phula* v. *Kashmiri*, A.I.R. 1956 Pepsu 17. The terms of section 18 are materially different from sec. 26, Real Property Limitation Act (3 & 4 Will. IV, C. 27) and that when a plaintiff has established that by fraud of the defendant he had been kept from the knowledge of his right to sue the burden is shifted on the defendant to show that the plaintiff had knowledge of the transaction impeached beyond the period of limitation—*Jadunath* v. *Kasiswar*, A.I.R. 1935 Cal. 779. This burden is not discharged by the defendant by proof of the fact that some hints and clues had reached the plaintiff which might have led to such knowledge—*Rahimbhoy* v. *Turner*, supra; *Sridhar* v. *Hara Prasad*, 209 I.C. 521, A.I.R. 1943 Pat. 377 or by showing that the plaintiff had means available to him for coming to know of the fact—*Swarnamoyee* v. *Probodh*, 34 C.W.N.

758 (766). In an application to set aside a sale, if it is obvious that a fraud has been perpetrated on the judgment-debtor, it is for the decree-holder to establish at what precise point of time the judgment-debor had clear and definite knowledge of those facts which would entitle him to apply for setting aside the sale—*Babu Lal* v. *Parem Kumari*, 10 P.L.T. 231, A.I.R. 1929 Pat. 228 (229), 117 I C. 46. So also, where an applicant for pre-emption has been kept from the knowledge of the sale by the fraud of the vendee, it is of the latter to establish that the influence of his fraud has ceased to operate at some time beyond the period of limitation. If he does not discharge the onus, the benefit of the fraud will continue to be available to the applicants for pre-emption—*Masior* v. *Samsammessa*, A.I.R. 1949 Cal. 307. Where the plaintiff alleges fraud and states that he acquired knowledge on a particular date, in ordinary cases the initial burden would be on him to lead evidence establishing the date of his knowledge; but if notwithstanding the fact that the plaintiff did in most specific terms allege in his suit the date and the circumstances in which he acquired knowledge for the first time, the defendant's pleadings are evasive and do not raise specifically an issue as to the date of the plaintiff's acquisition of knowledge, the burden of proving the date is not on the plaintiff—*Sri Kishan* v. *Ghanand*, 1929 A.L.J. 1153, A.I.R. 1929 All. 721 (723). Where the father of a minor obtained a decree, and died before execution, and then the judgment-debtor got himself appointed as guardian of the minor's property, *held* that the judgment-debtor who got himself appointed as guardian was under the obligation of enforcing against himself the decree which had been obtained against him, and the burden lay heavily upon him to show that he had made a full disclosure to the Court of his indebtedness to the estate; otherwise the Court would assume that no such disclosure was made and that he perpetrated a fraud both on the Court and on the minor by not making the disclosure—*Gobinda Lal* v. *Nalini Kanta*, 52 Cal. 63,, 88 I.C. 61, A.I.R. 1925 Cal. 584.

If the facts proved and found as established are sufficient to make a case of fraud within the meaning of this section, the objection that the plea under this section was not taken in the lower courts or in the grounds of appeal is not serious, as the question of the applicability of the section will be only a question of law and such a question can be raised at any stage of the case and also in the final court of appeal—*Yeshwant* v. *Walchand*, A.I.R. 1951 S.C. 16.

172. Application to set aside sale:—In the case of an application to set aside a sale on the ground of fraud, under O. 21, r. 90, C. P. Code, limitation runs not from the date when the applicant has some hearsay knowledge of the factum of sale, but when he has a clear and definite knowledge of the facts which constitute the fraud—*Bhusan Moni* v. *Profulla*, 48 Cal. 119 (122). Where irregularities affecting the validity of a sale have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled to make an application under section 311, C. P. Code, 1882 (O. XXI, r. 90); limitation (Art. 166) will be counted from the time when the fraud first became known to the applicant, and it is immaterial that the sale was confirmed. The confirmation of the sale ought not to be used as a shield for the fraud by which the Court has been induced to make the sale itself—*Mahendra* v. *Gopal*, 17 Cal. 769 (F.B.) (overruling *Gobindo* v. *Umacharan*, 14 Cal. 679); *Golam Ahmed* v. *Judhistir*, 30 Cal. 142 (153); *Sheo Ram* v. *Ikramunnissa*, 45 All. 316, 21 A.L.J. 176, 71 I.C. 631, A.I.R. 1923 All. 282. Where the auction purchaser, against whom the application for setting aside the sale under sec. 173, Bengal Tenancy Act, 1885, is directed, along with some of the judgment-debtors, is guilty of fraud, the applicants can avail themselves of the provisions contained in section 18, Limitation Act—*Parthasarathi* v. *Ahindranath*, A.I.R. 1935 Cal. 89.

Where execution-proceedings having been started against a judgment-debtor, who had died long ago, writs of attachment and proclamation of sale were issued in his name and returns were filed that the processes were duly served upon the judgment-debtor, and thereafter the sale took place, it was held that the application to set aside the sale (Art. 166) was within time if instituted within one month from the date of the applicant"s knowledge of the fraud—*Arjun* v. *Gunendra*, 18 C.W.N. 1266 (1270), 20 C.L.J. 341, 27 I.C. 294. Where every process issued by the Court to apprise the judgment-debtors or their representatives that execution was to proceed against them, had been fradulently suppressed, *held* that this section applied to the case—*Ram Kinkar* v. *Sthiti Ram*, 27 C.L.J. 528, 46 I.C. 221; *Jatindra* v. *Brojendra*, 19 C.W.N. 553, 24 I.C. 249.

But there is all the difference in the world between a failure to serve the notices and a deliberate contrivance on the part of a party to suppress the notices. The one is due to negligence, carelessness or various other circumstances; the other is the result of a deliberate contrivance on the part of a party for his own advantage. Mere negligence or carelessness on the part of the process-server or the identifier is insufficient as a basis for a finding of fraud—*Behari Lal* v. *Tanuk Lal*, A.I.R. 1926 Pat. 397, 8 P.L.T. 28, 97 I.C. 798.

This section applies where the application by a judgment-debtor to set aside an auction-sale is made against an *auction-purchaser*, and is not restricted to an application against the *decree-holder*. The words of this section are clear, *viz.*, that *any person* whose fraud has kept from another person the knowledge of his right to institute a suit or make an application is within the provisions of this section. Therefore, this section governs an application by a judgment-debtor against an *auction-purchaser* to set aside the confirmation of an execution sale on the ground that the auction-purchase was benami—*Pullo Reddi* v. *Pattabhirama*, 56 Mad. 734, 143 I.C. 388, 65 M.L.J. 139, A.I.R. 1933 Mad. 626 (627).

There is a difference of opinion as to the question whether in an application to set aside a sale it is sufficient to prove the fraud of the decree-holder only or whether it is necessary to prove the fraud of the auction purchaser also either as principal or as accessory. In *Mahipati* v. *Atul*, 53 C.W.N. 587, A.I.R. 1949 Cal. 212; *Sailendra* v. *Sudhanyo*, A.I.R. 1950 Cal. 166; *Karuppanna* v. *Ponnuthayee*, A.I.R. 1956 Mad. 198, (1956) 1 M.L.J. 190, I.L.R. (1956) Mad. 927; the former proposition has been laid down. The reason for the said proposition is that fraud proved against an auction purchaser is a fraud subsequent to the sale which under this section need not be proved. On the other hand in *Sailabala* v. *Atul*, 82 C.L.J. 9; *Ghulam* v. *Negapatinam*, (1950) 1 M.L.J. 432, 1950 M W.N. 240, A.I.R. 1950 Mad. 460; *Mihirlal* v. *Panch Kari*, 54 C.W.N. 637, A.I.R. 1950 Cal. 520; *Susamabala* v. *Profullamoyee*, A.I.R. 1951 Cal. 420; *Majibar Rahman* v. *Rahu Bux*, A.I.R. 1954 Cal. 604; the latter proposition has been laid down. The reason for the proposition is that the auction purchaser is not a person claiming through the decree-holder and the decree-holder's fraud will not be available as against him.

Fraud antecedent and subsequent to sale:—It is not necessary to prove fraud *subsequent* to the sale—*Jatindra* v. *Brojendra*, 19 C.W.N. 553, 24 I.C. 249. It is not necessary to prove that *after* the sale, when the right to apply for setting aside the sale accrued, there was some fraud practised by the decree-holder which kept his right to apply concealed from him. It is sufficient if fraud *antecedent* to the sale is proved. Therefore, if owing to the fradulent suppression of the processes by the decree-holder, all knowledge of the execution proceedings up to the date of the sale was withheld from the petitioner, then so long as he did not come to know of the

sale, *the effect of the fraud continued*, and the conclusion is that he was kept from the knowledge of the sale in consequence of the initial fraud practised by the decree-holder—*Sarvi Begam* v. *Ramchandra*, 47 All. 850, 23 A.L.J. 760, A.I.R. 1925 All. 778, 88 I.C. 500; *Bhusan Mani* v. *Profulla*, 48 Cal. 119 (122); *Nabin Chandra* v. *Bipin Chandra*, 87 I.C. 555, A.I.R. 1926 Cal. 229. In two cases the Calcutta High Court has held that this section does not apply where the fraud is *antecedent* to the accrual of the right—*Raikishori* v. *Mukunda*, 15 C.W.N. 965 (970); *Purna Chandro* v. *Anukul*, 36 Cal. 654 (657). But in later cases it has been held that, fraud *antecedent* to the sale cannot be excluded from consideration. It is a saying of an old Chancellor that "frost and fraud end in foul," and in this lies the truth of the matter. Fraud is a *continuing* influence and until that influence ends, it retains its power of mischief —*per Jenkins*, C.J. in *Narayan* v. *Mohanth Narayan* 16 C.W.N. 894, 16 I.C. 464 (dissenting from *Purna Chandra* v. *Anukul*, 36 Cal. 654 (657); *Bajrang* v. *Sonejhari*, 6 P.L.T. 567, A.I.R. 1925 Pat. 521). The question of fraud should be considered *as a whole*. The proof of fraud antecedent to the sale may have an important bearing on the determination of the question whether there was fraud subsequent to the sale, although it cannot be laid down as an inflexible rule that proof of fraud antecedent to the sale necessarily indicates continuance of that fraud up to a period subsequent to the sale—*Tookoomani* v. *Dwarka*, 17 C.W.N. 478, 17 I.C. 972.

173. Necessary document:—In one sense every document may be said to be necessary, but a limit should be placed on the meaning of the term, and a document which is merely useful in evidence cannot be considered a necessary document—*Lakshminarasa* v. *Ankinid*, 7 M.H.C.R. 22 (24).

Concealment of document:—The fact that a document which is alleged to have been fradulently concealed has been registered would seem to displace the allegation of concealment—*Venkateswara* v. *Shekhari Varma*, 3 Mad. 384 (398) (P.C.). So too does the production of the document before a public officer or in a Court in support of a claim—*Ibid* (at p. 399); *Ghiba* v. *Hayat*, 120 P.R. 1883.

174. Starting point of limitation:—*"When the fraud became known"*:— In case of a suit or application, limitation runs from the date when the fraud becomes known to the plaintiff or applicant. (In Englond, however, statute runs not from the date of discovery of the fraud but from the date when the plaintiff would have discovered it, if he had used due diligence. Lightwood, p. 297).

To bring his case within this section, plaintiff must allege when the fraud pleaded came to his knowledge—*Rai Radha Krishna* v. *Bisheswor*. 1 Pat. 733 (P.C.)., 67 I.C. 914, A.I.R. 1922 P.C. 336; *Kalyan Mal* v. *Ahmaduddin*, 1934 A.L.J. 909 (P.C.), 38 C.W.N. 1157, 151 I.C. 45, A.I.R. 1934 P.C. 208 (210). When the true nature of his rights was not discovered by the plaintiff earlier than the time at which his demand for possession was resisted, limitation began to run from the date of resistance—*Harnath* v. *Indar Bahadur*, 26 O.C. 223 (P.C.), 27 C.W.N. 949, 71 I.C. 629, A.I.R. 1922 P.C. 403.

The knowledge required by this section is not mere suspicion. It must be knowledge of such a character as will enable the person defrauded to seek his remedy in Court—*Natha* v. *Jodha*, 6 All. 406; *Samsudeen* v. *Lokshmi*, A.I.R. 1951 Tra-Co. 107. Hearsay knowledge is not the kind of knowledge contemplated by this section—*Bhusan Moni* v. *Profulla*, 48 Cal. 119 (123). Such knowledge must be a clear and definite knowledge of the facts constituting the particular fraud. The mere fact that some hints and clues reached the injured party which perhaps, if vigorously and acutely followed up, might have led to a complete knowledge of the fraud, is not enough to

constitute clear and definite knowledge of it—*Rahimbhoy* v. *Turner*, 17 Bom. 341 (P.C.); *Biman Chandra* v. *Promotha*, 49 Cal. 886 (F.B.), 36 C.L.J. 295; *Ramchandra* v. *Hardeo*, 20 N.L.R 23, A.I.R. 1924 Nag. 94; *Sridhar* v. *Hara Prosad*, 209 I.C. 520, A.I.R. 1943 Pat. 377; *Giribala* v. *Ushangini*, A.I.R. 1955 Assam 177.

In suits for money misappropriated by an agent employed for the collection of rents, where fraudulent accounts have been rendered by the agent, the Court having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of the attention being called to it, may infer such knowledge and may infer the time when the means of knowledge first came within the plaintiff's reach, or in other words, may hold the plaintiff fixed with constructive knowledge of the fraud—*Nilmoni* v. *Nilu Nath*, 20 Cal. 425.

174A. Protection of bona fide purchaser:—See clause (b). Under sec. 18 the extended time can be claimed only against a person guilty of the fraud and against a person accessory thereto and against a person who claims through the person who committed the fraud. From this it would appear that it cannot be claimed against an innocent third party against whom ordinary limitation would apply—*Majaharali* v. *Mafijaddi*, A.I.R. 1936 Cal. 706. Before a person can obtain the benefit of this section he must show (1) that he is a purchaser according to the proper meaning of the term; (2) that he is a purchaser *bona fide* and (3) that he is a purchaser for valuable consideration—*Radhanath* v. *Gisborne*, 15 W.R. 24 (27) (P.C). The property of which the plaintiff has been deprived by fraud can hardly be said to have been purchased in good faith from the person guilty of fraud, if the circumstances of the case are such as should put an ordinary careful man upon an inquiry and consideration as to the infirmity of the vendor's title or such as should call attention of the purchaser to such infirmity of title—*Ibid* (at p. 29).

175. Application of section to special or local laws:—Under sec. 29 (2) as now amended, this section will be applied in computing the period of limitation prescribed by any special or local law. Thus, it applies to an application under sec. 174 (4), Bengal Tenancy Act, to set aside a sale held in execution of a rent decree. Sec. 185 of that Act does not stand in the way, as an application under sec. 174 is not specified in Sch. III of that Act—*Midnapore Zamindary Co., Ld.* v. *Priya Bala*, 60 Cal. 970, 37 C.W.N. 927 (929), A.I.R. 1933 Cal. 782. The decision in *Radha Shyam* v. *Dinabandhu*, 18 C.W.N. 31 (32) to the effect that sec. 18, Limitation Act, cannot apply to an application under sec. 174, Bengal Tenancy Act, is no longer good law. But sec. 18 will not apply to suits, appeals and applications which are specifically mentioned in Sch. III of the Bengal Tenancy Act. See sec. 185 of that Act. So also this section applies to proceedings under the United Provinces Encumbered Estates Act—*Kazim* v. *Mubarak*, 14 Luck. 694, 1939 O.W.N. 719, A.I.R. 1939 Oudh 227; *Chuni* v. *Chandan*, 1939 A.L.J. 447, A.I.R. 1939 All. 542; *Mumtaz-un-nissa* v. *Abu*, I.L.R. (1944) All. 703, 1944 A.L.J. 504, A.I.R. 1945 All. 35. This section also applies to an application for restoration of a holding under Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act as there is nothing in sec. 11 of that Act which excludes this section—*Narsingh* v. *Silnath*, 7 B.R. 1003.

Effect of acknowledgment in writing.

19. (1) Where, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom

such property or right is claimed, or by some person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but, subject to the provisions of the Indian Evidence Act, 1872 (I of 1872), oral evidence of its contents shall not be received.

Explanation I.—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

Explanation II.—For the purposes of this section, "signed" means signed either personally or by an agent duly authorized in this behalf.

Explanation III.—For the purposes of this section an application for the execution of a decree or order is an application in respect of a right.

176. Applicability to Local or Special Acts:—The section is applicable to cases under the Orissa Tenancy Act; *Ramendra* v. *Brajamohan*, 23 Pat. 437, 1944 P.W.N. 413, A.I.R. 1944 Pat. 410; to cases under the Bihar Tenancy Act; *Jajdeo* v. *Babulal*, A.I R. 1941 Pat. 499; to the cases under the Bengal Tenancy Act; *Hasan Imam* v *Brahmdeo*, 9 Pat. 747, A.I.R. 1930 Pat. 301; but not to a suit under sec. 72 of the Dekkhan Agriculturist's Relief Act—*Janardan* v. *Ganesh*, I.L.R. (1945) Bom. 167, 47 Bom.L.R. 27, A.I.R. 1945 Bom. 200 (F.B.).

176A. Before expiration of period:—The very opening words of sec. 19 indicate that an acknowledgment to be valid must relate to the time when the right was still enforceable—*Sher Md.* v. *Karamchand*, A.I.R. 1935 Lah. 515, 37 P.L.R. 392, 155 I.C. 576. The acknowledgment must be made *before the expiration* of the period. An acknowledgment given after the expiry of the usual period of limitation is insufficient to keep the debt alive—*Raj Narain* v. *Ram Sarup*, 1930 A.L.J. 552, A.I.R. 1930 All. 467 (468), 123 I.C. 820; *Lalji* v. *Ghasi Ram*, 7 O.W.N. 420, A.I.R. 1930 Oudh 287 (289), 128 I.C. 276; *Indurai* v. *Shivlal*, 27 Bom.L.R. 467, A.I.R. 1925 Bom. 339, 87 I.C. 699. If a claim is barred the fact that there was an acknowledgment of liability later on will not resuscitate a barred claim because under the law an acknowledgment can be only of a subsisting liability—*Rajah of Vizianagaram* v. *Official Liquidator*, (1951) 2 M.L.J. 535, A.I.R. 1952 Mad. 136. Thus an admission of liability by the judgment debtor made more than three years after dismissal of last execution petition does not amount to an acknowledgment within the meaning of the section and cannot avail to revive a debt that has become barred—*Unichira* v. *Ramu*, (1951)

1 M.L.J. 51, 1951 M.W.N. 187, A.I.R. 1951 Mad. 674. Where a series of acknowledgments have been made, each within the new period arising from the previous acknowledgment and the first is within three years of the date of the debt, the debt is kept alive —*Mohesh Lal* v. *Busunta Kumaree*, 6 Cal. 340. In order that a written acknowledgment may be of avail to a plaintiff under sec. 19, Limitation Act, it is necessary that such acknowledgment must have been made before the expiration of the period prescribed for the suit. It is equally necessary that it must be a clear and unambiguous acknowledgment specifically admitting liability in respect of the debt sued upon and it must be signed by the party or by his authorised agent. If an admission amounts to such an acknowledgment, then, if it is made before the expiry of the period, it is helpful and the suit can be maintained for the recovery of the earlier debt, the time being extended by the acknowledgment.

On the other hand, if the acknowledgment is made after the period of limitation has expired, then the acknowledgment is of no utility and cannot save limitation. In order that a promise to say a time-barred debt should fall within the purview of sec 25 (3), Indian Contract Act, it is necessary that there should be a promise in writing to pay the time-barred debt. It follows, that the promise to pay should be express, and that an implied promise to pay will not fulfil the requirements of sec. 25—*Ghulam Murtaza* v. *Mt. Fasiunnisa*, A.I.R. 1935 All. 129; *Shanti Parkash* v. *Harnamdass*, A.I.R. 1937 Lah. 642.

The onus lies on the creditor to prove that the acknowledgment was made within time; it would be contrary to the provisions of secs. 101-104 of the Evidence Act to say that the burden lies on the defendant who acknowledged the liability—*Abdul Rafiq*, v. *Bhajan*, 53 All. 963, 1932 A.L.J. 77, A.I.R. 1932 All. 199, 137 I.C. 243; *Gur Saran* v. *Shib Singh*, I.L.R. (1944) All. 76, 1943 A.L.J. 548, A.I.R. 1943 All. 393 (F.B.); *Bharat* v. *Des Raj*, A.I.R. 1950 E.P. 157.

There has been some conflict of opinion as to the meaning of the words "prescribed period" in sections 19, 20 and other sections of the Act. The correct interpretation, according to the Allahabad High Court is that the acknowledgment or payment should have been made before the claim had become timt-barred and that is the prescribed period—*Firm Kamta Prasad* v. *Gulzari Lal*, 1954 All. L.J. 712, A.I.R. 1955 All 41 (F.B.). But in *Sant Lal* v. *Kamla Prasad*, A.I.R. 1951 S.C. 477, the Supreme Court held that it is the payment, and not the acknowledgment, that should be made within the period of limitation.

But where the mortgagor brought a suit for redemption of a very old mortgage of which there was an acknowledgment in the settlement records, but there was no evidence from which the date of the mortgage could be inferred with any certainty, it was held that no substantial inference could be drawn from the acknowledgment that the mortgage was at the date of the acknowledgment a subsisting mortgage not barred by limitation, and it was on the plaintiff (mortgagor) relying on the acknowledgment to show that it was made before the period of limitation had expired —*Anup Singh* v. *Fateh Chand*, 42 All. 575 (590, 592) (F.B), 56 I.C. 986; *Gur Saran* v. *Shib Singh*, I.L.R. (1944) All. 76, 1943 A.L.J. 548, A.I.R. 1943 All. 939 (F.B.); *Bharat* v. *Des Raj*, A.I.R. 1950 E.P. 157.

Acknowledgment made during holidays:—An acknowltdgment made during holidays but *after the expiry* of the period of limitation prescribed for the suit will not give a new period under this section, as this section requires that the acknowledgment should be given before the expiry of the prescribed period; and the fact that the right to sue was subsisting under sec. 4 on the date of the acknowledgment owing to the intervention of the vacation would be of no avail. The word 'prescribed'

means prescribed by the schedule and not prescribed by the operation of sec. 4—*Bai Hemkore* v. *Masamali*, 26 Bom. 782 (784); *Anisuddin* v. *Kalipada*, 58 Cal. 1148, 35 C.W.N. 370 (372), 134 I.C. 1132, A I.R. 1931 Cal. 785; *Nandram* v. *Ranchhodas*, 19 N.L.R. 135, 5 N.L.J. 178, A.I.R. 1922 Nag. 250; *Debendra* v. *Kartick*, 55 Cal. 1210, 32 C.W.N. 359, 47 C.L.J. 12, A.I.R. 1929 Cal. 68; *Shanti Prakash* v. *Harnamdas*, A.I.R. 1937 Lah. 642; *Chidambaram* v. *Venkatasubba*, A.I.R. 1937 Mad. 467; *Sheojiram* v. *Gulabchand*, 1940 N.L.J. 607; *Adiraja Ariga* v. *Beerana Rai*, (1956) 2 Mad. L.J. 218. But the Allahabad High Court is of opinion that there is no reason to limit the sense of the expression 'period prescribed' to the period prescribed in the schedule alone, but that the expression means the period prescribed by law, that is, the period prescribed by the whole body of the Limitation Act; in other words, the period prescribed by the schedule read with section 4. Therefore, an acknowledgment made after the expiry of the period of limitation but during the hlidays is a good acknowledgment—*Abdul Ghani* v. *Chiranji Lal*, 49 All. 726, 102 I.C. 111, A.I.R. 1927 All. 577 (dissenting from 26 Bom. 782). The same view has been expressed (by way of obiter) in *Visram* v. *Tabaji*, 15 Bom L.R. 348, 19 I.C. 820 (821) (disapproving 26 Bom. 782). Recently the Nagpur Court also dissents from the Bombay case and holds that an acknowledgment made during the holidays is valid—*Jhanaklal* v. *Gulabchand*, 11 N.L.J. 87, A.I.R. 1928 Nag. 192.

The same view has been adopted in the case of *Kishan Singh* v. *Sardar Ali*, A.I.R. 1937 Lah. 162. Tekchand, J., after considering the relevant decisions on the point holds that the "period prescribed for the suit" referred to in sec. 19 is not necessarily limited to the period prescribed in the Schedule to the Limitation Act, but means the period within which a suit could be instituted. A contrary view, however, has been taken recently in *Shantiparkash* v. *Harnamdas*, A.I.R. 1937 Lah. 642.

Acknowledgment made within period of grace:—A mortgage is kept alive by an acknowledgment of liability made by the mortgagor within the *period of grace* allowed by section 31 though after the expiry of 12 years prescribed by Art. 132—*Sheo Partab* v. *Tajammal*, 49 All. 67, A.I R. 1927 All. 114, 98 I.C. 1005; *Moti Begam* v. *Har Prasad*, 11 A.L.J. 570, 19 I.C. 658; *Seshayya* v. *Subbadu*, 59 M.L.J. 881, 128 I.C. 867, A.I.R. 1930 Mad. 991 (994). Sec. 31 has now been repealed.

Similarly, an acknowledgment made before the expiry of the period of grace allowed by sec. 5 of the Punjab Loans Limitation Repealing Act, III of 1923, is an acknowledgment made "before the expiration of the period prescribed" within the meaning of this section. The word "prescribed" is not limited to the period prescribed by the Schedule to this Act but extends to the period within which a suit may be instituted, including the period of grace allowed by any law—*Buta Singh* v. *Bhan Singh*, 129 I.C. 125, A.I.R. 1930 Lah. 978 (979); *Nagarur* v. *Nagarur*, A.I.R. 1938 Mad. 19, 46 M.L.W. 559.

Acknowledgment during extended period under sec. 6 :—The Bombay High Court held in some cases that the "period prescribed" means the period prescribed in the third column of the schedule, and not the period extended to a minor by operation of sec. 6. Therefore, the acknowledgment must be given before the expiration of the period prescribed in the schedule, and not before the expiration of the extended period within which a minor may bring a suit after his disability has ceased—*Maganlal* v. *Amichand*, 52 Bom. 521, 30 Bom.L.R. 733, A.I.R. 1928 Bom. 319 (320), 112 I.C. 24 (following 26 Bom. 782). Where the plaintiff is a minor at the date of the acknowledgment he can under the combined operation of this section and sec. 6 of the Act, institute a suit within the prescribed period of limitation after his disability as minor has ceased; *Shantaram* v. *Chintamanrao*, 44 Bom.L.R. 522, A.I.R. 1942 Bom. 248, I.L.R. (1942) Bom. 574. These cases have been dissented from in *Udhanji* v. *Bapudas*, 51 Bom.L.R. 830, A.I.R.

1950 Bom. 94, where it has been held that the scheme of the limitation Act is to determine the period of limitation not merely by looking at the first schedule but by looking at the schedule in conjunction with secs. 4 to 25 of the Act. Reading the first schedule along with sec. 6 of the Act, the period of limitation prescribed for a suit by a minor is not the period mentioned in the first schedule, but a special period as mentioned in sec. 6 of the Act. Therefore, an acknowledgment of liability passed not within the period prescribed by the first schedule but within the extended period allowed by sec. 6 constitutes an acknowledgment within the meaning of this section. The same view has been taken by the Madras High Court in *Subbarayadu* v. *Muthulakshmi*, (1945) 1 M.L.J. 3, A.I.R. 1945 Mad. 149.

Acknowledgment made within period excluded by local or special Act:—This section does not apply to an acknowledgment made after expiry of period of limitation but during the period excluded by sec. 52 of the U. P. Court of Wards Act, and so such an acknowledgment cannot extend time; *Shanker Lal* v. *Ram Lal*, I.L.R. (1938) All. 363, 1938 A.L.J. 252, A.I.R. 1938 All. 217 (F.B.). So also, an acknowledgment made after the period of limitation but during the period excluded under sec. 9 (5) of the U. P. Encumbered Estates Act, is not an acknowledgment within the meaning of this section. The words "before the expiration of the period prescribed" means the period prescribed by the Act in which this section occurs, *i.e.*, the Limitation Act read by itself and without reference, to any other enactment; *Sheo Shanker* v. *Motilal*, I.L.R. (1946) All. 532, A.I.R. 1947 All. 199. The Madras High Court has taken a contrary view in *Sambayya* v. *Subbayya*, I.L.R. (1938) Mad. 439, A.I.R. 1938 Mad. 19 where it has been held that in computing the period prescribed the period which a party is entitled to exclude under any law for the time being in force, should be taken into account, for example, where limitation is suspended by insolvency. See also, *Kuppuswami* v. *Lakshmi*, (1943) 1 M.L.J. 285, A.I.R. 1943 Mad. 552.

176B. Acknowledgment of barred debt—Promise to pay:—An acknowledgment *does not create any new right* of action but only enlarges the time and has the effect of making a new period run from the date of acknowledgment. It does not operate as a new contract but only helps to keep alive the original cause of action. It must therefore be distinguished from a novation of contract (sec. 62, Contract Act)—*Janaka* v. *Sheo Charan*, 7 Luck. 313, 8 O.W.N. 1210, A.I.R. 1932 Oudh 49 (50), 135 I.C. 390; *Hasti Mal* v. *Shanker*, A.I.R. 1952 Raj. 7 (F.B.). In other words, an acknowledgment gives a fresh period of limitation in respect of such debts as are not already barred at the time when the acknowledgment is made. An acknowledgment of a *barred debt* cannot give a fresh period of limitation in favour of the creditors—*Deoraj* v. *Indrasan*, 8 Pat. 706, A.I.R. 1929 Pat. 258 (260), 123 I.C. 470, 10 P.L.T. 169; *Suraj Prasad* v. *Bourcke*, 5 P.L.J. 371, 1 P.L.T. 190, 56 I.C. 379; *Mutssaddi* v. *B. B. & C. I. Ry.*, 42 All. 390; *Bindal* v. *Chota*, 16 C.W.N. 636, 14 I.C. 133. A time-barred debt cannot be revived by an acknowledgment; it can be revived only by a new contract under sec. 25 (3) of the Contract Act, in which there must be an *express promise to pay*; a mere acknowledgment of a time-barred debt or a mere willingness to renew the debt is insufficient to create a contract—*Ram Bahadur* v. *Damodar*, 6 P.L.J. 121, 60 I.C. 514, A.I.R. 1921 Pat. 29; *Maganlal* v. *Amichand*, 52 Bom. 521, A.I.R. 1928 Bom. 319 (322); *Gobind* v. *Sarju*, 30 All. 268; *Satya Ketu* v. *Ramesh Chandra*, 60 Cal. 714, 37 C.W.N. 326; *Guljar* v. *Sariman*, 36 C.L.J. 228, A.I.R. 1923 Cal. 71; *Md. Abid Hussain* v. *Bhagavan Das*, 5 I.C. 418 (All.); *Vasudev* v. *Ramakrishna*, 26 Bom. 394; *Mali* v. *Baikanath*, 18 C.L.J. 269; *Bhowani* v. *Peari*, 18 C.L.J. 329. This subject has been elaborately discussed in *Abdul Rafiq* v. *Bhajan*, 53 All. 963, 1932 A.L.J. 77, 137 I.C. 243, A.I.R. 1932 All. 199; *Raj Narain* v. *Ram Sarup*, 1930 A.L.J. 552, A.I.R. 1930 All. 467 (469), 123 I.C. 820; *Ghulam Murtaza* v. *Mt. Fassiunnissa*, A.I.R.

1935 All. 129; similarly, if the original debt cannot be proved, or if there is no evidence to show whether the original debt was subsisting at the time when the acknowledgment was made, the acknowledgment would be of no avail, in the absence of an express promise to pay—*Janaka* v. *Sheo Charan*, supra.

Under the English law, an acknowledgment of a debt implies a promise to pay even a barred debt. The English law makes no distinction between an acknowledgment or promise which is sufficient to extend the time in the case of a debt which is not barred, and an acknowledgment or promise which is sufficient to create a new contract where the debt has already become barred by lapse of time. But in India, an acknowledgment in which there is no express promise implying a new contract to pay, must be made before the debt is barred by time, and in this respect an acknowledgment under sec. 19, Limitation Act differs from a promise to pay a barred debt under sec. 25 (3) Contract Act—*Ram Bahadur* v. *Damadar*, 6 P.L.J. 121, 2 P.L.T. 308, A.I.R. 1921 Pat. 29; *Deoraj* v. *Indrasan*, supra; *Lalji* v. *Ghasi Ram*, 7 O.W.N. 420, A.I.R. 1930 Oudh 287 (289), 128 I.C. 276; *Nand Lal* v. *Partab*, 3 Lah. 326. Where, however, the acknowledgment is not merely an admission of an existing debt, but there are words from which a clear promise to pay is made out, such as fixing the date of payment and so on, such an acknowledgment would come under sec. 25 (3) Contract Act and not only under sec. 19 Limitation Act—*Deoraj* v. *Indrasan*, 8 Pat. 706, A.I.R. 1929 Pat. 258 (261), 120 I.C. 470.

177. Acknowledgment:—Each case relating to the question of an acknowledgment saving limitation must be treated on its own merits; and from the language used and the circumstances under which the acknowledgment is made it must be decided whether it amounts to an acknowledgment or an implied acknowledgment of the particular liability under consideration—*Baij Nath* v. *Sheo Dularey*, 8 O.W.N. 1117, A.I.R. 1932 Oudh 154 (155), 134 I.C. 1022. The Court cannot go beyond the words used for the purposes of this section. The endorsement itself must contain the acknowledgment either express or implied; *Ishri* v. *Chandrabhan*, I.L.R. (1939) All. 200, 1938 A.L.J. 1233, A.I.R. 1939 All. 177. It is not for the Court to overstrain the meaning of the words used, there is no warrant for holding that unless the words amount to a total repudiation of liability they should be read as an acknowledgment—*Official Assignee* v. *Natesa*, (1941) 2 M.L.J. 460, 1941 M.W.N. 827, A.I.R. 1941 Mad. 892. But the document said to constitute an acknowledgment has to be construed in the context in which it is given and where its language is not clear in itself, the context may be examined to see what it is to which the words refer. That is not to say that any equivocation in an acknowledgment can be cured by ascertaining what the probable intention of the acknowledgment was. That is quite a different thing. But where after examining in the light of the context what it was that the person giving the acknowledgment was actually referring to, the conclusion follows that it is an unequivocal acknowledgment of a right, then that acknowledgment is sufficient to satisfy the requirements of this section—*Munshi Lal* v. *Hiralal*, I.L.R. (1947) All. 11, 1947 A.L.J. 129, A.I.R. 1947 All 74 (F.B.). Acknowledgment means a definite admission of liability; it is not necessary that there should be a *promise to pay;* the simple admission of a debt is sufficient—*Binode Behari* v. *Raj Narain*, 30 Cal. 699; *Subramania* v. *Veerabhadra*, A.I.R. 1921 Mad. 464, 41 M.L.J. 217; *Peri Ramasami* v. *Chandra Kalayya*, 48 Mad. 603, 47 M.L.J. 840; *Ibrahim* v. *Lalit Mohan*, 50 Cal. 974 (975), 28 C.W.N. 322; *Nand Lal* v. *Partab Singh*, 3 Lah. 326, 69 I.C. 502, A.I.R. 1922 Lah. 425; *Kamal Devi* v. *Dr. Khudadad*, A.I.R. 1936 All. 522, 1936 A.L.J. 625, 163 I.C. 872; *Magham* v. *Vangala*, *A.I.R.* 1936 Mad. 939; *Ramprabha* v. *Bishunath*, A.I.R. 1938 Pat. 139; *Udhavji* v. *Bapudas*, 51 Bom.L.R. 830, A.I.R. 1950 Bom. 94; *Tulsiram* v. *Zaboo*, I.L.R. (1948) Nag. 639, 1949 N.L.J. 138, A.I.R. 1949 Nag. 229. In this respect

the Indian law differs from the English law. In England, an acknowledgment of a claim can keep it alive if the acknowledgment amounts to a promise to pay—*Tanner* v. *Smat*, (1827) 6 B. & C. 603; Lightwood, p. 339; so that the requirements of English law are more stringent than those of Indian law. See *Maniram* v. *Seth Rupchand*, 33 Cal. 1047 (1060) (P.C.). And so, the English authorities cannot afford any guidance in determining the question relating to an acknowledgment under the Indian law, which must be decided on the proper construction of the provisions of this Act—*Amir Mirza* v. *Lachmi Narain*, 7 Luck. 270, 138 I.C. 800, A.I.R. 1932 Oudh 1 (4). According to Indian law, where the right claimed is a debt, it is necessary that an unequivocal and unqualified admission of the debt or of the subsisting relationship of debtor and creditor should be established, but a promise to pay need not be made out—*Binode* v. *Rajnarain*, 30 Cal. 699; *Amir Mirza* v. *Lachhmi Narain*, supra. A promise to pay is required in case of a barred debt only. See preceding note.

Under this section, an acknowledgment is not limited in respect of a debt only, it may be in respect of *"any property or right"* which is the subject-matter of the suit (*e.g.*, the taking of accounts of a dissolved partnership)—*Hukumat* v. *Nenumal*, 22 S.L.R. 117, A.I R. 1928 Sind 45.

A document in which the mortgagee merely acknowledged having received possession of the mortgaged land would not constitute an acknowledgment of liability, in respect of the mortgagor's right to redeem the land, which would give him a fresh period for bringing a suit for redemption; for there cannot really be an acknowledgment without knowledge that the party is *admitting anything*. Sec. 19 intends a *distinct* acknowledgment of an existing liability—*Dharma* v. *Govind*, 8 Bom. 99 (102). A document containing a mere description of the property without any admission of a liability does not amount to an acknowledgment—*Khiali Ram* v. *Taik Ram*, 38 All. 540 (550). Similarly, where the plaintiff consigned some bags to be delivered to the consignee but they were not delivered, and the Railway Company wrote a letter to the plaintiff informing him that the bags were lying at a certain place and that the plaintiff might take delivedy if he liked, *held* that the letter did not amount to an acknowledgment of liability in respect of those bags—*Mutsaddi Lal* v. *B. B. & C. I. Ry. Co.*, 42 All. 390 (393).

The acknowledgment must be an acknowledgment of a *liability*. An admission by the defendant in a previous suit (not between these parties) that he had previously executed a promissory note in favour of the plaintiff is merely an admission of the fact of the execution of the note and does not amount to an acknowledgment of *liability* under the note—*Lallu Mal* v. *Reati Ram*, 45 All. 679, 21 A.L.J. 669, 74 I.C. 353, A.I.R. 1924 All. 70.

Under the Indian statute there need not be a promise to pay but the document must on a fair reading amount to an admission of liability, absolute or conditional, and in the latter case the condition must be fulfilled. But where the document relied upon expressly states that there is no liability and the liability is in fact denied and repudiated there is no principle on which limitation can be said to be extended under sec. 19—*Debji Chelabhai* v. *R. D. Metha & Co.*, A.I.R. 1935 Cal. 255, 39 C.W.N. 139, 60 C.L.J. 396, 155 I.C. 721; *Lakshmi* v. *Bhagat*, 50 P.L.R. 85, A.I.R. 1948 E.P. 36. The same principle applies to cases of admission of liability with a plea of discharge—*Karamadai* v. *Raju*, (1948) 2 M.L.J. 454, 1948 M.W.N. 743, A.I.R. 1949 Mad. 401.

There is no rule of law that an admission of a past liability unaccompanied by an allegation of discharge should in all cases be interpreted as an admission of a subsisting liability. The question in each case is, is it a proper inference to draw from the facts and circumstances, that the debtor intended to make an admission that on the date it

was made, the debt was existing—*Appasami* v. *Morangam*, A.I.R. 1935 Mad. 371, 68 M.L.J. 73, 157 I.C. 259. There must be a definite or unequivocal acknowledgment of the debt—*Maung Po* v. *B. Banerjee*, A.I.R. 1935 Rang. 152, 8 R. R. 48, 156 I.C. 783. So also an admission of post liability, though unaccompanied by an allegation of discharge cannot in all cases be interpreted as an admission of a subsisting liability. Each case must be treated on its own merits, and from the language used and the cidcumstances in which the acknowledgment is made it must be decided whether it amounts to an implied acknowledgment of a subsisting liability—*Kandasami* v. *Suppammal*, 45 Mad. 443 (447), 42 M.L.J. 268, A.I.R. 1922 Mad. 104, 70 I.C. 576; *Official Assignee* v. *Subramania Aiyar*, 46 M.L.J. 1, A.I.R. 1924 Mad. 286, 77 I.C. 740.

A writing which owing to some defect does not fulfil the requirements of sec. 20, it may nevertheless, as an acknowledgment of liability, operate to save the claim from being barred under sec. 19—*Krishnaswami* v. *Thiruvengada*, A.I R. 1935 Mad. 245, 68 M.L.J. 63, 1935 M.W.N. 122, 157 I.C. 272, 41 L.W. 721, 1935 M.W.N. 122. There must be a conscious acknowledgment that the party concerned is liable to pay under the document on which reliance is placed—*P. Muthu Chettiar* v. *Venkatachalam*, A.I R. 1935 Mad. 287, 159 IC. 486. It must also be made with the conscious intention of acknowledging the liability—*Nanak* v. *Suraj*, 1943 O.W.N. 302, A.I.R 1943 Oudh 425. The question whether an apparent acknowledgment contained in a document is a conscious acknowledgment of liability or not is of some difficulty, unless it is clearly and expressly acknowledged that the liability still exists. Where in reply to an application under Or. 34, r. 6, C. P. Code, a statement is made that the application is premature as all the mortgaged properties are not sold it does not amount to an acknowledgment in as much as the plea could be coupled consistently with the plea that the application was time barred—*Durga* v. *Kunj Behari*, 19 Luck. 279 ,1943 O.W.N. 352, A.I.R. 1943 Oudh 453. But where in answer to an application by the decree-holder for making a final decree in a mortgage suit, the judgment-debtor applies for instalments admitting his liability, a fresh period will start from that date—*Bajya* v. *Tarachand*, I.L.R. (1947) Nag. 683, 1947 N.L.J. 502, A.I.R. 1948 Nag. 308.

The acknowledgment must be an acknowledgment of an *existing* liability—*Ram Khelwan* v. *Nanhoo*, 6 C.L.J. 544; *Rangasami* v. *Thangavelu*, 42 Mad. 637; *Kandasami* v. *Suppammal*, 45 Mad. 443; *Onkarlal* v. *Raj Mohamud*, 17 N.L.R. 209, A.I.R. 1921 Nag. 1; *Kasturchand* v. *Manekchand*, 45 Bom.L.R. 837, A.I.R. 1943 Bom. 447; *Fakirchand* v. *Narmadabai*, 49 Bom.L.R. 770, A.I.R. 1948 Bom. 125. It must be an acknowledgment of the debt as such and must involve an admission of a subsisting relationship of debtor and creditor; and an intention to continue it until it is lawfully determined must also be evident—*Venkata* v. *Parthasaradhi*, 16 Mad. 220; *Hukumat* v *Nenumal*, 22 S.L.R. 117, A.I.R. 1928 Sind 45. In the absence of anything to the contrary when a debtor makes an acknowledgment of his liability to pay a debt it would ordinarily mean that he was admitting a subsisting liability to pay—*Tulsi* v. *Nek Ram*, I.L.R. (1945) All. 120, 1945 A.L.J. 58, A.I.R. 1945 All. 224.

Mere endorsement of payment without more does not amount to an acknowledgment of subsisting liability to pay. Such endorsement proves only the fact of payment and not an acknowledgment of liability to pay the unpaid balance—*Harkubai* v. *Shankerbhai*, 45 Bom.L.R. 1014, A.I.R. 1944 Bom. 37; *Ram Chandra* v. *Shitu*, 24 Pat. 96, 26 P.L.T. 173, A.I.R. 1945 Pat. 271; *Narasinga* v. *Rangayya*, (1942) 2 M.L.J. 610, 1942 M.W.N. 685, A.I.R. 1943 Mad. 133; *Dial Singh* v. *Mahomad Ali*, 45 P.L.R. 407, A.I.R. 1944 Lah. 88; *Shyam* v. *Dolgobind*, 24 Pat.L.T. 21, A.I.R. 1942 Pat. 395; *Durga* v. *Kishuni*. 18 Luck. 241, 1942 O.W.N. 582, A.I.R. 1942 Oudh 508; *Ishri* v. *Chandrabhan*, I.L.R. (1939) All. 200, 1938 A.L.J. 1233, A.I.R. 1939 All. 177; *Ram Prasad* v. *Binask*, 55 All. 632, A.I.R. 1933 All. 453. A contrary view has been taken

in *U Tun Maung* v. *L. Ah Choy*, 1938 Rang.L.R. 594, A.I.R. 1938 Rang. 401; *Kasiviswanathan* v. *Lakshmanan*, 175 I.C. 550, A.I.R. 1938 Rang. 84; *Siraj* v. *Umar*, A.I.R. 1941 Lah. 23, 192 I.C. 118, *Ganesh* v. *Dattatraya*, 47 Bom. 632, 25 Bom.L.R. 144. The reason given is that there is an implied acknowledgment by such endorsement. Though a mere endorsement of payment by a debtor does not constitute an acknowledgment, yet if the endorsement is so worded that an acknowledgment of debt can be read into it, either expressly or impliedly such endorsement may amount to an acknowledgment —*Thakur Das* v. *Sant Ram*, A.I.R. 1949 E.P. 219. Where however the debtor at the time of making the endorsement writes in his own hand that the payment will be adjusted on the promissory note account, such endorsement is an acknowledgment— *Bur Singh* v. *Sikri Bros.*, 42 P.L.R. 103, A.I.R. 1940 Lah. 106. So also the endorsement on a promissory note "out of the amount due under the promissory note Rs. 1,000 was paid this day" (signature of debtor) amounts to an acknowledgment of liability—*Chandukutti* v. *Moosan Kunthi*, A.I.R. 1936 Mad. 616, 163 I.C. 803, *Ajodhya* v. *Gobind*, 27 P.L.T. 464, A.I.R. 1946 Pat. 401; *Ramayya* v. *Anjayya*, I.L.R. (1942) Mad. 405, (1941) 2 M.L.J. 848, A.I.R. 1942 Mad. 146. *Venkatachelamiah* v. *Annapoornamma*, I.L.R. (1942) Mad. 590, (1942) 1 M.L.J. 469, A.I.R. 1942 Mad. 353 (F.B.). The reason is such payment "towards" promissory notes implies that some thing more remains to be paid i.e., the payment is made on account of a larger sum due under the instrument—*Kesarmal* v. *Narayan*, I.L.R. (1942) Bom. 512, A.I.R. 1942 Bom. 218. See also *Vira Raghavayya* v. *Sita Ramayya*, (1943) 2 M.L.J. 456, A.I.R. 1944 Mad. 57. The same principle applies to such an endorsement even though no payment is made—*Abdul* v. *Livesay*, I.L.R. (1945) Nag. 745, 1945 N.L.J. 213, A.I.R. 1945 Nag. 181. An acknowledgment of an unsettled or outstanding account without more amounts to an acknowledgment of liability to pay whatever may be found due by either party on account being taken, and that therefore there is an acknowledgment of liability within the meaning of sec. 19—*Amritsar Municipality* v. *Ralla Ram*, A.I.R. 1936 Lah. 638, 17 Lah. 737, 165 I.C. 723, (33 Cal. 1047 (P.C.), followed). So also an admission of the existence of an unsettled account coupled with an expression of willingness to have it settled and a query whether anything would be due implies an admission of liability for the amount that may be due upon the settlement—*Subbaramaya* v. *Verri Iragram*, 49 L.W. 106, A.I.R. 1939 Mad. 300; or where the debtor admits that a definite amount is due from him according to his accounts— *Diwani Widyawati* v. *Ramji*, 41 P.L.R. 557, A.I.R. 1939 Lah. 216. It is not necessary that the actual amount due should be mentioned so long as there is an acknowledgment of liability in writing signed by the debtor—*Shanti Lal* v. *Lyallpur Bank Ltd.* (in liquidation), *Lahore*, A.I.R. 1936 Lah. 276. The admissin of the execution of a promissory note is *prima facie* no more than admission of liability as at the date of the note—*Sagoremal Gopalka* v. *A. Banerjee & Co.*, A.I.R. 1935 Cal. 721, 40 C.W.N. 132, 159 I.C. 618.

In a suit to recover a *definite* sum of money the plaintiff relied upon a letter written by the defendant to this effect:—"I wish to look to your accounts; in my own account I do not see any amount due to you. Please therefore send the account." It was held that there was no acknowledgment, as there was no admission of the existence of a debt. Under section 19, when it is sought to use an acknowledgment for starting a fresh period of limitation, the right acknowledged must be of the *same description* as the right which is the subject of the suit. Thus, in a suit for the *balance due upon taking accounts*, an admission that *accounts must be taken* and settled would be a pertinent acknowledgment, but it would be otherwise in a suit brought to recover a *definite* sum of money. The asking for an account in response to a creditor's demand for a definite sum of money would not amount to an acknowledgment; it would have amounted to an acknowledgment if the creditor had based his right upon accounts—

Andiappa v. *Alasinga Naidu*, 36 Mad. 68 (70). Similarly, where a tradesman sent a bill for a *certain* sum with the words "to account rendered", to which the customer replied: "Please send me a detailed bill," such words meant that the customer wanted to see and examine the accounts, and would not amount to an admission of liability in respect of a *definite* sum—*Ibid.* Where the suit, though framed as a suit for a definite sum of money, is really a suit for an amount *due on accounts*, an admission that accounts must be taken and settled is a good acknowledgment—*Kumaraswamy* v. *Narayan Rao*, 46 M.L.J. 468, A.I.R. 1924 Mad. 619, 80 I C. 355. Where the creditor demanded a definite sum but the debtor replied: "I do not owe as many rupees as you have written. Send an extract of the account and then whatever mistake has crept in will appear. Your dues have remained unpaid for many days," this did not amount to an acknowledgment; but when after receiving the account sent by the creditor, the debtor wrote to the creditor admitting the correctness of the account and asking for time to enable him to pay the amount, it was held that this was a valid acknowledgment—*Velchand* v. *Bhagvandas*, 32 Bom.L.R. 1390, 128 I.C. 911, A.I.R. 1931 Bom. 74 (75); following *Pandurang* v. *Maruj*, 30 Bom.L.R. 688. A letter from the debtor containing a definite statement that the creditor has no claim and that his claim if any should be established in a Civil Court is not an acknowledgment of liability—*Purnendu* v. *Union of India*, A.I.R. 1956 Cal. 66. But if the debtor admitted that a definite sum was due from him that would amount to acknowledgment—*Diwanni Widgwati* v. *Ramji*, 41 P.L.R. 557, A.I.R. 1339 Lah. 216. A writing by the debtor containing the details of account of the creditor, stating that a specific amount is due to the creditor on the date of the writing and signed by the debtor is unquestionably an acknowledgment even though it is recited that the debtor has handed over certain documents in favour of the creditor the value of which is equivalent to the debt without any formal assignment, and the word *"bhuktan,"* is used (meaning satisfied in full)—*Ramdin* v. *Ram Parichhan*, 22 Pat.L.T. 1057, A.I.R. 1042 Pat. 170. So also, where in course of several letters written by the debtor to the creditor asking him to send accounts or further particulars he makes a request to "write the amount of money due to you," it amounts to an acknowledgment—*Baldev* v. *Harbans*, A.I.R. 1944 Lah. 65, 215 I.C. 30.

Where the admission was in the following terms: "I am ashamed that the account has stood so long," it was held to be a good acknowledgment—*Cornford* v. *Smithard*, (1859) 5 H. & N. 13; *Holmes* v. *Mackrell*, (1858) 3 C.B. (N.S.) 789. Where the defendant (*i.e.*, the debtor) himself first wrote to the plaintiff requesting him to send in his account made up to Christmas last, and not having received any reply to his first note, he wrote the plaintiff again requesting him to send in his account, it was *held* that there was a sufficient admission of a debt—*Quincey* v. *Sharpe*, (1875) 1 Ex. D. 72. Where by a letter the writer definitely asked the plaintiff to send a copy of the account showing what amount was due by him to the plaintiff, *held* that it was clearly an acknowledgment—*Kirpa Ram* v. *Devi Dayal*, 28 P.L.R. 169, 101 I.C. 544, A.I.R. 1927 Lah. 832. Where the defendant admitted the existence of a running account between the partits and went on to say that his representatives would compare accounts and pay what was found to be due, *held* that the words were a clear admission of liability—*Sant Lal* v. *Beni Prasad*, 23 A.L.J. 248, 87 I C. 985, A.I.R. 1925 All. 340; *Joharmal* v. *Hiralal*, 7 Pat. 238, A.I.R. 1928 Pat. 221. There is a distinction between an acknowledgment of a right to an account and an acknowledgment of a debt. For an acknowledgment of a right to an account there need not be an acknowledgment that a debt or even a specified amount thereof is actually due. Where the parties in effect state that: "There is a right to a pending account between us and each has got a claim to recover the balance which may be found due upon the taking of the accounts and each agrees to pay the other the balance so found due,"—the statement

amounts to an unconditional admission of liability. It is not essential that there should be an express statement that the balance would be paid. Even the words "settle the accounts" would indicate that the parties agreed to pay whatever was found to be due on the accounts being looked into—*Janakirama* v. *Narasimha*, A.I.R. 1937 Mad. 38 distinguishing *Narayanaswamy* v. *Gangadhar*, A.I.R. 1919 Mad. 838, and *B. Ramamurthy* v. *Thammana Gopaya*, A.I.R. 1917 Mad. 892.

A writing in a *sarkat* or the book of the creditor by the debtor to the effect "for making your account of the *sarkat* I will come on 22nd November 1936 to your place and will make payments" amounts to an acknowledgment of liability to pay the amount found due on taking accounts—*Pachkodi* v. *Krishnaji*, I.L.R. 1946 Nag. 796, 1946 N.L.J. 622, A.I.R. 1947 Nag. 145. Payments made *'alal hishab'* that is, on account amount to an acknowledgment—*Deputy Commissioner* v. *Brijendra*, 15 Luck. 537, 1940 O.W.N. 425, A.I.R. 1940 Oudh 305.

An admission of liability coupled with a declaration as to the arrangement proposed for its satisfaction is an acknowledgment of liability—*Ramaswami* v. *Velayutham*, (1938) 1 M.L.J. 450, A.I.R. 1938 Mad 486; or with a prayer to grant time for payment; *Ramchandar* v. *Krishnan*, 1939 A.L.J. 2, A.I.R 1939 All. 179; in such a case limitation will be saved only upto the date of the letter of acknowledgment and not upto the time mentioned in the letter—*Kunji* v. *Dwarka*, I.L.R. (1945) All. 35, 1944 A.L.J. 447.

But a mere reference to arbitration with an agreement to pay whatever the arbitrators decide would be a conditional acknowledgment, and if the arbitrators fail and the plaintiff brings a case the agreement to refer to arbitration would not prevent the plaintiff's claim being barred by limitation. The defendant wrote a letter to the effect that if certain arbitrators should decide that he should pay any amount, he would immediately pay. The arbitrators failed. It was held that the letter would not operate as an acknowledgment—*Ramamurthy* v. *Gopayya*, 40 Mad. 701 (704); *Narayanasami* v. *Gangadhara*, 48 I.C. 89, 37 M.L.J. 353. (Contra—*Hukumat* v. *Nenumal*, 22 S.L.R. 117, A.I.R. 1928 Sind 45 (48). A mere reference to arbitration which is *prima facie* only a mode of settling disputes, and not an admission of any liability by the parties, does not import any subsisting jural relationship of debtor and creditor, and therefore does not amount to an acknowledgment—*Ramamurthy* v. *Gopayya*, 40 Mad. 701 (704). A mere submission to arbitration containing a promise to pay whatever the arbitrators decide, is not available as an acknowledgment if the arbitration proves abortive, unless the submission contains an unqualified acknowledgment of the debt—Halsbury, Vol. 19, p. 66; Banning, p. 45. But where there was a reference to arbitration and the arbitrators gave an award, the agreement to refer the matter in dispute to arbitration and the award thereon would amount to an acknowledgment of the debt—*Phul Singh* v *Bhojraj*, 49 All. 801, 102 I.C. 181, A.I.R. 1927 All. 488; and the fact that the award was subsequently set aside by the District Judge and by the High Court did not nullify the acknowledgment—See *Sitayya* v. *Rangareadi*, 10 Mad. 259. But recitals in a reference to arbitration admitting liability to pay a debt amount to sufficient acknowledgment of liability in respect of the debt so as to extend the period of limitation, even though reference may prove infructuous —*Tikamdas* v. *Kalianji*, I.L.R. (1939) Kar. 693, A.I.R. 1939 Sind 113. But if such an admission is subject to a condition that the defendants would be liable only if the liability is ascertained by the arbitrators, this section does not apply—*Fatechand* v. *Wasudeo*, I.L.R. (1947) Nag. 477, 1947 N.L.J. 417, A.I.R. 1948 Nag. 334.

An allegation that a debt has been discharged is not an acknowledgment because it is tantamount to a *denial* of the debt—*Rangasami* v. *Thangavelu*, 42 Mad. 637, 10 L.W. 533, 50 I.C. 380. See also, *Karamadai* v. *Raju*, (1948) 2 M.L.J. 454, 1948

M.W.N. 743, A I.R. 1949 Mad. 401. Where the defendant writes to the plaintiff: "Out of the 2,000 pieces of sleepers supplied by you, 800 pieces are bad and are lying rejected; please arrange to remove them; and thereafter adjusting the account, let me hear about your dues, if any," the first part of the letter amounts to a *denial* of liability for the price of the 800 rejected sleepers; and the last part of the letter amounts to an acknowledgment of liability in respect of the price of the 1,200 sleepers accepted—*Debji Ghelabhai* v. *R. D. Mehta & Co.*, 39 C.W.N. 139 (141), A.I.R. 1935 Cal. 255, 60 C.L.J. 396, 155 I C. 721. Where there was an acknowledgment that there was a mortgage, and there was no express statement that it was discharged, but there was a statement that in order to pay off the debt a sale was effected and that since the date of sale the vendees had been in possession of the property, the statement was not an acknowledgment of liability regarding the mortgage, but it rather suggested that the mortgage no longer existed—*Chhaterdhari* v. *Nasib*, 5 P.L.T. 551, 78 I.C. 919, A.I.R. 1924 Pat. 806 (807). A letter written by a railway company to the plaintiff informing the latter that the goods have been rightly delivered to a third person under an indemnity bond, and that the plaintiff's claim cannot be entertained is not an acknowledgment of liability, but on the contrary amounts to a *denial* of liability—*Ludhomal* v. *Secretary of State*, 13 S.L.R. 1, 51 I.C. 570. But where the defendant denied that any balance would be due to the plaintiff but admitted that accounts should be taken and that *he would be liable if any balance were found due to the plaintiff*, it was held that the defendant had made an acknowledgment of the debt—*Sitayya* v. *Rangareddi*, 10 Mad. 259 (265).

Where a person admitted in a previous case that he had received Rs. 1,000 as earnest money, but stated that the sum had been more than repaid by delivery of cotton of the value of Rs. 3,000, such statement cannot be construed as an admission of a *subsisting* liability in respect of Rs. 1,000—*Kalu* v. *Mehru*, 41 P.R. 1916, 32 I.C. 497. But where a debtor wrote a letter to the creditor enclosing a memorandum of account which showed that out of the amount of Rs. 1,654 due to the creditor, the debtor had deducted the sum of Rs. 1,489 being a sum due to the debtor from a firm of which the creditor was the manager, and remitted to the creditor Rs. 165 being the balance due, *held* that the mere fact that the debtor stated in the account that he had on that day appropriated a part of the amount due to the creditor in satisfaction of a claim due from a third party did not alter the fact that on the date of the letter the sum of Rs. 1654 was due from the debtor to the creditor before the alleged appropriation was made; there was therefore an acknowledgment of the whole sum of Rs. 1,654—*Curlender* v. *Abdul Hamid*, 43 All. 216 (219), 59 I.C. 941.

An oral agreement to pay damages for breach of contract does not amount to an acknowledgment—*Kamal* v. *Bani*, A.I.R. 1923 Nag. 332, 75 I.C. 440; *Kesri Mal* v. *Ganesh*, A.I.R. 1951 Ajmer 59.

177A. Conditional and unconditional acknowledgment:—The acknowledgment of liability must be an absolutely *unconditional* one. If the plaintiff, a contractor, sends a bill to the defendant demanding the price of work done, and the defendant replies: "I think the bill is incorrect; there are many errors in it. I will examine the work done, and then see what, if anything, is due," such a letter is not an acknowledgment sufficient to give a fresh start—*Jogeshwar* v. *Rajnarain*, 31 Cal. 195 (200). A letter saying that the writer will sign after looking into the accounts is no acknowledgment—*Bhairo* v. *Gajadhar*, 19 C.W.N. 170, 23 I.C. 587.

Where the parties to an *abichalnama* acknowledged that accounts remained unadjusted which the arbitrators had to adjust, and each party agreed that he would pay such amount as might be found due from him on adjustment of accounts, it was

held that there was a sufficient acknowledgment—*Janardan* v. *Radhaballabh*, 23 C.W.N. 921, 53 I.C. 898.

Where a guardian files a list of debt due by the estate of the minor in guardianship court with a note that it is difficult for him to admit the amounts due under the documents and of the correctness of the documents unless seen by him, it is not an unconditional acknowledgment of the debts mentioned therein—*Sri Chand* v. *Lajjia*, 41 P.L.R. 356, A.I.R. 1939 Lah. 31.

Even if the acknowledgment be a conditional one, the condition must be fulfilled in order that such acknowledgment should save limitation—*Maniram* v. *Seth Rup Chand*, 33 Cal. 1047 (1058) (P.C.); *Arunochella* v. *Rangiah Appa*, 29 Mad. 519; *Ramamurthi* v. *Gopayya*, 40 Mad. 701 (704); *Debji Ghelabhai* v. *R. D. Mehta & Co.*, 39 C.W.N. 139 (141); *Sheocharan* v. *Chhakowri*, A.I.R. 1937 Pat. 616.

An acknowledgment of liability need not be express; it may be by implication—*Arur Sing* v. *Partab*, 131 P.R. 1919, 53 I.C. 425; *Subba Rao* v. *Parasurama*, 34 M.L.J. 551, 46 I.C. 973; *Bhagwan* v. *Madhav*, 46 Bom. 1000, 24 Bom.L.R. 713; but the implication must be a necessary implication, so that the acknowledgment is clear and unequivocal—*Bibi Saheb* v. *Sayad Mir Mahamad*, 9 S.L.R. 143; *Filip & Co.*, v. *Mahomedalli*, 13 S.L.R. 183, 55 I.C. 822; *Ralliram* v. *Budhuram*, 17 S.L.R. 324, A.I.R. 1925 Sind 181; *Hukumat* v. *Nenumal*, 22 S.L.R. 117, A.I.R. 1928 Sind 45; *Sarangdhar Singh* v. *Lakshmi Narayan*, A.I.R. 1955 Pat. 320. Where a judgment-debtor in an execution proceeding objected to his being arrested because he was a poor man and asked that the warrant of arrest should not be executed until his objection had been decided, *held* that there was no acknowledgment of a debt within the meaning of this section but a mere objection to the execution of the decree in the manner sought by the decree-holder. An acknowledgment must be a clear one and not be left to sheer inference—*Luchman Das* v. *Ahmad Hassan*, 39 All. 357. But a petition by the arrested judgment-debtor praying for release and for an order to pay the balance of the decretal amount is an acknowledgment of the judgmtnt-debt—*Vithal* v. *Gopal*, 5 N.L.R. 8, 1 I.C. 240. An acknowledgment must be something positive. Mere silence on the part of a party would not be enough. So that a mere omission to deny assertion of a claim cannot of itself amount to an acknowledgment sufficient for the purposes of this section—*Jainabbibi* v. *Shankar*, I.L.R. (1951) Bom. 57, 52 Bom.L.R. 858, A.I.R. 1951 Bom. 255.

In order to make a binding acknowledgment it is not necessary that the exact sum due should be stated in the acknowledgment, it being sufficient if some debt be acknowledged due—*Colledge* v. *Horn*, (1825) 3 Bing. 119; *Lechmere* v. *Flecher*, (1833) 1 Cr. & M. 623. Where the principal sum advanced on a mortgage bond was Rs. 5,700, and on payment of Rs. 1,750 by the mortgagor an endorsement was made by him on the back of the bond in the following terms: "Paid on account of principal as per separate accounts, Rs 1,750 only," *held* that the endorsement was a sufficient acknowledgment under this section. Although it did not specify the principal sum due at the time of the endorsement, still the expression 'the principal' must be taken to refer to the principal mentioned in the bond on the back whereof the endorsement was made—*Prasanna* v. *Niranjan*, 48 Cal. 1046, 26 C.W.N. 213, 64 I.C. 988.

177B. An acknowledgment of liability would be good, even if it is accompanied with a demand of evidence of title. Thus, the tenants wrote to the landlord's attorney: "As we have informed your client, we are quite willing to pay him the rent due under our *mourasi pattah* if he can shew a title to give us a good receipt for it that will satisfy our lawyers. If he is unable to produce a perfect title, we

are still willing to pay him the rent on his giving us a substantial indemnity." It was held to be a sufficient acknowledgment of the tenants' liability to pay rent—*Rungo Lall* v. *Wilson*, 26 Cal. 204.

The acknowledgment must distinctly and definitely relate to the liability in respect of the right claimed—*Benimadhub* v. *Birbal*, 21 O.C. 151, 46 I.C. 813; it must be a necessary implication from the words used that the person acknowledging was referring to the distinct liability in dispute, and not *any liability*—*Hingu* v. *Heramba*, 13 C.L.J. 139, 8 I.C. 81; *Fillip & Co.* v. *Mahomedalli*, 13 S.L.R. 183, 55 I.C. 822; *Gopal Rao* v. *Harilal*, 9 Bom.L.R. 715; *Bhagwan* v. *Madhav*, 46 Bom. 1000, 24 Bom.L.R. 713, A.I.R. 1922 Bom. 356; *Official Assignee* v. *Natesa*, (1941) 2 M.L.J. 460, 1941 M.W.N. 827, A.I.R. 1941 Mad. 892. There is no necessity of a specific and direct acknowledgment of the particular liability which is sought to be enforced in the suit—*Jainarain* v. *G. G. in Council*, 4 D.L.R. (Cal.) 225. A letter sent by the defendant to the plaintiff was as follows:—"I was bound to send Rs. 30 according to my *vaida* (fixed time) but on account of the death of my father I have not been able to fulfil my promise. But now, on his obsequies being over, I will positively pay Rs. 30. As to whatever debts may be due by my old man, I am bound to pay the same so long as there is life in me." It was held that the letter merely contained the personal promise of the writer to pay Rs. 30 and a general admission that he was liable to pay his father's debt, but it did not acknowledge the existence of any *particular* debt due to the plaintiff from the defendant's deceased father—*Madhavrao* v. *Gulabhai*, 23 Bom. 177. Thus a letter written by a guardian of a succeeding shebait promising to pay any debt incurred for legal necessity by the previous shebait, does not constitute an acknowledgment of any debt as there is no acknowledgment of the right of any particular creditor and of any debt really but a qualified promise to pay off only those debts which would fulfil the requirements specified in the letter—*Himanshu* v. *Radha*, 43 C.W.N. 943. If more than one debt be due to the creditor at the time, the acknowledgment must be such as to identify the particular debt sued on, for oral evidence will not be admissible to establish the identity of the debt—*Beti Maharani* v. *Collector*, 17 All. 198 (P.C.). Evidence is admissible to show how the language used is related to the existing facts: the true meaning of the language used may be gathered from the surrounding circumstances—*Durga Prosad* v. *Galstaun*, A.I.R. 1955 Cal. 194.

It is not necessary that the creditor should openly assent to an amount acknowledged by his debtor to be due to him; it is sufficient if he relies upon it in the suit he brings, and if between the date of acknowledgment and the time of bringing the suit, the creditor has allowed the acknowledgment to remain uncontradicted and unexplained by his debtor—*Lalji* v. *Raghoonundun*, 6 Cal. 447 (452).

Where a person admits the genuineness of a document he admits his liability under it. So where a prior mortgagee admits the mortgage deed in favour of a subsequent mortgagee he admits the latter to be the subsequent mortgagee and that amounts to an acknowledgment of liability—*Sheo Prasad* v. *Parkash*, 18 Luck. 601, 1942 O.W.N. 766, A.I.R. 1943 Oudh 164.

It is not required that an acknowledgment should specify every legal consequence of the thing acknowledged. A simple acknowledgment by one of two joint-debtors that the original debt was a joint debt is sufficient to keep alive the right of the other to claim contribution—*Sakhamoni* v. *Ishan Chunder*, 25 Cal. 844 (851) (P.C.). So, where in a suit for the making of accunts of a dissolved partnership the plaintiff relies on an acknowledgment, all that he is required to prove is that the defendant has admitted from time to time existence of the partnership accounts between the parties and his obligation to settle such accounts. It is not necessary, for the acknowledgment to be operative, that he shuld go further and state that he was

bound to pay any particular sum or such sum as may be found due by him—*Hukumat* v. *Nenumal*, 22 S.L.R. 117, A I.R. 1928 Sind 45. The plaintiff shipped 200 cases of oil on the defendant's steamship from Bombay to Jeddha. On the arrival of the steamship at Jeddah, 35 of the cases were missing and the agents of the defendant company at Jeddah granted a certificate that the 35 cases had been short delivered. *Held* that the certificate contained a clear acknowledgment that the 35 cases which ought to have been delivered had not been delivered; and from that followed the legal incident of the defendant's position to pay compensation in respect of non-delivery—*Haji Ajam* v. *Bombay & Persia S. N. Co.*, 26 Bom. 562 (569).

178. Acknowledgment, to whom to be made:—It is not necessary that the acknowledgment of liability must be made to the person who is entitled to the right in respect of which the liability arises, or to any one through whom he claims. An acknowledgment, to *whomsoever* made, is a valid acknowledgment if it points with reasonable certainty to the liability under dispute—*Guru Charan* v. *Surendra*, 19 C.W.N. 263, 22 I.C. 650; *Shamsud Ali* v. *Miriam Elias*, 30 C.W.N. 968, 97 I.C. 710; *Bhagwan* v. *Madhav*, 24 Bom L.R. 713, 46 Bom. 1000; *Venkata Krishniah* v *Subbarayadu*, 40 Mad. 698; *Abdul* v. *Von Goldstein*, 43 P.R. 1910, 14 P.L.R. 1909, 4 I.C. 902; *Tanner* v. *Smart*, (1827) 6 B. & Co. 603; *Halliday* v. *Ward*, (1811) 3 Camp. 32; *Moodie* v. *Bannister*, (1859) 4 Drew. 432; *Bhalchandra* v. *Chanbasappa*, 41 Bom.L.R. 391, A.I.R. 1939 Bom. 237. Thus an admission of liability in respect of a decree amounts to an acknowledgment although the admission is not made to the decree holder—*Sree Narain* v. *Bhagwan*, I.L.R. (1939) 2 Cal. 523, 44 C.W.N. 322, A.I.R. 1940 Cal. 210. So also, an acknowledgment, although addressed to a dead person, operates as a valid acknowledgment of a debt—*Amrit* v. *Baijnath*, A.I.R. 1938 Pat. 180, 174 I.C. 779. Similarly, a letter written by the debtor to a third person, in which he agrees to give him a lien over certain properties "now with the creditor-mortgagee as collateral security" is an acknowledgment of the existence of the equitable mortgage—*Ramanatham* v. *Shri Dowlat*, (1938) 2 M.L.J. 534, A.I.R. 1938 Mad. 865. See Explanation 1.

It was held in a Calcutta case that an acknowledgment to be operative must be made to the creditor or to a person through whom he claimed or at least must be addressed to *some* person, though not necessarily the person entitled to the right. Therefore the recital of a debt in a conveyance, which was not addressed to any person nor was communicated to the creditors or any body on their behalf, was not a sufficient acknowledgment—*Imam Ali* v. *Baij Nath*, 33 Cal. 613, following *Mylapore v. Yeo Kay*, 14 Cal. 801 (P.C.). Similarly it was held in a Bombay case that an entry in the debtor's book of account was not an acknowledgment because it was not communicated or addressed to the creditor or some person—*Mahalakshmi Bai* v. *Nageswar*, 10 Bom. 71. But the authority of these rulings has been shaken by the Privy Council decision in *Maniram Seth* v. *Seth Rupchand*, 33 Cal. 1047 (P.C.) in which the acknowledgment was not addressed to the creditor or to any person but was contained in a petition for probate, and by another decision of the same high tribunal in *Hiralal* v. *Narsilal*, 37 Bom. 326 (P.C.) (cited below) in which the acknowledgment was contained in a certain book of the Government Agent. See *Pranjivandas* v. *Bai Mani*, 45 Bom. 934 (943), 61 I.C. 406, A.I.R. 1921 Bom. 291. "But there is a clear distinction between addressing the acknowledgment of liability to a person and acknowledging liability to a person. In order to bring his case within limitation the person who attempts to enforce his right must show that the acknowledgment of liability was in his favour though it need not have been addressed to him, as acknowledgment of liability to the person who is claiming relief may be addressed to another person. That is the effect of 14 Cal.

801 (P.C.), read with the Explanation to sec. 19, Limitation Act—*Ishan Singh* v. *Sadhu Singh*, A.I.R. 1936 Lah. 659, 38 P.L.R. 855, 165 I.C. 74.

When an acknowledgment of liability is made in favour of only one of the obligees having equal shares, the others are not entitled to the benefit of sec. 19. And in such a case (where the several obligees have equal shares in the amount) the obligee having the benefit of sec. 19 is entitled to recover his share only and not the whole amount—*Ishar Singh* v. *Sadhu Singh*, A.I.R. 1936 Lah. 659, 38 P.L.R. 855, 165 I.C. 74. It will be evident from the undernoted cases that an acknowledgment is not required to be addressed to *any* person, much less to the creditor or some person through whom he claims.

Thus, a deposition given and signed by a party as a witness in a suit is a sufficient acknowledgment in writing under sec. 19—*Venkata* v. *Parthasaradhi*, 16 Mad. 220; *Peria Venkan* v. *Subramanian*, 20 Mad. 239, *Meghraj* v. *Mathura*, 35 All. 437; *Subramania* v. *Veerabhadra*, 41 M.L.J. 217, A.I.R. 1921 Mad. 464; so also, a written statement in a former suit and containing a distinct acknowledgment of a mortgage or debt or right will give a fresh starting point of limitation—*Balmokand* v. *Ramji Lal*, 20 P.R. 1887; *Jeba* v. *Chaman*, 16 P.R. 1891; *Sriniwas* v. *Narhar*, 32 Bom. 296; *Venkataratnam* v. *Ramaraja*, 24 Mad. 361; *Kadiri Pakirappa* v. *Manki Husan*, 19 M.L.J. 650, 3 I.C. 19; *Official Assignee* v. *Subramania*, 46 M.L.J. 1, A.I.R. 1924 Mad. 286; *Indar Pal* v. *Mewa Singh*, 36 All. 264; *Ganga Sahai* v. *Khazan Chand*, 1 Lah. 357; *Balbhaddar* v. *Sheo Peorey*, 6 O.W.N. 943, A.I.R. 1930 Oudh 67 (68); *Ram Autar* v. *Beni Singh*, 25 O.C. 89, 10 O.L.J. 7, 68 I.C. 96, A.I.R. 1922 Oudh 135. But where the written statement in the previous suit merely called upon the plaintiff to produce the promissory note adverted to in the plaint in that case, it was held that the written statement was insufficient to establish an acknowledgment of liability in respect of the promissory note which was the foundation of the present claim—*Kapur* v. *Narinjan*, 34 P.R. 1918, 45 I.C. 99. Where in a written statement an admission was made that the document under which the liability arose, to enforce which the suit was brought, was executed by the defendant and this was followed by a denial of liability on the ground that the claim had become barred by limitation, but subsequently the defendant stated that should the court arrive at the conclusion that the suit was maintainable proper provision should be made for compensating him, it was held that the last portion of the written statement could be construed as amounting to an acknowledgment—*Lakshmi* v. *Abraham*, A.I.R. 1951 Tra.-Co. 93. A statement contained in a plaint in a case filed by the grand-father of the mortgagee, to the effect that the property is mortgaged to him is an acknowledgment of liability in respect of the mortgagor's right to redeem—*Hari Chand* v. *Phiraya*, 180 P.L.R. 1911, 11 I.C. 377. So also, where in a suit for redemption of a mortgage the plaintiff, who was the purchaser of a portion of the mortgaged property, stated in his plaint that there were other persons interested in the redemption of the property who had not joined in the suit, and that therefore he was seeking to redeem the entire mortgage making the other persons as *pro forma* defendants, *held* that this statement amounted to an acknowledgment of the right of the other co-mortgagors to redeem—*Baleshar* v. *Ram Deo*, 36 All. 408. Where a debt due on a promissory note executed by the deceased was included in the form of valuation filed with the petition for the grant of letters of administration to the estate of the deceased, *held* that the inclusion of the debt amounted to an acknowledgment of liability—*Raja Rama* v. *Fakruddin*, 53 Mad. 480, 58 M.L.J. 210, A.I.R. 1930 Mad. 218, 122 I.C. 504.

An admission of liability contained in a deed of gift executed by the debtor in favour of his son is a valid acknowledgment—*Aijaz Husain* v. *Ram Sarup*, 7 O.W.N. 1195, 130 I.C. 347, A.I.R. 1931 Oudh 54 (56). A statement contained in a *Kobala*

that a certain mortgage on some of the properties comprised in the *Kobala* is still subsisting has the effect of an acknowledgment so as to create a new period of limitation —*Azizur* v. *Ram Chandra*, 91 I.C. 461, A.I.R. 1926 Cal. 693 or the recital that the property is conveyed as part payment towards the principal amount due to the vendee on an earlier mortgage and the executant admits the execution of the same before the Registrar amounts to an acknowledgment of the mortgage—*Balasubramania* v. *Manicka*, 1938 M W.N. 113, A.I.R. 1938 Mad. 429. An entry in the *wajib-ul-arz* in which the mortgagee stated the amount of the mortgage, the names of the parties, the property mortgaged and the terms of redemption of the mortgage, is an acknowledgment in respect of the mortgagor's right to redeem—*Kamala Devi* v. *Gurdayal*, 17 A.L.J. 330, 51 I.C. 283 (284); *Anup Singh* v. *Fateh Chand*, 42 All. 575 (580) (F.B.); *Sheo Prasad* v. *Rama Kant*, 1948 O W.N. 87, A.I.R. 1918 Oudh 257. A statement mentioning the mortgage in a pedigree of the co-sharers of the village which was the subject of the mortgage, signed by the mortgagees, and an entry in the village *wajib-ul-arz* signed by them and duly verified before a Settlement Officer, are valid acknowledgments so as to give a fresh period of limitation in respect of the mortgagor's suit for redemption —*Suraj Baksh* v. *Ganga Baksh*, 4 O.W.N. 882, 105 I.C. 93, A.I.R. 1927 Oudh 457. But see *Gur Saran* v. *Shib Singh*, I L.R. (1944) All 76, 1943 A.L.J. 548, A.I.R. 1943 All. 393 (F.B.), where it has been held that entries in the khewat did not amount to acknowledgment at all as there was no conscious acknowledgment in the sense that it was present to the mind of the mortgagees or their representatives that they were acknowledging a subsisting and enforceable liability against themselves. The onus of proving that the acknowledgment was made within sixty years of the mortgage is on the mortgagee —*Gur Saran* v. *Shib Singh*, supra; *Bharat* v. *Des Raj*, A.I.R. 1950 E.P. 157. An attestation in the settlement records signed by the agent of the mortgagee in which the name of the mortgagee and the property mortgaged are mentioned, is an acknowledgment of the mortgagor's right to redeem—*Bhagwan Das* v *Said Muhammad*, 14 Lah. 587, A.I.R. 1933 Lah. 345 (346). Where a certain *desaigiri dastur* having been mortgaged on 4th November 1793, the mortgagees procured the entry of their names in the Collector's books as mortgagees, and on 8th June 1843, an entry of payment to the mortgagees of their respective shares of the allowance was made in the books of the Government Agent entrusted with the payment thereof, and the mortgagees signed their names against it acknowledging receipt of their shares, *held* that a new period of limitation started from the date of the acknowledgment and a suit for redemption brought in 1901 was in time—*Hiralal* v. *Narsilal*, 37 Bom. 326 (P.C.). Certain lands were mortgaged with possession in 1826. Government issued sanads to the holders of the lands in 1865 and 1876. These sanads were entered in a register where the mortgagee was described as holding the lands as mortgagee, and the entries were signed by the mortgagee. On the death of the mortgagee a similar sanad was granted to his widow in 1882, and was similarly entered in the register and signed by the widow. The mortgagor having sued for redemption in 1917, *held* that the registers having the signatures of the mortgagee and his widow were acknowledgments of the mortgagee's liability to be redeemed by the mortgagor and consequently the suit was not barred—*Pranjivan Das* v. *Bai Mani*, 45 Bom. 934 (dissenting from *Imam Ali* v. *Baijnath*, 33 Cal 613).

An acknowledgment contained in the will of the deceased mortgagee who thereby devised to his son certain lands therein described as held by him on kanom, although the mortgagor's name was not mentioned nor the date of the kanom, nor was there any further description of the lands, was held to constitute a sufficient acknowledgment—*Uppi* v. *Mammavan*, 16 Mad. 366. Where the defendants attested as correct the record of rights prepared at a settlement with them of an estate in which they were described as mortgagees, but which did not mention the name of the mort-

gagor, it was held that there was an acknowledgment of the mortgagor's right to redeem —*Daia Chand* v. *Sarfraz*, 1 All. 117 (F.B.). Where a mortgagee sold his right in the mortgaged property, and in the deed he stated that he was holding the property as a mortgagee under a mortgage-deed dated 11th June 1849, *held* that the statement in the sale-deed was an acknowledgment which extended the time for the purpose of redemption—*Har Narayan* v. *Sheo Prasad*, 11 A.L.J. 86, 18 I.C. 95.

If the insolvent writes down a debt in his schedule as owing the debt to a named person and signs the schedule, it would operate as an acknowledgment under this section —*Shrigopal* v. *Dhanalal*, 35 Bom. 383; *Chettyar Firm* v. *Munnee*, 6 Rang. 533, A.I.R. 1928 Rang. 326 (327), 117 I.C. 570; *Rampal* v. *Nand Lal*, 16 C.W.N. 346, 13 I.C. 603; *Sakala Rattam* v. *Musalayya*, 38 L.W. 204, A.I.R. 1933 Mad. 565, 143 I.C. 681, *Velayudha* v. *Annamalai*, (1945) 1 M.L.J. 298, A.I.R. 1945 Mad. 215. So also, the mention of a decree-debt in a statement made by the insolvent in an examination for ascertaining his assets and liabilities, without any further mention of any payment towards its discharge amounts to an implied admission that the liability under the decree is then subsisting—*Sakala Rattam* v. *Musalayya*, supra.

An acknowledgment of the debt in an application before a Debt Conciliation Board, if made before the period of limitation expires, will extend the period of limitation for a suit in respect of the debt—*Jawanmal* v. *Akaji*, I.L.R. (1941) Nag. 761, 1940 N.L.J. 217, A.I.R. 1940 Nag. 214; *Ghansiam* v. *Girija*, I.L.R. (1944) Nag. 244, A.I.R. 1944 Nag. 247; *Bhalchandra* v. *Britilal*, I.L.R. 1946 Nag. 493, 1946 N.L.J. 368, A.I.R. 1946 Nag 344. But an entry in a "list of reliance," *viz.*, a list of documents filed in a suit which the party relies on, is not an acknowledgment; *Tapi* v. *Shankertal*, 1939 N.L.J. 109, A.I.R. 1939 Nag. 113; I.L.R. (1941) Nag. 222.

Under the English law, an acknowledgment to a stranger is inoperative—*Stamford* v. *Smith*, [1892] 1 Q.B. 765; *Rogers* v. *Quinn*, 26 L.R. Ir. 136.

179. Other instances of acknowledgment:—Where before a debt became barred by limitation the creditor granted an extension of time on the written application of the debtor praying for extension, the written application amounted to an acknowledgment—*Sugappa* v *Gobindappa*, 12 M.L.J. 351. A mortgagor subsequent to his mortgage executed two promissory notes in favour of the mortgagee; in one of these notes he referred to the mortgage-debt thus: "the amount due under the mortgage-deed is set apart;" in another he wrote "besides this, the mortgage-debt is distinct." These notes would constitute sufficient acknowledgment of the mortgage *Dinkar* v. *Chhaganlal*, 38 Bom. 177. An acknowledgment which is valid in other respects cannot be inoperative simply because it contains a wrong date in respect of the debt, *e.g.*, where it refers to a mortgage of 1842, although it is found that the mortgage was that of a date earlier than 1842 -*Dip Singh* v. *Girand*, 26 All. 313. See also *Har Narain* v. *Sheo Prosad*, 11 A.L.J. 86, 18 I.C. 95. In a suit upon a joint and several bond brought against the defendant as a principal debtor, an acknowledgment of liability made by him as surety only is sufficient to save limitation—*Uncovenanted Service Bank* v. *Grant*, 10 All. 93.

A *hatchitta* is an acknowledgment within the meaning of this section—*Mahendra Nath* v. *Lalit Mohan*, 46 Cal. 746. A *muzukhata* (*i.e.*, account stated, being the totalling up of the items of an account adding interest and acknowledging their correctness) signed by the debtor and made within the period of limitation is an acknowledgment—*Chunilal* v. *Laxman*, 46 Bom. 24 (26), A.I.R. 1922 Bom. 183, 23 Bom.L.R. 606.

Where a document says "the money was received from you, and I have purchased shares for you but I have handed over to another person," in spite of the words

"without prejudice" it is an acknowledgment of liability—*Commercial Enterprises* v. *Madan*, A.I.R. 1951 Hyder. 47.

When a person borrows a sum of money and executes a promissory note, he executes it for the consideration received by him, and when it is executed in respect of a consideration already passed, it is an acknowledgment of the liability to pay the amount mentioned in the note. Even though the promissory note cannot be enforced for some cause (*e.g.*, as offending against sec. 26 of the Paper Currency Act) it can nevertheless be used as evidence of an acknowledgment of liability—*Kesavaramayya* v. *Venkataratnam*, 50 M.L.J. 36, 92 I.C. 626, A.I.R. 1926 Mad. 452; *Nachimutha* v. *Audiappa*, 1917 M.W.N. 778, 42 I.C. 706, 6 L.W. 630.

Renewed promissory notes operate as acknowledgment of liability in respect of the loan—*Sridhar* v. *Jahor*, 49 C.W.N. 37, A.I.R. 1945 Cal 268; where in renewal of an old debt a promissory note and a receipt are executed and the promissory note is found to be inadmissible owing to insufficiency of stamp the receipt can be relied upon as an acknowledgment of liability—*Sunder* v. *Nanhu*, 18 Luck. 191, 1942 O.W.N. 343, A.I.R. 1942 Oudh. 388. So also where a receipt acknowledges not only the consideration of the promissory note of even date but further acknowledges that an earlier promissory note in respect of the liability under which the new pronote is executed, it must be taken to have the effect of acknowledging the liability under the earlier loan —*Pirdin* v. *Ramcharan*, 1943 O.W.N. 483, 211 I.C. 146. The endorsement of cancellation of a prior promissory note at the time of execution of fresh promissory note for the amount due under the earlier one amounts to an acknowledgment—*Kondamma* v. *Venkatarayudu*, (1938) 2 M.L.J. 846, A.I.R. 1938 Mad. 34.

Admission of liability under earlier mortgage in later mortgage replacing earlier one amounts to acknowledgment; *Ram Narain* v. *Nawab*, I.L.R. (1946) All. 375, 1946 A.L.J. 104, A.I.R. 1947 All. 214.

A sub-mortgage made by the mortgagee is an acknowledgment of liability, *i.e.*, it is an acknowledgment that the property at the date of the sub-mortgage is still held by him as mortgagee, and gives the mortgagor an extended period in respect of his right of redemption—*Motilal* v. *Samal*, 54 Bom. 625, 32 Bom.L.R. 1096, A.I.R. 1930 Bom. 466 (474); *Bachu* v. *Jang Bahadur*, A.I.R. 1939 Pat. 427, 180 I.C 795; *Arjon* v. *Gurdial*, A.I.R. 1951 Pepsu 52.

180. Acknowledgment when not valid:—An acknowledgment made by a person under legal disability is not valid, *e.g.*, an acknowledgment given by a minor—*Aniz-ul-Reman* v. *Beni Ram*, 59 P.R. 1901.

An acknowledgment not coming directly from the debtor himself but merely deduced as an inference from the tenor of a series of letters is not a proper acknowledgment. There must be some principal writing of a particular date (from which the new period of limitation is to run) which can be relied on by itself. A series of letters in none of which there is a definite acknowledgment of the debt is not sufficient —*Rogers* v. *Montriou*, 6 B.L.R. 550. An acknowledgment of a *different* kind of liability is not sufficient to save limitation. Thus, an admission made by a tenant that he held the land as a *mulgaini* (permanent) tenant at a lighter rent is not an acknowledgment entitling the landlord to recover rent from the defendant as a *chalgaini* tenant (tenant from year to year)—*Venkataramana* v. *Srinivasa*, 6 Mad. 182. The acceptance of a sale-certificate by the purchaser of a mortgagee's interest in land, sold in satisfaction of a decree against him, is not an acknowledgment by the purchaser of the title of the mortgagor, so as to give him a fresh starting point for a new period within which he can redeem—*Raman* v. *Krishna*, 6 Mad. 325 (327). Where the defendants in the

present partition suit had made in a written statement filed by them in a previous suit the following statement, *viz.*, "proper parties have not been joined in this suit, since A and S left a sister B who died after them. It is necessary to join her heirs in the suit;" it was held that the above words were not an admission that B's heirs had a share in the estate—*Bibi Saheb* v. *Syed Mir Mahmmad*, 9 S.L.R. 143, 32 I.C. 548.

An acknowledgment of liability contained in a communication made to a public officer in official confidence cannot be relied upon, since that communication is inadmissible in evidence under the provisions of sec. 124, Evidence Act. Thus, in a suit on a mortgage bond, the mortgagee cannot rely upon a letter written by the mortgagor to the Collector, in which the mortgagor had mentioned the mortgage and had stated that he was financially embarrassed and desired the Court of Wards to take charge of his estate. Such a statement is made soley with the purpose of giving information to the Court of Wards on the strength of which the Court of Wards may decide whether or not the estate should be taken over; such a communication made to the Collector in official confidence cannot be made public property and cannot be relied upon by the creditor as an acknowledgment of liability—*Collector* v. *Jamna Prasad*, 44 *All.* 360 (366), 20 A.L.J. 140.

The delivery of a *hundi* and a cheque which are dishonoured on presentation does not amount to an acknowledgment—*Padma Lochan* v. *Girish Chandra*, 46 Cal. 168 (170). But where the *hundi* (which was given and dishonoured) was accompanied by a letter of the defendant acknowledging his liability on the *hundi*, there was a sufficient acknowledgment of the debt—*Raman* v. *Vairavan*, 7 Mad. 392.

An *oral* acknowledgment of a debt is not valid. This section requires the acknowledgment to be in *writing*—*Ghasita* v. *Sultan*, 93 P.R. 1911, 11 I.C. 445.

181. Signing:—An acknowledgment without signature is no acknowledgment —*Jaggi* v. *Sri Ram*, 34 All. 464. Thus an acknowledgment of a debt by adjustment of accounts by the manager of a Hindu joint family without signature does not save limitation; *Nagarmal* v. *Bajranglal*, A.I.R. 1950 P.C. 15. An admission of a debt in a draft will written by the testator in the first line of which his name appeared but which was not signed by him, did not constitute an acknowledgment under this section —*Ramasami* v. *Muttusami*, 15 Mad. 380. Entries in the debtor's account books not signed cannot be treated as an acknowledgment—*Palaniappa* v. *Veerappa*, 41 Mad. 446, 34 M.L.J. 41. A deposition made by the defendant in another suit but neither signed by him nor by his authorised agent does not amount to a proper acknowledgment—*Kapur* v. *Narinjan*, 1918 P.R. 34, 45 I.C. 99.

Signature need not necessarily be by writing one's name. Making his mark by an illiterate debtor is sufficient—*Bheemangowada* v. *Eeranah*, 7 M.H.C.R. 358; *Jamna* v. *Jaga*, 28 Bom. 262. Under section 3 (52) of the General Clauses Act, "*Sign* should, with reference to a person who is unable to write his name, include his mark."

Signature by initials is not valid, and an acknowledgment merely bearing initials instead of full signature is not proper—*Lakshmanachayulu* v. *Venkataramamuja*, 51 M.L.J. 414, A.I.R. 1926 Mad. 827, 96 I.C. 700, a case of doubtful authority. Initials are equivalent to signature—*Langoju* v. *Venkataratnam*, A.I.R. 1935 Mad. 555, 68 M.L.J. 623, 1935 M.W.N. 490, 41 L.W. 744, 156 I.C. 449, 59 Mad. 72; *Raja of Tarla* v. *Ramarao*, I.L.R. (1942) Mad. 927, (1942) 2 M.L.J. 242, A.I.R. 1942 Mad. 680; *Menakshi* v. *Subramanian*, A.I.R. 1957 Mad. 8.

It does not matter in what part of the document—at the top or at the bottom—the signature is placed, provided the signature is introduced into the document with a view to authenticate it—*Mahalakshmibai* v. *Nageswar*, 10 Bom. 71; *Mathura* v.

Babu, 1 All. 683 (686); *Mohesh Lal* v. *Busunt*, 6 Cal. 340; *Onkarlal* v. *Raj Mohamud*, 17 N.L.R. 209, A.I.R. 1921 Nag. 1. If there is a particular custom of signing among the class or community to which the defendant belongs, and if the defendant signs according to that custom, that would be a sufficient signature. For instance, where a certain letter contained certain specified words in the handwriting of the defendant at the top and the bottom, and the evidence showed that among the community to which the defendant belonged, this was the usual custom of signing letters and informal documents, it was held that the writing of the specified words amounted to "signing" —*Gangadhar* v. *Shidramapa*, 18 Bom. 586. So also, according to the custom and practice of Natukottai Chetties, who do not sign their letters at the foot but begin by saying that the letters is from such and such a firm, the name so written is a sufficient signature—*Muthia* v. *Kuttayan*, 1918 M.W.N. 42, 44 I.C. 20. Where in a *hatchita*, which represented the account between the defendant and the plaintiff, the defendant's name was entered at the top of the entries on the debit side which were admittedly written by the defendant, and he wrote the words *likhitang khode* (written by itself) at the bottom of the entries, it was held that this was the mode adopted by the debtor of "signing" the *hatchita*—*Sadasook* v. *Baikanta*, 31 Cal. 1043. But where in a suit to recover money based on a khata entry made by the defendant himself in course of his employment as Munim there was nothing in the entry to indicate that it was authenticated by the defendant or that it was made by him with a view to admit his liability and the entry was not signed by him, it was held that the entry could not be treated as an acknowledgment within the meaning of this section—*Rajmal* v. *Phulchand*, A.I.R. 1957 M.P. 237. The name of a firm in the heading of a letter written in the course of business is a sufficient signature—*Uma Shankar* v. *Gobind*, 46 All. 892, 22 A.L.J. 807, A.I.R. 1924 All. 855; *Het Ram* v. *Subhag*, 16 Luck. 727, 1941 O.W.N. 527, A.I.R. 1941 Oudh 376. Hence where a partner makes an acknowledgment in the name of the firm but does not sign it, it is a valid acknowledgment on behalf of the firm—*Het Ram* v. *Subhag*, supra.

Where an agent duly authorised in that behalf writes an acknowledgment and then affixes thereto the name of the principal by impressing it with a rubber stamp, such affixation of the name of the principal amounts to signing within the meaning of sec. 19—*Vellayappa* v. *Somasundaram*, 13 Rang. 322; A.I.R. 1935 Rang. 160; 156 I.C. 589 If the debtor's name is introduced into the document of acknowledgment in such a way as to show that the acknowledgment was intended to be his own, the name, whether written or printed would constitute his signature under this section. It is not necessary that the debtor's name should be written by himself. It is sufficient if it is written by a person acting with authority to write his name and to acknowledge the debt in question—*Ramjan* v. *Khawja Meer Ahme*, 18 Pat. 715, 20 Pat.L.T. 927, A.I.R. 1940 Pat. 6.

Rajahs, Maharajas and great Zemindars often sign without any name. They simply put down the words "Sree" or "Maharaja" or the name of the place (*e.g.*, *Burdwan*, *Nuddia*); such a signature is sufficient. See *Gunee Biswas* v. *Sreegopal*, 8 W.R 395.

Where an illiterate defendant merely touched a pen and asked another person to write his name, this was held to be a sufficient signature—*Krishnachar* v. *Vadichi*, 6 M.L.J. 209; *Rajani* v. *Digindra*, 36 C.W.N. 188 (189), 137 I.C. 788, A.I.R. 1932 Cal. 440. A balance of account was written by a person at the request of an illiterate debtor in the debtor's name and signed by the writer in his own name; it was held to be a sufficient acknowledgment—*Hem Chand* v. *Vohora*, 7 Bom. 515. Where S, a debtor, while making payment, touched a pen and passed it on to scribe who wrote that "S paid Re. 1," adding his signature as scribe, which was followed by the

signature of an attestor, it was held that the endorsement in question was not signed by the person making the payment within the meaning of sec. 20—*Karuppayya Thevar* v. *Subbayya Thevar*, A.I.R. 1935 Mad. 1047, 1935 M.W.N. 1082, 42 L.W. 644, 159 I.C. 158 (A.I.R. 1932 Cal. 440, dist.).

Where the whole of an account stated (*khata*) was written by the debtor himself with the introduction of his name at the top of the entry, the *khata* was held to be sufficiently signed within the meaning of this section—*Jekisan* v. *Bhowsar*, 5 Bom. 89; *Holmes* v. *Mackrell*, (1858) 3 C.B. (N.S.) 789.

182. Signing by agent:—See Explanation II. For the purposes of this section, the writing containing the acknowledgment need not be signed by the debtor himself; it would be sufficient if the signature is that of an authorised agent—*Muthiah* v. *Kuttayan*, 1918 M.W.N. 42, 43 I.C. 20. The person authorised to give the acknowledgment may sign his name or that of his principal—*Onkarlal* v. *Mohamud*, 17 N.L.R. 209, A.I.R. 1921 Nag. 1. Where the name of the mortgagor appeared in a document in the handwriting of another person, and there was nothing to show that that person was authorised to sign the name of the mortgagor, the document was held not to be validly 'signed'—*Gokul* v. *Saheb*, 15 A.L.J. 121, 38 I.C. 162.

As to who is an agent duly authorised, see Note No. 190 *infra*.

183. Acknowledgment by person having no interest in the property: —The acknowledgment must be made by a person who has personal liability to pay—*Madan* v. *Damodar*, 2 D.L.R. 796. According to the Allahabad High Court, section 19 does not require that the person making the acknowledgment of liability in respect of any property *should have an interest* in the property at the time when the acknowledgment is given. It is sufficient if the acknowledgment has been made by the person against whom the right is claimed—*Jugul Kishori* v. *Fakhruddin*, 29 All. 90. In this case the plaintiff brought a suit in 1903 for possession of a house which he purchased at an execution sale in 1890, and in order to save limitation he relied on an admission made by the defendant in a suit for pre-emption brought by the latter against the plaintiff in 1892. In that suit the defendant admitted that the plaintiff purchased the house at an execution sale. The lower Court held that the admission was insufficient to save limitation, because the defendant when he made the admission had no interest in the property, his father being then alive. The High Court held that under section 19 the question does not arise as to whether the defendant had any interest in the house when he made the admission; all that this section requires is that an admission was made by the person against whom the right is claimed; and that is sufficient to save limitation. The same view has been taken in *Fakir* v. *Narmada*, I.L.R. (1943) Bom. 701, 45 Bom.L.R. 831, A.I.R. 1943 Bom. 461. The Calcutta and Madras High Courts support this view by holding that an acknowledgment made by a mortgagor after he has assigned one of the mortgaged properties is sufficient to keep alive the mortgage-debt against the assignee and against the property assigned—*Krishna Chandra* v. *Bhairab Chandra*, 32 Cal. 1077 (1080); *Muthu* v. *Muthuswami*, 55 Mad. 758, A.I.R. 1932 Mad. 516 (518); *Umesh Chandra* v. *Hemanga*, 36 C.W.N. 1138 (1141). The same view has been adopted in *Skinner* v. *Bank of Upper India Ltd.*, A.I.R 1937 Lah. 507. The Madras High Court has held in *Pavaji* v. *Panalivela*, I.L.R. (1940) Mad. 872, 1940 M.W.N. 448, A.I.R. 1940 Mad. 470, (1940) 1 M.L.J. 766 (F.B.) that payment of a small amount after assignment of equity of redemption and loss of personal remedy against the mortgagor does not save limitation. An acknowledgment by the mortgagor in the subsequent mortgage of the previous mortgage does not extend the period of limitation as the acknowledgment is not made by the person against whom the liability is sought to be enforced, viz., the mortgagee—

Mohammad Khan v *Salim*, 1951 A.L.J. 174, A.I.R. 1951 All. 392. In England, however, an acknowledgment signed by the mortgagor after the assignment of the mortgaged property will not give the mortgagee a fresh period against the assignee—*Newbould* v. *Smith*, (1886) 43 Ch. D. 127. This rule of English law has not been followed in *Krishna Chandra* v *Bhairab Chandra*, supra,and *Domilal* v. *Roshan*, 33 Cal. 1278. The case of *Surjiram* v. *Berhamdeo*, 1 C.L.J. 337 was distinguished or dissented from in the above cases. The Oudh Chief Court is of opinion that an acknowledgment of liability or right presupposes an acknowledgment by a person *possessed of some interest* which can be bound by the acknowledgment. If the person acknowledging has no interest whatsoever, then such acknowledgment would not have the legal quality of an acknowledgment and can therefore be of no consequence. Therefore, a mortgagor cannot extend limitation against a puisne mortgagee by making an acknowledgment of a prior mortgage after he has parted with the equity of redemption—*Amir Mirza* v. *Lachhmi Narain*, 7 Luck. 270, 8 O.W.N. 1160, A.I.R. 1932 Oudh 1 (5), 138 I.C. 800. The difference of opinion has been set at rest by their Lordships of the Judicial Committee in *Bank of Upper India Ltd.* v. *Skinner*, I.L.R. (1942) Lah. 686, 76 C.L.J. 447, I.L.R. (1942) All. 660, 47 C.W.N. 43, 1942 A.L.J. 648, 1942 O.W.N. 604, A.I.R. 1942 P.C. 67, (1942) 2 M.L.J. 559 (P.C.) and in *Skinner* v. *Bank of Upper India Ltd.*, A.I.R. (1942) Lah. 684, 47 C.W.N. 46, where it has been held that an acknowledgment made by a mortgagor after he had parted with all his interest in the mortgaged property to a purchaser does not bind the latter. Following these cases the Madras High Court has held that an acknowledgment of liability by the mortgagor will not bind the assignee, who has prior to such acknowledgment, acquired an interest in the property mortgaged although the mortgagor is, at the time of making the acknowledgment, possessed of some interest or other in the property mortgaged—*Naranappa* v. *Ramalingam*, (1950) 2 M.L.J. 13, A.I.R. 1950 Mad. 553. See also *Kunchi Pillai* v. *Sunny Rebella*, A.I.R. 1953 T.C. 196 (F.B.) and *Chacko* v. *Thuppan*, A.I.R. 1954 T.C. 311.

"Through whom he derives title or liability" :—This section allows an acknowledgment to be made not only by the person against whom the right is claimed, but also by "some person through whom he derives title or liability." This derivation of title is a matter quite independent of the making of an acknowledgment. A subsequent mortgagee derives title or liability from the mortgagor, irrespective of the fact whether the second mortgage was made before or after the acknowledgment. Therefore, an acknowledgment by the mortgagor can be used against a subsequent mortgagee as giving a fresh period of limitation in favour of the prior mortgagee—*Amir Mirza* v. *Lachhmi Narain*, 7 Luck. 370, 8 O.W.N. 1160 A.I.R. 1932 Oudh 1 (5), 138 I.C. 800; *Ramlagam* v. *Ram Bilochan*, 1941 P.W.N. 667, A.I.R. 1942 Pat. 166, where it has been held that to confine the word "acknowledgment" to an acknowledgment made prior to transfer or mortgage would be to add to or alter the language of the section. A contrary view has been taken in *Radhakisan* v. *Babu Hazari*, I.L.R. (1944) Nag. 383, 1944 N.L.J. 229, A.I.R. 1944 Nag. 163 (F.B.); *Ram Narain* v. *Nawab Singh*, I.L.R. (1946) All. 375, 1946 A.L.J. 104, A.I.R. 1947 All. 214 where it has been held that a subsequent mortgagee is not bound by such an acknowledgment. This principle applies even where the mortgagor giving the acknowledgment has retained some scintilla of interest in the form of an equity of redemption—*Munshilal* v. *Hiralal*, I.L.R. 1947 All. 11, 1947 A.L.J. 129, A.I.R. 1947 All. 74 (F.B.). An acknowledgment made by the mortgagor after he had assigned one of the mortgaged properties, is sufficient to keep alive the mortgage-debt against the assignee and against the property assigned, because the acknowledgment, was made by a person through whom the assignee derived his title or liability within the meaning of this section—*Krishna Chandra* v. *Bhairab*, 32 Cal. 1077 (1080), *Muthu* v. *Muthuswami*, supra; *Skinner* v. *Bank of Upper India Ltd.*, A.I.R. 1937 Lah. 507; *Madhugiri* v. *Nandigam*, A.I.R. 1935 Mad. 899; *Ram Sarup*

v. *Bhagwati*, A.I.R. 1936 All. 636; *Halsnad* v. *Mahabala*, A.I.R. 1937 Mad. 826. These cases are no longer good in view of the decision of the Judicial Committee in *Bank of Upper India Ltd.* v. *Skinner*, supra.

184. Unstamped or insufficiently stamped acknowledgement:— An unstamped acknowledgment (within Article 1, Schedule I, Stamp Act) cannot be given in evidence for *any purpose* including the purpose of saving limitation—*Mulji* v. *Lingu*, 21 Bom. 201 (F.B.) (overruling *Fatechand* v. *Kishan*, 18 Bom. 614); *Galstaun* v. *Hutchinson*, 39 Cal. 789, 16 C.W.N. 945; *Nagappa* v. *V. A. A. R. Firm*, 49 M.L.J. 306, A.I R. 1925 Mad. 1215, 91 I.C. 494; *Jogendra* v. *Sachindra*, 63 Cal. 813, 40 C.W.N. 399; *Penatapati* v. *Narayamurthi*, A.I.R. 1938 Mad. 75, 46 M.L.W. 692.

But an acknowledgment which is merely intended to acknowledge the correctness of an account is not one requiring to be stamped under the Stamp Act—*Magham* v. *Vangala Narasimha*, A.I.R. 1936 Mad. 939. A document containing an admission of liability, such as a letter reciting a settlement of accounts will save limitation under this section, though not stamped—*Tilak Chand* v. *Ram Kisan*, I.L.R. (1939) Nag. 695, 20 N.L.J. 276, A.I.R. 1938 Nag. 51. There is no law requiring an acknowledgment of liability for the purpose of saving limitation to be stamped. The reason is that such a signature is not evidence of debt of which there is already evidence in the account book or in any other writing—*Sambasiva* v. *Venkata*, (1949) 2 M.L.J. 543, 1949 M.W N. 680. For an acknowledgment to come under Art. 1, Stamp Act, it is necessary that it should have been made in order to supply evidence of the debt—*Satgurnath* v. *Brahmadatt*, A.I.R. 1937 Oudh 391; *Tilak Chand* v. *Ram Kisan*, I.L.R. (1939) Nag. 695, 20 N.L.J. 276, A.I.R. 1938 Nag. 51. An unconditional acknowledgment, implying a promise to pay, if unstamped is admissible in evidence on payment of penalty—*Munnalal* v. *Damodar*, A.I R. 1951 M.B. 78.

If the original debt cannot be proved, and a subsequently executed pro-note which contains an acknowledgment of the debt is insufficiently stamped, neither the original debt nor the acknowledgment can be enforced. The acknowledgment cannot be enforced by reason of the pro-note being insufficiently stamped, and the creditor cannot fall back upon the original debt because there is no evidence in proof of it—*Janaka* v. *Sheo Charan*, 7 Luck. 313, 8 O.W.N. 1210, 135 I.C. 390, A.I R. 1932 Oudh 49 (50); *Jogendra* v. *Sachindra*, 63 Cal. 813, 40 C.W.N. 399; *Penatapati* v. *Narayamurthi*, A.I.R. 1938 Mad. 75, 46 M.L.W. 622. But where in respect of a liability under an earlier pro-note a fresh pro-note was executed which was insufficiently stamped, but *there was an endorsement* on the earlier note to the effect that in lieu of the earlier note a second pro-note was executed and the former thereby became void, and the later note being insufficiently stamped and unenforceable the plaintiff consequently sued on the earlier note, it was held that the endorsement on the earlier note was a valid acknowledgment so as to save limitation—*Saling Ram* v. *Radhay Shiam*, 1931 A.L.J. 522, 134 I.C. 254, A.I.R. 1931 All. 560 (562). See *Ambika* v. *Jagdeo*, A.I.R. 1937 Oudh 387. Where an insufficiently stamped promissory note contains an admission of liability, its admission is not precluded by sec. 35 of the Stamp Act, if it is merely intended to prove that the debtor made an admission of liability to pay on that date. If the creditor derives his right to recover the money not from the document itself but from the Limitation Act in consequence of the admission of liability simpliciter contained in the document, sec. 35 of the Stamp Act has no application. Such a document can be used for the purpose of extending limitation under this section—*Sudamsa* v. *Kisanrao*, 1938 N.L.J. 145, A.I.R. 1938 Nag. 294.

185. Unregistered acknowledgment:—Though a compulsorily registrable but unregistered document relating to land is inadmissible in evidence in respect of

any question as to the land covered by it, it would nevertheless be good evidence between the parties for any other purpose, *e.g.*, as an acknowledgment of a debt recited in it, so as to give a fresh starting point of limitation—*Nundo* v. *Ramsookhee*, 5 Cal. 215; *Mugniram* v. *Gurmukh*, 26 Cal. 334; *Chuhar* v. *Wazira*, 17 P.R. 1881; *Syad Muhammad* v. *Jaisukh*, 88 P.R. 1880; *Khushal* v. *Behari*, 3 All. 523; *Kubra* v. *Lalji*. 20 O.C. 13, 38 I.C. 582. Thus an unregistered mortgage-deed may be accepted as an acknowledgment of the simple debt, though it cannot be received as evidence of a transaction affecting the real property—*Syad Muhammad* v. *Jaisukh*, 88 P.R. 1880; *Chuhar* v. *Wazira*, 17 P.R. 1881.

An unregistered document, registration of which is compulsory, can be used for the collateral purpose of proving acknowledgment of liability for the purpose of extending time under sec. 19, Limitation Act, and also in order to establish part-payment of the amount due—*Shanti Lal* v. *Lyallpur Bank Ld. (in liquidation)*, *Lahore*, A.I.R. 1936 Lah. 276.

In a Bombay case, where a document executed by the defendant spoke of the plaintiff as the proprietor of certain lands above Rs. 100 in value, and mentioned the fact of his (defendant's) having come into possession, it was held that this document when used as an acknowledgment of the plaintiff's title to the lands was inadmissible in evidence for want of registration, as it declared a title to the property and was therefore compulsorily registrable (under sec. 17 of the Registration Act)—*Faki* v. *Khotu*, 4 Bom. 590. But this decision has been overruled by the Privy Council in *Bageshwari* v. *Jagarnath*, 11 Pat. 272 (P.C.), 36 C.W.N. 250 (257), 136 I.C. 798, A.I.R. 1932 P.C. 55, where their Lordships pointed out that a document which merely acknowledges a title is a mere recital of a fact of title and does not 'declare' or 'create' a title within the meaning of sec. 17 (1) (*b*) of the Registration Act, and does not require registration. An acknowledgment of liability in respect of a charge under sec. 55 (4) (b) of the Transfer of Property Act does not of itself create any title or right in the owner which would attract the provisions of sec. 17 (1) of the Registration Act, but is a mere statement, an admission of an existing fact and as such no registration is necessary—*Parasram* v. *Punamchand*, I.L.R. (1942) Nag. 541, 1942 N.L.J. 412, A.I.R. 1942 Nag. 102.

186. Effect of acknowledgment:—The acknowledgment of a debt does not alter the quality of the debt and does not create a new debt—*Kamal* v. *Krishna*, 10 C.L.J. 517, 3 I.C. 34. Thus, the acknowledgment does not entitle the creditor to claim interest at a higher rate than that which was prevailing up to the date of acknowledgment—*Tanjore Ramchandra* v. *Vellyanandan*, 14 Mad. 258 (P.C.).

An acknowledgment of a mortgage-debt is good not only as against the person acknowledging, but also as against those deriving title under him even prior to the date of acknowledgment and subsequent to the debt acknowledged—*Velayudu* v. *Narasimha*, 32 M.L.J. 263 38 I.C. 240. But an acknowledgment of liability made by one of the heirs of the debtor can be used only against the person acknowledging but not against all the heirs of the debtor—*Collector of Jaunpur* v. *Jamna Prasad*, 44 All. 360 (367), 20 A.L.J. 140, 66 I.C. 171; *Raja Rama* v. *Fakruddin*, 53 Mad. 480, 58 M.L.J. 210, A.I.R. 1930 Mad. 218, 122 I.C. 504; *Hakim Sayid Fida* v. *Bhuneshwari*, 20 Pat. 770, 23 Pat.L.T. 431, A.I.R. 1942 Pat. 73.

If a person admits a right, it is a necessary implication that he also admits the *legal consequences* of that right. Therefore, where a person admits that the land of which he is in possession belongs to another, he admits that he is liable to restore the land to that other—*Guru Charan* v. *Surendra*, 19 C.W.N. 263. 22 I.C. 650. An acknowledgment of a current account implies an acknowledgment to have accounts

settled and implies a promise to pay, should the balance turn out to be against the person making it—*Bengal National Bank* v. *Jatindra*, 56 Cal 556, 33 C.W.N. 412 (415). Where the defendant stated that for the last five years he had open and current account with the plaintiff's predecessor, the legal consequence would be that either of the parties had a right against the other to an account; it followed equally that whoever on the account should be shown to be the debtor to the other was bound to pay his debt to the other, and the inevitable deduction from the admission is that the defendant acknowledged his liability to pay his debt to the plaintiff, if the balance should be ascertained to be against him—*Maniram Seth* v. *Seth Rup Chand*, 33 Cal. 1047 (1057) (P.C.). Where a mortgagor describes his mortgagee as such and the latter admits in writings over his signature the correctness of the description, it is a necessary implication from the admission that the mortgagee acknowledges all the legal consequences of his position, one of which is his liability to be redeemed—*Sheikh Mahomed* v. *Jamaluddin*, 10 Bom.L.R. 385; *Ahmad Haji* v *Mayan*, 57 M.L.J. 789, A.I.R. 1930 Mad. 65. An acknowledgment by a mortgagor of his liability under the mortgage carries with it an admission of all the remedies to which the mortgagee might be entitled under it—*Thakur Basant Singh* v. *Thakur Rampal*, 6 O.L.J. 248, 51 I.C. 985; *Ram Ahtar* v. *Beni Singh*, 25 O.C. 89, 68 I.C. 196.

An acknowledgment of the sub-mortgage, made by the sub-mortgagee does not involve an acknowledgment of the original mortgage and therefore it will not operate to extend the period of limitation for a suit for redemption brought by the original mortgagor against the original mortgagee—*Bhagwan Ganpati* v. *Madhav Shankar*, 46 Bom. 1000, 24 Bom.L.R. 713, 70 I.C. 906. But where the sub-mortgagee in submitting a list of the properties to be sold in execution of a decree obtained by him against his mortgagor (the original mortgagee) had described the property as subject to the original mortgage, *held* that the description amounted to an acknowledgment and saved limitation as against him in a suit brought by the original mortgagor to redeem the original mortgage—*Sanwal Das* v. *Sayid*, A.I.R. 1925 All. 174, 85 I.C. 330. The admission of liability to pay interest under the mortgage amounts to an acknowledgment of liability under the mortgage, including liability to give possession to the mortgagee under the terms of the mortgage—*Anant Ram* v. *Inayat Ali*, 2 Lah.L.J. 549 But an acknowledgment of liability in respect of the amount due as principal does not involve the admission to pay interest—*Fillip & Co.* v. *Mahomedalli*, 55 I.C. 822. An admission that a certain person has purchased the property is not an admission that that party has acquired a good title in the property, for it is quite consistent with an assertion that the purchase was bad in law, and did not operate to confer any title on the alleged purchaser—*Imbad Ali* v. *Nandkumar*, A.I.R. 1925 Pat. 473, 88 I.C 478. An admission that a certain person has recovered judgment in an action of ejectment is not an admission of title, for it is quite consistent with an assertion that the judgment in ejectment was wrong and that the person had no title at all—Halsbury's Laws of England, Vol. 19, p. 132.

An unconditional acknowledgment has always been held to imply a promise to pay, because that is the natural inference, if nothing is said to the contrary. It is what every honest man would mean to do—*Maniram Seth* v. *Seth Rupchand*, 33 Cal. 1047 (P.C.), 33 I.A. 165; *Hiralal* v. *Badkulal*, 1953 S.C.R. 758, 1953 S.C.J. 315, A.I.R. 1953 S.C. 225.

Where the vendee of immovable property executes a promissory note to the vendor for the balance of the sale price due to the vendor, acknowledgment of liability evidenced by endorsement made on the promissory note cannot be treated as acknowledgment of liability in respect of the vendor's lien for the portion of the purchase money which is due so as to save limitation to file a suit to enforce claim

on the lien as against the immoveable property. The reason is that the remedies, though flowing out of the same transaction, are distinct and separate in their scope and in their essential features. So anything done or said to save one of the remedies from the bar of limitation cannot operate by itself to save the other also—*Abdul* v. *Usman Khan*, (1941) 2 M.L.J. 939, A.I.R. 1942 Mad. 167.

As regards the question whether an acknowledgment itself can be the basis of a suit, it has been held in some cases that since an unconditional acknowledgment implies an unconditional promise to pay, if it is made before the limitation period expires, it can itself be the foundation of an action—*Govind Singh* v. *Bijay Bahadur*, 1929 A.L.J. 1279, A.I.R. 1929 All. 980 (982); *Abdul Rafiq* v. *Bhajan*, 53 All. 963, 1932 A.L.J. 77 (87), 137 I.C. 243, A.I.R. 1932 All. 199; *Fateh Mahomed* v. *Ganga Singh*, 10 Lah. 748, A.I.R. 1929 Lah. 264, 115 I.C. 853; *Chunilal* v. *Laxman*, 46 Bom. 24 (28), A.I.R. 1922 Bom. 183; *Punjab Zamindar's Bank* v. *Shaffi*, 40 P.L.R. 801, A.I.R. 1938 Lah. 505; *Hiralal* v. *Badkulal*, 1953 S.C.R. 758, 1953 S.C.J. 315, A.I.R. 1953 S.C. 225. Where acknowledgment implies a promise to pay, a suit can be brought on the basis of such acknowledgment considered as an agreement provided consideration is proved. In such a case even if the acknowledgment is made after the period of limitation, the suit is not barred—*Shanti* v. *Harnam*, I.L.R. (1938) Lah. 193. 40 P.L.R. 533, A.I.R. 1938 Lah. 234 (F.B); *Bai Shanta* v. *Trikamlal*, 45 Bom.L.R. 957, A.I.R. 1944 Bom. 19. But in some other cases of the same High Courts the above view has been dissented from. Thus a recent Allahabad case gives expression to the opinion that an acknowledgment cannot be made the basis of a suit. The acknowledgment merely confirms the debt, and thereupon if anything has to be recovered, it is on the debt which is being acknowledged. An acknowledgment of a debt does not supersede the old debt and give rise to a new one. If a plaintiff brings his suit on an acknowledgment of a pro-note debt, he should be allowed to amend his plaint by basing his claim on the promissory note—*Bal Krishna* v. *Deb Singh*, 56 All. 281, 1933 A.L.J. 1530, 149 I.C 571, A.I.R. 1934 All. 76 (77) (dissenting from 1929 A.L.J. 1279); *Shankar* v. *Mukta*, 22 Bom. 514 (518). A mere acknowledgment of liability cannot be made the basis of a suit so as to constitute a fresh cause of action, but in a suit based on the original consideration the acknowledment can be relied upon as a piece of evidence in proof of the debt—*Reoti Ram* v. *Lachman*, 23 A.L.J. 900, 89 I.C. 402, A.I.R. 1926 All. 155 (156) (following *Ganga Prasad* v. *Ram Dayal*, 23 All. 502); *Ramprasad* v. *Brindawan*, I.L.R. (1940) Nag. 441, A.I.R. 1938 Nag. 180; *Bhawani* v. *Ganga*, A.I.R. 1941 Rang. 244. See also *Kalappa* v. *Krishna*, I.L.R. (1945) Mad. 521, (1944) 2 M.L.J. 225, A.I.R. 1945 Mad. 10.

Acknowledgment of part of debt:—An acknowledgment of a part of a debt will keep it alive only to that extent—*Chandra* v. *Ramdin*, 16 C.W.N. 493.

Acknowledgment in favour of minor:—If an acknowledgment is made in favour of a minor, the new period of limitation is to be computed from the date when the plaintiff attains majority—*Ramji* v. *Manya*, 1919 P.L.R. 37, 52 I.C. 115; *Venkataramayyar* v. *Kothandaramayyar*, 13 *Mad.* 135. This section speaks of a *new* period of limitation, not an extension of the old period. Thus, time began to run against the plaintiff's father, and, after his death, against the plaintiff who then a minor; subsequent to the death of the father, an acknowledgment of liability was made by the defendant in favour of the plaintiff during his minority. Under this section the effect would be that the period already running is not simply extended but terminates, and an entirely *new* period of limitation is to be reckoned from the date of acknowledgment, and as the minor falls under the strict wording of section 6 which uses the words "at the time when the period of limitation is to be reckoned, a minor," limitation would run from the date of his attaining majority—*Venkataramayyan* v. *Kothandara-*

mayyar, 13 Mad. 135; *Chandrabhan* v. *Rajkumar*, 54 All. 1019, A.I.R. 1933 All. 100 (101) 142 I.C. 794, 1932 A.L.J. 1012; *Gangadhar* v. *Dolgobinda*, A.I.R. 1956 Orissa 193.

187. New period of limitation:—"The expression 'fresh period' presupposes the previous running of another period of limitation. Hence the new period is to be calculated from the date of acknowledgment only when that date is subsequent to the date from which the period would otherwise be computed. Thus a written acknowledgment of a liability made before the debt has fallen due, *i.e., before time has commenced to run*, is of no effect so far as the shortening or extending of the time for the institution of suits in concerned"—Banning, 2nd Ed., p. 127.

In computing the period of limitation, the date on which the acknowledgment was signed (*i.e.*, the date from which the new period of limitation runs) must be excluded under sub-section (1) of section 12—*Jai Narain* v. *Vithoba*, 6 N.L.J. 281, A.I.R. 1923 Nag. 143, 71 I.C. 556.

When the defendant acknowledges the liability while he is absent from India, the period already elapsed is cancelled and a new period begins to run; and if the defendant continues to remain abroad, time will not run until he returns, by virtue of sec. 13.

188. Oral evidence:—See sub-section (2). Oral evidence of the contents of a document cannot be received. Therefore, where the acknowledgment of a debt was signed by the debtor each year, and on the signing of a fresh acknowledgment, the old one was given back to the debtor, no oral evidence of these old acknowledgments could be given so as to show that they had been given while the debt was still unbarred—*Zulnissa* v. *Motidev*, 12 Bom. 268. But this section must be read with sections 65 and 91 of the Evidence Act and does not exclude secondary evidence in cases in which the same would be admissible under section 65 of that Act—*Chathu* v. *Virarayan*, 15 Mad. 491. For instance, where the original document has been lost or destroyed, it is open to the plaintiff to give secondary evidence of the contents of the said document—*Shambhu* v. *Ram Chandra*, 12 Cal. 267; *Wajiban* v. *Kadir*, 13 Cal. 292.

Where the date originally borne by a written acknowledgment (*ruzukhata*) has been altered, no oral evidence can be received as to the date on which it was given —*Sayad Gulamali* v. *Miyabai*, 26 Bom. 128 (distinguishing *Atmaram* v. *Umedram*, 25 Bom. 616, in which no question was raised as to the effect of alteration of the *date* of a written acknowledgment). Where there are more debts than one, oral evidence will not be received to identify the debt acknowledged with the debt sued on, for that would involve a question of the *intention* of the debtor as to what debt he meant; and no parol evidence of the *intention* of the party can be admitted for the purpose of identifying the debt acknowledged—*Beti Maharani* v. *Collector*, 17 All. 198 (P.C.). The law is well settled that to prove an acknowledgment of liability oral evidence of the intention of the party said to have made the acknowledgment is not admissible for construing the writing given—*Haiderali* v. *Brojendra*, 45 C.W.N. 208. But where there is only one debt, and the acknowledgment omits to mention the name of the mortgagor or the date of the mortgage or the amount of the debt, parol evidence is admissible to prove the name, the date or the amount—*Uppi* v. *Mammavan*, 16 Mad. 366; *Narayana* v. *Venkataramana*, 25 Mad. 220 (F.B.). In England also, the date of the bond may be supplied by parol evidence, as also the name of the creditor to whom the debt is owing—*Hartley* v. *Wharton*, (1840) 11 A. & E. 934; *Edmunds* v. *Downes*, (1834) 2 Cr. & M. 459. Parol evidence may also be received to prove the exact amount due—*Dickinson* v. *Hatfield*, (1881) 1 Mec. & R. 141; *Colledge* v. *Horn*, (1825) 3 Bing. 119; *Cheslyn* v. *Dalby*, (1840) 4 Y. & C. 238. Where the plaintiff relies on post cards as containing acknowledgment, but there is nothing on the face of the

post cards that they necessarily referred to the suit debt, oral evidence is admissible to prove that the post cards relate to the suit debt as there is nothing in this section or in the Evidence Act which precludes the letting in of oral evidence to explain what debts the post cards necessarily refer to—*Athmaramayya* v. *Seshappa,* (1941) 1 M.L.J. 173, A.I.R. 1941 Mad. 409.

189. Explanation:—"*Exact nature of property or right*":—An acknowledgment is sufficient even though it omits to specify the exact nature of the property or right; that is, an acknowledgment need not necessarily be in respect of the particular *relief* prayed for in the suit or application. It is sufficient acknowledgment if it is of a right or property which is the subjtct matter of the suit or application—*Jageshar* v. *Bir Ram,* 23 O.C. 176, 60 I.C. 189. It is not necessary that there should be a specific or direct acknowledgment of the particular liability which is sought to be enforced, and if there is an admission of facts of which the liability in question is a necessary consequence, there would be an acknowledgment within the meaning of this section—*Jainarain* v. *G. G. of India,* A.I.R. 1951 Cal. 462.

Claim to a set-off:—Section 19 applies where the acknowledgment is coupled with a claim to a set-off. Under the English law also, a claim to a set-off does not negative a promise to pay—*Leland* v. *Murphy,* (1865) 16 Ir. Ch. R. 500. But where a plea in the written statement sets forth that the money is not owing and if it is, it must be set off against an amount, such a plea is not an acknowledgment of liability; it is a *denial* of liability with a claim to a set-off in the alternative—*Shaik Meera* v. *Shaik Nainar,* 25 M.L.J. 259, 21 I.C. 30.

Refusal to pay:—An acknowledgment is sufficient, even if it is accompanied by a refusal to pay—*Janardan* v. *Radhaballabh,* 23 C.W.N. 921, 53 I.C. 898. Under sec. 19, Limitation Act, the words relied on, in order to constitute a valid acknowledgment, must be such as to show an existing jural relationship of debtor and creditor. An admission of a debt coupled with a refusal to pay because the parties have arranged for payment elsewhere, amounts to an acknowledgment—*Kuppuswami* v. *Sabapathy Pathan,* A.I.R. 1936 Mad. 943, 44 L.W. 362. According to English law, however, such an acknowledgment is insufficient, a promise to pay being the essential requisite of every acknowledgment. See *Lee* v. *Wilmot,* (1865) L.R. 1 Ex. 364.

Addressed to a person not entitled to the right:—See Note 178, *ante* under heading "Acknowledgment to whom to be made."

190. Agent duly authorised:—The test for determining the effect of acknowledgment by a third person will in each case be whether the person who keeps alive the debt had express or implied authority to act on behalf of those against whom limitation is sought to be asserted—*Kothandaraman* v. *Shanmugam,* 32 I C. 608 (Mad.). The authorization need not be in writing—*Badri* v. *Gopi,* A.I.R. 1950 Ajmer. 4. But it must be to acknowledge the liability in question and not merely to sign the document. The kind of authorization contemplated by this section implies the conferral of powers on a person who does not already possess them—*Yazardhar* v. *Udaychand,* I.L.R. (1942) Nag. 182, 1940 N.L.J. 445, A.I.R. 1940 Nag. 354. So a judge signing the deposition of a party or of a witness is in no sense an agent of him. *Ibid.*

A manager, who has got general authority to purchase and pay for all things required for the use of his principal, can, without any special authority, give a note promising payment of the price of goods to the supplier of the goods; and the note is a sufficient acknowledgment of liability made by 'an agent duly authorised' within the meaning of this section—*Raja Braja Sunder Deb* v. *Bhola Nath,* 24 C.W.N. 153 (P.C.), 55 I.C. 543, A.I.R. 1919 P.C. 120. But a *Mukhtar-am* has no power to ack-

nowledge a liability under this section unless he has been given *special* authority to make the acknowledgment of the liability—*Narain Rao* v. *Manni Kunwar*, 44 All. 546, 20 A.L.J. 359, 66 I.C. 394. The mere fact that the defendant used to write letters on behalf of the principal is not sufficient in law to enable the Court to infer that he was an authorised agent for the purpose of making an acknowledgment of liability—*Uma Shankar* v. *Govind*, 46 All. 892, 22 A.L.J. 807, A.I.R. 1924 All. 855, 80 I.C. 6.

The manager of a Hindu joint family has the power to acknowledge debt which is binding on the coparceners. Such an acknowledgment even made after adjudication of the manager as an insolvent is binding on them—*Vyagreswarudu* v. *Bhadranma*, I.L.R. (1943) Mad. 53, (1942) 2 M L.J. 233, A.I.R. 1942 Mad. 721.

Guardian:—A guardian appointed under the Guardians and Wards Act, 1890, is an "agent duly authorised" and competent to make an acknowledgment, provided it be shewn that the guardian's act was for the benefit of the ward—*Annapagauda* v. *Sangadigyapa*, 26 Bom. 221 (F.B.); *Sobhandari* v. *Sriramulu*, 17 Mad. 221. Similarly, an acknowledgment by a natural guardian will give a fresh start for limitation, if it be shewn that the acknowledgment was for the benefit of the minor—*Bhulli* v. *Nanalal*, 8 Bom.L.R. 812; *Ram Charan* v. *Gaya*, 30 All. 422 (F.B.); *Kailasa* v. *Pennu Kannu*, 18 Mad. 456. An acknowledgment of liability by a guardian *ad litem* of a minor, who is also a lawful guardian under the personal law of the minor, is effective against the minor, whether or not such acknowledgment is for his benefit—*Gumti* v. *Jugal*, I.L.R. (1939) 2 Cal. 33, 43 C.W.N. 604, A.I.R. 1939 Cal. 399. But a *defacto* guardian has no power to acknowledge a debt—*Tukaram* v. *Madhaorao*, I.L.R. (1947) Nag. 710, 1947 N.L.J. 405, A.I.R. 1948 Nag. 293.

Where the wife of a lunatic applied to get herself appointed as guardian of her husband and in her petition she included certain debts due by her husband, but pending that petition her husband died and she was never in fact appointed as guardian, it was held that the wife was not an "agent duly authorised" and the acknowledgment of her husband's debts in the petition could not save limitation—*Gomathi Ammal* v. *Avu Ammal*, 56 Mad. 964, A.I.R. 1933 Mad. 686, 146 I.C. 49.

In some cases decided before the enactment of sec. 21 (1) it was held that no guardian (whether certificated or natural) could acknowledge a debt on behalf of the minor—*Wajibun* v. *Kadir*, 13 Cal. 292; Chhato v. *Bilto*, 26 Cal. 51; *Narendra* v. *Rai Charan*, 29 Cal. 647. But these cases are no longer good law.

As to who is or is not a lawful guardian, see Note 206 under sec. 21.

Court of Wards:—The Court of Wards has power to make acknowledgment of a debt due by the ward which would bind the ward and give a fresh starting point for limitation—*Rashbehary* v. *Anand*, 43 Cal. 211. The Collector in charge of the Court of Wards is the duly authorised agent of the wards for the purpose of making an acknowledgment under this section—*Shanker Lal* v. *Ram Lal*, I.L.R. (1938) All. 363, 1938 A.L.J. 252, A.I.R. 1938 All. 217 (F.B.). Thus, an acknowledgment by the Collector and Deputy Collector as agents of the Court of Wards is equally binding on the minor—*Kannamodalu* v. *Alluri Sarvaryudu*, 34 Mad. 221. An order by the Court of Wards deciding to allow a debt of a creditor is an acknowledgment of the debt—*Kanraj* v. *Vijai*, A.I.R. 1951 Raj. 74. So also a report made by the Collector admitting a claim on a mortgage is an acknowledgment—*Bhalchandra* v. *Chanbasappa*, 41 Bom.L.R. 391, A.I.R. 1939 Bom. 237.

Sarbarakar:—The *sarbarakar* of a disqualified person not being a guardian and having nothing to do with the person or property of the proprietor, but appointed only to manage the lands owing to the incompetency of the proprietor, cannot be regarded as a person authorised to admit the personal debt of the proprietor for the purpose of

this section—*Beti Maharani* v. *Collector*, 17 *All.* 198 (P.C.). It cannot be assumed that a Mukhtarian or general agent has power to acknowledge liability within the meaning of sec. 19, Limitation Act, and that such a liability can only be fastened upon the principal by a person duly authorised in this behalf, that is to say, who has been given authority to make such an acknowledgment of liability—*Deputy Commissioner, Kheri* v. *Jagdamba Prasad*, A.I.R. 1936 Oudh 332; *Beti Maharani* v. *Collector of Etawah*, 17 All. 198.

Co-mortgagees:—Where the mortgage is joint and incapable of being redeemed piecemeal, one mortgagee is not an agent for the other joint-mortgagees; and an acknowledgment of the mortgagor's title made and signed by one mortgagee only cannot avail against the other mortgagees for the purpose of saving limitation in respect of the mortgagor's suit for redemption—*Dharma* v. *Balmakund*, 18 All. 458 (460); *Jwala* v. *Achchey*, 34 All. 371 (374); *Bhogilal* v. *Amritlal*, 18 Bom. 173 (181); *Mah Bibi* v. *Motan Lal*, 61 P.R. 1877. So too is an acknowledgment made by one of several heirs of the original mortgagee without effect—*Bhogilal* v. *Amritlal*, supra.

But where after the creation of the mortgage, which was a mortgage with possession, the two branches of the family of the original mortgagee had effected a partition of the property and each branch has been in possession of the mortgaged property allotted to each, an acknowledgment made by the persons of one branch is a good acknowledgment so as to save the mortgagor's right of redemption being barred in respect of the property in possession of that branch—*Motilal* v. *Samal*, 54 Bom. 625 (F.B.), 32 Bom.L.R. 1096, A.I.R. 1930 Bom. 466 (475), 128 I.C. 417 (distinguishing *Bhogilal* v. *Amritlal*, 17 Bom. 173); see also *Janardhanan* v. *Mariam*, A.I.R. 1957 T.C. 186, *Kuttan* v. *Bhagyodayam Co. Ltd.*, A.I.R. 1957 T.C. 253.

Co-mortgagor:—An acknowledgment of liability by one of several mortgagors will ordinarily give a fresh start of limitation against the mortgagor who acknowledge the same. It is only when he makes the acknowledgment on behalf of the others also under circumstances which would make him an agent of the other co-mortgagors under sec 21 of the Limitation Act, that limitation would be saved against the others as well—*Rameshwar* v. *Ram Dass*, 18 Pat. 434, 20 Pat.L.T. 619, A.I.R. 1939 Pat. 451. Such an acknowledgment is insufficient to provide a fresh period of limitation for a suit by other mortgagor for redemption of his share as against the redeeming co-mortgagor—*Mukhnarain* v. *Ramlochan*, 19 Pat. 938, 21 Pat.L.T. 702, A.I.R. 1941 Pat. 147.

Joint debtors:—The same principle applies to joint debtors. So, payment made by one of the debtors does not extend the period of limitation—*Kunjandi* v. *Chinnavava*, (1940) 2 M.L.J. 326, A.I.R. 1941 Mad. 110.

Receiver:—A receiver of a partnership firm appointed for collecting its outstandings and doing all things necessary for the realisation and preservation of its assets, may be a person authorised to make an acknowledgment binding on the firm, if the acknowledgment was necessary for the preservation of the partnership assets—*Lakshumanan Chetty* v. *Sadayappa Chetty*, 35 M.L.J. 571, 48 I.C. 179. A receiver of an insolvent's estate appointed under the C. P. Code can give a valid acknowledgment inasmuch as the ownership vests in him and he can deal with it as owner—*Paramasivan* v. *Aristotle*, 5 L.W. 222, 38 I.C. 160; *Ramagopal Naicker* v. *Muthukrishna Ayyar*, (1956) 2 Mad. L.J. 421.

Partners:—*Cf.* sec. 18 of the Partnership Act: "A partner is the agent of the firm for the purpose of the business of the firm." See also Note 207 under sec. 21.

Legal Practitioner:—An acknowledgment by a legal practitioner will be a valid acknowledgment to bind his clients. An admission made by a pleader on behalf of

his client in a memorandum of appeal in a case not *inter partes* that a certain decree was a subsisting decree and capable of execution, will amount to an acknowledgment so as to give a fresh starting point of limitation for execution of such decree—*Hingon* v. *Mansa*, 18 All. 384. A letter from defendants' attorney to the plaintiffs' attorney to the effect that the defendants were willing to pay the rent in question in case the plaintiffs could show a good title, was held to be a sufficient acknowledgment—*Rungo Lall* v. *Wilson*, 26 Cal. 204 A letter written by a mukhtear at the request of the debtor acknowledging the liability and pleading present inability to pay is a valid acknowledgment—*Deputy Commissioner* v. *Ram Kumar*, 16 Luck. 701, 1941 O.W.N. 108, A.I.R. 1941 Oudh 254.

Ex-Agent:—Acknowledgment signed by defendant's ex-agent whose agency has terminated long before the giving of acknowledgment cannot bind the defendant or prevent the operation of limitation—*Jogeshwar* v. *Raj Narain*, 31 Cal. 195 (202). But if the termination of agency (by death of the master) had been unknown to the plaintiff, the acknowledgment made by the gomosta after the death of the master would be valid and would save limitation—*Ebrahim* v. *Chunilal*, 35 Bom. 302, 10 I.C. 888, 13 Bom.L.R. 264.

Director:—An acknowledgment made by one of the directors of the company who does the ordinary acts necessary in the conduct of the business on behalf of the company is a sufficient acknowledgment—*Amulya* v. *Coral Engineering Works Ltd.*, 33 C.W.N. 833 (834), 115 I.C. 177, A.I.R. 1929 Cal. 155. The mere signing of a balance sheet by a director of a company does not amount to an acknowledgment. He is under a duty where he is bound to set out, among other things, the claims made on the company and not with the intention of acknowledging liability—*Kashinath* v. *The New Akot Cotton Ginning and Pressing Company Ltd.*, I.L.R. (1950) Nag. 562, A.I.R. 1951 Nag. 255. But where the debt due to certain creditor is included in the item relating to sundry creditors as contained in the balance-sheet of the company, the balance-sheet contains an acknowledgment to the particular creditor—*Rajah of Vizianagram* v. *Official Liquidator*, (1951) 2 M.L.J. 535, A.I.R. 1952 Mad. 136.

Official Assignee:—The Official Assignee is not the agent of the insolvent, and an acknowledgment made by him does not save limitation—*Currimbhai* v. *Ahmedali*, 35 Bom.L.R. 12, A.I.R. 1933 Bom. 91, 143 I.C. 698.

An appointee of insolvent's property under the Insolvency Act cannot be treated as an agent duly authorised within the meaning of sec. 19—*Maung Po* v. *B. Banerjee*, A.I.R. 1945 Rang. 152, 156 I.C. 783.

Official Receiver:—The Official Receiver is not an agent of the insolvent. Since, however, under Section 28 (2), Provincial Insolvency Act, all the properties of the insolvent rest in the Official Receiver he is the party against whom such property or right can be claimed, and, under Section 19 of the Limitation Act, an acknowledgment of liability by the Official Receiver will furnish a fresh starting point for limitation—*Ramgopal* v. *Muthukrishna*, A.I.R. 1957 Mad. 1. The Official Receiver and the insolvent stand to each other in the relation of predecessor in title and successor-in-title. The phrase "by some person through whom he derives his title or liability" is equally apt to cover such relationship—*Patro* v. *Raju*, A.I.R. 1952 Orissa 62.

191. Execution-proceedings:—Explanation III has been added to set at rest the conflict of decisions which existed as to the question whether this section under the old Act applied or not to execution-proceedings. The Madras High Court was of opinion that this section was not applicable to applications for execution, while the other High Courts held the contrary view. See *Sreenivasachariar* v. *Ponnusami*, 28 Mad. 40; *Rama* v. *Venkatesa*, 5 Mad. 171 (F.B.); *Brojo* v. *Gaya*, 6 C.L.J. 141;

Kally v. *Heera Lal*, 2 Cal. 468; *Ramhit* v. *Satgur*, 3 All. 247 (F.B.); *Trimbak* v. *Kashi Nath*, 22 Bom. 722.

The following are instances of acknowledgment:—An application in writing by a judgment-debtor asking the decree-holder to postpone the sale and allow him to make some arrangement for paying off the debt—*Ramhit* v. *Satgur*, 3 All. 247 (F.B.); *Toree* v. *Mahomed*, 9 Cal. 730; *Norendra* v. *Bhupendra*, 23 Cal. 374 (387); *Subbalakshmi* v. *Ramanujam*, 42 Mad. 52; *Venkatrav* v. *Bijesingh*, 10 Bom. 108; a joint application by the decree-holder and the judgment-debtor stating on the one hand, that the former received a certain sum in part payment of the decretal amount, and on the other, that there was a certain balance due from the judgment-debtor under the decree—*Mahammad* v. *Prayag*, 16 All. 228; the payment of part of the judgment-debt by the judgment-debtor, with an acknowledgment of liability by his pleader—*Trimbuk* v. *Kashinath*, 22 Bom. 722; a petition by the judgment-debtor for the enlargement of time for the payment of the decretal amount—*Ram Coomar* v. *Jakur*, 8 Cal. 716; an application by the decree-holder for certifying certain payment in satisfaction of a redemption-decree—*Bacharai* v. *Babaji*, 38 Bom. 47; *Eusuffseman* v. *Sanchia*, 43 Cal. 207, 34 I.C. 606; or other decree *Satrughana* v. *Kofini*, A.I.R. 1945 Pat. 280; a statement by the decree-holder in his execution application that he had received a sum from the judgment-debtor—*Eusuffzeman* v. *Sanchia*, 43 Cal. 207, 20 C.W.N. 272, 34 I.C. 606; an agreement made between the judgment-debtor and the decree-holder in course of the execution-proceedings—*Fateh* v. *Gopal*, 7 All. 424; an endorsement of part payment of the decretal amount made on the decree by the judgment-debtor—*Janki* v. *Ghulam*, 5 All. 201. A compromise to have the rest of the decree executed at a future time amounts to an admission on the part of the judgment-debtor and entitles the decree-holder to a fresh period from the date of the compromise—*Bindeswari* v. *Awadh Behari*, 6 I.C. 366. Even if such compromise deals with the properties not the subject matter of the suit, it can be regarded as an acknowledgment of the title of the person bringing a suit for possession of those properties—*Supdu* v. *Soniram*, 46 Bom.L.R. 931, A.I.R. 1945 Bom. 143. If in a petition of insolvency filed by the judgment-debtor the judgment-debt is specified, that would amount to an acknowledgment—*Rampal* v. *Nand Lal*, 16 C.W.N. 346, 13 I.C. 603. Where the judgment-debtor expressly admitted that there was an instalment decree in favour of the decree-holder, that several instalments had already been paid, that the instalment for *Poush* remained unpaid but as it had not become due, the decree-holder was not entitled to proceed with the execution, *held* that this was a sufficient acknowledgment—*Paresh Nath* v. *Ismail*, 26 C.W.N. 486, 34 C.L.J. 195, 64 I.C. 993. A statement by the judgment-debtor as to existence of mortgage decree in reply to an application by the decree-holder for injunction restraining the judgment debtor from disposing of the mortgaged property is an acknowledgment to save the decree-holder's application for execution—*Risal* v. *Lal*, I.L.R. (1939) All. 728, 1939 A.L.J. 746, A.I.R. 1939 All. 483. An acknowledgment by the judgment-debtor may save limitation against the auction-purchaser, but such acknowledgment, if made after attachment, cannot prevail against the auction-purchaser who is entitled to have the property purchased by him in the condition in which it was at the time of the attachment—*Rajeswari* v. *Binode*, 22 C.W.N. 278, 44 I.C. 533. A contrary view has been taken by the Allahabad High Court in *Tulshi* v. *Mek Ram*, I.L.R. (1945) All. 120, 1945 A.L.J. 58, A.I.R. 1945 All. 224, where it has been held that an auction purchaser derives his title through the judgment-debtor as such would be bound by the acknowledgment of the latter made after the attachment of his properties but before the actual auction sale.

An acknowledgment of liability in writing by *some* of the judgment-debtors within three years from the date of the last application for execution would save limitation

as against the persons making the acknowledgment—*Ban Behary* v. *Jnanendra*, 22 I.C. 709; *Chandra* v. *Ramdin*, 16 C.W.N. 493, 13 I.C. 702. An application for payment by one of the several judgment-debtors amounts to an acknowledgment—*Lachmi* v. *Brahmdeo*, 22 Pat.L.T. 416. Where the judgment-debtor sent a part of the decretal amount with a letter to the decree-holder asking further time to pay the balance and the decree-holder endorsed the receipt on the letter and returned it, it was held that there was a valid acknowledgment—*Satgur* v. *Brahmadutt*, A.I.R. 1937 Oudh 391.

An admission by a decree-holder purchaser made in course of execution of his decree that the property sought to be sold is subject to a mortgage is not an acknowledgment of liability in respect of the mortgage in as much as the admission was made at a time when he had no interest in the mortgaged property—*Jiwanlal* v. *Ramrao*, 1951 N.L.J. 26, A.I.R. 1951 Nag. 240.

This section does not apply to section 48, C. P. Code, because the term of 12 years prescribed by that section is not strictly speaking a "period of limitation," and therefore an acknowledgment cannot give the decree-holder a fresh period of 12 years for the execution of his decree—*Mohant Krishna Dayal* v. *Sakina*, 1 P.L.J. 214, 34 I C. 27; *Narendra* v. *Oudh Commercial Bank*, 11 O.W.N. 1103, 151 I.C. 541, A.I.R. 1934 Oudh 465 (471).

192. Acknowledgment under previous Act—Suit under present Act:—The law to be applied is the law in force at the time when the plaintiff's *suit is brought* and not the law in force at the time when the acknowledgment was made. An acknowledgent of a mortgage was made by an agent in 1868 while the Act of 1859 was in force and the suit on the mortgage was brought in 1909, under the present Act. It was held that although under the Act of 1859 an acknowledgment by an agent was not a valid one, still that Act would not apply, but the Act in force at the time when the suit was instituted; that is, the Act of 1908 would be applicable and the acknowledgment by an agent being a valid acknowledgment under this Act would save limitation—*Zaibunnissa* v. *Maharaja of Benares*, 34 All. 109; see also *Soni Ram* v. *Kanhaiya Lal*, 35 All. 227 (234) (P.C.), 19 I.C. 291.

But where the right of action was barred before the new Act came into force, it could not be revived by the new Act. Thus, where a claim was barred before 1871 because an acknowledgment by an agent could not keep the claim alive, it cannot be revived by the Acts of 1871 and 1877 by reason of the fact that those Acts make an acknowledgment by an agent valid. Therefore a suit brought on the claim in 1880 is barred—*Dharma* v. *Govind*, 8 Bom. 99 (103); *Narayan* v. *Govind*, 29 Bom.L R. 1563, A.I.R. 1928 Bom.L.R. 1287, A.I.R. 1930 Bom. 55 (56).

Effect of payment on account of debt or of interest on legacy.

20. (1) Where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period, by the person liable to pay the debt or legacy, or by his duly authorised agent, a fresh period of limitation shall be computed from the time when the payment was made:

Provided that, save in the case of a payment of interest made before the 1st day of January, 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by, the person making the payment.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or pdoduce of such land shall be deemed to be a payment for the purpose of sub-section (1).

Effect of receipt of produce of mortgaged land.

Explanation.—Debt includes money payable under a decree or order of Court.

Change:—The words in sub-section (1) were substituted by sec. 2 of the Indian Limitation (Amendment) Act 1942, (16 of 1942) and the proviso to sub-section (1) were substituted, by the Indian Limitation Amendment Act, 1927 (Act I of 1927), in place of the old sub-section (1) and the proviso which stood as follows:—

(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or his agent duly authorised in this behalf,

Effect of payment of interest as such or of part-payment of principal.

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made.

"Provided that, in the case of part payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same."

In other words, while under the old law. the handwriting of the payer was necessary in case of part payment of the *principal* alone, under the new law, the handwriting of. or a writing signed by, the payer shall be necessary in the case of payment of *interest* also, if made on or after the 1st January, 1928.

The following is an extract from the Report of the Select Committee regarding amendment of words in sub-section (1)—

"The mere omission of the words "as such" from section 20 of the Indian Limitation Act, 1908, would not abolish the distinction between payment of interest and part payment of principal. So long as the distinction remained it would be necessary for the creditor to appropriate an open payment either to interest or principal, if he wished to save limitation. It is also necessary to distinguish part payments of legacies from part payments of other debts, and to secure that it is only a payment of interest on a legacy that starts a fresh period of limitation.

We have decided against giving to this alteration of the law any retrospective effect.....".

The amendment of the proviso has been made in pursuance of the following recommendations of the Civil Justice Committee: "With regard to section 20, we think that the provisions of clause (1) as they stand lead to a number of frivolous suits long after the period of limitation prescribed. It is easy in the first place for the plaintiff to say that within the time fixed the defendant paid him one rupee and two rupees as interest. He attempts to prove such payment by adducing oral evidence which takes up much valuable time, but ultimately the suit is, in most cases, dismissed. There is no reason why the payment of interest should stand on a different footing from the part payment of the principal of a debt. In the latter case the proviso to clause (1) enacts that the fact of payment should appear in the handwriting of

the person making the same. It seems to us that the payment of interest should also be subject to the same conditions as the part-payment of principal. There does not seem to be any reason for providing for payment of interest *as such*, so long as any portion of the sum paid can be appropriated for that interest. Moreover, having in view our recommendation that the payment of interest should be also in writing, the words '*as such*' would lose much of their importance"—*Civil Justice Committee Report*, p. 489.

193. Retrospection of amendment:—The amendment of this section by Act XVI of 1942 has no operation to a suit already instituted before that Act came into force—*Sarabdeva* v. *Dwarka*, 1945 P.W.N. 178, A.I.R. 1946 Pat. 59; *Durga* v. *Kishuni*, 18 Luck. 241, 1942 O.W.N. 582, A.I.R. 1942 Oudh 508; *Avudayyammal* v. *Ambasankar*, (1944) 1 M.L.J. 347, A.I.R. 1944 Mad. 398; *Venkatappayya* v. *Venkatappayya*, (1945) 2 M.L.J. 405, A.I.R. 1946 Mad. 72; *Prabhakar* v. *Chandrakant*, I.L.R. (1943) Nag. 422, 1943 N.L.J. 159, A.I.R. 1943 Nag. 178; *Kashiram* v. *Malkhan*, 1943 A.L.W. 401. There is a difference of opinion as to whether the section as amended in 1942 will apply to suits instituted after the amendment. The Patna and the Orissa High Courts have held that the amended section will apply—*Jagdish* v. *Saligram*, 24 Pat. 391, A.I.R. 1946 Pat. 60; *Baleswar* v. *Latafat*, 24 Pat. 249, A.I.R. 1945 Pat. 368; *Pitambar* v. *Lakshmidhar*, A.I.R. 1949 Orissa 64. The reason given is that the law of limitation which governs an action is the law which prevails on the date of the institution of the suit and that though the remedy is barred under the old law the right is not barred and no question of reviving a right arises. But the Allahabad and the Madras High Courts have taken a contrary view—*Pearey Lal* v. *Solugir*, I.L.R (1945) All. 896, A.I.R. 1946 All. 58; *Mangapathi* v. *Krishnaswami*, (1950) 1 M.L.J. 107, A.I.R. 1950 Mad. 762; *Ramanathan* v. *Kandappa*, (1950) 2 M.L.J. 624, A.I.R. 1951 Mad. 314.

193A. Sections 19 and 20:—Section 20 does not prevent the operation of section 19, and the two sections are not mutually exclusive. These sections cannot be treated as one general and the other special. Therefore, a payment though it may be ineffectual as a payment under sec. 20 may nevertheless be treated as an acknowledgment under section 19, if it fulfils the requirements of that section. Moreover, section 19 only operates against the person who makes the acknowledgment, but sec. 20 makes the part-payment good in favour of any suit on that liability. Further, an acknowledgment under section 19 need not be addressed to the person entitled, but a part-payment under sec. 20 must be made only to the person entitled to payment—*Venkatakrishniah* v. *Subbarayudu*, 40 Mad. 698 (699, 700). There is a fundamental difference between secs. 19 and 20. Under sec. 20 all that is necessary is that an acknowledgment of payment should appear in the handwriting of, or be signed by the person making it. But this is not enough under section 19—*Gazadhar* v. *Udiachand*, 1940 N.L.J. 445, A.I.R. 1940 Nag. 354. Sections 19 and 20 are independant of each other. There may be an acknowledgment of liability unaccompanied by part payment under sec. 19 or accompanied by part payment fulfilling the requirements of sec. 20, in which case the debt is saved from limitation both under sec. 19 and sec. 20; but if there is part payment which does not comply with the terms of sec. 20, that can not prevent the endorsement from operating as an acknowledgment within sec. 19—*Tayerali* v. *Garabad*, 41 Bom.L.R. 455, A.I.R. 1939 Bom. 252. An acknowledgment mustbe made by the person against whom the right is claimed, but in the case of a payment of interest or principal all that is required is that it should be made by a person liable to pay the debt. Further, the principle on which payment towards a debt is differentiated from mere acknowledgment is that such payment enures to the benefit of all who are liable to pay, which cannot be said of a mere acknowledgment made by one of the persons

liable to pay—*Narasimha* v. *Ibrahim*, 56 M.L.J. 630, A.I.R. 1929 Mad. 419 (420, 421), 118 I.C. 302; *Azizur* v. *Upendra*, 66 C.L.J. 104, 42 C.W.N. 18, A.I.R. 1938 Cal. 129.

Sec. 20 and Art. 75:—Section 20 has no concern with a suit governed by Art. 75. That Article contemplates a suit on an instalment bond which provides that in default in the payment of two or three successive instalments the whole amount would become due. The *terminus a quo* under Art. 75 is not the date of *payment* but the date of *non-payment* (*i.e.*, not the date on which an instalment was last paid, but the date on which the next instalment has become due and has not been paid); and therefore sec. 20 which provides that the period of limitation is to be freshly reckoned from the date of *payment* of interest or part of principal, has no application to a suit covered by Art. 75, and the payment of the last previous instalment need not be endorsed on the back of the bond in the handwriting of the debtor—*Probhat Chandra* v. *Mohesh Chandra*, 58 Cal. 615, 52 C.L.J. 591, 130 I.C. 571 A.I.R. 1931 Cal. 157 (158); *Nand Lal* v. *Akki*, 6 Lah. 163, 89 I.C. 294, A.I.R. 1925 Lah. 394 (dissenting from *Jawand Lal* v. *Sharf Din*, 35 P.R. 1913, 16 I.C. 961); *Gaya Din* v. *Kiyali Ram*, 11 O.W.N. 1191, 151 I.C. 852, A.I.R. 1934 Oudh 455 (457). The Allahabad High Court has taken a contrary view and has held that this section is applicable to cases falling under Art. 75; *Rup Narain* v. *Tirbeni*, I.L.R. (1943) All. 210, 1943 A.L.J. 28, A.I.R. 1943 All. 172; *Chedda* v. *Baldeo*, 1949 A.L.J. 291, A.I.R. 1949 All. 764.

194. Prescribed period:—The word "prescribed" means the period prescribed in the first schedule, and not the period within which the plaintiff may bring his suit. Therefore, if interest is paid *after the expiry* of the period of limitation, though before the plaintiff can bring a suit owing to the intervention of the vacation, it is of no avail —*Debendra* v. *Kartic*, 55 Cal. 1210, A.I.R. 1929 Cal. 68, 114 I.C. 483; *Pattabhiramayya* v. *Krishna*, 1938 M.W.N. 513, A.I.R. 1938 Mad. 683; *Laxman* v. *Yadao*, 1940 N.L.J. 227, A.I.R. 1940 Nag. 401; *Shyam* v. *Ram Autar*, A.I.R. 1939 All. 252, 181 I.C. 899; *Puran* v. *Abdullah*, I.L.R. (1938) All. 861, 1938 A.L.J. 1183, A.I.R. 1938 All. 606. Compare the cases cited in Note 176 to sec. 19, under heading "Acknowledgment made during holidays." The expression "prescribed period" means not the period prescribed for the repayment of the loan, but the period prescribed for the limitation of the suit, because in ordinary cases no debtor would make a payment before the time fixed for repayment of the loan—*Ramsebuk* v. *Ramlal*, 6 Cal. 815. It means that the interest must be paid before the debt is barred—*Venkataratnam* v. *Kamayya*, 11 Mad. 218. Any payment of interest made beyond the period of limitation cannot operate to extend the period of limitation—*Percy Fisher* v. *Ardeshir*, A.I.R. 1935 Bom. 213 ,37 Bom.L.R. 165, 156 I.C. 531. See also *Firm Kamta Prasad* v. *Gulzari Lal*, 1954 All.L.J. 712, A.I.R. 1955 All. 41 (F.B.).

195. Payment:—This section does not specify any particular mode or form of payment, and there are many modes in which payment may be made. Where the common agent of the joint debtors paid interest on the joint debt out of joint funds under express instructions contained in the instrument of his appointment, and this payment was relied upon by the plaintiff (one of the joint debtors) in a suit for contribution against the defendant (another joint debtor), it was held that this payment was clearly a payment in exoneration *pro tanto* of the liability of the plaintiff and such as is contemplated by this section—*Sukhamoni* v. *Ishan*, 25 Cal. 844 (852) (P.C.). All that is required by the plain words of the Indian statutes is that there should be a payment of a part of the debt due. All that has to be shown is that the payment was made towards this existing debt whose amount exceeded the amount paid, and once this is done, then by the words of the statute time is extended. In

Amritsar Municipality v. *Ralia Ram*, A.I.R. 1936 Lah. 636, 17 Lah. 737, 165 I.C. 723, Dalip Singh, J., remarked: "it appears to me that no words such as "without prejudice" can override the words of the Statute, which lay down that a part payment shall extend limitation, if it is in the handwriting of, or signed by the person making the payment."

A payment may be made not only in the current coin of the realm but in any other medium that the creditor may choose to accept. Thus, where goods are delivered by the debtor and taken by the creditor in payment either of principal or interest, such delivery would be a good payment of principal or interest, as the case may be, so as to extend the period of limitation under this section—*Ragho* v. *Hari*, 24 Bom. 619 (621); *Hooper* v. *Stephens*, (1835) 4 A. & E. 71. See also Contract Act, sec. 50, Illustration (*c*). It is not necessary that the payment of a debt should be actually made in money. The payment may be in goods or even by a settlement of accounts between the parties, provided that the payment must be of such a nature that it would be a sufficient answer to a suit. The test to be applied is, whether the payment that has been made is of such a nature that it would be a complete answer to a suit brought by the creditor to recover the amount—*Kariappa* v. *Rachapa*, 24 Bom. 493 (496); *Mylan* v. *Annavi*, 29 Mad. 234 (235); *Kollipara* v. *Maddula*, 19 Mad. 340 (342); *Narsoomal* v. *Athmal*, 9 S.L.R. 27, 30 I.C. 51. Thus, a payment made in goods will be sufficient if that is the intention and agreement—*Hart* v. *Nash*, (1835) 2 Cr. M. & R. 337; *Hooper* v. *Stephens*, (1836) 4 A. & E. 71. There may be a part payment by a mere settlement of accounts—*Amos* v. *Smith*, (1862) 31 L.J. Ex. 423; *Maber* v. *Maber*, (1867) L.R. Ex. 153; *Ramprabha* v. *Bishunath*, A.I.R. 1938 Pat. 139, 174 I.C. 585. Where a debtor consents that money due from him for interest should be credited to the account of the principal, and the interest-balance reduced by that amount, such a consent is really tantamount to a payment of interest; it is as if the debtor makes the payment and the creditor advances it again. Where both parties agree to such a settlement, and the accounts are so adjusted, the adjustment operates as a payment of interest under this section—*Kariappa* v. *Rachapa*, 24 Bom. 493 (501). If by agreement money is paid by the debtor on behalf of the creditor to a third person, that may be a sufficient payment as between the debtor and the creditor—*Worthington* v. *Grimsditch*, (1845) 7 Q.B. 479. Thus, a payment made by the mortgagors by means of a sale by the mortgagors to the mortgagees of a certain property other than that covered by the mortgage in suit is a good payment within the meaning of this section—*Raushan* v. *Kanhaiya*, 41 All. 111 (112), 47 I.C. 845. The payment may be made in the shape of a new bond passed for interest—*Doming* v. *Antone*, 1889 P.J. 39; *Kandaswami* v. *Thevammal*, I.L.R. (1938) Mad. 1090, (1938) 1 M.L.J. 620, A.I.R. 1938 Mad. 601. Payment under sec. 20 may be made in any form and a pro-note can be given by way of payment. The writing of the pro-note need not specify that the payment was made towards interest or principal. It can be proved by evidence—*Kandasami* v. *Thevammal*, A.I.R. 1936 Mad. 848. So also, the receipt of produce of land was held to be a payment of interest where the payee of a promissory note had been put into possession under an agreement that the produce of land should be taken as interest—*Mylan* v. *Annavi*, 29 Mad. 234 (235). But a plaintiff cannot rely on an *entry* made by the defendant in his own books crediting a sum to the plaintiff's account, because such an unilateral act does not amount to 'payment'; the credit of a sum by the defendant in his books to the plaintiff's account is not such a payment to the plaintiff as would be an answer in a suit brought by the plaintiff to recover the money—*Kollipara Pullamma* v. *Maddulu*, 19 Mad. 340 (342); *Palaniappa* v. *Veerappa*, 41 Mad. 446 (448), 34 M.L.J. 41; *Muinuddin* v. *Mahammad*, 1916 P.L.R. 68, 31 I.C. 782; *Nagappa* v. *Ramanathan*, (1916) 2 M.W.N. 264, 29 I.C. 422; *Raj Narain* v. *Ram Sarup*, 1930

A.L.J. 552, A.I.R. 1930 All. 467 (468), 123 I.C. 820; *Kariyappa* v. *Rachapa*, 24 Bom. 493 (499); *Satappa* v. *Annappa*, 47 Bom. 128 (131). An entry of interest in the defendant's books even if made in the presence of the plaintiff does not amount to a payment of interest within the meaning of this section—*Ichha* v. *Natha*, 13 Bom. 338 (343). Similarly, where subsequent to the adjustment of accounts by the defendant, he had been credited with the amounts of surplus proceeds of goods sold and with the proceeds of a *hundi*, such amounts were not 'payments' within the meaning of this section—*Narronji* v. *Mugniram*, 6 Bom. 103 (106).

Where both parties agree to wipe out the previous balance and add the amount of interest to the principal so as to make it a new debt, it may be conceded that such an act may amount to payment of interest within the meaning of this section. But such addition of interest to the principal must be the result of an *agreement between the parties on the date of such payment*. That is, the addition of interest must be with mutual consent given at the time. If either the creditor or the debtor by himself goes on adding interest to the principal in his own books, even though the same may be in pursuance of an agreement originally made between the parties, this would not amount to a fresh payment to the creditor so as to extend the period of limitation under this section—*Raj Narain* v. *Ram Sarup*, 1930 A.L.J. 552, 123 I.C. 820, A.I.R. 1930 All. 467 (468, 469).

Where there are debts due on both sides, and the accounts are gone through by the parties and a balance struck, this in effect constitutes a payment to the amount of the smaller debt—*Ashby* v. *James*, (1843) 11 M. & W. 542, 63 R.R. 676; *Re Hawkins*, (1879) 28 W.R. (Eng.) 240. But it is the striking of the balance that constitutes the payment, and not the mere existence or even a statement in writing of cross demands—*Williams* v. *Griffiths*, (1835) 2 Cr. M. & R. 45, 41 R.R. 685; *Scholey* v. *Walton*, (1844) 12 M. & W. 510, 67 R.R. 414. Hence, an agreed statement of accounts where all the items are on one side only, if the statement is not signed by the party liable and is inoperative as an acknowledgment, will not be allowed to support an action on an account stated in respect of items which are statute-barred—*Jones* v. *Ryder*, (1838) 4 M. & W. 32; *Nash* v. *Hill*, 1 F. & F. 198, 115 R.R. 897; *Guljar* v. *Sariman*, 36 C.L.J. 228, A.I.R. 1923 Cal. 71, 72 I.C. 692. See Notes under Art. 64.

Moneys realised in execution sale cannot be regarded as amounting to payment, because a payment relied on must be a *voluntary* acknowledgment by the person making the payment, of his liability and an admission of the title of the person to whom the payment is made—*Ram Chandra* v. *Devba*, 6 Bom. 626; *Raghunath* v. *Shiromonee*, 24 W.R. 20; *Bemul* v. *Ikbal*, 25 W.R. 249.

Under this section, a payment is not a good payment unless it is made to the person entitled—*Venkata Krishniah* v. *Subbarayudu*, 40 Mad. 698 (699). It must be made to the creditor or some one who is his agent. Payment to a stranger is inoperative —*Stamford Banking Co.* v. *Smith*, [1892] 1 Q.B. 765. Payment made to a person who is acting as the creditor's administrator, although his title is defective, is sufficient —*Clark* v. *Hooper*, 10 Bing. 480.

Where a customer overdraws account on different occasions each payment made by the customer over his signature goes to extend limitation in regard to the particular overdraft which it goes to repay and which would be the earliest item outstanding on the debit side. The payment would therefore be of no avail to save limitation in respect of the general balance of account. The fact that part of the floating balance is secured will not make a difference in this respect—*Basanta* v. *Chota Nagpur Banking Association Ltd.*, 26 Pat. 231, A.I.R. 1948 Pat. 18.

If there are two debts, and a payment is made by the debtor without specification

of the debt towards which the payment is made, the creditor can appropriate the money towards any debt he likes. See section 60, Contract Act. But so far as the question of *limitation* is concerned, such appropriation by the creditor does not keep the debts alive. Under section 20, the payment is viewed from the standpoint of the debtor and hence the determining factor is the intention of the debtor in making the payment and not that of the creditor in appropriating it. Where, therefore, the debtor makes payment to his creditor, to whom he owes two debts, the mere appropriation of the payment by the creditor to one of the debts, cannot in the absence of evidence to show the debtor's intention, save limitation in respect of that debt —*Parma Lal* v. *Ram Singh*, 10 Lah. 750, 116 I.C. 549, A.I.R. 1929 Lah. 288 (289). 30 P.L.R. 223. It must be proved to the satisfaction of the Court that the payment was *actually* made. The mere statement of the creditor that he received or appropriated certain sum is not sufficient—*Ammalu* v. *Narayanan*, 51 *Mad.* 549, A.I.R. 1928 Mad. 509 (512), 111 I.C. 210.

Where a payment is made by a person who fills two different capacities, the capacity in which he pays is a question of fact. No presumption arises that such payment is made in both capacities. On the other hand, in the absence of any evidence to show that the payment is made in both capacities, there is a presumption that the payment is made in the personal capacity of the person making it, in discharge of his own liability—*Azizur* v. *Upendra*, 66 C.L.J. 104, 42 C.W.N. 18, A.I.R. 1938 Cal. 129.

Who can make payment:—A payment saves limitation under this section if it is made by a *person liable to pay it*. A purchaser of the equity of redemption is a person liable to pay the mortgage-debt within the meaning of this section; therefore, if under a mortgage decree for sale of the mortgaged property, to which he is a party though exempted from personal liability, he pays interest as such, such payment gives a fresh period of limitation for execution of the decree—*Askaram* v. *Venkataswami*, 44 Mad. 544; *Bhuban Mohan* v. *Ram Gobinda*, 54 Cal. 179, A.I.R. 1926 Cal. 1218, 98 I.C. 214; *Naayana* v. *Venkatesa*, (1943) 1 M.L.J. 135, A.I.R. 1943 Mad. 395. A second mortgagee is a person liable to pay the first mortgagee on the ground that he can only get the property by redeeming the first mortgage—*Bolding* v. *Lane*, (1863) 1 DeG. J. & Sm. 122; *Chinnery* v. *Evans*, (1864) 11 H. L. Cas. 115 (135); *Narayana* v. *Venkatasa*, supra. Therefore where a purchaser of the mortgaged property at a sale by the Official Receiver in the insolvency of the mortgagor makes a payment to the first mortgagee towards interest and endorses the same on the mortgage deed, such payment starts a new period of limitation which affects a second mortgagee whose charge was created before payment—*Narayana* v. *Venkatasa*, supra. In respect of a pro-note executed by a deceased Mahomedan, one *co-heir* can make payment of interest to save limitation against the other co-heirs, as the co-heir is a person *liable to pay the* interest. It is immaterial that the co-heirs took the property of the deceased as tenants-in-common or that their interests are several—*Narasimha* v. *Ibrahim*, 56 M.L.J. 630, A.I.R. 1929 Mad. 419 (420). See Note 210.

196. Interest:—It means interest or any *part* of the interest due—*Abdul* v. *Mahtab*, 35 All. 378, 11 A.L.J. 477, 20 I.C. 258.

Where there are several debts, and payment of interest has been made by the debtor without specification, the payment may reasonably be attributed to all the debts which are thus saved from limitation—*Hingu* v. *Heramba*, 13 C.L.J. 139, 8 I.C. 81; *Sankaram* v. *Thiraviya*, 51 I.C. 240 (following 13 C.L.J. 139).

197. Interest as such:—It must be interest paid *as interest* and stated to be so at the time of payment or there must be evidence from which it can be *inferred* that the debtor intended that the amount should be appropriated towards interest—

Kariyappa v. *Rachapa*, 24 Bom. 493 (499); *Bitari Ram* v. *Kunji Singh*, 19 C.W.N. 237, 20 I.C. 857. If the debtor makes a payment of a certain sum, but does not specify how that amount is to be appropriated, *i.e.*, whether it is to be appropriated towards principal or towards interest, and there is nothing to show that he has made the payment towards interest as such, the mere appropriation by the creditor of the payment towards interest is not an indication that the debtor intended that the money should be applied towards interest. The Limitation Act says that the debtor must make the payment of interest as such, and it is the act of the debtor which gives a fresh starting point. The creditor cannot, by his own act and without any act of volition on the part of the debtor, make a fresh starting point of limitation—*U Ba Gyi* v. *U Than*, 7 Rang. 522, A.I.R. 1929 Rang. 339 (340), 120 I.C. 897; *Chanderpal* v. *Dunia*, 19 I.C. 825; *Muhammad Abdulla* v. *Bank Instalment Co.*, 31 All. 495 (496); *Jago* v. *Mahadeo*, 59 I.C. 709; *Lalji* v. *Ghosi Ram*, 7 O.W.N. 420, A.I.R. 1930 Oudh 287 (288), 128 I.C. 276; *Narain* v. *Chandrawati*, 6 O.W.N. 776, A.I.R. 1929 Oudh 479 (480); *Havabu* v. *Emp.*, 40 Bom.L.R. 968, A.I.R. 1938 Bom. 467; *Harkabai* v. *Shankerbai*, 45 Bom.L.R 1014, A.I.R. 1944 Bom. 37; *Dail* v. *Mahomed*, I.L.R. (1944) Lah. 528, 45 P.L.R. 407, A.I.R. 1944 Lah. 88; *Avudayyammal* v. *Ambassankar*, (1944) 1 M.L.J. 347, A.I.R. 1944 Mad. 398; *Khan Sahib* v. *Uchil*, 1938 Rang.L.R. 591, A.I.R. 1938 Rang 280; *Kesar* v. *Bulagi*, 42 P.L.R. 635, A.I.R. 1940 Lah. 513. In other words, where payment is not expressed to be made on account of interest or on account of principal and interest, but is simply made *on account of the debt*, it cannot be said that there is a payment on account of interest as such, and limitation will not be saved on that footing. The word 'as such' means that there must be at the time of payment some mention that the payment is wholly or partly for interest—*Hormasji* v. *Hajrat Yarkhan*, 28 Bom.L.R. 569, 96 I.C. 311, A.I.R. 1926 Bom. 423; *Ammalu* v. *Narayanam*, 51 Mad. 549, A.I.R. 1928 Mad. 509 (512), 111 I.C. 210; *Ram Prasad* v. *Binaek*, 55 All. 632, 1933 A.L.J. 930, A I.R. 1933 All. 453 (455), 144 I.C. 899; *Kripa* v. *Balak*, A.I.R. 1935 All 47, 1933 A.L.J. 23; *Rambohar* v. *Chaturghun*, A.I.R. 1935 All. 58, 1935 A.L.J. 304 (Dist.); and even though the fact of payment appears in the handwriting of the debtor, limitation cannot be saved on the assumption that a part of the principal has been paid—*Ram Prasad* v. *Binaek*, supra. Thus, the defendant at different times made payments to the plaintiff, who was his creditor, *in reduction of the general balance* of account against him, but without intimating that any of such payments was to be appropriated in satisfaction of the interest due on his debt, and without making any memorandum. It was held that there had been no payment of interest "as such," nor any payment of principal as there was no memorandum by the payer—*Hanmantmal* v. *Ramba Bai*, 3 Bom. 198; *Damodar* v. *Janki Rai*, 5 Bom.L.R. 350; *Maheswar* v. *Baidyanath*, 7 I.C. 7; *Muinuddin* v. *Muhammad*, 1916 P.L.R 68, 31 I.C. 782; *Narain* v. *Chandrawati*, 6 O.W.N. 776, A.I.R. 1929 Oudh 479 (480); *Shyam* v. *Dolgobind*, 24 Pat L.T. 21, A.I.R. 1942 Pat. 395; *Girdhari* v. *Kishore*, 1940 A.L.J. 332, A.I.R. 1940 All. 338. The Rangoon High Court has taken a contrary view and has held that in such a case the payment must be regarded as payment towards principal. The reason given is when a debtor pays he must intend to pay either towards interest or towards principal; he must have one or other of these two intentions; *Khan Sahib* v. *Uchil Ahmed*, 1938 Rang.L.R. 591, A.I.R. 1938 Rang. 280. The plaintiff must establish not only that there was payment within time but also that there was either an express limitation by the debtor or circumstances exist which make the conclusion inevitable that the payment was made on account of the interest of the particular debt sued on —*Muinuddin* v. *Muhammad*, 1916 P.L.R. 68, 31 I.C. 782. If the debtor is shown to have consented to such appropriation or to have been aware of it, it may be treated as a payment of interest as such—*Havabu* v. *Isup*, 40 Bom.L.R. 968, A.I.R. 1938 Bom. 467. It is not essential that the debtor should on every occasion of payment state

explicitly that the payment is made on account of interest as such; it is sufficient if circumstances exist which lead to the inevitable conclusion that the payment must have been made on account of interest—*Charu Chandra* v. *Karam Bux*, 27 C.L.J. 141, 43 I.C. 812; *Idan Sadagar* v. *Premsukdas*, A.I.R. 1937 Pat. 583. The question whether a payment was made on account of interest as such must be determined on the facts of each case. Where the amount paid was less than the amount due on account of interest, it could be presumed that the payment was made towards interest—*Janaki Ammal* v. *Srinivasa*, 66 M.L.J. 40, 148 I.C. 126, A.I.R. 1934 Mad. 45 (46). An endorsement otherwise fulfilling the requirements of sec. 20 need not necessarily show on the face of it that the payment was towards interest. Sections 91 and 92, Evidence Act do not preclude evidence being given to show that at the time when the payment was made the debtor expressly stated that it should be appropriated towards interest—Peveylal v. Md. Yusuf, A.I.R. 1937 All. 640. It can be established by external evidence—*Bichitrananda* v. *Mir Mahabub*, 12 Cut.L.T. 80, A.I.R. 1947 Pat. 275; *Govindram* v. *Gulabrao*, I.L.R. (1949) Nag. 478, 1949 N.L.J. 189, A.I.R. 1949 Nag. 394; *Rajarejeswari* v. *Sankaranarayana*, (1947) 2 M.L.J. 93, I L.R. (1948) Mad. 351, A.I.R. 1948 Mad. 155 (endorsement of interest by mistake in another bond); *Ram Shah* v. *Lalchand*, 67 I.A. 160. There is no rule of law which says that the fact of a payment having been made towards interest due should be proved only by documentary evidence; *Kandaswami Thevammal*, I.L.R. (1938) Mad. 1090, (1938) 1 M.L.J. 620, A.I.R. 1938 Mad. 601. It is not necessary that the character of the payment as intended to go towards interest or towards principal must appear by the writing—*Jujisthe* v. *Magata*, 9 Cut.L.T. 14. No question of admissibility of oral evidence can arise—*Jagdish* v. *Gazadhar*, 20 Luck. 43, 1944 O.W.N. 154. It is not competent for a creditor to establish it by evidence *'aliunde'*—*Khat* v. *Surajpal*, 1940 O.W.N. 807, A.I.R. 1941 Oudh 56. Where the amount paid was the whole amount that was due, both principal and interest, it is impossible to draw any other inference than that a part of this amount was paid as interest—*Bandhu* v. *Kayastha Corporation*, 93 I.C. 295, A.I.R. 1926 All. 329.

Where a certain sum was paid "towards principal *and* interest," or expressed to be made on account of principal *and* interest, but it was not specified how much was paid for principal and how much for interest, it was held that there was nevertheless a payment of interest as such—*Rai Mohan* v. *Lakshu*, 6 I.C. 16 (Cal.); *Subraya* v. *Pakaya*, 4 Bom.L.R. 231. In other words, if there is in fact a payment of interest expressed to be such, it is immaterial if such payment of interest is mixed up with a part-payment of principal—*Subraya* v. *Pakaya*, 4 Bom.L.R. 231. The Madras High Court has taken a contrary view in *Avudayyammal* v. *Ambasankar*, (1944) 1 M.L.J. 347, A I.R. 1944 Mad. 498 where it has been held that the mere fact that a payment is made towards principal and interest where both are due and the sum paid does not exceed the one or the other, cannot involve the implication that any part of the payment was intended by the debtor to go towards interest. Such a payment is a payment generally on account or an open payment and cannot be regarded as a payment towards interest as such.

Where there was *an express provision in the bond* that any money paid was to be applied first towards payment of interest and next towards payment of principal, and money, was paid by the debtor from time to time, it was held that it might be safely assumed that the payment was for interest as such—*Gopi Nath* v. *Hardeo*, 31 All. 285. It is not necessary to repeat the formula each time the payment is made—*Govindram* v. *Gulabrao*, I.L.R. (1949) Nag. 478, A.I.R. 1949 Nag. 394, 1949 N.L.J. 189.

If the payment by a debtor is not payment of interest as such within sec. 20, it cannot be said that the payment must of necessity be payment of principal and so fall under the second branch of the section. For, if the payment have been actually

appropriated to interest, then in fact there has been no part payment of principal—*U. Sin* v. *U. Tun Si*, A.I.R. 1935 Rang. 473. If therefore, until after the expiry of the prescribed period the creditor has treated the sum as paid on account of interest or has not done anything to treat it as paid on account of principal, then under the amended section part payment of principal has not been established—*Ram Shah* v. *Lalchand*, 67 I.A. 160, A.I.R. 1940 P.C. 63; *Ram Chandra* v. *Shitu*, 24 Pat. 96, 1945 P.W.N. 264, A.I.R 1945 Pat. 271; *Kesar* v. *Bulaqui*, 42 P.L.R. 635, A.I.R. 1940 Lah. 513; nor can the creditor be allowed to appropriate it towards principal during the course of the suit when he has in fact appropriated and notified the defendant that he has appropriated to interest—*Harkubai* v. *Shankerbai*, 45 Bom.L.R. 1014, A.I.R. 1944 Bom. 37.

Under sec. 20 no payment of interest can be made to avail unless it is a payment of interest *as such*. Hence some acknowledgment must be given by the payer at the time of the payment that the money paid is intended by him to be a payment of interest or there must be sufficient evidence from which it can be inferred that the debtor intended that the amount should be appropriated towards interest—*U. Sin* v. *U. Tin Si*, A.I.R. 1935 Rang. 473. There is nothing in law which requires that the payment of interest as such must necessarily appear in the hand-writing of or under the signature of the party making the payments though it is necessary that it must be clearly mentioned at the time of the payment that it was made on account of interest—*Bachchu* v. *Bhagwati*, 15 Luck. 524, 1940 O.W.N. 289, A.I.R. 1940 Oudh. 179. A contrary view has been taken in *Zaman* v. *Ram*, 14 Luck. 588, 1939 O.W.N. 203, A.I.R. 1939 Oudh 141 where it has been held that there must be acknowledgment in writing of payment of interest as such.

When there is no other loan except that evidenced by a promissory note, payments of interest made by the borrower and endorsed on the back of the note are sufficient to save limitation for a suit on the original loan under sub-section (1) of this section—*Sridhar* v. *Jahar*, 49 C.W.N. 87, A.I.R. 1945 Cal. 268; or when the amount paid is more than the amount due as interest, a part of it will be presumed to have been made towards principal—*Kesar* v. *Balaqi*, 42 P.L.R. 635, A.I.R. 1940 Lah. 513.

Where the payment is evidenced by writing which is signed by the person making the payment, it makes no difference whether the payment is held to be for interest or for principal or for both—*Lakshmi Naidu* v. *Gunnamma*, A.I.R. 1935 Mad. 101, 58 Mad. 418, 1935 M.W.N. 17, 67 M.L.J. 470, 41 L.W. 94, 154 I.C. 1035. In *Nageshar* v *Batukakumari*, A.I.R. 1935 All. 605 the point was raised but was not decided. On the facts of the case it was found that the payments referred to in the endorsements were not payments made towards interest as such, but were payments of principal.

The Calcutta High Court in a case proceeded to the length of saying that where payments were made towards a debt, but there is nothing to show whether they had been made in respect of principal or interest, the Court is entitled to find out on the evidence for what purpose the payments were made—*Hem Chandra* v. *Purna Chandra*, 44 Cal. 567 (571); *Arjan Mal* v. *Amar Singh*, 3 Lah.L.J. 250, A.I.R. 1921 Jour. 33. A payment of interest on a mortgage-bond, not expressly made as such, can nevertheless be taken as payment towards principal, if the fact of the payment appears from a document in the hand-writing of the debtor making the same—*Hemchandra* v. *Purna Chandra*, 44 Cal. 567 (571). The Bombay High Court did not decide the point though raised—*Tayerali* v. *Garabad*, 41 Bom.L.R. 455, A.I.R. 1939 Bom. 252. Where interest was paid on an unregistered mortgage-bond and the payment was entered in the bond, it was held that as the bond, not being registered, was not admissible in evidence, there was no payment of interest as such—*Venkaji* v. *Shiramapa*, 19 Bom. 663. So also payments made towards a void mortgage does not save limitation—*Panchoo* v. *Ram Sunder*, I.L.R. (1943) All. 604, 1943 A.L.J. 250, A.I.R. 1943 All. 294.

The point was recently fully considered by a Full Bench of the Allahabad High Court. The Full Bench held that where money is paid by a debtor without specifying whether the payment is towards interest or towards principal, leaving it to the option of the creditor to appropriate it as he likes, and the creditor appropriates it towards interest, there is neither a payment of interest *as such* nor a part payment of the principal within the meaning of sec. 20—(*Per Sulaiman*, C. J., and Niamatullah and Rachhpal Singh, JJ., *Contra*, Thom and Bajpai, JJ.—*Udeypal* v. *Lakshmichand*, 58 All. 261 (F.B.), A.I.R. 1935 All. 946, 1935 A.L.J. 1029, 159 I.C. 387. This case was followed in *Lalchand* v. *Raman*, A.I.R. 1937 Lah. 820, 39 P.L.R. 622.

A mere payment of interest is useless to save limitation unless the interest has been paid: (a) before the expiration of the period; (b) paid as such, and (c) by the person liable to pay the debt or by his duly authorised agent. The words 'paid as such' necessarily imply that the interest must have been paid 'as interest,' which in its turn implies that it must have been paid as interest at the time of its payment. It should be payment of interest professedly as interest which means that at the time of making the payment, the debtor should distinctly appropriate it towards interest and inform the creditor that he is doing so, so that the creditor thereafter may not have the option of appropriating it towards the principal.

Where a debtor makes a general payment without specifying whether he is making it towards interest or principal, it is the absolute right of the creditor to make an appropriation. All that this means is that it is open to him to accept the payment either towards part payment of interest or towards part payment of principal But that has nothing to do with the question of limitation. By crediting the payment towards the part payment of interest the creditor would not be entitled to claim a fresh period of limitation because the payment had not been made towards interest as such within sec. 20—*Udeypal* v. *Lakshmi*, supra, (per Sulaiman C. J.). The conflict of decisions has been set at rest by the pronouncement of their Lordships of the Judicial Committee in *Rama Shah* v. *Lalchand*, 67 I.A. 160, I.L.R. (1940) Lah. 470, 44 C.W.N. 625, 71 C.L.J. 444, 42 Bom.L.R. 640, 1940 A.L.J. 639. (1940) 1 M.L.J. 895, A.I.R. 1940 P.C. 63, 1940 P.W.N. 935 where their Lordships approved the decision in *Udeylal* v. *Lakshmi*, supra and held that so far as payment of interest is concerned it is necessary even under the amended section that it should be paid "as such," that is to say, the intention of the debtor must be shown to have been that the payment should go towards interest. Consequently, although the creditor may appropriate an open payment towards interest as well, such appropriation will not give a fresh start to limitation, even when the requirement as to writing is satisfied, in as much as there will be no payment of interest "as such" by the debtor.

But this question does not arise where there is option of the parties to appropriate and under the provisions of law, *e.g.*, sec. 13 (f) of the Dekkhan Agriculturists Relief Act, the payment must be appropriated towards interest first and the residure, if any, towards principal—*Lachhia* v. *Nagindas*, 45 Bom.L.R. 178, A.I.R. 1943 Bom. 115. As to the applicability of this section to suit under the Dekkhan Agriculturists Relief Act, see *Keshab* v. *Bhagwan*, 44 Bom.L.R. 138, A.I.R. 1942 Bom. 131.

From the 1st day of January 1928, a payment of interest and a part-payment of principal stand on the same footing, for it appears from the amendment of the proviso that all payments of interest made from that date must be endorsed, like a part-payment of principal, in the handwriting of, or in a writing signed by the person making the same. The words, "as such" have no more any special significance and should be omitted. As to payments made before 1st January 1928, the words "as such" have some significance. As to payments made after that date they are now placed on an equality. Therefore, the words "as such" are material when the Court

has to consider the payment made before 1st January 1928, but they have no significance after the date mentioned—*Bankanidhi* v. *Godipatna*, 16 Pat. 294, 18 Pat.L.T. 563, A.I.R. 1938 Pat 183. The words "as such" are redundant since the amendment of the section in 1927—*Santa* v. *Hari Kishore*, 18 Pat. 253, 20 Pat.L.T. 175, A.I.R. 1939 Pat. 389. After the 1st of January, 1928, it is a matter of complete indifference whether the payment is of interest or prinripal or both so long as it is a payment relating to the debt—*Narayan* v. *Rama*, I.L.R. (1939) Nag. 235, 1939 N.L.J. 205, A.I.R. 1939 Nag. 156. After the deletion of the words "as such" the sub-section applies to any part payment by the debtor, although the debtor has not made clear whether the payment was made towards the interest or towards the principal as such—*Ambalal* v. *Jani*, A.I.R. 1956 Bom. 347, 58 Bom.L.R. 399. See Notes under "Change," *ante*.

Labour in lieu of interest:—Where the plaintiff proves that he received interest through the labour of the defendants till within three years before suit, his claim is not barred by limitation—*Swaminatha* v. *Mandaiyan*, 3 L.W. 552, 35 I.C. 480; see also *Muthukrishna* v. *Pakkiri*, 33 I.C. 134 (Mad.).

198. Part payment of principal:—Where part of the principal is paid, the fact of its being a part-payment need not be stated in so many words; it may be inferred from the writing itself or from other evidence regarding the state of accounts between the parties—*Bharat National Bank* v. *Bishan Lal*, 13 Lah. 448, 33 P.L.R. 42, A.I.R. 1932 Lah. 212 (213), 135 I.C. 673; *Ranchordas* v. *Pestonji*, 9 Bom.L.R. 1329, Thus, if it appears that no interest was due at the time when the payment was made, it may be inferred that the payment could only have been made in part-payment of the principal—*Curlender* v. *Abdul Hamid*, 43 All. 216 (219), A.I.R. 1921 All. 335. Where a decree does not bear any interest, any payment made by the judgment-debtor must be taken to have been made in part-payment of the principal—*Harendra* v. *Gyan Chandra*, 22 C.W.N. 325 (328). So also, where the debt due does not bear interest, the payment must be in part payment of principal, *Kesar* v. *Wazir*, 42 P.L.R. 638, A.I.R. 1940 Lah. 442; *Kesar* v. *Bulaqi*, 42 P.L.R. 635, A.I.R. 1940 Lah. 513. The words, 'as such' should not be read into the second para of sub-section (1); the law does not require that the part-payment of principal should be made *as such*; i.e., it is not necessary that the words 'part payment of the principal' should appear in the entry; it is the fact of payment which should appear in the writing of the person making the same. Therefore, where a sum of money in part-payment of the principal was sent by the debtor to the creditor along with a letter in the handwriting of the debtor, but it was not expressly stated that the amount was paid "in part-payment of principal" *held* that the payment was a good payment and saved limitation—*Curlender* v. *Abdul Hamid*, 43 *All.* 216 (219). The endorsement need not specify that the payment was made *towards the principal*; all that is required is that the *fact of payment* should appear in the handwriting of the person making the same—*Jada Ankamma* v. *Nadimpalle Rama*, 6 Mad. 281; *Sakharam* v. *Keval*, 44 Bom. 392 (397); *Jawahir* v. *Ghulam*, 40 P.L.R. 124, A.I.R. 1938 Lah. 347; *Bur Singh* v. *Sirki Bros.*, 42 P.L.R. 103, A.I.R. 1940 Lah. 106; *Ram Shah* v. *Lal Chand*, supra. The proviso requires not that the part-payment of the principal *as such* should appear in the handwriting of the person making the payment, but that the *fact of payment* should so appear—*In re Ambrose Summers*, 23 Cal. 592. If the legislature had desired that there must further be recorded in handwriting of the debtor the fact that the payment is made towards the principal, it would have inserted the words, "as such" after the words "fact of payment" (in the old proviso)—*M. B. Singh & Co.* v. *Sircar & Co.*, 1930 A.L.J. 590, A.I.R. 1930 All. 392 (395). By the Amendment Act I of 1927, the words "fact of payment" have been changed into the words "acknowledgment of payment."

When a payment is made without specifying whether it is for interest or for principal and the creditor also makes no appropriation at the time of the payment the payment in order to be available under this section, to the creditor as payment on account of principal must be made within the time for filling a suit and further the creditor must be proved to have, in the exercise of his right of appropriation, done within the prescribed period something which treats the payment as made on account of principal—*Rishi* v. *Krishna*, 15 Luck. 573, 1940 O.W.N. 647, A.I.R. 1940 Oudh 340 (F.B.); *Sarab* v. *Dwarka*, 1945 P.W.N. 178, A.I.R. 1946 Pat. 59; *Ajodhya* v. *Gobind*, 1946 P.W.N. 349, A.I.R. 1946 Pat. 404; *Ram Shah* v. *Lal Chand*, 67 I.A. 160. The fact that the appropriation has been made towards principal within the period of limitation can appear from the creditor's books of account—*Sitaram* v. *Sitaram*, I.L.R. (1941) All. 291, 1941 A.L.J. 50, A.I.R. 1941 All. 132; *Muslim Bank* v. *Mahomed*, I.L.R. (1943) All. 598, 1943 A.L.J. 255, A.I.R. 1943 All. 289; *Ram Shah* v. *Lal Chand*, supra.

If the part-payment is made within the period of limitation, the mere fact that the writing evidencing the payment was made after the period of limitation had expired would not render such handwriting useless for the purpose of saving a claim from the limitation bar. This section requires that the *payment* must be made within the period of limitation, it does not require that the *writing* should be made before the expiration of the period. It only requires a writing as the mode of proving the fact of payment—*Venkatasubba* v. *Appusundaram*, 17 Mad. 92; *Lal Singh* v. *Gulab*, 55 All. 280. 146 I.C. 510; A.I.R. 1933 All. 363; *Vishwanath* v. *Mahadeo*, 57 Bom. 453, 144 I.C. 990, A.I.R. 1933 Bom. 252 (253); *Ramprasad* v. *Bansilal*, 19 N.L.R. 6, 71 I.C. 17, A.I.R. 1932 Nag. 117; *Md. Moizuddin* v. *Nalinibala*, A.I.R. 1937 Cal. 284 (287-288); *U. Po Nyum* v. *Mah Ah Ma*, A.I.R. 1939 Rang. 118, 181 I.C. 765; *Kesar* v. *Bulaqi*, 42 P.L.R. 635, A.I.R. 1940 Lah. 513; *Mahabali* v. *Ram Dass*, 1940 O.W.N. 156, A.I.R. 1940 Oudh 177 (the words "before the expiration of the prescribed period" do not appear in the proviso and if the intention of the legislature had been that the acknowledgment should also be within the period of limitation they would have clearly said so in the proviso—*Shyam* v. *Dolgobind*, 24 Pat.L.T. 21, A.I.R. 1942 Pat. 395; *Ram Shah* v. *Lal Chand*, 67 I.A. 160. See also *Sant Lal* v. *Kamla Prasad*, (1951) S.C.J. 768 A.I.R. 1951 S.C. 477; *P. Kempegowda* v. *Channaveeriah*, A.I.R. 1958 Mys. 43.

198A. Part payment in full discharge:—If a debtor makes a part-payment unaccompanied by an express denial or repudiation, an admission of a right in the payee for the balance of the debt may be inferred. But where, without there being a naked payment, the debtor expressly states in a letter that the payment is in full discharge, though as a matter of fact something more is found due, far from it being an admission of right, there is an unequivocal denial of it. Such a payment does not save limitation—*Appasami Pillai* v. *Morangam*, A.I.R. 1935 Mad. 371, 1935 M.W.N. 783, 68 M.L.J. 73, 157 I.C. 259.

199. Actual payment not necessary at the time of endorsement:—Where an endorsement of payment on a bond is sought to save the bond from limitation, it is not necessary that there should be an actual payment of money at the time of the endorsement—*Thesiger* v. *Srinivisa*, 10 M.L.J. 25; *Lakshmi* v. *Ramaswamy*, 26 I.C. 754; *Ramakrishna* v. *Venkatasubba*, 28 I.C. 15; *Sheoji* v. *Motilal*, A.I.R. 1950 Ajmer 11. But the period is to be reckoned from the date of the payment and not from the date of endorsement of such payment—*Lakhminarasimham* v. *Bharata*, 9 M.L.T. 216, 8 I.C. 349.

200. Handwriting of the person making the same:—The fact of part-payment of the principal of a debt (and, under the present law, of interest also) must appear in the hand-writing of, or in a writing signed by (under the present law)

the person making the payment and not in that of any other person, even though the latter may have been expressly authorised to endorse the fact of payment—*Manindra* v. *Kanhai*, 4 P.L.J. 365, 48 I.C. 728; *Bishen Parkash* v. *Siddique*, 1 P.L.J. 474, 35 I.C. 375; *Mukhi Haji Rahmuttulla* v. *Coverji*, 23 Cal. 546 (F.B.); *Joshi Bhaishankar* v. *Bai Parvati*, 26 Bom. 246, 3 Bom.L.R. 834. Thus where payments are made by the daughters of the debtor not as messengers of their father but as independant persons, actually making the payments either on their own behalf or on behalf of their father, in order to save limitation the endorsement must each be written or signed by that one of them which made such payment—*U Po Nyun* v. *Mah Ah Ma*, A.I.R 1939 Rang. 118, 181 I.C. 765. The actual payment by the debtor is not necessary provided that the acknowledgment required by this section is in the handwriting of the person making the payment. But the acknowledgment must appear on its face to be on account of the debt—*Gobind* v. *Chuni*, A.I.R. 1942 Pat. 47, 196 I.C. 392. A letter written and signed by the debtor along with a part-payment of principal would save limitation—*Viswanath* v. *Sri Ramchandra*, 17 M.L.T. 78, 27 I.C. 744; *Sakharam* v. *Keval*, 44 Bom. 392.

If at the time when the debtor made a payment (which was within time), there was no writing in the hand of or signed by the defendant, the fact that the defendant recited the payment in his *written statement* which was signed by him would not satisfy the requirements of this section and would not save limitation if the suit was brought out of time—*Debji Ghelabhai* v. *R. D. Metha & Co.*, 39 C.W.N. 139 (141), A.I.R. 1935 Cal. 255 (256).

Where the endorsement of part-payment of principal was in the handwriting of a person other than the debtor, but it was signed by the debtor, it was held (prior to the Amendment of 1927) that this was not a sufficient compliance with the proviso. Where part-payment of the principal of a debt was made by a person who could write, it was held that the whole of the endorsement recording the payment (and not the signature only) should be written by the person who made the payment—*Lodd Gobindoss* v. *Rukmani*, 38 Mad. 438; *Venkatakrishniah* v. *Subbarayudu*, 40 Mad. 698 (700); *Nivaj Khan* v. *Dadabhai*, 41 Bom. 166; *Santishwar* v. *Lakhikanta*, 35 Cal. 813 (814), *Bisheshwar* v. *Madho Rao*, 17 N.L.R. 40. 62 I.C 297. But in such circumstances it was also held that although the payment was not good as part-payment of the principal within the meaning of this section, still the endorsement would amount to an acknowledgment of liability under section 19 so as to save limitation. The meaning of the endorsement was that the debtor made a part-payment of the amount due on the bond, which was certainly an *acknowledgment* that more money was due—*Venkatakrishniah* v. *Subbarayudu*, 40 Mad. 698 (700), following *Jaganadha* v. *Rama Sahu*, 17 M.L.T. 80, 27 I.C. 747. Where the fact of payment appears in the handwriting of the debtor there is no reason why the said writing should not be taken as an acknowledgment of payment also. There is nothing in this section which precludes the same document as being treated as evidence of fact of payment as well as an acknowledgment of payment—*Profulla* v. *Jatindra*, I.L.R. (1938) 2 Cal. 320, 42 C.W.N. 548, A.I.R. 1938 Cal. 538. But under the present proviso as amended by the Amendment Act I of 1927, the addition of the words "or in a writing signed by" shows that it is no longer necessary (in case of a payment made on or after 1st January 1928) that the whole of the endorsement must be written by the person making the payment; it will be sufficient if it is merely signed by him, although it is written by another person This change in the law, however, has not been noticed in *Maung Tun* v. *U. Aung*, A.I.R. 1930 Rang. 64 (65), 126 I.C. 540; *U Paw Tint* v. *U Than*, A.I.R. 1939 Rang. 112, 181 I.C. 393.

In case of an illiterate man, sec. 3 (52) of the General Clauses Act provides that

the word "sign" includes his *mark*. And so, where the payment is made by a person who does not know how to write, the endorsement may be made in the handwriting of a third party and the payer may subscribe his mark to the endorsement—*Ellappa* v *Annamalai*, 7 Mad. 76; *Sesha Charlu* v. *Seshaya*, 7 Mad. 55; *Baleram* v. *Sobha Sheikh*, 28 C.L.J. 222, 23 C.W.N. 930 (931), 44 I.C. 516; *Jamna* v. *Jaga Bhana*, 28 Bom. 262; *Hari Govind* v. *Gangubai*, 52 Bom. 356, A.I.R. 1928 Bom. 417 (418), 109 I.C. 702; *Faizur* v. *Feroz*, A.I.R. 1943 Pesh. 36. And the fact that the description of the mark is written by another person who did not write the endorsement is immaterial, because the mark is complete even without the description—*Hari Govind* v. *Gangubai*, supra. Where no such mark is affixed, the provision of law has not been complied with —*Baloram* v. *Sobha Sheikh*, (supra); *Joshi* v. *Bai Parvati*, 26 Bom. 246; *Banga Ram* v. *Nikka*, 29 P.L.R. 438, A.I.R. 1928 Lah. 157. The Patna High Court however holds that, if the person making the payment is illiterate, it is sufficient if the endorsement is made by another person on his behalf, and it is not necessary for the payer to make any mark or thumb-impression under the endorsement—*Sri Ram* v. *Kashi Mollah*, 2 P.L.T. 355, 62 I.C. 644 (645), A.I.R. 1921 Pat. 476. The Calcutta High Court has followed the Patna view even in respect of a payment of interest made after the 1st January 1928, and has held that if an endorsement of payment of interest was made by a scribe on behalf of an illiterate debtor, and was also signed by him on behalf of the debtor, but the debtor himself merely touched the pen but made no mark beneath the endorsement, this was a sufficient signature, as it was the prevailing custom of signing by illiterate persons in Bengal—*Rajani* v. *Digindra*, 36 C.W.N. 188 (189), 137 I.C. 788, A.I.R. 1932 Cal. 440.

Payment through messenger or by money order:—Where an agent sent money through a mohurrir or servant and then followed it up by an entry of such payment with his own hand in his account book, the payment should be treated as made by the agent and not by the mohurrir. The writing by the agent in his account book complied with the requirements of this section. Writing by the mohurrir is not necessary, as he is a mere messenger—*Sarajubala* v. *Sarada*, 23 C.W.N. 336, (340), 50 I.C. 862. The words "person making the same (payment)" do not necessarily mean the person who *physically* hands over the money. So, if part-payment of principal is made by an agent of the debtor, but the money is sent through a peon with a slip signed by the agent, it is the agent who makes the payment, and since the fact of the payment appears in the handwriting of the agent (in the slip) it is sufficient to save limitation. It is not necessary that the fact of payment should appear in the handwriting of the peon who physically hands over the money. Similarly, if an agent of the debtor sends a cheque or notes by post, the person actually making the payment and physically handing over the notes or cheque is the postman. But certainly the postman is not the person who "makes the payment" within the meaning of this section, and his handwriting is not required. The postman or the peon is merely a conduit pipe through which the money passes to the creditor, the duly authorised agent who sent the cheque or notes being regarded as the person who made the payment—*Ramkumar* v. *Nanuram*, 53 Cal. 163, 94 I.C. 657, A.I.R. 1926 Cal. 510 (511). A money-order coupon written by the debtor, requesting the credit of the sum sent towards the debt, satisfies the requirements of this section— *Ram Sarup* v. *Md. Ubaidulla*, A.I.R. 1930 All. 123 (124), 124 I.C. 22.

Payment by two debtors:—Where two persons are liable on a debt embodied in a *Khata*, and they make payments towards satisfaction of the debt, it is not necessary that both persons should make the entries in the creditor's books. It is enough if the writing is made by the debtor paying the debt, and is signed by both the debtors, because under this section it is sufficient if the fact of payment appears in

the handwriting of the *person making the same*—*Devchand* v. *Jamshedji*, 25 Bom.L.R. 354, A.I.R. 1923 Bom. 309, 74 I.C. 302.

Signature made before writing:—Where at the time of making payment the debtors simply signed their names on the back of the promissory note but did not write anything and then afterwards another person, without any authorisation of the debtors, wrote the endorsement above the signatures of the debtors, *held* that as the signatures were made before the writing, the writing was not an "acknowledgment of payment in a writing signed by the debtors" within the meaning of this section, nor did the bare signatures of the debtors amount to an acknowledgment under sec. 19—*Talok* v. *M. S. V. Seugan*, A.I.R. 1934 Rang. 287 (288).

201. Payment by cheque:—Where a debtor paid a certain sum of money by a cheque, *held* that as it was a mere order for payment and not a payment itself and did not show on its face that it was given as a part-payment of the principal, it was not sufficient to keep alive the creditor's claim under this section—*Sardar Bachittar Singh* v. *Jagan Nath*, 1 P.R. 1897. Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque to the creditor, such endorsement did not satisfy the conditions of this section—*Mackenzie* v. *Tiruvengadathan*, 9 Mad. 271; *Ram Chandra* v. *Chandi Prasad*, 19 All. 307. These are old decisions given at a time when payment by cheque was not so prevalent as in the present day. In later cases it has been held, in consonance with the practice observed in the business world of modern times, that where a cheque is signed by the debtor and addressed to the creditor in part-payment of the principal, and is received by the creditor as such, and the cheque is honoured, the proviso is sufficiently complied with. The giving or handing of the cheque is considered as payment, and the payment is to be considered to be in the handwriting of the debtor appearing in the cheque or in its endorsement. If the cheque is dishonoured, the original debt revives—*Kedar Nath* v. *Dinobandhu*, 42 Cal. 1043, 19 C.W.N. 724; *Jagtu Mal* v. *Charanji*, 14 Lah. 530, 141 I.C. 611, A.I.R. 1933 Lah. 341; *M. B. Singh & Co.* v. *Sircar & Co.*, 52 All. 459, 1930 A L.J. 590, 127 I.C. 581, A.I.R. 1930 All. 392 (394); *Cholirmal* v. *Rupchand*, 25 S L.R. 360, A.I R. 1931 Sind 28 (29); *Prafulla* v. *Jatindra*, I.L.R. (1938) 2 Cal. 320, 42 C.W N. 548, A.I.R. 1938 Cal. 538; *Krishnaswami* v. *Ramaswami*, (1945) 2 M.L.J. 202, A.I.R. 1945 Mad. 515; *Fatima* v. *Official Trustee*, A.I.R. 1941 Rang. 344, 198 I.C. 564; *Chintaman* v. *Sadguru*, A.I.R. 1956 Bom. 553; *Subrahmanyam* v. *Venkataratnam*, A.I.R. 1956 Andhra 105; *Mangat Ram* v. *Mange Lal*, I.L.R. 1953 Punj. 439, A.I R. 1954 Punj. 162. If a cheque is given in part-payment of a debt, the fresh period of limitation under this section should be computed from the actual giving of the cheque, and not from the date when the Bank pays cash for it. But if a cheque is handed over to the creditor on the 5th January after banking hours, the Court will presume that the payment was made on the 6th January—*Maurice* v. *Morley*, 29 C.W.N. 496, 89 I.C. 508, A.I R. 1925 Cal. 937. In England also, payment by cheque has been held to be a good payment when the cheque is honoured. See *Currie* v. *Misa*, (1875) L.R. 10 Ex. 153 (164) and *Turney* v. *Dodwell*, (1854) E. & B. 136, cited in 42 Cal. 1043 at p. 1046. See also *Garden* v. *Bruce*, 37 L.J.C.P. 112, 3 C.P. 300. Where the debtor had addressed a *letter* to his creditor enclosing a cheque for a certain sum and requesting that it should be placed to the credit of the loan account, it was held to be sufficient—*In re Ambrose Summers*, 23 Cal. 592.

202. Effect of payment:—Payment of part of the mortgage-debt made by one of the mortgagors will give a fresh start of limitation to the mortgagee not only against the mortgagor making the payment but also against all the mortgagors—*Achola-*

sundari v. *Doman*, A.I.R. 1926 Cal. 150, 90 I.C. 774; *Ghasi Khan* v. *Thakur*, 1929 A.L.J. 446, A.I.R. 1929 All. 380 (381); *Baijnath* v. *Sati Lal*, 19 Pat.L.T. 240, A.I.R. 1938 Pat. 383. Payment of interest made by one heir of the original debtor is effectual under this section to save limitation against the other co-heirs also—*Narasimha* v. *Ibrahim*, 56 M.L.J. 630, A.I.R. 1929 Mad. 419 (420), 118 I.C. 302. Payment of debt by one debtor would give the creditor a fresh period of limitation not only against the payer, but would make the debt enforceable against anyone liable for it—*Velayudam* v. *Vaithilingam*, 24 M.L.J. 66, 17 I.C. 619; *Amir Mirza* v. *Lachhmi Narain*, 7 Luck. 270, 138 I.C. 800, A.I.R. 1932 Oudh 1; *Banchhanidhi* v. *Udakar*, A.I.R. 1949 Pat. 214, 14 Cut.L.T. 51. A payment by one joint promisor liable to pay the debt is for the purpose of sec. 20 sufficient to operate against all the joint debtors, for a fresh period of limitation begins to run not merely in respect of the liability of the one who pays but in respect of the liability upon the whole debt—*U Sin* v. *N Tun Si*, A.I.R. 1935 Rang. 473. But when the question is a matter not of the liability on the mortgage but on the personal covenant, a payment made by a co-mortgagor can not be deemed to be a payment of the other or others under this section. This section quite clearly implies apart from sec. 21 of the Limitation Act that one contractor is not the agent of the other or others so as to save limitation as against the other—*Baijnath* v. *Satilal*, supra. So also payment by one of the mortgagors after the death of the other mortgagor does not save limitation as against the heirs of the deceased mortgagor even though he is one of the heirs—*Azizur* v. *Upendra*, 66 C.L.J. 104, 42 C.W.N. 18, A.I.R. 1938 Cal. 129. In this case the payment was made by the person who was one of the co-mortgagors and also an heir of the deceased co-mortgagor. Their Lordships held that in the absence of evidence to the contrary it must be presumed that the payment was made towards the discharge of his own liability as one of the original debtors.

A part-payment can avail not merely against the person making the payment or those deriving title under him subsequent to such payment but even against other persons liable in respect of the same debt—*Lakshmi Naidu* v. *Gunnamma*, A.I.R. 1935 Mad. 101, 58 Mad. 418, 68 M.L.J. 470, 1935 M.W.N. 17, 47 L.W. 94, 154 I.C. 1053. The word "debtor" in paragraph 2 of sub-section (1) of this section connotes not only the person who contracted the debt but also his legal representatives—*Laxminarayan* v. *Ashkar*, A.I.R. 1951 Raj. 50. So after the death of a Hindu father if any payment is made towards the promissory note executed by him is made by any of his sons, the said payment will save limitation not only against the said person but also the other sons even though they have changed their religion—*Soma Sundara* v. *Narasimha*, I.L.R. (1939) Mad. 140, (1939) 1 M.L.J. 68, A.I.R. 1939 Mad. 69. Contra—*Arjun* v. *Rohina*, 14 I.C. 128 (Cal).

The joint liability of the members of a Hindu Joint family for a family debt is not a debt within the meaning of this section, so that one member by making a part payment can keep the debt alive against all the others—*Pangudaya* v. *Uthandiya*, I.L.R. (1938) Mad. 968, (1938) 2 M.L.J. 33, A.I.R. 1938 Mad. 774.

In a mortgage without possession a portion of the produce was agreed to be paid as interest. The mortgagee sub-mortgaged half his rights. The sub-mortgagee continued to receive from the mortgagor his share of the produce up to a period within six years of the present suit which was brought by the sub-mortgagee against the original mortgagee. The question arose as to whether limitation was saved as against the original mortgagee by the payment of produce to the sub-mortgagee by the mortgagor within 6 years of the suit. *Held* that where a debt is kept alive by section 20 (1) by payment made by a person liable to pay it, its effect is to save limitation not only against the person who makes the payment, but also to make the debt enforceable against any one liable for it, and that in this case the debt was kept alive against the original mortgagee—*Ram Chand* v. *Mewa*, 3 P.R. 1918, 44 I.C. 213.

So long as the mortgagor has not parted with his interest in the mortgaged property and is liable under the mortgage he can make a payment which will serve under this section to start a fresh period of limitation—*Kempamma* v. *Racha*, (1947) 1 M.L.J. 153, A.I.R. 1947 Mad. 329.

A payment made by the mortgagor after he has assigned one of the mortgaged properties is sufficient to keep alive the mortgage-debt against the assignee—*Krishna Chandra* v. *Bhairab*, 32 Cal. 1077 (1080); *Umesh Chandra* v. *Hemanga*, 36 C.W.N. 1138 (1141). As the mortgagor is the debtor within the meaning of the 2nd para. of this section, the payment of part of the principal by him even after his equity of redemption has been purchased by a third person in execution of a money-decree against the mortgagor, gives the mortgagee a fresh period of limitation not only against the mortgagor but also against the purchaser of the equity of redemption—*Domilal* v. *Roshan*, 33 Cal. 1278 (1281), following *Krishna Chandra* v. *Bhairab*, supra, and dissenting from *Newbould* v. *Smith*, (1886) 33 Ch. D. 127; *Thayyanayaki* v. *Sundarappa*, I.L.R. (1942) Mad. 308, (1941) 2 M.L.J. 913, A I.R. 1942 Mad. 200. A contrary view has been taken by the Assam High Court in *Pitram* v. *Lalit*, A.I.R. 1951 Assam 68, and also by the Patna High Court in *Ramswarup* v. *Harihar*, 21 Pat. 330, 23 Pat.L.T. 328, A.I.R. 1942 Pat. 363 (the personal liability of the mortgagor was barred at the time of payment).

203. Agent duly authorised:—See Note 190 under sec. 19. Part-payment by an agent of the debtor within the lawful scope of his agency is sufficient—*Jones* v. *Hughes*, (1850) 5 Ex. 104; *Newbould* v. *Smith*, (1885) 29 Ch. D. 882. The agent who can give the creditor the benefit of sec. 20 has to act within the terms of his authority. If he exceeds his authority or does something which is not actually covered by his authority, he cannot bind the principal so as to give the creditor the benefit of this section—*Balaguruswami* v. *Guruswami*, 48 M.L.J. 506, 87 I.C. 989, A.I.R. 1925 Mad. 703.

The agent authorised to make a payment may make the payment himself, or through a servant or friend. and in the latter case the payment is as good as a payment made by the agent himself—*Duraiswami* v. *Krishnier*, 10 L.W. 466, 50 I.C. 318 (320). See also *Sarajubala* v. *Saroda*, 23 C.W.N. 336 (339), 50 I.C. 862; *Ram Kumar* v. *Nanuram*, 53 Cal. 163 A.I.R. 1926 Cal. 510 (511), 94 I.C. 657.

When an agent is authorised to pay an amount towards the total amount of the bond, the authority extends to his paying an amount towards the interest due on the bond, and is not confined to paying only towards the principal, for the 'total amount' of the bond includes principal and interest; but where the authoirty is specific, that is to say, where the agent is authorised only to pay towards the principal, the agent will not be justified in paying towards interest—*Karuppan* v. *Muruthanayagam*, 51 M.L.J. 472, 98 I.C. 162, A.I.R. 1926 Mad. 1176. The authority referred to in this section is an authority to make the payment. It is not necessary under this section that the agent who makes the payment must also be expressly authorised to make the endorsement or get the same done by another. This section assumes that the authority to make the payment carries with it the authority to make the endorsement —*Venkateswarulu* v. *Suryaprakasam*, 53 M.L.J. 555, A.I.R. 1927 Mad. 959, 105 I.C. 475.

The guardian of a minor appointed under the Guardians and Wards Act is an agent authorised to make a part-payment of the principal of a debt due by the ward, if it is shown that the guardian's act is for the protection and benefit of the ward's property—*Annappagauda* v. *Sangadigyapa*, 26 Bom. 221 (F.B.) (overruling *Rammalsingji* v. *Vadilal*, 20 Bom. 61); such a guardian is also an agent duly authorised to

pay interest—*Narendra* v. *Rai Charan*, 29 Cal. 647. A testamentary guardian who continues to be the lawful guardian of property in spite of the marriage of the minor legatee is an "agent duly authorised to make payment"—*Raja Rajeswari* v. *Sankaranara*, I.L.R. (1948) Mad. 351, (1947) 2 M.L.J. 93, A.I.R. 1948 Mad. 155. A natural guardian is also an agent duly authorised to pay principal and interest on behalf of the ward. See section 21, which generally authorises all lawful guardians to make payments and acknowledgments. The case of *Tilak Singh* v. *Ghutta Singh*, 26 All. 598 (where it was held that a natural guardian was not competent to pay interest so as to save the bar of limitation) was decided under the Act of 1877, and is no longer good law in view of sec. 21 of the Act of 1908. As to payment by *defacto* guardian, see *Madhava* v *Subramaniya*, (1943) 2 M.L.J. 556, A.I.R. 1944 Mad. 152.

It is not necessary that the agent should be authorised in writing to make a payment, nor that he should be expressly authorised; it is sufficient that the authority is implied—*Birjmohan* v. *Rudra Perkash*, 17 Cal. 951; *Ram Parshad* v. *Mool Chand*, 1941 A.M.L.J. 63; *Sukumari* v. *Dhirendra*, 73 C.L.J. 356, A.I.R. 1941 Cal. 643. It is to be inferred from the conduct of the parties as to whether there was any authority to make payment—*Sukhdeo* v. *Sahdeo*, A.I.R. 1947 Oudh 173, 229 I.C. 265. Thus, where it is agreed between a third person and the promisor that the former would discharge the latter's debt evidenced by a promissory note to the promisee in respect of principal and interest, and it is clear from the promisor's evidence that he left it to the third person to do so, an implied authority from the promisor to the third person to pay the interest on his behalf as it becomes due is established and any payment made by the third person saves limitation against the promisor. Moreover, as the third person was under a direct obligation to satisfy the debt, the payment was made by a "person liable to pay it"—*National Bank of Upper India* v. *Bansidhar*, 57 I.A. 1, 6 O.W.N. 1136, 34 C.W.N. 145 (149), A.I.R. 1929 P.C. 297. The words "duly authorised" include authority given by law, as well as authority given by act of parties. Thus, where the *Karta* of a joint Hindu family purporting to act for himself and his minor brother made part-payment of interest due on a debt contracted by himself and his father for joint family purposes, it was held that in making the payment the *Karta* acted both for himself and is minor brother, and was an agent duly authorised to make the payment—*Chandra Kanta* v. *Behari Lal*, 31 C.L.J. 7, 52 I.C. 436. The *Karta* of a joint family is the agent of the entire family duly authorised to make part-payments on behalf of the family—*Bajrangi Prasad* v. *Kesho Singh*, 6 Pat. 811, A.I.R. 1928 Pat. 156 (158). A payment made by the manager of a joint Hindu family would save limitation as against all the other members who are liable to pay the debt—*Annadacharan* v. *Jhatucharan*, A.I.R. 1935 Cal. 648, 158 I.C. 512. A payment towards principal and interest made by the manager, and an endorsement on the pro-note (executed by the manager for an amount borrowed for the expenses of the family) in his handwriting and over his signature have the effect of extending the period of limitation as against the junior members also, though the payment and endorsement do not purport to have been made and signed by him as manager—*Thankammal* v. *Kunhamma*, 53 I.C. 878 37 M.L.J. 369. Under the new sub-section (3) (b) of sec. 21, the manager of a joint family is expressedly authorised to make payment on behalf of the family, and such payment will save limitation. This principle applies so long as the family remains joint and not after the partition of the family as after partition there is no manager. So a payment made after partition by a member does not extend the period of limitation in respect of family debt so as to affect the erstwhile members—*Pangudaya* v. *Uthandia*, I.L.R. (1938) Mad. 968, (1938) 2 M.L.J. 33, A.I.R. 1938 Mad. 774; *Rangaswami* v. *Sivaprakasam*, I.L.R. (1942) Mad. 251, (1941) 2 M.L.J. 883, A.I.R. 1941 Mad. 925 (F.B.). So also the mere fact that the father is the manager is not sufficient to save limitation when there is

no prooof that the loan was contracted for the benefit of the family—*Juro Kanto* v. *Adikanta*, 22 Pat.L.T. 1054, A.I.R. 1941 Pat 208. In the absence of other facts from which an authority can be implied there can be no saving of limitation by payment by father on a promissory note executed by the son—*Kannayya* v. *Appala*, (1940) 2 M.L.J. 369, A.I.R. 1940 Mad. 954. A Burmese Budhist husband is not necessarily the agent of his wife. Though formal authorisation is not required under this section but it must be shown that there was at least implied authority—*Maung* v. *Thom*, A.I.R. 1939 Rang. 287, 184 I.C. 622.

A vendee of the mortgaged property authorised to pay the mortgage debt is "an agent duly authorised" of the mortgagor—*Parthasarathy* v. *Ekambara*, (1938) 1 M.L.J. 624, A.I.R. 1938 Mad. 579. So also where a subsequent mortgagee is authorised to pay off the dues of the first mortgagee the payment made by the subsequent mortgagee is payment by "an agent duly authorised" of the mortgagor—*Ramlagan* v. *Ram Bilochan*, 1941 P.W.N. 667, A.I.R. 1942 Pat. 166.

A mortgagee who is required under his mortgage document to pay a portion of the consideration to a creditor of the mortgagor in discharge of the amount due to the creditor for principal and interest on a bond, cannot, by making payment of *interest only* to the creditor, keep the debt alive, his authority being to pay off both principal and interest—*Alagappa* v. *Subramania*, 26 M.L.J. 509, 23 I.C. 810. So also where the vendee is directed to pay off a mortgage debt in full, he cannot keep it alive by making part payment of the debt—*Thinnappa* v. *Krishna*, (1940) 2 M.L.J. 726; A.I.R. 1941 Mad. 6. Where a mortgagee undertakes as a part of consideration for the mortgage to discharge a debt due by the mortgagor, he cannot be deemed to have authority to make a part payment of the principal or a payment of interest, for purposes of this section. Whether there is authority to make part payment is a question of fact. If the person who is to make the payment is left with a discretion in the matter, his principal will have to suffer the consequences of a payment to account if the conditions of this section are complied with—*Rama Chandra* v. *Shanta*, I.L.R. (1941) Mad. 191, (1941) 1 M.L.J. 77, A.I.R. 1941 Mad. 67 (F.B.). A person who acts as solicitor to the mortgagor and mortgagee can make payment of interest to the mortgagee on behalf of the mortgagor, and such payment keeps alive the mortgage —*Bradshaw* v. *Widdington*, [1902] 2 Ch. 430. Where a firm owes a debt, and on one of the partners retiring, the remaining partners undertake to pay it, the payment of interest by the remaining partners to the creditor keeps alive the debt against the retiring partners, whether the creditor was aware of the agreement or not, provided there has been no novation of contract—*Tucker* v. *Tucker*, [1894] 1 Ch. 724.

Where a common manager appointed under sec. 95 of the Bengal Tenancy Act incurs a debt and it is agreed between him and the proprietors that he should pay off the debt out of the assets of the estate under his management, an authority is implied from the proprietors to the common manager to pay the interest on their behalf as it falls due, and this is sufficient to make the payments of interest by him effective under this section so as to save limitation against the proprietors. Mere entry of these payments in the common manager's books that the payments have been made on requisition of some of the proprietors will not affect the position in the absence of evidence that while making the payments the common manager did so with any such reservation—*Sukumari* v. *Dhirendra*, 73 C.L.J. 356, A.I.R. 1941 Cal. 643.

The payment of part of a debt by a receiver appointed to the estate of the debtor will keep the debt alive, since the receiver is to be deemed as an agent of the debtor —*Chinnery* v. *Evans*, (1864) 11 H.L. Cas. 115; *In re Hale, Lilley* v. *Food*, [1899] 2 Ch. 107. See also *Venku* v. *Subbaya*, A.I.R. 1957 Andhra 437.

Part payment by one judgment debtor independently of the other does not bring this section to save limitation. Sec. 21 (2) is explanatory and does not lay down any exceptions to the general principle embodied in this section—*Ram Kumar* v. *Hira Lal*, I.L.R. (1939) All. 258, 1939 A.L.J. 66, A.I.R. 1939 All. 230; *Naziruddin* v. *Ramanand*, 23 Luck. 114, 1947 O.W.N. 623, A.I.R. 1948 Oudh 193.

Court as 'Agent':—When a Court in discharge of its duty pays out money belonging to the judgment-debtor to the decree-holder, it is a duly authorised agent of the judgment-debtor to make the payment on his behalf, the fact of payment appearing in the paper written and signed by the Judge—*Govindasami* v. *Dasai Goundan*, 44 Mad. 971, 41 M.L.J. 423. In 1912, a final decree for sale was passed in a mortgage suit for Rs. 3,500 and odd. Two of the mortgaged properties were afterwards acquired under the Land Acquisition Act and the compensation money of Rs. 3,400 was deposited in Court and paid out to the decree-holder on 11th August, 1914. At the time of payment the Judge signed a paper showing that the amount was paid to the decree-holder in his presence and through the Court. On 10th August 1917 (that is, within three years from the payment but more than three years after the decree) the decree-holder filed an execution application for the balance due. *Held* that the application was not barred as the payment made by the Court in 1914 gave a fresh start for limitation—*Ibid.* If a debtor's assets are so placed either by his own act or by operation of law that if some other than he alone can release them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant—*Govindasami* v. *Dasai*, supra. But where a certain amount was deposited in Court to the credit of a certain person V, and this sum being attached by one S who was suing V's son on a pro-note executed by V, it was paid over to him by the Court, *held* that this payment by the Court could not be construed as one made by the duly authorised agent of V's son. The mere fact that a Court holds moneys belonging to a debtor's *father* cannot constitute that Court the agent of the *debtor himself*. There must be communication with the son—*Venkatasubbaya* v. *Seshayya*, 51 M.L.J. 610, A.I.R. 1927 Mad. 80, 98 I.C. 571. See also *Tevar* v. *Tevar*, A.I.R. 1956 Mad. 238.

A warrant officer cannot be regarded as an agent of the judgment debtor duly authorised to make payment. So payment made by him by attachment and sale of judgment debtor's property under a warrant issued by Court does not attract the operation of the section—*Braja* v. *Ramendra*, 1946 P.W.N. 116, A.I.R. 1946 Pat. 31.

Principal debtor and surety:—Payment by the principal debtor does not give a fresh starting point against the surety, even in the absence of prohibition by the surety against the payment of interest by the debtor on his account—*Gopal Daji* v. *Gopal Somu*, 28 Bom. 248; *Sami Aiyangar* v. *Luxmi*, 21 M.L.J. 455, 9 I.C. 8; *Jainarain* v. *Parmeshar*, 8 O.W.N. 544, 132 I.C. 198, A.I.R. 1931 Oudh 310; *Seth Abde Ali* v. *Askaran*, 20 N.L.R. 140, A.I.R. 1924 Nag. 411. See Note 210 under sec. 21. Even though the interest was paid with the knowledge and consent of the surety and at his request, it does not keep alive the remedy against the surety unless there is evidence that such payment was made on behalf of the surety. The period of limitation as against the surety therefore runs from the date of the promissory note—*Brojendra Kishore* v. *Hindusthan Co-operative Insurance Ld.*, 44 Cal. 978, 21 C.W.N. 482, 25 C.L.J. 238, 39 I.C. 705. The liability of the principal debtor and the liability of the surety are distinct and separate, although arising out of the same transaction; a payment by one person cannot therefore keep alive the remedy against the other—*Ibid.* Consequently, even if a suit is barred by limitation as against the prinhipal

debtor, if the surety has made certain payments and endorsements on the bond on which the suit is based, thus preventing limitation running against him, the plaintiff is entitled to a decree against the surety (though not against the principal debtor)—*U Ba Pe* v. *Ma Lay*, 10 Rang. 321, 139 I.C. 738, A.I.R. 1932 Rang. 88. The Calcutta High Court has taken a contrary view in *Ranjit* v. *Kishori*, I.L.R. (1940) 2 Cal. 362, 44 C.W.N. 985, A.I.R. 1940 Cal. 401, where it has been held that in cases of principal and surety, there are two distinct contracts in respect of one debt common to both. It follows that payments of principal or interest and acknowledgments in accordance with the provisions of this section by either principal or surety create a fresh period of limitation in respect of the common debt as against either or both the principal and the surety. Where the form of guarantee is such that the surety agrees that the guarantee shall remain in force until the debt due is fully and finally adjusted, and that it will not be affected by forbearance or arrangement for giving time to or other facilities to the principal debtor there is by implication an authority to the principal to make payments and acknowledgments in accordance with the terms of this section. The case reported in *Brojendra* v. *Hindusthan Co-operative Insurance Ltd.*, supra was distinguished on the ground that there the promissory note bore an endorsement signed by the surety "*repayment guadanteed by me.*" But this view has been criticised in a recent Punjab case—*Federal Bank of India* v. *Som Dev*, I.L.R. 1955 Punj. 1263, A.I.R. 1956 Punj. 21. A surety who claims that he has been discharged must prove it affirmatively. Mere granting of time to the judgment debtor in the sense of staying his hands without placing himself under any binding obligation to do so, does not discharge the surety—*Het Ram* v. *Aya Ram*, 42 C.W.N. 509 (P.C.). In England, however, the law is otherwise, and there it is held that the payment of the interest or payment of the principal by the principal debtor will keep alive the debt as against the surety. The principal debtor making the payment is in effect the agent of the surety to make the payments which he made—*Lindsell* v. *Phillips*. (1885) 30 Ch. D. 291; *Lewin* v. *Wilson*, (1886) 11 App. Cas. 639.

204. Sub-section (2)—Scope:—The proviso to sub-section (1) of the section, inserted by the Amending Act of 1929 does not apply to this sub-section—*Mathura* v. *Palakdhari*, A.I.R. 1940 Pat. 512, 187 I.C. 484. This sub-section has no application to charges—*Gurdin* v. *Raj Kunwar*, 18 Luck. 637, 1943 O.W.N. 85, A.I.R. 1943 Oudh 211. Sub-section (2) is meant to extend the time for a suit by the *mortgagee* to recover a debt secured by the usufructury mortgage, and does not apply to a *suit for redemption by the mortgagor*—*Md. Akbar* v. *Mt. Motai*, 74 I.A. 285, I.L.R. (1947) Lah. 727, 50 Bom.L.R. 539, (1948) 1 M.L.J. 130, A.I.R. 1948 P.C. 36, 52 C.W.N. 142 (P.C.); *Bhart* v. *Des Raj*, A.I.R. 1950 E.P. 157. The period provided for a suit for redemption of a usufructuary mortgage can be extended by an acknowledgment of liability made in writing under sec. 19, but it is not intended that it should be extended indefinitely by payments in the shape of receipt of rent or produce by the mortgagee—*Kallu* v. *Halki*, 18 All. 295; *Anwar* v. *Lalmir*, 26 All. 167 (169); *Khilanda* v. *Jhinda*, 37 P.R. 1883; *Piroze Khan* v. *Kanhaiya Ram*, 6 Lah.L.J. 194, 78 I.C. 617, A.I.R. 1924 Lah. 484; *Bhagwan* v. *Madhav*, 46 Bom. 1000, 24 Bom. L.R. 713. Receipts by a mortgagee in possession of the usufruct of the mortgaged property after a mortgage-decree is passed are treated as payments to the mortgagee under this section for the purpose of limitation, but such receipts cannot be held to come under the category of payment of 'money payable under the decree' within O. 21, r. 2, C. P. Code—*Vaidhinadasamy* v. *Somasundaram*, 28 Mad. 473 (478).

Receipt of rent or produce:—If the mortgagee is in possession of the mortgaged land and receives the produce of the land in lieu of interest, such receipt of produce

must be deemed to be payment of interest within the meaning of this section, and limitation would begin to run from the date of the last of such payments—*Vithoba* v. *Balkrishna*, 45 Bom. 1206; *Indrajit* v. *Gajadhar*, 35 All. 270, 19 I.C. 238. Where the mortgagor is left in possession of part of the mortgaged property as tenant of the mortgagee, the receipt of rent and profit by the mortgagee should be considered as payments of interest as such within the meaning of sub-sec. (1) of this section—*Ram Kumar* v. *Mahapal*, I.L.R. (1938) All. 218, 1938 A.L.J. 18, A.I.R. 1938 All. 188. Where a property was usufructuarily mortgaged, and then the mortgagee executed a lease of the property in favour of the mortgagor, under which the mortgagor was to pay the Government revenue out of the rent, and to pay the balance of the rent to the mortgagee, *held* that the payment of Government revenue by the mortgagor amounted to a receipt of rent by the mortgagee, within the meaning of sub-section (2) —*Eressa Menon* v. *Abdul Rahiman*, 51 M.L.J. 378, A.I.R. 1926 Mad. 1061, 97 I.C. 941. Where a simple mortgage was executed in favour of a mortgagee, and subsequently a usufructuary mortgage was executed in favour of the same person but by the terms of the usufructuary mortgage the usufruct of the mortgaged property was given only to satisfy the interest due on the usufructuary mortgage and not the interest due on the simple mortgage, the enjoyment of usufruct could not be said to amount to payment of interest under the simple mortgage—*Anpurna* v. *Ram Padarath*, 49 All. 430, A.I.R. 1927 All. 417, 100 I.C. 670.

This sub-section does not refer expressly to the *intention* of the party who receives the rent or produce, and can be construed to apply wherever the mortgaged land is in the possession of the mortgagee. In such event the receipt of the rents and produce may be deemed a payment for the purpose of sub-section (1)—*Bama Charan* v. *Nimai*, 35 C.L.J. 58, A.I.R. 1922 Cal. 114. This case was distinguished in *Md. Yusuf* v. *N. Pillai*, A.I.R. 1937 Mad. 642, where it was pointed out that for the applicability of sec. 20 (cl. 2) the perception of rents and profits must be by a person in the capacity of a mortgagee. Where a person is also the owner of the property, the perception of rents and profits by him cannot be said to have been only in the capacity of a mortgagee. Thus where a person is in possession as a vendee of the mortgaged property, the receipt of rents and profits by him cannot be said to be only in the capacity of a mortgagee, even though he claims to be subrogated to the rights of the mortgagee by payment of the mortgage—*Girdharilal* v. *Ranoo*, I.L.R. (1943) Nag. 764, 1943 N.L.J. 611, A.I.R. 1944 Nag. 37. But the position will be different when a mortgagee enters into possession of the mortgaged property under an invalid contract of sale. The fact that his sale is proved to be invalid cannot vitiate his title as mortgagee and the rents and profits received by him must be deemed to have been received by him as the mortgagee—*Doraisami* v. *Periakaruppan*, I.L.R. (1941) Mad. 739, (1941) 1 M.L.J. 388, A.I.R. 1941 Mad. 475 (reversing *Peria-karuppan* v. *Doraisami*, (1940) 1 M.L.J. 134, A.I.R. 1940 Mad. 461); *Sooryanarayana* v. *Saruf*, (1947) 1 M.L.J. 373; A.I.R. 1948 Mad. 105. It has been held that receipt of profits by a usufructuary mortgagee even after the final decree in a mortgage suit amounts to receipt by way of interest to give fresh start of limitation—*Ramaswami* v. *Kesavan*, I.L.R. (1941) Mad. 963, (1941) 2 M.L.J. 248, A.I.R. 1941 Mad. 737 (reversing *Kesavan* v. *Ramaswami*, (1941) 1 M.L.J. 116, A.I.R. 1941 Mad. 406). Receipt of the produce of land under a deed of mortgage required to be, but not, registered, cannot be deemed to be a payment for the purpose of this section because the deed is not admissible to prove that the rents were received as interest—*Pichandi* v. *Kandasami*, 7 Mad. 539; *Balaprasad* v. *Bholanath*, 9 N.L.R. 140, 21 I.C. 281; *Venkaji* v. *Shidhramapa*, 19 Bom. 663. Certain Vatan lands were mortgaged with possession. On the death of the mortgagor in 1901, the mortgage became void under sec. 5 of the

Hereditary Officer's Act, 1874. The mortgagee, however, remained in possession till 1914 when the mortgagor's son took possession. The mortgagee thereupon sued in the same year to recover the mortgage amount. It was held that in as much as the mortgage became void in 1901, the possession of the mortgagee thereafter was only the possession of a trespasser, and the receipt of produce by him would not save limitation, as the lands were no longer 'mortgaged lands' within the meaning of sub-section (2) of this section. The suit was therefore barred—*Krishnaji* v. *Kashim*, 44 Bom. 500, 57 I.C. 76. So also the enjoyment of the usufruct of the property by a person in possession under a void mortgage is not that of a mortgagee but as a trespasser, and such enjoyment does not give a fresh start of limitation—*Maksudam* v. *Niranjan*, 19 Pat. 507, 21 Pat.L.T. 219, A.I.R 1940 Pat. 494; *Ram Sukh* v. *Ram Pher*, 1946 O.W.N. 341, A.I.R. 1947 Oudh 91.

205. Judgment-debt:—There was a conflict of decisions as to whether this section under the old Act applied to judgment-debts. The Calcutta and Madras High Courts held that the word 'debt' did not include judgment-debts—*Kally Prosonna* v. *Heera Lal*, 2 Cal. 468; *Mungal* v. *Shama*, 4 Cal. 708; *Kader Buksh* v. *Gour*, 6 C.W.N. 766; *Periasami* v. *Krishna*, 25 Mad. 431; *Kuppusami* v. *Rangasami*, 27 Mad. 608; the Allahabad and Bombay High Courts held that it applied to judgment-debts —*Roshan* v. *Matadin*, 26 All. 36; *Parmanandas* v. *Vallabdas*, 11 Bom. 506. This conflict has now been removed by the Explanation added to this section.

The Explanation lays down that the word 'debt' includes money payable under a decree. A decree means not only a final decree capable of execution but also a preliminary decree for sale, and such a preliminary decree constitutes a debt payable by the judgment-debtor within this Explanation. The time may be extended for an application for a final decree either under sec. 19 or sec. 20 in a fit case. But the payment in order to extend time must satisfy the requirements of sec. 20, *i.e.*, it must be attested by some writing by the hand of the person making the payment—*Baldeo Sahai* v. *Jafar*, 49 All. 147, A.I.R. 1927 All. 159, 98 I.C. 818.

Payments made under a decree directing payment by instalments will be treated as part payment of the whole debt even though there was no default clause in the decree that on failure of any instalment the whole amount would become payable. The reason is that the decree created one single judgment debt payable by instalments and the claim to instalments arose on a single cause of action for a single debt—*Kantilal* v. *Amratlal*, 45 Bom.L.R. 497, A.I.R. 1943 Bom. 260.

Some of the High Courts have in some cases expressed the view that an *uncertified* payment or adjustment towards a decree (*i.e.*, a payment which has not been certified at the time of payment, but which is certified when the application for execution is made) will not operate to prolong the period of limitation provided for an application for execution of the decree—*Bireswar* v. *Ambika*, 45 Cal. 630 (633); *Kutabulla* v. *Durga Charan*, 16 C.W.N. 396 (397); *Baij Nath* v. *Panna Lal*, 46 All. 635 (636); *Gokul Chand* v. *Bhika*, 12 A.L.J. 387, 23 I.C. 753; *Bhajan* v. *Chheda Lal*, 12 A.L.J. 825, 24 I.C. 215; *Chattar Singh* v. *Amir*, 38 All. 204 (209). But in some other cases of the Calcutta High Court it has been held that if a *payment* towards the decree has been *made within the period of limitation*, the fact that it has not been certified is immaterial. The practice in this country is that the decree-holder certifies the part-payments in the application for execution and thereupon the Court, having recorded the whole of the petition, directs execution to issue for the balance. This is the usual mode of proceeding, and it is not usual that a separate petition is filed merely certifying the part satisfaction of the decree. There is no period of

limitation fixed within which the decree-holder must certify, and therefore the decree-holder can certify the part-payments at any time; and if the part-payments be within time to prevent the decree from being barred, then execution can issue for the balance —*Lakhi Narain* v. *Felamani*, 20 C.L.J. 131, 27 I.C. 11; *Eusuffzeman* v. *Sanchia*, 43 Cal. 207; *Jalim Chand* v. *Yusufali*, 54 Cal. 143, A.I.R. 1925 Cal. 1012. This is also assumed in *Jatindra Kumar* v. *Gagan Chandra*, 46 Cal. 22, 45 I.C. 903. The same view is taken by the other High Courts—*Masilamoni* v. *Sethusami*, 41 Mad. 251, 254 (following 20 C.L.J. 131); *Rajam Aiyar* v. *Anantharatham*, 29 M L.J. 669, 31 I.C. 318; *Narayana* v. *Kunhi Raman*, 20 L.W. 190, 82 I.C. 743, A.I.R. 1925 Mad. 131; *Pandurang* v. *Jagyya*, 45 Bom. 91 (94); *Amar Singh* v. *Ram Dei*, 47 All. 873, A.I.R. 1925 All. 802; *Badri Narayan* v. *Kunj Behari*, 35 All. 178, 18 I.C. 731 (732); *Kishen Singh* v. *Aman Singh*, 17 All. 42; *Roshan Singh* v. *Mata Din*, 26 All. 36. An uncertified payment towards the decree must satisfy the requirements of sec. 20 (*e.g.*, the payment must be endorsed on the back of a certified copy of the decree); otherwise the decree cannot be saved—*Narayana* v. *Kunhi Raman*, supra. The *payment* must be made within three years of the decree or of the last starting point of limitation, in order to be effectual under sec. 20; but it may be certified at any subsequent time by the decree-holder—*Amar Krishna* v. *Jagat Bandhu*, 35 C.W.N. 1192 (1201) (F.B.), A.I.R. 1931 Cal. 719, 134 I.C. 922. If the payment is ineffectual under sec. 20, *e.g.*, if it is made at a time when execution of the decree has become barred by limitation, or if it is made within time but is *not endorsed* by the hand-writing of the judgment-debtor, the mere certification is of no effect—*Amar Krishna* v. *Jagat Bandhu*, supra. In *Jatindra Kumar* v. *Gagan Chandra*, 46 Cal. 22 (24), 45 I.C. 903, the Calcutta High Court laid down that if a *part-payment* was made in satisfaction on the decree *within three years of the decree*, (even though the payment was *not endorsed* by the judgment-debtor). and then an *application* for execution of the decree together with an application for certifying the payment was made *within three years from the date of the payment*, the payment would give a fresh starting point for limitation, being a step-in-aid of execution within the meaning of Article 182 (5), and consequently the application for execution would be within time. This case has been followed in *Madan Mohan* v. *Harulal*, 26 C.W.N. 534 (535, 536). The decision in *Jatindra* v. *Gagan*, 46 Cal. 22 has been overruled by the Full Bench in *Amar Krishna* v. *Jagat Bandhu*, 35 C.W.N. 1192 (F.B.), on the ground that as the payment, not being duly endorsed under sec. 20, is ineffectual to keep the decree in force, the certification cannot afford a fresh starting point under Art. 182, clause (5). The Rangoon High Court in *Maung Law* v. *Maung Po*, 2 Rang. 393 (395) has followed 46 Cal. 22. But the Madras High Court disapproves of this view on two grounds *viz.*, that the part-payment in satisfaction of the decree not being endorsed upon the decree by the judgment-debtor did not satisfy the requirements of sec. 20, and consequently it could not save limitation, and secondly, the *payment* could not be regarded as a step-in-aid of execution, for Article 182 (5) clearly lays down that it is the *application* for certifying the payment and not the *payment* itself that can be considered as a step-in-aid of execution; consequently, the application for certifying the payment being made more than three years after the date of the decree, the execution was barred—*Narayana* v. *Kunhi Raman*, supra. Where in execution of a compromise decree providing for payment of the decretal amount by instalments a compromise is effected, such a compromise does not affect the liability under the original decree but affects the conditions of payment; if it is treated as an adjustment under Or. 21, r. 2 Civil Procedure Code, the Court may recognise it in executing the decree and if it is not, the Court may see what it is and take into account the payments made under it in executing the decree; *Het Ram* v. *Aya Ram*, 42 C.W.N. 509 (P.C.) 1938 A.L.J. 150, 1938 M.W.N. 662 (P.C.).

Agent of person under disability.

21. (1) The expression "agent duly authorized in this behalf," in sections 19 and 20, shall, in the case of a person under disability, include his lawful guardian, committee or manager, or an agent duly authorized by such guardian, committee or manager to sign the acknowledgment or make the payment.

Acknowledgment or payment by one of several joint contractors, etc.

(2) Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by, or by the agent of, any other or others of them.

(3) For the purposes of the said sections—

(*a*) An acknowledgment signed, or a payment made, in respect of any liability, by, or by the duly authorized agent of, any widow or other limited owner of property who is governed by the Hindu law, shall be a valid acknowledgment or payment, as the case may be, as against a reversioner succeeding to such liability; and

(*b*) Where a liability has been incurred by, or on behalf of, a Hindu undivided family as such, an acknowledgment or payment made by, or by the duly authorized agent of, the manager of the family for the time being shall be deemed to have been made on behalf of the whole family.

Change:—Sub-section (3) has been newly added by sec. 3, The Indian Limitation Amendment Act I of 1927, in pursuance of the following recommendations of the Civil Justice Committee: "It will save considerable unnecessary litigation and prevent vexatious pleas if limited owners under the Hindu law, and also the *karta* or manager of a joint Hindh family are enabled to make acknowledgments and payments so as to attract the provisions of sections 19 and 20. Conflicting views are held with reference to the power of a widow to make an acknowledgment binding any interest excepting her own. A limited owner like a Hindu widow fully represents the estate for many purposes; a judgment properly obtained against her will constitute the subject matter of the suit *res judicata* in a suit by the ultimate reversioner. There appears to be no reason why in the normal course of her administration of the estate of the last male owner she shall not have authority to acknowledge a debt"—*Civil Justice Committee Report*, p. 489. See Notes 210A and 210B below.

This sub-section came into effect from 1st January, 1928.

206. Scope:—This section shows that for the purposes of this section the payment made by a guardian must be held to be a payment by an agent duly authorised on his behalf. The legislature does not enact that for the purposes of the Limitation Act,

the guardian shall be treated as an agent of his ward—*Mani Devi* v. *Anpurna*, 22 Pat. 144, A.I.R. 1943 Pat. 218.

This section is explanatory of secs. 19 and 20 of the Act and does not constitute an exception in the case of either of these sections—*Naziruddin* v. *Ramanand*, 23 Luck. 114, A.I.R. 1948 Oudh 193, 1947 O.W.N. 623 (F.B.).

206A. Lawful guardian:—An admission amounting to an acknowledgment under sec. 19 and by the guardian of a minor appointed by the Court is binding on the minor—*Bageshwari* v. *Bindeshwari*, 13 P.L.T. 509, A I.R. 1932 Pat. 337 (339). The expression "lawful guardian" is not limited to a guardian appointed by the Court. It means any person who is entitled to act as guardian under the personal law of the minor. Thus, under the Hindu Law, on the death of the father, the mother is not only the natural guardian but also the legal guardian, and as such she can acknowledge a debt on behalf of the minor—*Bechu* v. *Baldeo*, 10 O.W.N. 188, 145 I.C. 180, A.I.R. 1933 Oudh 132. A single Bench of the Madras High Court has held that any person who is lawfully acting as guardian though not legally appointed as such, is a lawful guardian under this section, if he is acting for the benefit of the minor. And so, where the guardian appointed by the will of the minor's adoptive father, and all his relations appear to have been unwilling to act as guardian, the natural mother of the minor is the proper person to be entrusted with his interests, and if she makes a payment for the benefit of the minor, it will save the bar of limitation under sec. 20—*Tirapayya* v. *Ramaswamy*, 24 M L.J. 428, 19 I.C. 362. But this case has been disapproved of in a later case where it is held that a *de facto* guardian is not a 'lawful guardian' within the meaning of this section and has no authority to acknowledge a debt—*Ramasamy* v. *Kasinath*, 1927 M.W.N. 356, A.I.R. 1928 Mad. 226 (231); *Subbakka* v. *Venkata*, 1932 M.W.N. 1193; *Dashrath* v. *Gayanam*, I.L.R. (1943) Bom. 486, 45 Bom.L.R. 740, A.I.R. 1943 Bom. 381 (paternal aunt); *Chennappa* v. *Onkaramma*, I.L.R. (1940) Mad. 358, (1939) 2 M.L.J. 884, A.I.R. 1940 Mad. 33 (F.B.) (paternal grand-mother); *Saradambal* v *Kuppuswami*, (1942) 2 M.L.J. 281, A.I.R. 1942 Mad. 663 (mother as guardian of person); *Tukaram* v. *Madhaorao*, 1947 N.L.J. 405; *Ahammu* v. *Kunhu*, (1938) 2 M L.J. 251, A.I.R. 1938 Mad. 836; *Nagayya* v. *Narasayya*, I.L.R. (1939) Mad. 65, (1938) 2 M.L.J. 501, A.I.R. 1938 Mad. 853. Under the Hindu Law, in the absence of the father, the mother is entitled to be the guardian of her infant sons, in preference to their brother; and a payment made by the brother of an infant judgment-debtor towards the decree, while their mother is alive, cannot be said to have been made by a lawful guardian—*Bireswar* v. *Ambika*, 45 Cal. 630. Under the Mahomedan Law, a father's brother is a guardian of the *person* (and not of the *property*) of the minor nephews and nieces, and a payment made by him of interest on a debt due by his deceased brother (the minors' father) cannot save limitation so as to keep the debt alive against the minor daughters of the deceased brother—*Yagappa* v. *Mahomed*, 9 L.B.R. 78, 40 I.C. 858. So also, a mother, not being a guardian of the *property* of her minor son, under the Muhammadan Law, is not a lawful guardian, and cannot sign an acknowledgment on behalf of the minor—*Chanan* v. *Wadhu Ram*, 1917 P.L.R. 61, 42 I.C. 17.

207. Partners:—The proper interpretation to put on sec. 21 is that if at the time when the acknowledgment is made or the payment is made there are more than one person in existence who stand in relationship to each other as joint contractors, partners, executors or mortgagors, then the acknowledgment or payment made by one would save limitation as against that person and would be of no avail against the others —*Md. Taqi* v. *Raja Ram*, A.I.R. 1936 All. 820 (F.B.), (41 All. 111, A.I.R. 1927 All. 209 overruled). This section does not mean that no payment or acknowledgment by a co-

partner will be deemed as an acknowledgment or payment made on behalf of the other partners and binding on them. The word "only" in sub-section (2) is not to be treated as a surplusage. The meaning of this word is that the mere writing or signing of an acknowledgment by one partner does not necessarily of itself bind his co-partners; but it must also be shown that he had authority, express or implied, to make the acknowledgment on behalf of himself and his co-partners; and if it is shown, then of course the acknowledgment will be binding on them all—*Gordhandas* v. *Bhulabhai*, 34 Bom.L.R. 623, A.I.R. 1932 Bom. 426, 138 I.C. 805; *Gadu Bibi* v. *Purisotom*, 10 All. 418; *Premji* v. *Dossa Doongersay*, 10 Bom. 358. The use of the word "only" shows that while a partner cannot make another partner liable merely by his acknowledgment, there is nothing to prevent such liability falling on partners, if they are shown to have all joined in the settlement made by one of them —*Kariyappa* v. *Rachapa*, 24 Bom. 493 (502). The mere fact that persons are partners does not make one partner liable under an acknowledgment by another; but if the acknowledgment is done *in the course of partnership business*, it is binding on the others—*Debi Dayal* v. *Baldeo*, 26 A.L.J. 1036, A.I.R. 1928 All. 491 (492), 111 I.C. 143. Cf. Sec. 23 of the Partnership Act (IX of 1932) which runs as follows: "An admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business." Where a Hindu joint family carries on a business, the members of the family are in the position of partners in regard to persons dealing with that business, and an acknowledgment of liability made by a member in the usual course of the partnership business, is binding on the other members of the family as partners and extends the period of limitation —*Debi Dayal* v. *Baldeo*, supra. It is not necessary, that a co-partner shall be *specially* empowered to make an acknowledgment or payment on behalf of his other co-partners, in order to bind them. In the absence of direct evidence that a co-contractor or partner was authorised to make an acknowledgment or payment on behalf of the others, such authority can be *inferred* from other surrounding circumstances such as the position of the other co-contractors or partners in the business, though it cannot be laid down which circumstances should be deemed sufficient to warrant the inference —*Veeranna* v. *Veerabhadraswami*, 41 Mad. 427 (F.B.), 34 M.L.J. 373 (overruling *Sheikh Mohideen* v. *Official Assignee*, 35 Mad. 142, *K. R. V. Firm* v. *Seetharamaswami*, 37 Mad. 146, and *Valasubramania* v. *Ramanathan*, 33 Mad. 421); *Rala Singh* v. *Bhagwan Singh*, 2 Rang. 367, 84 I.C. 391; *Mahadeva* v. *Ramakrishna*, 50 M.L.J. 67, 92 I.C. 653, A.I.R. 1926 Mad. 114. The question whether an acknowledgment made by one partner was impliedly authorised by others, depends upon whether it was an act necessary for or usually done in carrying on the business—*Bengal National Bank* v. *Jatindra*, 56 Cal. 556, 33 C.W.N. 412 (415). The authority of a partner to acknowledge liability or to make payments so as to save limitation as against his co-partners may be inferred from surrounding circumstances. And where the endorsement is made and signed by one of the partners in the ordinary course of business the endorsement is binding against his co-partners—*Dayal & Co.* v. *Radha*, A.I.R. 1935 Lah. 559: 158 I.C. 260. In a going mercantile concern such agency is to be presumed as an ordinary rule—*Premji* v. *Dossa*, 10 Bom. 358; *Mahadeva* v. *Ramakrishna*, 50 M.L.J. 67, A.I.R. 1926 Mad. 114; *Kuljas* v. *Wishan Singh*, 33 P.L.R. 584, 137 I.C. 771, A.I.R. 1932 Lah. 456; *Gulsaran* v. *Brij Mohan*, 41 P.L.R. 90, A.I.R. 1939 Lah. 397, 184 I.C. 734. But this presumption can be rebutted, and if it can be shewn that the acknowledgment of liability by one of the partners was not an act necessary for or usually done in carrying on the business of the partnership, the case will fall under the general rule contained in sub-section (2)—*Dalsukhram* v. *Kalidas*, 26 Bom. 42.

If the partnership had been *dissolved* at the date of the acknowledgment, and the creditor had had notice of such dissolution, the acknowledgment by one partner

will be of no avail as against the firm—*Dalsukhram* v. *Kalidas*, 26 Bom. 42; *Gandi Singh* v. *Bhag Singh*, 7 Lah. 403, A.I.R. 1926 Lah. 616, 99 I.C. 563. In the absence of express evidence of authority, an acknowledgment of a partnership-debt by an ex-partner, after the dissolution of the partnership, is not binding on any other ex-partner. Where, however, an ex-partner is authorised to collect the outstandings and pay all debts of the partnership, such authority includes the lesser power of acknowledging debts—*Muthuswami* v. *Shankara Lingam*, 1915 M.W.N. 722, 30 I.C. 675, 2 L.W. 823.

According to English law also, so long as the partnership exists, each partner, in the absence of evidence to the contrary, is presumed to be the agent of the others to make payments on account of debts due by the firm, because payments by any one partner are payments by the firm; but as soon as the partnership is dissolved, such agency ceases unless specially reserved, and payments by one can then only be held to be payments by all on proof that such payments were actually *authorised* by all—*Watson* v. *Woodman*, L.R 20 Eq. 721 (730); *Wood* v. *Braddick*, (1808) 1 Taunt. 104; *Pritchard* v. *Draper*, (1831) 1 Russ. & Myl. 191; *Goodwin* v. *Parton*, 41 I.T.N.S. 91; *Bistow* v. *Miller*, 11 Ir. L.R. 461; Lightwood's Time Limit on Actions, page 383. After the partnership has determined or has been discontinued, a partner cannot validly acknowledge a partnership debt—*Thomson* v. *Waithman*, (1856) 3 Drew. 628; *Kilgour* v. *Finlyson*, (1789) 1 H.B. 155; *Watson* v. *Woodman*, supra. But where the partnership has been discontinued or determined upon the condition that A only shall go out of it, and that it shall continue as between B and C, and there are also special arrangements by which A is to ostensibly remain a partner, and is to be entitled also to resume (in a certain event) his old position of a partner, in such a case B and C or either of them may validly acknowledge a debt of the old partnership (by payment of interest or part-payment of the principal) so as to keep that old debt alive as against A—*Tucker* v. *Tucker*, [1894] 3 Ch. 429: 63 L.J. Ch. 737.

If the partnership had been dissolved by the death of one of the partners, an acknowledgment made by the surviving partners, unless they are specially authorised to do so, cannot bind the representatives of the deceased partner—*Rajagopala* v. *Krishnaswami*, 8 M.L.J. 261.

208. Co-executors:—An acknowledgment by one executor only keeps alive the debt against the assets of the testator but is not sufficient by itself to make the other executors personally chargeable—*Dick* v. *Fraser*, [1897] 2 Ch. 181; *Fordham* v. *Wallis*, (1853) 17 Jur. 228; *Astbury* v. *Astbury*, [1898] 2 Ch. 111.

209. Co-mortgagees:—An acknowledgment of the title of the mortgagor made by one only of two mortgagees would not avail to save the mortgagor's right of redemption from being barred by limitation, where the mortgage was a joint mortgage and not capable of being redeemed piecemeal—*Jwala Prasad* v. *Achhey*, 34 All. 371 (374); *Dharma* v. *Balmakund*, 18 All. 458 (460); *Bhogilal* v. *Amritalal*, 17 Bom. 173; *Richardson* v. *Younge*, L.R. 6 Ch. 478.

'Chargeable":—The word 'chargeable' means every kind of chargeability and includes liability as to property; it is not limited to personal liability only—*Thayammal* v. *Muthukumaraswami*, 57 M.L.J. 588, A.I.R. 1929 Mad. 881 (884).

210. Co-contractors:—Purchasers of different portions of mortgaged properties from the original co-mortgagors, who take over the original contract made by the original mortgagors with the mortgagee are joint contractors within the meaning of sub-section (2) of this section—*Nagayya* v. *Duraiswami*, 175 I.C. 426, 1937 M.W.N. 194, A.I.R. 1938 Mad. 111. One of several co-contractors (co-debtors, co-mortgagors,

etc.) cannot make an acknowledgment or payment on behalf of the others. In case of co-contractors, jointly and severally liable, an acknowledgment of liability or a payment by one of them does not deprive the other of the benefit of limitation, unless the payer is authorised to make the payment by the other as an agent on his behalf—*Oudh Commercial Bank* v. *Bishambhar*, 2 Luck. 180, A.I.R. 1926 Oudh 601, 96 I.C. 353; *Jogesh* v. *Manindra*, 59 Cal. 1128, 36 C.W.N. 487 (488), A.I.R. 1932 Cal. 620, 138 I.C. 740; *Arjan Ram* v. *Rohima*, 14 I C. 128 (Cal.); *Jnan* v. *Monoranjan*, I.L.R. (1941) 2 Cal. 576, 74 C.L.J. 327, A.I.R. 1942 Cal. 251; *Federal Bank* v. *Som Dev*, I.L.R. 1955 Punj. 1263, A.I.R 1956 Punj. 21. Where a part payment by one of the joint debtors is made, the mere presence of the other debtors at the place of payment will not save limitation, unless it is proved that they also made the payment, or that the person making the payment was authorised by the others to do so—*Annadacharan* v. *Jhatucharan*, A.I.R. 1935 Cal. 648, 158 I.C. 512. Payment by one of the judgment debtors does not interupt the running of limitation as against the other—*Ram Kumar* v. *Hira Lal*, I.L R. (1939) All. 258, 1939 A.L.J. 66, A.I.R. 1939 All. 230. In England also, it has been laid down by the Mercantile Law Amendment Act, 1856, sec. 14, that where there are two or more co-contractors or co-debtors (where bound jointly only or jointly and severally) no such co-contractors or co-debtors shall lose the benefit of the bar of time by reason only of any part-payment by any other or others of the co-contractors or co-debtors. And so one co-debtor cannot make payment or acknowledgment to bind the others—*Jackson* v. *Woolley*, (1860) 8 El. & Bl. 778.

Co-mortgagors:—Co-mortgagors stand in the position of joint contractors—*Nagayya* v. *Duraiswami*, 175 I.C. 426, 1937 M.W.N. 194, A I.R. 1938 Mad. 111; *U. So Maung* v. *Thom*, 184 I.C. 622, A.I.R. 1939 Rang. 287; *Dashrath* v. *Gayanan*, I.L.R. (1943) Bom. 486, 45 Bom.L.R. 740; A.I.R. 1943 Bom. 381. A co-mortgagor cannot make payment or acknowledgment on behalf of another co-mortgagor, when there is nothing to warrant the inference that the former acted as an agent duly authorised by the latter in making the payment or acknowledgment—*Thayammal* v. *Muthukumaraswami*, 57 M.L.J. 588, A.I.R. 1929 Mad. 881 (884); *Narayana* v. *Venkataramana*, 25 Mad. 220, 233 (F.B.); *Baijnath* v. *Satilal*, 174 I.C. 156, A.I.R. 1938 Pat. 383, 19 Pat.L.T. 240; *Dashrath* v. *Gayanan*, supra; *U. So Maung* v. *Thom*, supra. An acknowledgment of liability by some only of the heirs of a mortgagor against whom a decree for sale on the basis of a mortgage has been passed, does not operate to save limitation as against the other heirs of the mortgagor—*Md. Taqi* v. *Raja Ram*, A.I.R. 1936 All. 820, 1936 A.L.J. 1140, 166 I.C. 106 (F.B.) overruling 41 All. 111 and A.I.R. 1927 All. 209. See also *Hakim* v. *Muhammad*, A.I.R. 1957 Pat. 559.

Where subsequent to the death of the mortgagor, one of his heirs makes a payment within the period of limitation, such payment saves limitation only as against the person who makes the payment, and not against all the heirs—*Annadacharan* v. *Jhatucharan*, A.I.R. 1935 Cal. 648. So also, where after the death of one of the mortgagors, the other mortgagors make payments towards the mortgage, the heirs of the deceased mortgagor are entitled to the benefit of the exemption under sub-section (2) of this section—*Azizur* v. *Upendra*, 42 C.W.N. 18, 66 C.L J. 104, A.I.R. 1938 Cal. 129. Where a Mahomedan brother and sister are co-mortgagors and payments are made by the brother, a payment of interest as such on behalf of the sister cannot be inferred from the mere fact of relationship—*Euboof* v. *Niemeyer*, 194 I.C. 177, A.I.R. 1941 Rang. 37. But in some other cases it has been held that since every mortgagor is liable for the entire debt secured by the mortgage, payment by one of the mortgagors is effectual to extend the period against all the co-mortgagors—*Achola Sundari* v. *Doman*, A.I.R. 1926 Cal. 150, 90 I.C. 774; *Ghasi* v. *Thakur Kishori*, 1929 A.L.J. 446, A.I.R. 1929 All 380 (381); *Nagayya* v. *Duraiswami*, supra. In *Badri Das* v. *Pasupati Banerjee*, A I.R.

1933 Pat. 1: 12 Pat. 93: 14 P.L.T. 6: 140 I.C. 145 it was held that payment by one of the debtors would save limitation for a suit to realise the security, although in the hand of persons other than those making the payment. Agarwalla, J., pointed out that in the case of a debt secured by mortgage, the liability is indivisible; and no splitting up of the security avails to split up the liability unless the mortgagee consents to it, the payment of interest by one of the mortgagors will keep the mortgage alive so that the mortgagee would be entitled to enforce it against all or any part of the mortgaged property. Where the debt is a single debt and the liability is one and indivisible the case falls within sec. 20 and is not taken out of its operation by sec. 21 (2) of the Act, so that any person interested in the equity of redemption may by making payment in the manner provided by sec. 20 keep the mortgage alive in such a manner that the whole of the mortgaged property remains liable for the debt. The provisions of sub-sec. (2) sec. 21 might be applied if the suit was based on personal covenants to repay. This case was expressly followed in the same High Court in *Sripati Samanta* v. *Lalji Sahu*, A.I.R. 1936 Pat. 361, 163 I.C. 808. And in the latter case James, J., remarked: "that the distinction between joint contractors and the body of persons interested in the equity of redemption is this: that whereas with joint contractors there are a number of single debts: for the persons interested in the equity of redemption there is one single indivisible debt and a single indivisible security." In *Baijnath* v. *Sati Lal*, 174 I.C. 156, A.I.R. 1938 Pat. 383, 19 Pat.L.T. 240 it has been held that although the mortgage itself may be kept alive by a payment made by one of the mortgagors, when the question is a matter not of the liability on the mortgage but the liability on the personal covenant, a payment by one co-mortgagor (or joint contractor) cannot be deemed to be payment of the other.

Co-heirs:—The words "joint contractors" in sub-sec. (2) does not include the co-heirs of a deceased debtor, nor can this sub-section be extended by analogy to co-heirs—*Narasimha* v. *Ibrahim*, 56 M.L.J. 630, A.I.R. 1929 Mad. 419 (420). A contrary view has been taken in *Arjun Ram* v. *Rohima*, 14 I.C. 128 (Cal.); *Md. Taqi* v. *Raja Ram*, A.I.R. 1936 All. 820; *Azizur* v. *Upendra*, 42 C.W.N. 18.

Surety:—The expression "joint-contractor" applies also to a surety—*Kothandaraman* v. *Shanmugam*, 32 I.C. 608 (Mad.). The principal debtor and the surety are often in the position of joint contractors, and under this section one joint contractor is not bound by an acknowledgment or payment made by another. A payment by the debtor does not keep alive the action against the surety, nor can a payment by the surety keep alive the debt against the principal debtor—U. N. Mitra's Limitation, 5th Edn., pp. 824, 825. Unless it appears otherwise in the terms of the surety's contract, an acknowledgment of payment by a debtor does not extend limitation against the surety—*Federal Bank of India* v. *Som Dev*, I.L.R. 1955 Punj. 1263, A.I.R. 1956 Punj. 21. In England, however, it has been held that a principal debtor and surety do not stand in the position of co-contractors or co-debtors; and so, the payment of interest or a part-payment of the principal by the principal debtor will keep alive the debts as against the surety—*Lindsell* v. *Phillips*, (1885) 30 Ch. D. 291. See Note 203 under sec. 20.

210A. Hindu woman:—It was formerly held that a Hindu woman in possession of her limited interest in the estate of her deceased husband or father, could not make an acknowledgment so as to extend the period of limitation as against the reversioners. Her acknowledgment did not bind the estate or the reversioners—*Soni Ram* v. *Kanhaiya*, 35 All. 227 (235) (P.C.) (affirming on appeal *Shib Sankar* v. *Soni Ram*, 32 All. 33); *Mohini Mohan* v. *Sarat Sundari*, 86 I.C. 353, A.I.R. 1925 Cal. 862; *Shafiquddin* v. *Lakhan*, 1949 A.L.J. 423, A.I.R. 1950 All. 60. But these cases

are no longer good law in view of the new sub-section (3) (*a*) which expressly lays down that an acknowledgment or payment made by the widow or limited owner shall be a valid acknowledgment or payment as against a reversioner. Under the Limitation Amending Act of 1927, a widow can by acknowledgment save a debt from being barred by limitation, and this acknowledgment is binding upon reversioners—*Darogi Rai* v. *Basdeo Matho*, A.I.R. 1937 Pat. 40 (42); *Sundarbati* v. *Sukhdeo*, (1945) P.W.N. 225, A.I.R. 1946 Pat. 120.

210B. Manager of joint family:—Sub-section 3 (b) of this section lays down two conditions in order that the acts of a member of a joint Hindu family specified in sections 19 and 20 may extend the period of limitation against all the members. These conditions are (i) that the loan must have been incurred by or on behalf of the joint family, and (ii) that the specified acts must be the acts not of any member of the family but must be the act of the *karta*. It is not, however, necessary that the document evidencing the loan must *on the face of it* show that the loan has been incurred on behalf of the joint family. If the fact that the loan has been incurred on behalf of the family can be established on the evidence, sub-section 3 (b) of this section is attracted, if the acknowledgment or part payment of the principal and interest has been made and endorsed by the *karta*—*Kistur* v. *Rajani*, 70 C.L.J. 201, 44 C.W.N. 299. A.I.R. 1940 Cal. 137. The manager of a joint Hindu family has power to acknowledge the liability of the family, and in so doing he would be considered as the agent duly authorised to bind the other members; in such a case the acknowledgment need not be expressed as having been made in his capacity as *Karta*—*Hari Mohan* v. *Sourendra*, 41 C.L.J. 535, A.I.R. 1925 Cal. 1153; *Sarada* v. *Durgaram*, 37 Cal. 461; *Har Prosad* v. *Bakshi Harihar*, 19 C.W.N. 860, 31 I.C. 40; *Bhaskar* v. *Vijalal*, 17 Bom. 512; *Inderpal* v. *Mewalal*, 36 All. 264 (267); *Sanwal* v. *Saijit*, 22 A.L.J. 1018, A.I.R. 1925 All. 174; *Chinnaya* v. *Gurunathan*, 5 Mad. 169 (F.B.); *Ram Autar* v. *Beni Singh*, 25 O.C. 89, A.I.R. 1922 Oudh 135; *Venkatachalam* v. *Venkateswara*, (1943) 2 M.L.J. 610, (1943) M.W.N. 680. A.I.R. 1944 Mad. 33 (Junior member of a joint family in charge of and management of property and business). See the new sub-section (3). But the acknowledgment must be such as to satisfy the conditions of section 19 of the Act. It must be in writing and must be signed. Thus where the manager consents to an adjustment of an account but does not sign the account, the debt is not by acknowledgment kept alive against all the members of the family—*Nagarmal* v. *Bajranglal*, A.I.R. 1950 P.C. 15. But where a creditor deals not merely with the managing member of a family, but with all the members as co-obligors, he cannot rely on an acknowledgment made by the manager as an acknowledgment made on behalf of all the members—*Narayana* v. *Venkataramana*, 25 Mad. 220 (F.B.). An acknowledgment made by a member of the joint Hindu family, who is *not* the manager of the family, binds only the person acknowledging and the persons who claim through him, but not the other members of the family—*Ramkishan* v. *Hirde Ram*, 71 I.C. 737, A I.R. 1923 Lah. 135. Where a manager and other members of a Hindu undivided family are liable to pay a debt and a payment is made by the manager, it may be possible to infer from the circumstances that the payment was made by the managing member on behalf of the other members as well on the principle of implied agency—*Lakshmi Naidu* v. *Gunnamma*, A.I.R. 1935 Mad. 101: 68 M.L.J. 470: 58 Mad. 418: 1935 M.W.N. 17: 41 L.W. 94: 154 I.C. 1035. Thus, where a father makes payment, in order to stay the hands of the decree-holder in executing the decree and time is given to pay in consideration of the payment made, such payment is as manager of the joint family and saves the time against father and sons—*Ragghi* v. *Nathulal*, 1938 A.L.J. 973, A.I.R. 1938 All. 638, 179 I.C. 90. But after partition there is no undivided family and therefore, no managing member of it, and unless there is authority to ack-

nowledge the debt or make a part-payment, the other members of the family will not be bound by the acknowledgment or part-payment of one member alone—*Rama Vadhyar* v. *Manian Vadhyar*, A.I.R. 1937 Mad. 586. The payments made after partition by an ex-manager are not payments made by the "manager for the time being" within the meaning of sub-section 3 (b) of this section—*Pangudaya* v. *Uthandiya*, I.L.R. (1938) Mad. 968, (1938) 2 M.L.J. 33, A.I.R. 1938 Mad. 774; *Kabhiram* v. *Bhaga*, 47 Bom.L.R. 470, A.I.R. 1945 Bom. 511.

"Liability incurred by or on behalf of "the family."—The expression suggested that the family as a whole might be a party to the contract or the managing member on behalf of the family might have entered into the contract—*Ambalavana* v. *Gowri*, A.I.R. 1936 Mad. 871 (875), 44 L.W. 467.

Effect of substituting or adding new plaintiff or defendant.

22. (1) Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to an assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

211. Scope of section:—Sub-section (1) does not apply to cases in which the plaintiff is added in the course of the suit in consequence of assignment of interest from the original plaintiff. but is confined to cases where the new plaintiff is added or substituted *in his own right*, so that he may himself be considered to be instituting a suit *independently* of the right of the original plaintiff—*Arunachella* v. *Orr*. 40 Mad. 722. If the plaintiff is added in consequence of assignment of right from the original plaintiff, the case will fall under sub-section (2) and not sub-section (1).

This section is confined to *suits* only, and does not apply to proceedings in execution—*Golab Koer* v. *Syed Mohammad*, 2 P.L.T. 619, 62 I.C. 30. See the definition of 'suit' in section 2 (10). The word 'suit' in this section includes only the stages of a suit down to its termination by the decree of the trial Court, and does not include an appellate stage or proceedings in execution of the decree made in the suit. Therefore, an application to set aside an *ex parte* decree cannot, as regards the added party, be deemed to have been made when the added party was brought on the record—*Chandrika* v. *Ramkuer*, 6 P.L.J. 463, A.I.R. 1923 Pat. 88, 62 I.C. 536.

An application for filing an award is required by Sch. II, para. 20. C. P. Code to be registered as a *suit*, and the parties are to be treated as plaintiff and defendant. Therefore, on the analogy of a suit, it may be said that if in an application for filing an award one of the opposite party in whose favour also the award has been made asks to be transposed as an applicant, at a time when the period of limitation has already expired, the Court can transpose the party on the analogy of sub-section (2) of this section, and no question of limitation arises—*Mangal Sen* v. *Prag Das*, 1931 A.L.J. 863, 133 I.C. 410, A I.R. 1931 All. 725 (726).

An application under O. XXI, r. 101, C. P. Code, is not a suit; and this section does not apply—*Indubhushan* v. *Haricharan*, 58 Cal. 55, A.I.R. 1931 Cal. 385 (387), 132 I.C. 631.

This section is not applicable to an application for restoration under sec. 3 of the Bihar Restoration of Bakasht Lands (IX of 1938) as this section is applicable to suits —*Sheobadan* v. *Bihari*, 1944 P.W.N. 499. The Calcutta High Court has held that this section is applicable to persons added in an application under sec. 37A of the Bengal Agricultural Debtors Act, the reason being that the Bengal Act II of 1942 inserting sec. 37A in the Bengal Agricultural Debtors Act is a local and special Act and under sec. 29 (2) (a) of the Limitation Act the period of limitation applicable will be governed by this section—*Kunja* v. *Mritunjay*, A.I.R. 1950 Cal. 54. Their Lordships overlooked the fact that this section is applicable to *suits* only and not to applications.

This section applies to the case of all persons brought on record after the expiry of limitation. It is immaterial whether the Court acts *suo motu* or on the application of a party. *Sita Ram* v. *Munshi Ram*, A.I.R. 1940 Lah. 262, 192 I.C. 105. See also *Provakar* v. *Bibhuti*, A.I.R. 1957 Cal. 177.

212. Addition of new plaintiff or defendant:—All plaintiffs who have a *joint* cause of action must be impleaded before the expiry of the period of limitation. If some of them institute a suit within time and the other plaintiffs are added after the period of limitation, the claim of the original plaintiffs also, who had a *joint* cause of action with the added plaintiffs, would be barred, as the claim could not be enforced without the additional plaintiffs—*Ramsebuke* v. *Ram Lal*, 6 Cal. 815; *Girwar* v. *Makbunnessa*, 1 P.L.J. 468, 36 I.C. 542; *Dalla Ram* v. *Nibahumal*, 1886 P.R. 8; *Mir Tapurah* v. *Gopi Narayan*, 7 C.L.J. 251; *Motan Mal* v. *Kripa Mal*, 79 P.R. 1906; *Bhagela* v. *Abdul Rahaman*, 1 P.L.J. 472, (Note). Where one of three brothers sued alone for a joint debt, and when objection was taken to the form of the suit it was too late to bring in the other brothers as co-plaintiffs, the debt having by that time become time-barred, it was held that the suit must be dismissed—*Kalidas* v. *Nathu*, 7 Bom. 217; see also *Imamuddin* v. *Liladhur*, 14 All. 524; *Motan Mal* v. *Kripa Mal*, 79 P.R. 1906. But if *no objection* as to the non-joinder of parties is taken by the defendants, the suit will not be barred. Where the original plaintiffs alone sued within the period of limitation, and others who had a joint cause of action were added after the expiry of the period on their own application, *no objection* as to the non-joinder of parties being taken by the defendants at any stage of the proceedings, the suit would not be barred—*Shirekulli Timapa* v. *Ajjibal*, 15 Bom. 297; *Pateshri* v. *Rudra*, 26 All. 528. But the provisions of sec. 22 (1) can be availed of only in cases where the plaintiff and the defendant have a joint cause of action and not when their causes of action are different—*Periakaruppa Chetti* v. *Mottayya*, A.I.R. 1935 Mad. 240: 69 M.L.J. 30: 1935 M.W.N. 210: 41 L.W. 177: 156 I.C. 455.

Where the cause of action is *separate*, a suit wherein certain defendants were added at a time when a separate suit against them would be barred, is liable to be dismissed as against *them* only on the ground of limitation—*Obhoy* v. *Kritarthamoyi*, 7 Cal. 284; *Bishamberdas* v. *Brijlal*, 33 Bom.L.R. 1385, A.I.R. 1931 Bom. 590 (592). But where the relief sought is not separable, the suit will be dismissed as against all the defendants—*Habibulla* v. *Achaibar*, 4 All. 145.

The question whether the joinder of parties after the institution of a suit shall necessarily involve the bar of limitation, if the prescribed period has expired, must depend upon the consideration of the question *whether the joinder was necessary* to enable the Court to award such relief as may be given in the suit as framed. If the fresh parties are joined merely for the purpose of safeguarding the right subsisting as between them and the others claiming generally in the same interest, the fact that the suit is barred as regards the freshly joined parties does not ordinarily affect the right of the original plaintiffs to continue the suit—*Guruvayya* v. *Dattatraya*, 28 Bom. 11

(17, 18); *Gehimal* v. *Karmumal*, 35 I.C. 551, 10 S.L.R. 38. When a party is brought on the record out of time, the question of limitation does not arise when there is no relief claimed against that party—*Jadu Nath* v. *Amulya*, 46 C.L.J. 118, 104 I.C. 576, A.I.R. 1927 Cal. 794; *Mahomed Ishaq* v. *Sk. Akramul Huq*, 12 C.W.N. 84, 6 C L.J. 558.

The test to be applied is—whether the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded. A suit is not said to be properly constituted unless all the *necessary* parties are impleaded in it. By necessary parties are meant those parties who ought to be joined and who are indispensable, as without them no decree at all can be made. If these parties are not joined, then the suit is bad for non-joinder, and the addition of these parties after the period of limitation will necessitate a dismissal of the suit. If, however, the necessary parties are impleaded, the non-joinder of other persons who are not necessary or indispensable but whose joinder is only desirable to safeguard their rights and the rights of others, and to prevent further litigation, does not render the suit as improperly constituted, and the joinder of those parties after limitation will not necessitate the dismissal of the suit—*Shahasasheb* v. *Sadashiv*, 43 Bom. 575 (580, 581); *Coorla Spinning Mills* v. *Vallabhdas*, 27 Bom.L.R. 1168, A.I.R. 1925 Bom. 547; *Hubli Panjarapole* v. *Saraswatevva*, A.I.R. 1953 Bom. 334; *Yakub* v. *Gulamabbas*, A.I.R. 1958 Bom. 51; *Ramdoyal* v. *Juwmenjoy*, 14 Cal. 791; *Imamuddin* v. *Liladhur*, 14 All. 524; *Ambika Charan* v. *Tarini Charan*, 18 C.W.N. 464, 19 I.C. 963; *Sital Prasad* v. *Kaifut*, 26 C.W.N. 488, A.I.R. 1922 Cal. 149; *Labhu Ram* v. *Kanshi Ram*, 57 P.R. 1905; *Pateshri* v. *Rudra Narain*, 26 All. 528, affrmed, 32 All. 241 (P.C.); *Hazari Mal* v. *Bhawani*, 30 All. 538; *Annamalai* v. *Murugappa*, 38 Mad. 837 (842); *Virchand* v. *Kondu*, 39 Bom. 729, 31 I.C. 180. In an application under sec. 37A of the Bengal Agricultural Debtors Act the lessees and present occupiers are not necessary parties. The addition of the lessees of the certificate holders at a date beyond the period mentioned in sec. 37A (2) of the Act does not therefore attract the bar of limitation—*Kunja* v. *Mritunjuy*, A.I.R. 1950 Cal. 54. So also, where a party who is not a necessary party to the suit applies to be impleaded as a party after the period of limitation and is added as a party, he can not turn round and plead that the suit is barred by limitation—*Sheo Prasad* v. *Mst. Parkash*, 18 Luck. 601, 1942 A.L.J. 766, A.I.R. 1943 Oudh 164. Contra—*Mathewson* v. *Ram Kanai*, 36 Cal. 675 (688), and *Hasan Ali* v. *Gurudas*, 34 C.W.N. 248 (249), where it is stated that sec. 22 applies where the party subsequently added is a *proper* party, even though he is not a *necessary* party, and he cannot be added after the expiry of the period of limitation.

Where a suit for sale of mortgaged property was instituted against the mortgagor's minor son, but upon information that the mortgagor (a Muhammadan) left a widow and daughters, the widow and the daughters were made defendants after the period of limitation, it was held that the suit was not barred against them; the suit as originally framed was not improperly constituted, in the sense of being instituted against only one of several parties to a contract, but it was one to enforce a mortgage lien against the *property* and the plaintiff could have obtained relief in the suit as originally filed in as much as the money was specifically charged upon the property—*Virchand* v. *Kondu*, 39 Bom. 729, 31 I.C. 180; *Gurcharan* v. *Ram Bharose*, 19 Luck. 133, 1943 O.W.N. 105, A.I.R. 1943 Oudh 218. So also, where in the same suit first one legal representative and then another is impleaded, the estate which is the object of the suit has been represented throughout there is no change of party so as to invoke the operation of this section—*Subbiah* v. *Unnamalai*, (1942) 1 M.L.J. 580, A.I.R. 1941 Mad. 609. But where a mortgagee institutes a suit against the father of the legal representatives of the deceased mortgagor and it is found that he cannot be the legal representative of

the deceased, the property having been gifted to his sons by the mortgagor, the mortgagee cannot implead the legal representatives of the deceased mortgagor after the expiry of the period of limitation—*Sita Ram* v. *Munshi Ram*, A.I.R. 1940 Lah. 262, 192 I.C. 105. A suit was brought against the original mortgagors, but on objection being taken, the sons were added as defendants at a time when a suit against them would have been barred by limitation. *Held* that the sons were sufficiently represented in the suit by their respective fathers and the unnecessary addition of the sons after the period of limitation would not justify a dismissal of the suit—*Hori Lal* v. *Munwan Kunwar*, 34 All. 549 (F.B.), 15 I.C. 126. See also *Rajwanta* v. *Rameswar*, 12 O.L.J. 235, A.I.R. 1925 Oudh 440. A suit to redeem the mortgage was brought by some of the heirs of the mortgagor within the period of limitation, and subsequently the plaintiffs applied to make the remaining heirs party defendants to the suit, after the period of limitation had expired; *held*, that the other heirs were not *necessary* parties in the sense that the plaintiffs were to lose their rights to redeem by reason of omission to make those persons parties to the suit, but that they were necessary parties only for the record in order to satisfy the provisions of O. XXXIV, r. 1. Section 22 did not therefore apply and the suit was not barred—*Shivabai* v. *Shideswar*, 45 Bom. 1009, 23 Bom.L.R. 405, 61 I.C. 590.

But where a suit is defective at its inception for non-joinder of all the mortgagees, it is not cured by the addition of the other mortgagees after the expiry of the period of limitation for the suit and under sub-section (1) of this section the suit as regards the newly added mortgagees, is already barred—*Adiveppa* v. *Rachappa*, 50 Bom.LR. 30, A.I.R. 1948 Bom. 221 (F.B.); the principle of the indivisibility of the mortgage and the principle that all the joint promisees must combine to enforce the claim against the promisors being applicable one of the mortgagees is not entitled to sue either for the whole or a part of the share in the mortgaged property without impleading the other mortgagees within the period of limitation—*Rameshwar* v. *Ganga Bux*, A.I.R. 1950 All. 598 (F.B.).

A suit on a mortgage should be distinguished from a suit on a *promissory note*. So, where the suit was wrongly brought against the widow of the executant, but on objection by the widow that she was not the legal representative of her husband, the name of the minor son of the executant was substituted at a time when the period of limitation for the suit had expired, it was held that it could not be said that the suit was brought against the *estate* of the executant represented by a wrong person, but against a wrong person *personally;* and therefore the substitution of the name of the right person after limitation necessitated the dismissal of the suit—*Northern Bank* v. *Ramesh Chandar*, 33 P.L.R. 253, A.I.R. 1932 Lah. 314 (315), 137 I.C. 89 (distinguishing 39 Bom. 729). So also, where a wrong person sues on a pronote and after the period of limitation the right person is substituted, the suit so far as the right person is concerned, shall be deemed to be instituted on the date of the substitution and if barred on that date shall be dismissed—*Gowarjabai* v. *Ganpatsa*, 1940 N.L.J. 333, A.I.R. 1940 Nag. 274, 190 I.C. 430. Defendant executed a bond in favour of X and Y, who were members of a joint family, and upon partition the bond fell to the share of X, who alone then brought a suit on the bond; the defendant contended that Y should be impleaded, and Y was then made a co-plaintiff after the period of limitation. *Held* that as Y was not a necessary party (he having no interest in the bond), the fact that he was impleaded after the expiry of the period of limitation did not affect the maintainability of the suit—*Padam* v. *Data Ram*, 30 P.L.R. 124, 115 I.C. 74, A.I.R. 1929 Lah. 505 (506).

A suit on a negotiable instrument must be instituted in the name of the person who on the face of it is entitled thereto. If it is instituted in the name of a wrong

person, and the name of the right person is substituted after the period of limitation, the suit is barred—*Subbaraya* v. *Vaithinatha*, 33 Mad. 115 (117), 5 I.C. 931. Where a suit on a promissory-note which was executed in favour of the father, was brought by the son on the allegation that the father had renounced the world, but in fact the father had not renounced the world, the suit must be dismissed, and the name of the father could not be substituted at a time when the period of limitation had expired—*Krishnaji* v. *Hanmaraddi*, 58 Bom. 536, A.I.R. 1934 Bom. 385 (386). Where a suit on a promissory note was brought against the widow of the executant (the executant having died before the suit), but on objection by the widow that she was not the legal representative of her husband, the name of the minor son of the executant was substituted, at a time when the period of limitation for the suit had expired, it was held that it was not a case of misdescription, because it is clear that a wrong person was impleaded and not that the right person was impleaded by a wrong name or wrong description—*Northern Bank* v. *Ramesh Chandar*, 33 P.L.R. 253, A.I.R. 1932 Lah. 314 (315), 137 I.C. 89 (distinguishing 20 C.W.N. 49).

If parties are effectively represented through those whose actions bind them, so that a decree passed against them is binding on such parties, a specific mention of the name of such party subsequently made in the title of the suit cannot be regarded as the addition of a new defendant for the purpose of limitation. And so, where a suit was instituted within the period of limitation against all the adult members of a joint Hindu family, but after the expiry of that period two more minor defendants were added whose fathers were already defendants in the suit, *held* that it could not be said that new defendants were added, and the suit could not be dismissed against the minors—*Banwari* v. *Sakhraj*, 1931 A.L.J. 421, A.I.R. 1931 All. 585 (586), 135 I.C. 248; *Chetan Singh* v. *Sartaz*, 46 All. 709, 22 A.L.J. 702, A.I.R. 1924 All. 908, 79 I.C. 1001.

The auction-purchaser is a necessary party to a proceeding to set aside an auction-sale. Therefore, if one of the auction-purchasers is made a party after the expiry of the period, the application to set aside the sale will be barred—*Ajiuddin* v. *Khoda Bux*, 50 I.C. 5 (Cal.). In a suit for partition, it is an inflexible rule of law that all interested parties should be joined as plaintiffs or defendants. Where the plaintiff in a suit for partition did not implead some of the co-sharers, the omission was a fatal one which could not be remedied by adding the names of those persons after the period of limitation—*Mahomed Ahmad* v. *Ansar*, 23 O.C. 62, 56 I.C. 304. Where a suit was brought in time making the common manager as well as some of the proprietors parties, and the other co-proprietors were made parties after the period of limitation allowed by law, it was held that the suit against the common manager was rightly brought, and that as the suit against him was in time, it was immaterial whether several proprietors were brought on the record out of time, because the latter were not *necessary* parties—*Chowdhury Kirtibash* v. *Umesh*, 16 C.W.N. 96, 11 I.C. 397, 14 C.L.J. 61. The alienee from a claimant of attached property after an order has been made in his (claimant's) favour and before a suit under O. XXI, r. 63 has been instituted, is not a necessary party to the suit, and his addition after the period of limitation will not necessitate the dismissal of the suit as barred. The case also falls under sub-section (2) of this section as it is a case of assignment of interest, and the suit even so far as the assignee is concerned must be deemed to have been instituted when it was originally brought against the claimant, and not when the assignee from the claimant was added as a defendant—*Krishnappa* v. *Abdul Kader*, 38 Mad. 535, 25 I.C. 11.

In a suit for pre-emption, if the transferee from the original vendee is added as a party, the suit must be held to have been instituted against the transferee only

when he was added as a party—*Karam Dad* v. *Ali Muhammad*, 61 P.L.R. 1913, 31 P.R. 1913, 18 I.C. 70 (73). A suit for pre-emption in respect of a sale was filed against the two joint vendees, but it appeared that one of them had died previously to the suit. An application to bring his legal representatives on the record was not made till after the period fixed for the institution of the suit had expired. *Held* that the suit being barred against the representatives of the deceased vendee was also barred against the surviving vendee—*Hussain* v. *Hakim*, 86 P.R. 1919, 52 I.C. 587. In a pre-emption suit, there were four vendees, *viz.*, T. B. D. and J, but the plaintiff at first joined in his plaint T, D and J, but did not join B (who was the father of T) and on objection being taken, he joined B long after the period of limitation. *Held* that the suit must be dismissed as a whole—*Jwala Das* v. *Gopal*, 26 P.L.R. 447, 88 I.C. 555, A.I.R. 1925 Lah. 343.

The addition, after the expiry of the period of limitation of a minor member of a Mitakshara family as a plaintiff to a suit on the mortgage is not fatal to the suit —*Thakurmani* v. *Dai Rani*, 33 Cal. 1079. Where two executors are jointly appointed under a will, a suit brought by one executor is defective; and the addition of the other co-executor (who is a necessary party) after the period of limitation will bar the suit—*Sreerangathanni* v. *Voithilinga*, 40 M.L.J. 532, 63 I.C. 104. When a person is adjudicated an insolvent, the whole of his property passes to the Official Assignee by virtue of the vesting order. Consequently, nothing is left vesting in the insolvent which would give him a cause of action. So, a suit by an insolvent in his own name, after his adjudication, cannot be maintained, and the substitution of the name of the Official Assignee later on is adding a new plaintiff within the meaning of this section—*Sayad Daud* v. *Mulna Mahomed*, 28 Bom.L.R. 554, 95 I.C. 538, A.I.R. 1926 Bom. 366. But where during the pendency of a suit one of the defendants is adjudicated an insolvent, and the Official Receiver is added as a party defendant, *held* that the addition of the Official Receiver is not an addition of a new party but a continuation of the old proceedings—*Kaliaperumal* v. *Ramachandra*, 53 M.L.J. 142, A.I.R. 1927 Mad. 693, 102 I.C. 444. R as owner of certain land brought a suit for damages for loss of crops. The defendant objected that R was a *benamidar* for his uncle. Thereupon the uncle was added as a second plaintiff at a time when a large portion of the claim had been barred. It was held that the first plaintiff as *benamidar* had full right to bring the suit, because he fully represented in his own person all the rights of the second plaintiff for whom he acted as agent all along. The addition of the second plaintiff's name did not make any difference in the character of the suit and would not necessitate the dismissal of the suit—*Ravji* v. *Mahadeo*, 22 Bom. 672. The impleading of the alleged beneficial owner merely as a matter of caution will not by itself let in the operation of this section, because he will not, in that view, be a new party; *Subramania* v. *Srinivasaraghava*, 1938 M.W.N. 500, A.I.R. 1938 Mad. 687, 177 I.C. 381.

This section in terms applies to plaintiffs suing in their *representative capacity* as well as in their personal capacity. Therefore, where some of the heirs of a deceased are at first made plaintiffs in a suit to recover a debt due to the deceased, the addition of other heirs amounts to addition of new plaintiffs, and if they are added after the period of limitation, the suit as regards them is barred. A plaintiff added or substituted is none the less a new plaintiff even if he is made a party merely for the purpose of more correctly representing the title originally asserted—*Fatmabai* v. *Pirbhai*, 21 Bom. 580 (584).

213. Action in tort:—In suits upon a *contract*, all persons having the same cause of action must sue jointly, and if one of them is added after the period of limitation the whole suit will be barred. But this rule will not apply to actions in

tort in which several persons have been damnified by the same tortious act. Therefore, where a suit for compensation for illegal distraint of crops was brought by one of two persons jointly entitled to the crops distrained, and the other person was added as a plaintiff after his claim was barred, it was held that the whole suit was not barred but the first plaintiff was entitled to compensation as far as he was injuriously affected by the illegal distraint—*Jagdeo* v. *Padarath*, 25 Cal. 285. Where the dedendants were first made defendants as sons and legal representatives of the deceased tort-feasor ,but were discharged and the estate of the deceased was made defendant, but there being no administrator to the estate of the deceased, the sons were again reinstated as defendants, *held* that the suit must be deemed to have been filed as on the date of the re-instatement—*Haveli Shah* v. *Shaikh Painda Khan*, 31 C.W.N. 175 (P.C.), 96 I.C. 887, A.I.R. 1926 P.C. 88.

214. Application by party—Delay of Court:—If the application for addition of parties is made within the period of limitation, but the order of the Court allowing the addition of parties is passed after the period, the date of the application will be regarded as the date of addition of the new parties, and the applicants will not suffer by reason of the delay of the Court—*Ramkrishna* v. *Ramabai*, 17 Bom. 29. It is the date of the application to add a new plaintiff or defendant which is material and not the date on which the party is brought on the record. That is the way in which the words "when he was so made a party" in the section ought to be interpreted; *Praful* v. *Gajendra*, I.L.R. 1944 Nag. 768, 1944 N.L.J. 510, A.I.R. 1945 Nag. 57.

Where an application to add a party-defendant is made, and is granted, whether by the trial Court, or by the Appellate Court in reversal of the trial Court's order rejecting the application, the suit must be deemed to have been instituted against the added party on the date on which the application to add him as a party is made. Otherwise, though an application might be made in time, by the dilatoriness of the Court or by the manœuvres of the opposite party or by a mistaken decision of the Court which had to be put right on appeal or revision, the order to which the party applying was entitled might not be made until the suit had become time-barred—*South Indian Industrials Ld.* v. *Narasimha*, 50 Mad. 372, A.I.R. 1927 Mad. 468, 100 I.C. 680. See also *Ramanlal* v. *Ramgopal*, A.I.R. 1954 Raj. 135.

215. Amendment of plaint, correction of misdescription, etc:—This section is not intended to apply to a case in which the ground on which the original defendant is sought to be made liable is merely shifted, without new persons being introduced as defendants—*Saminatha* v. *Muthayya*, 15 Mad. 417. An amendment of a plaint which does not seek to bring in a new party, but only varies the ground on which the relief was originally sought or asks for a different or additional relief, without changing the cause of action, does not bring the case within sub-section (1) of this section—*Seth Nandaramdas* v. *Zulika*, I.L.R. (1944) Mad. 133, (1943) 2 M.L.J. 1, A.I.R. 1943 Mad. 531. Thus, where a plaint is amended without any persons being newly included as defendants, this section does not apply, and the date of the original presentation of the plaint is the date of the suit—*Mohini Mohun* v. *Bongsi*, 17 Cal. 580 (P.C.). Where in a suit on a promissory note signed by a person on his own behalf and as guardian of a minor, only relief against the assets of the minor in the hands of the guardian was asked for but subsequently an amendment claiming relief against the guardian personally was asked for, it was held that the effect of the amendment was not to add a new person as defendant but to alter the ground on which a person already a defendant was to be held liable, and sec. 22 was not applicable—*Seshagiri Rao* v. *Sesha Giri Rao*, A.I.R. 1935 Mad. 95, 40 L.W. 900, 154 I.C. 747.

A suit was brought for the recovery of amounts alleged to have been spent by the plaintiff (ex-shebait) in protecting the debutter estate, and the defendant (who had been appointed receiver of the debutter essate) as well as all other possible claimants to the office of shebait were made parties. The defendant was sued both in his capacity as receiver and in his personal capacity, but the Court directed an amendment in the plaint so as to raise directly the question as to which of the claimants was at present entitled to the office of the shebait and should represent the estate, and the defendant being found to be entitled to the office of shebait was impleaded as shebait; it was held that the amendment did not alter the nature of the suit and the defendant was not brought on the record as a 'new defendant' within the meaning of this section—*Peary Mohun* v. *Narendra*, 37 Cal. 229 (P.C.), affirming, *Peary Mohan* v. *Narendra*, 32 Cal. 582. In a suit by the committee of a temple against a former trustee for recovery of trust property, if the *cestui que trust* is substantially on the record from the very beginning (*e.g.*, if the suit is instituted on behalf of the temple), the rectification of the original improper representation by a proper representation (*e.g.*, by substituting the name of the proper person to represent the temple in place of an improper person) cures all the original technical defects from the date of the institution of the suit, and the rectification cannot be treated as the addition of a new party—*Subramania* v. *Subba Naidu*, 25 M.L.J. 452, 21 I.C. 421 (423). A suit was at first brought against an idol 'under the sarvarkarship of Basdeo Prosad.' But on objection being taken by the other party, the plaint was amended by describing the defendant as 'Basdeo Prosad, Sarvarakar of the idol.' This amendment was made after the period of limitation. *Held* that such an amendment would not have the effect of introducing a new party into the record, and no question of limitation would arise—*Bodhi Rai* v. *Basdeo Prasad*, 33 All. 735 (F.B.). So also, where a suit by a deity is sufficiently represented by two out of three shebaits, the third shebait when added as a party is not a new plaintiff within the meaning of sub-section (1) of this section, the real plaintiff being the deity itself—*Iswar Sridhar Jew* v. *Jahor*, 49 C.W.N. 37, A.I.R. 1945 Cal. 268. In a suit by a Hindu reversioner to recover property after the widow's death, the plaintiff, in the original plaint, stated that he claimed title through his father, but subsequently amended his plaint by saying that he claimed title through his uncle. *Held* that it was not essential that the plaintiff should have named any intermediate reversioner through whom he claimed title, and as there was no substitution or addition of a new plaintiff, the amendment of the plaint after the period of limitation did not bring this section into operation—*Bisheshar* v. *Hira Lal*, 19 O.C. 221, 36 I.C. 941. Where a party is already on the record either as a plaintiff or as a defendant, an amendment which alters the capacity in which he has been impleaded to one of a different character does not involve an addition of parties so as to attract the provisions of this section. Consequently, an amendment of a plaint by which a suit is converted into a representative action under Or. 1, r. 8, C. P. Code, does not involve the addition of fresh parties, and when made after the period of limitation will not make the suit barred by limitation—*Seth Nandaramdas* v. *Zulika*, I.L.R. (1944) Mad. 133, (1943) 2 M.L.J. 1, A.I.R. 1943 Mad. 531. Where the plaintiff in the original plaint did not say that he was suing on behalf of a Company, and on objection being taken by the defendant, he agreed that the decree should be in favour of the Company, and prayed that the plaint be amended so that the suit might proceed as being instituted on behalf of the Company, it was held that this was not a case of adding a new plaintiff, for the plaintiff was already on the record, but the amendment simply made clear the capacity in which the plaintiff instituted the suit—*Muthukrishna* v. *Rajam Aiyanger*, 30 M.L.J. 57, 33 I.C. 357; *Rajam* v. *Muthukrishna*, 16 M.L.T. 251, 25 I.C. 945. Where the plaintiff originally sued in his personal capacity, and subsequently the plaint was amended so as to show that the plaintiff sued on behalf

of himself and as shebait, the amendment did not amount to an addition or substitution of a new plaintiff—*Kuarmani* v. *Wasif*, 19 C.W.N. 1193, 28 I.C. 818. The plaintiff sued within the period of limitation in his personal capacity for a certain sum of money alleged to have been realised by the defendant from the plaintiff's tenants; but after the expiration of the period he prayed to be permitted to sue also as an administrator to the estate of the deceased proprietor. *Held* that there was no change in the 'person' and that the suit was not barred by limitation—*Naba Kumar* v. *Higheazany*, 51 Cal. 845, 79 I.C 403, A.I.R. 1925 Cal. 419.

If the amendment of the plaint as to the capacity in which the plaintiff was suing introduces a totally new case, this section will apply, and the plaintiff will be deemed to be instituting the suit when he seeks to make the amendment. Thus, where the plaintiff brought a suit against the defendants, alleging that he was a partner with the defendants and asking for an account, but afterwards the plaintiff sought to amend his plaint on the footing that he was not a partner but a servant remunerated by a share of the profits, it was held that the amendment introduced a totally different, new and inconsistent case, and that if the period of limitation had run out on the date the amendment was asked for, the suit would be barred by limitation—*Kalidas* v. *Draupadi*, 22 C.W.N. 104, 43 I C. 893. So also, an amendment, the effect of which is to add a very large number of fresh parties to the suit, though by a special procedure one of their number who happens to be already on the record in his personal capacity is treated as the representative of the whole unincorporated association is essentially a case of adding fresh parties, and when it is after the period of limitation, the suit is barred under this section. Absence of objection to the amendment cannot take away any legal defence which may be open to the fresh parties brought on the record thereby—*Sankara* v. *Kuttani*, 1940 M.W.N. 446, A.I.R. 1940 Mad. 639.

The essential difference between an alteration that comes under the head of mere misdescription and an alteration that comes under the head of substitution is that in the case of a misdescription there is the same person or legal entity throughout, merely the name of the person to be altered, but when person, be it a legal or other person, is to be substituted for another, then the alteration cannot fairly come under the head of misdescription. It is a case of substitution, and this section applies. Therefore an amendment of a plaint which seeks to substitute one legal entity for another after the period of limitation has passed cannot be allowed—*Mangharam* v. *Haji*, I.L.R. (1939) Kar. 275, A.I.R. 1939 Sind 172.

This section only applies to new plaintiffs and defendants made parties *personally* and does not apply where the same legal person remains the plaintiff or defendant but that person has been sued by a wrong name or through a wrong representative. Thus,where a suit was brought against a Municipal Committee in the name of its Secretary, whereas it ought to have been sued in the name of its President, and the name of the President was substituted at a time when a new suit would have been barred, *held* that this amendment did not amount to an addition of a new defendant—*Munni Kasundhan* v. *Crooke*, 2 All. 296. Where a suit was brought by the manager in the name of the firm, the plaintiff being described as "the firm of K. S. by its manager S. S." and the names of the partners were afterwards substituted for the name of the firm, it was held that the case was one of misdescription and not of misjoinder, and did not fall under sec. 22—*Kasturchand* v. *Sagarmal*, 17 Bom. 413. So also where all the partners are impleaded either as plaintiffs or defendants the suit is a properly constituted one, and the addition of plaintiff firm is not necessary—*Rameswarlal* v. *Bejonji*, A.I.R. 1950 Cal. 238. Where a suit was instituted in the name of the 'Chairman, District Board' as plaintiff, but in the Appellate Court the plaint was amended by describing the plaintiff as "the District Board," *held* that the plaintiff

being all along the District Board itself, the amendment was merely in respect of the description of the plaintiff, and did not introduce a new plaintiff within the meaning of this section—*Anukul Chandra* v. *Chairman, Dacca District Board*, 32 C.W.N. 396, (399), A.I.R. 1928 Cal. 485, 113 I.C. 24. Where the defendants in a suit were at first described as a firm doing business; thereafter it was discovered that the defendants were a joint Hindu family doing business under that name, and accordingly the plaint was amended by substituting the names of members of the family for the firm's name, *held* that this was not a case of addition of new parties but only of substitution in order to correct a misdescription, and that the amendment did not affect limitation—*Ram Prasad* v. *Srinivas*, 27 Bom.L.R. 1122, A.I.R. 1925 Bom. 527, 90 I.C. 685. So also where a suit is brought by the members of Hindu joint family with word 'firm' affixed and on objection as to registration of the firm, the plaint is amended by deleting the word 'firm' after the period of limitation, the suit is not barred under this section as the deletion of the word 'firm' is no addition of parties within the meaning of this section. The original description of the plaintiffs as partners is mere misdescription—*Bhagirath* v. *Munga*, 179 I.C. 761, A.I.R. 1936 Pat. 40. And so, where a suit is originally brought against the defendants as members of a joint family, and subsequently the plaintiff amends his plaint by adding an alternative claim against them as partners, there is no change in the *persona* of the parties but only a change in the basis on which the same parties were sought to be held liable, and they cannot be deemed to be newly added under this section—*Bishamberdas* v. *Brijlal*, 33 Bom.L.R. 1985, A.I.R. 1931 Bom. 590 (592). When a plaintiff gives a wrong description of the person whom he intends to sue, and then when he realises his mistake amends the plaint and gives a correct description of the defendant, the case is not one of substitution within the meaning of sec. 22, Limitation Act. It is one of mere misdescription, and the suit ought to be deemed to be instituted against the defendant when the suit is originally filed—*Girdhari Lal* v. *Dharam Das*, A.I.R. 1936 Lah. 147, 162 I.C. 280; *Amrik Singh* v. *Sant Singh*, A.I.R. 1936 Lah. 485, 38 P.L.R. 827, 162 I.C. 734 is distinguishable as it was a case not of misdescription but of one where no defendants at all had been named in the plaint as originally put in. To such a case sec. 22 applies. Where a suit was at first brought by one S as the "authorised manager of the Rajahs," and subsequently at a time when a new suit would have been barred by limitation the Rajahs themselves were substituted as plaintiffs, it was held that the suit being the same, the change of parties did not affect the question of limitation —*Subodini* v. *Ganoda Kant*, 14 Cal. 400. In a suit against a Railway Company to recover damages for loss of goods, the defendant was described in the title as "The Agent, B. B. & C. I. Railway Company," but the amount was claimed against the *Railway Company* and not against the *Agent*. The Railway Company filed an objection that the plaintiff's suit could not lie as it was filed against the *Agent*. *Held* that there was only a misdescription in the title of the Railway Company, and that the plaintiff should be given leave to amend the title by omitting the word "Agent," even though the period of limitation had expired—*Saraspur Manufacturing Co.* v. *B. B. & C. I. Ry. Co.*, 47 Bom. 75, 25 Bom.L.R. 513, A.I.R. 1923 Bom. 452; *Gopiram* v. *Agent, E. I. Railway*, 30 C.W.N. 209, A.I.R. 1926 Cal. 612, 94 I.C. 762. In these two cases the Railway Company not only knew that the various claims were made against it but also considered itself the party sued, and entered appearance. But where in a suit against the Railway Company, the plaintiff described the defendant as Agent of the Railway Company, and subsequently on objection being taken by the defendant to the frame of the suit, the plaintiff sought to amend the plaint by bringing the Company on the record, and he stated that he all along intended to sue the Company and that in substance he sued the Company, *held* that as the plaintiff *knew* that there were two persons in existence (the Company and the Agent) and he brought the suit against one

of them and afterwards applied to have the other brought on the record on the ground that he all along intended to sue the other and that in substance he sued the other, it was not a case of misdescription, and that the amendment had the effect of adding a new party to the suit, and as it was prayed for after the period of limitation the suit was barred—*Agent, B. N. Ry. Co.* v. *Behari Lal*, 52 Cal. 783, 29 C.W.N. 614 (618), 90 I.C. 426, A.I.R. 1925 Cal. 716 (distinguishing 47 Bom. 785). Where a suit was instituted against the "Agent, East Indian Railway Company" and a *personal* decree was sought against the *Agent*, and there was no suggestion in the plaint that it was sought to bind the *Railway Company* by any decree that the plaintiff might obtain against the Agent, *held* that the plaintiff was not entitled, after the period of limitation for the suit had expired, to amend the plaint by substituting the Railway Company for the Agent, as such amendment would have the effect of introducing a new defendant —*E. I. Ry. Co.* v. *Ram Lakhan*, 3 Pat. 230, 78 I.C. 312, A.I.R. 1925 Pat. 37; *Sinehi Ram Behari Lal* v. *Agent, E. I. Ry. Co.*, 2 P.L.T. 679. Where in a suit instituted within time against the Government as responsible for the administration of the railways, the plaint describes the Government as the Secretary of State, and the plaint is subsequently amended after the period of limitation altering the description to the Governor General in Council as required by sec. 79, C. P. Code, the suit is not barred by limitation as the claim being against the same Government it cannot be anything more than a matter of misdescription—*Kanailal* v. *The Governor General in Council*, 46 C.W.N. 18. In a plaint filed against two companies, the defendant companies were described as "the I. G. S. N. & Ry. Co. Ld., and the R. S. Navigation Co. Ld., by their joint Agent, A. E. Rogers." Mr. Rogers filed a written statement that the suit was not maintainable against him. Mr. Rogers then retired from the services of the two companies and left the country. At the trial of the suit the plaint was amended by expunging the name of Mr. Rogers. *Held* that the suit was not at first properly framed, and that it must be taken to have been instituted against the two companies on the date when the plaint was allowed to be amended—*I. G. S. N. & Ry. Co.* v. *Lal Mohan Saha*, 43 Cal. 441, 22 C.L.J. 241, 31 I.C. 35. See also *Madhosingh* v. *Union of India*, A.I.R. 1955 Raj. 57.

Where the suit was originally brought against a 'Company' and the plaint was amended by bringing the individual partners of the Company on the record, the section was held to have no application as there was virtually no addition of *new* defendants but merely the correction of misdescription—*Pragi* v. *Maxwell*, 7 All. 284. In the plaint in a partnership suit two defendants were described as Joharmull Manmull, and the plaint was subsequently amended by substituting the words "Joharmull Khemka and Manmull Khemka;" *held* that such an amendment would not amount to a substitution of new parties, but it was an amendment merely for the purpose of more clearly describing the parties who were already before the Court. Section 22 would not apply to the case—*Seodoyal* v. *Joharmull*, 50 Cal. 549, 75 I.C. 81. In a suit to recover a debt due to a Company which had gone into liquidation, the plaintiff was at first described in the plaint as "The Official Liquidator, Himalayan Bank Limited in Liquidation." Afterwards the plaint was amended and the plaintiff was described as "The Himalayan Bank Ltd. in Liquidation, plaintiff." This amendment did not introduce a new plaintiff into the suit so as to let in the operation of this section—*Muhammad* v. *Himalayan Bank*, 18 All. 198 (F.B.) (overruling *Ghulam* v. *Himalayan Bank*, 17 All. 292). Similarly, where the defendant was wrongly described as 'Mr. P. J. Forbes, but after the period of limitation the mistake was corrected and 'Miss P. J. Forbes' was substituted, it was held that the suit was not barred by limitation since the mistake was a clerical one, and the case was merely one of misdescription—*Jogendra* v. *Forbes*, 32 I.C. 872 (Cal.). Where two sons were placed on the record as the heirs of their deceased father, and subsequently it transpired that the father did not die

intestate, but left a will appointing one of such sons his executor, and the record was altered after expiration of the period by placing that son as executor instead of as heir, it was held that the change in the record was not an addition of a new defendant—*Prosunno* v. *Mahabharat*, 7 C.W.N. 575. Where a suit is filed to recover a sum of money due to him from the estate of a deceased person and his widow is made a defendant and during the pendency of the suit the plaintiff learns that the deceased has left a will and he amends the plaint by impleading the executors as defendants, there is no addition of new defendants and as such this section does not apply—*Subbiah* v. *Umamalal*, (1942) 1 M.L.J. 580, A.I.R. 1941 Mad. 609. The widow of a deceased person was appointed administratrix until her eldest son should attain majority, and a suit was instituted by the widow, after the eldest son had attained majority, under a *bona fide* belief that she was competent to sue as administratrix; but on discovering her mistake she prayed that her three sons should be substituted as plaintiffs, and the substitution was made at a time when the suit if instituted would be barred by limitation; it was held that this was not an addition of new plaintiffs within the meaning of this section—*Nistarini* v. *Sarat Chandra*, 20 C.W.N. 49, 22 C.L.J. 279, 29 I.C. 680.

Where a suit was brought on behalf of Devasthanam in the name of a trustee who was not entitled to represent the idol, the amendment of the plaint by placing the name of the right trustee on the record does not affect the suit. The principle is that when the *cestui que trust* (here the idol) is substantially on the record of a suit from the beginning, the rectification of the original improper representation cures all original technical defects with effect from the date of the institution of the suit, and the rectification cannot be treated as an addition of a new party under this section—*Subramania Aiyar* v. *Subba Naidu*, 25 M.L.J. 451, 21 I.C. 421.

Where a foreign firm institutes a suit in its firm name, which it cannot do in view of O. 30, R.I., C.P.C., and the maintainability of the suit being objected to on this ground the plaint is amended by the substitution of the names of the partners, there is no addition of new plaintiffs but merely a clarification of the individuals already on record, and as such Section 22 of the Limitation Act is not attracted to the case—*Mura Mohideen* v. *Mohomed*, (1955) 1 M.L.J. 337, A.I.R. 1955 Mad. 294.

In the recent case of *Manilal & Sons* v. *Umedbhai & Co.*, A.I.R. 1957 Cal. 688, where an application was made for amendment of the plaint by striking out the name of the plaintiff firm (a non-resident firm not carrying on business in India) as the plaintiff and introducing in its place the names of its five partners, P. B. Mukharji, J. differed from the view taken by the Madras High Court in almost similar circumstances as reported in *Mura Mohideen* v. *Mohomed*, (1955) 1 M.L.J. 337, A.I.R. 1955 Mad. 294 and dismissed the application.

216. Addition of parties by Court:—A Court in joining parties under sec. 32 of the C. P. Code, 1882 [O. 1, r. 10 (2), C. P. Code, 1908] is bound by the provisions of sec. 22, Limitation Act, and cannot disregard any question of limitation in respect of the suit itself as affected by such joi der—*Imam Ali* v. *Baijnath*, 33 Cal. 613; *Ram Kinkar* v. *Akhil Chandra*, 35 Cal. 519 (F.B.) (overruling *Fakera* v. *Azimunnissa*, 27 Cal. 540 and *Grish* v. *Dwarka*, 24 Cal. 640 and virtually overruling 12 Cal. 642 also); *Imamuddin* v. *Liladhar*, 14 All. 524; *Krishnaji* v. *Hanmaraddi*, 58 Bom. 536, A.I.R. 1934 Bom. 385 (386); *Subbaraya* v. *Vaithinatha*, 33 Mad. 115 (117), 5 I.C. 931.

217. Assignment and devolution:—See sub-section (2). Where the added plaintiff or defendant derives his title from the original plaintiff or defendant by an assignment or devolution pending the suit, he will not be treated as a new plaintiff or defendant, and the case is merely one of continuation of the original suit

without any change in the date of the institution—*Fatteh Muhammad* v. *Said Ahmad*, 3 P.R. 1907; *Meyappa Chetty* v. *Subbramania*, (1916) 1 M.W.N. 455, 20 C.W.N. 833, 35 I.C. 323 (P.C.); *Suput Singh* v. *Imrit Tewari*, 5 Cal. 720; *Arunnachella* v. *Orr*, 40 Mad. 722; *Ganpat* v. *Adarji*, 3 Bom. 312 (321). So, where on the death of a party during the pendency of the suit an application to bring the legal representatives of the deceased party is made by one of his heirs and the other heirs are brought on record later on after the period of limitation, the suit does not abate—*Dhanji* v. *Manji*, A.I.R. 1950 Kutch. 83.

The only sort of devolution of interest contemplated by section 22 of the Act of 1877 was devolution by *death;* and therefore where in a suit instituted within time, the plaintiff assigned over his interest, and the assignees were substituted on the record in place of the original plaintiff after the period of limitation had expired, the suit was held to be barred, for the assignees were considered as new plaintiffs under the section—*Harak Chand* v. *Deonath*, 25 Cal. 409; *Abdul Rahaman* v. *Amirali*, 34 Cal. 612 (F.B.). But now sub-section (2) not only contemplates cases in which devolution of interest takes place by death but it extends to *all cases of devolution* including cases of *assignment*.

218. Addition of parties in appeal:—Addition of parties in appeal is governed by O. XLI, r. 20 of the C. P. Code. When a Court takes action under this rule, no question of limitation can arise—*Gajraj* v. *Gouri*, 18 O.C. 90; *Nahi Lal* v. *Lala*, 9 A.L.J. 410, 14 I.C. 35.

This section applies only to plaintiffs and defendants, not to appellants and respondents, as there is no Act which makes the former terms include the latter. Therefore, where a party to a suit is not made a respondent to an appeal, and the Court orders him to be made a respondent, under sec. 559, C. P. Code, 1882 (O. 41, rule 20, C. P. Code, 1908), he cannot object that the time for appealing against him has passed and that no relief can be granted as against him—*Manickya* v. *Baroda Prosad*, 9 Cal. 355; *Sohna* v. *Khalak Singh*, 13 All. 78. Where the liability of two defendants was joint, and the plaintiff by an over-sight appealed against the first defendant only, and the second defendant was made a respondent after the time allowed for appealing against him had expired, it was held that section 22 did not bar the appeal, even so far as it affected the second defendant. The Appellate Court can add or substitute new appellants or respondents even after the expiry of the period of limitation—*Court of Wards* v. *Gaya Prosad*, 2 All. 107. In *Ranjit Singh* v. *Sheo Prosad*, 2 All. 487 the Judges, while holding that the Appellate Court is competent to add a respondent to the appeal, have laid down that the Court is not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent is barred under section 22 of the Limitation Act.

219. Transposition of party:—A party transferred from the position of a defendant to that of the plaintiff is not a new party to whom the provisions of sec. 22 (1) will apply, and the suit cannot be deemed to be filed on the date of such transposition. The original date of filing is the material date of filing for the purpose of limitation—*Dwarkanath* v. *Monmohan*, 19 C.W.N. 1269, 30 I.C. 34; *Nagendrabala* v. *Tarapada*, 35 Cal. 1065; *Husainara* v. *Rahmannessa*, 38 Cal. 342; *Jibanti* v. *Gokool*, 19 Cal. 760; *Municipal Council* v. *Veeraperumal*, 28 M.L.J. 147, 28 I.C. 45; *Khadir Maideen* v. *Rama*, 17 Mad. 12; *Moolchand* v. *Bhup Singh*, 3 Luck. 241, 105 I.C. 473, A.I.R. 1927 Oudh 484; *Rajkishore Lal* v. *Alam*, A.I.R. 1926 Pat. 28, 90 I.C. 82. *Birbal* v. *Thamansingh*, A.I.R. 1955 Raj. 91. If a party already on record is transferred from the category of defendant to that of plaintiff, the provisions of section 22 (1) will not apply, sub-section (2) provides that the change of position

will not affect limitation—*Koman Nair* v. *Moolacheri Nair*, A.I.R. 1935 Mad. 95, 40 L.W. 900, 154 I.C. 747. A suit on a promissory note was instituted against two defendants. The second defendant was removed from the category of the defendant and made a plaintiff at a time, when the suit, if instituted at that time, would have been barred. The plaint was thereafter returned for want of jurisdiction to be filed in proper Court. The plaint was again presented to the proper Court and the same two defendants were made defendants; the second defendant was again removed from the category of the defendant and made a plaintiff, it was held that under sec. 22 (2) of the Act, the suit would be deemed to have been instituted, so far as the second defendant who was made a plaintiff is concerned, on the date when the plaint was presented to the proper Court after return—*Bibhuti* v. *Sree Sree Tarakeswar Jew Shiva Thakur*, 51 C.W.N. 907. But where defendant No. 1 executed a promissory note in favour of defendant No. 2, a benamidar for the plaintiff and the suit by the plaintiff not being maintainable independently, the defendant No. 2 was transposed to the side of the plaintiff, and joined as a co-plaintiff, at a time when the period had expired, *held* that the transposition amounted to bringing a new suit, and as it was made after the period of limitation, the suit must fail. See *Ram Das* v. *Chhota Lal*, 9 P.L.T. 238, A.I.R. 1928 Pat. 24, 104 I.C. 526.

23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.

Continuing breaches and wrongs.

The object of this section is to prevent multiplicity of suits and to enable one action to be brought for all loss suffered during the whole period the breach continued. The person damnified is not obliged to bring successive suits for damages but can wait and bring an action once for all at the end of the term when there is no possibility of future performances of the breach—*Secy. of State* v. *Venkayya*, 40 Mad. 910 (920, 921).

220. Continuing breach:—A breach of a covenant for quiet possession is a continuing breach, and a suit on such breach would not be barred so long as the breach continues—*Raja Balu* v. *Krishnarav Ramchandra*, 2 Bom. 273 (293). A breach of a covenant to repair is a continuing breach, because the covenant is broken every day the premises are out of repair—*Spoor* v. *Green*, L.R. 9 Ex. 99 (111). A lessee allowing rooms to be used contrary to a covenant, when he might have prevented such user, commits a continuing breach of contract—*Doe de Ambler* v. *Woodbridge*, 9 B. & C. 376. The building of a house on his holding by a tenant contrary to the terms of his tenancy is a continuing breach. Limitation, therefore, does not run against the landlord from the moment the first operation of the building is commenced, but commences definitely when it is finally erected—*Surja* v. *Gnanendra*, 179 I.C. 482, A.I.R. 1939 Pat. 149. So also erection and maintenance of huts on an occupancy holding, which is not authorised by sec. 21 of the Chota Nagpur Tenancy Act, is a misuse of that holding which is in the nature of a continuing wrong—*Gaya Prasad* v. *Jagdish*, 1940 P.W.N. 394, 188 I.C. 495. Where contrary to the terms of an agreement the defendant built his *otla* so as to cover up a gutter, it was held that the continuance of the *otla* was a continuing breach of contract—*Ladakchand* v. *Nathu*, 1892 P.J. 299.

Where the directors of a company misapplied and misappropriated the company's funds in *ultra vires* transactions and speculations, there was a breach of contract by

the directors which continued up to the date of the annual meeting when the balance-sheet showing the loss ascertained was laid before the company, and the period of limitation for a suit against the directors ran from the date of the annual meeting—*Govind* v. *Rangnath*, 54 Bom. 226, A.I.R. 1930 Bom. 572 (585), 127 I.C. 305.

By a family arrangement A agreed with B to refund to N the price of certain property sold by A to N of which a share belonging to B, and of which B was put into possession under the arrangement. A having died without having paid the money, N obtained a decree against B for possession of a part of such property. Five years after N's suit, a suit was brought by B's representatives against A's representatives for damages for breach of the agreement. *Held* that this suit was not barred by limitation as the breach was a continuing one and had not ceased even at the date of suit—*Imdad Ali* v *Nijabat Ali*, 6 All. 457. When one of the parties to a contract renders the performance thereof impossible, there is a continuing breach of contract throughout the whole of the contract period, and the suit may be instituted within three years from the expiry of that period—*Gurmukh* v. *Secretary of State*, 16 P.R. 1899. A suit for partition of a house was brought in 1905. The suit was compromised, the defendant agreeing to transfer his interest to the plaintiff for a consideration, and the suit was dismissed. The agreement was not carried out and a second suit was brought for partition. *Held* that the right to partition was a continuing right, and the breach of the agreement was a continuing wrong. The second suit was not therefore barred—*T. C. Mukherji* v. *Afzul Beg*, 37 All. 155, 27 I.C. 694.

This section refers to cases of *continuing* breach of contract, and not to cases of *successive* breaches of contract. Thus, where the purchasers of certain land agreed to pay the vendors certain fees annually in respect to such land and agreed that in default of payment the vendors should be entitled to the proprietary possession of a certain portion of the said land, a suit by the vendors for possession of such portion upon default of payment of the fees by the purchasers must be brought within 12 years (Art. 143) from the date of the first default, and this section did not apply, because the obligation created by the agreement was not of a *continuing* nature, but was of a recurring kind and could admit only of a series of *successive breaches* —*Bhojraj* v. *Gulshan*, 4 All. 493 (496). The case of successive causes of action is provided for in Article 115, and if the contract is registered, in Art. 116.

221. Continuing wrong:—The word "wrong" in this section seems to have been used in a restricted sense, and to imply something in the nature of a tort—*Mohamed Ata* v. *Husain*, 19 Luck. 515, 1944 O.W.N. 37, A.I.R. 1944 Oudh. 139. In considering whether the particular act complained of constitutes a continuing wrong within the meaning of this section for which the cause of action arises *de die in diem*, it is necessary to keep in mind the distinction between an "injury" and the "effects of that injury." Where the injury complained of is complete on a certain date there is no "continuing wrong" even though the damage caused by the injury may continue. In such a case the cause of action to the person injured arises once and for all, at the time when the injury is inflicted and the fact that the effects of the injury are felt by the aggrieved party on subsequent occasions intermittently or even continuously does not make the injury a "continuing wrong" so as to give him a fresh cause of action on each such occasion. If however, the act is such that the injury itself is continuous, then there is a "continuing wrong" and the case is governed by this section—*Khair* v. *Mt. Jannet*, I.L.R. (1941) Lah. 22, A.I.R. 1940 Lah. 359, 191 I.C. 42 (F.B.); *Thaman* v. *Sohna*, 4 D.L.R. 168; *G. D. Bhattar* v. *The State*, A.I.R. 1957 Cal. 483; *District Board of Manbhum* v. *Shyamapada*, A.I.R. 1955 Pat. 432; *Kuchibotha* v. *Tadepalli*, A.I.R. 1957 Andhra 419. To give rise to a continuing wrong there must not be a single wrongful act from which injurious consequences follow, but there must

be a state of affairs every moment's continuance of which is a new tort. The test is not whether the corresponding right is a continuing right but whether the wrong is a continuing wrong. Where the act or wrong is complete, this section has no application—*Radhe Krishna* v. *Radharamanasami*, A.I.R. 1949 Orissa 1; *Krishnaji* v. *Annaji*, 54 Bom. 4, 31 Bom L.R. 1240, A.I.R. 1930 Bom. 61, 63.

Disturbance of the right of worship is a continuous wrong. Thus, where the plaintiffs (Digambari Jains) had been worshipping certain *charans* or foot prints on the Parasnath hill, but the defendants (Swetambari Jains) removed those *charans* and replaced them by *charans* of a different type obnoxious to the plaintiffs, it was held that the action of the defendants was a continuing wrong in respect of which a fresh period of limitation began to run every moment of the day on which the wrong continued—*Hukum Chand* v. *Maharaj Bahadur Singh*, 12 Pat. 681 (P.C.), 14 P.L.T. 559, 37 C.W.N. 1021 (1028), A.I.R. 1933 P.C. 193, 144 I.C. 346.

The construction and occupation of a balakhana by the defendants over the mosque of which they were *mutwallis*, for the purposes of private residence is a continuing wrong so that a fresh period of limitation begins to run at every moment of the time during which the wrong continues—*Muhammad Ahmad* v. *Muhammad Fazal*, 31 P.R. 1917, 39 I.C. 116. Every fresh appropriation of the income of a property by one co sharer to the exclusion of the other co-sharers is a continuing wrong giving rise to a fresh cause of action to those co-sharers for a suit for a declaration of their rights —*Harnam Singh* v. *Makhan Singh*, 21 P.L.R. 1918, 44 I.C. 31. An infringement of a trade mark is a continuing wrong, and a fresh cause of action arises *de die in diem* so long as the infringement continues—*Abdul Salam* v. *Hamidullah*, 97 P.R. 1913. 15 I.C. 116.

A trespass upon immoveable property is a continuing wrong, and the owner may sue the trespasser for compensation within three years of the termination of the trespass *Narasimma* v. *Raghupathi*, 6 Mad. 176. Acts of trespass committed by the defendant over the plaintiff's land, when the defendant has not acquired an easement for passing through plaintiff's land, constitute a continuing wrong giving rise to a recurrent cause of action—*Sheo Prosad* v. *Manager*, 12 A.L.J. 1150, 25 I.C. 185. Trespass or obstruction may in some cases be continuing wrongs and in some cases they may not be. Single acts of obstruction or trespass which are not continued are not continuing wrongs. If, however, the trespass or obstruction is continued by the wrong-doer in the sense that it is not abandoned, the wrong is continuous and this section gives rise continuously to fresh periods of limitation—*Bibhuti* v. *Guru Mahadev*, 19 Pat. 208, 1940 P.W.N. 829, A.I.R. 1940 Pat. 449. But there is no perpetual right of suit under this section, for if the wrong ceases to be a wrong, it cannot be said any longer to continue. The trespass may by lapse of time itself give rise to rights of easement or acquisition by adverse possession. Where the wrong amounts to dispossession of the plaintiff, then, although it may be a continuing wrong, the plaintiff cannot receive possesson after the expiry of the period prescribed therefor—*Bibhuti* v. *Guru Mahadev*, supra; *Kuseshwar* v. *Umakant*, 22 Pat.L.T. 1001, A.I.R. 1942 Pat. 188, 197 I.C. 818. Once it is found that the plaintiff's right is extinguished by the operation of sec. 28 of the Act, it is quite irrelevant whether the wrong is technically continuing or not, so far as the question of recovery of possession of the land is concerned—*Kuseswar* v. *Umakant*, supra; *Akhauri* v. *Deo Narain*, 19 Pat. 852, A.I.R. 1941 Pat. 181, (this section will cease to have any operation the moment when the wrong ceases to be such by virtue of the title conferred by the statute upon the wrong-doer); *Masjid Shahid Ganj* v. *Shiromani Gurdwara, etc.*, 40 P.L.R. 319. A.I.R. 1938 Lah. 369, 175 I.C. 945 (F.B.) (refusal to allow the Muslims to pray on the site after acquiring title by virtue of sec. 28 of the Act is not "continuing wrong". Complete usurpation of possession and occupation and

consequent dispossession of the owner is a wrong which is complete from the moment of the dispossession. It is not a continuing trespass of the character contemplated by this section—*Evangelical German Mission* v. *Mahant Ramsahaigir*, 1939 N.L.J. 153, A.I.R. 1939 Nag. 145, 182 I.C. 613. In case of recurring infringement a suit can be brought at any time before the defendant acquires title by adverse possession—*Srinivash* v. *Ramanuja*, I.L.R. (1941) Mad. 564, (1941) 1 M.L.J. 322, A.I.R. 1941 Mad. 498.

The interference with the right of irrigation of a person is a continuing wrong within the meaning of this section—*Kania* v. *Narain*, 177 P.W.R. 1918, 50 I.C. 299. An obstruction caused by defendant to the immemorial egress of the plaintiff's rain-water over defendant's land is a continuing wrong and the plaintiff's suit for removal of the obstruction is protected from limitation by the express provisions of this section —*Punja* v. *Bai Kuvar*, 6 Bom. 20. The right of proprietors of a village to irrigate from a Kuhl is a recurring right to which sec. 23 applies—*Ram Singh* v. *Sadhu Ram*, 13 L.L.T. 22. Sec. 23 applies to cases of interference with a water course. So also, where the defendants, co-owners of a well, fix a persian wheel over the well to irrigate their lands and the other co-owners in enjoyment of the well bring a suit for the removal of the said wheel, the suit is not barred by limitation as the act complained of does not amount to a complete ouster of the plaintiff from the enjoyment of the well with the result that the injury is continuous and there is, therefore, continuing wrong—*Thaman* v. *Sohna*, 4 D.L.R. 168, A.I.R. 1950 E.P. 21.

In view of the illustration to sec. 24 in respect of interference with a water course, the party injured has a continuing cause of action—*Muthalagappa Chettiar* v. *Navaneetheswara*, A.I.R. 1935 Mad. 668, 69 M.L.J. 42, 1935 M.W.N. 538, 42 L.W. 183, 158 I.C. 987. Where the defendant has not acquired an easement to drain his water on the plaintiff's land or roof, the construction of a drain by the former on the latter's land or roof is a continuous wrong giving rise to a continuous cause of action—*Ramphul* v. *Mistree*, 24 W.R. 97; *Nur Muhammad* v. *Gouri Shanker*, 2 Lah. L.J. 463, 56 I.C. 1003. An obstruction to a water course is a continuous wrong as to which the cause of action is renewed from day to day so long as the obstruction continues—*Rajrup* v. *Abdul*, 6 Cal. 394 (404, 405) (P.C.). The obstruction by the defendant of a channel through which water flowed from a natural stream into the plaintiff's land is a continuing wrong, even though the stream had not a continuous flow and was dry for the greater part of the year—*Mohanth Krishna Dayal* v. *Bhawani*, 3 P.J. 51 (59), 43 I.C. 235. Where the right of a superior riparian proprietor to have the drainage water from his lands permitted to flow off in the usual course, was obstructed by the defendants (lower riparian proprietors) by blocking up the stream, it was held that their act was actionable whether special damage had or had not occurred, and so long as the obstruction continued, there was a continuous cause of action from day to day —*Subramaniya* v. *Ramchandra*, 1 Mad. 335; *Kasiswar* v. *Annoda Prasad*, 22 C.W.N. 666, 41 I.C. 863. A Calingula was constructed by the Government for the purpose of reducing the flow of water into a tank through a channel. The necessary effect of the Calingula would have been to cause the water diverted from the channel to flood the plaintiff's land. To obviate this, a small drainage channel was formed by Government to carry off the surplus water. Plaintiff contended that the drainage channel was not sufficient to carry off the water and that the water which flowed over the Calingula stagnated on his lands and made them unfit for cultivation. He prayed for a mandatory injunction directing that the Calingula be blocked up. The defendant pleaded limitation. *Held* that the injury was a continuing one and that the suit was not barred by limitation—*Sankaravadivelu* v. *Secretary of State*, 28 Mad. 72. The disturbance of a right of ferry is in the nature of a nuisance and a continuing wrong within the meaning of this section—*Nityahari* v. *Dunne*, 18 Cal. 652.

Infringement of a right of way is a continuous wrong giving rise to a cause of action from day to day—*Soojan* v. *Shamed*, 1 C.W.N. 96; *Nirode* v. *Bharat*, 2 I.C. 410; *Nazim* v. *Wazidulla*, 29 I.C. 385, 21 C.L.J. 640. An obstruction which prevents some one from exercising a right of way falls within the scope of the 'continuing wrong' and a fresh period of limitation begins to run under this section at every moment of the time during which the wrong continues—*Masooma* v. *Mohammad*, 1941 A.L.J. 706, A.I.R. 1942 All. 77, 198 I.C. 532. Limitation does not apply in a case of obstruction to a right of way, it being a continuous nuisance—*Aptabuddin* v. *Joharlal*, A.I.R. 1935 Cal. 201, *Nazeem* v. *Wazedulla*, A.I.R. 1916 Cal. 733 followed. There is nothing in this section which will justify any distinction between a public right and a quasi-public or a private right—*Bibhuti* v. *Guru Mahadev*, 19 Pat. 208, 1940 P.W.N. 829, A.I.R. 1940 Pat. 449, 22 Pat.L.T. 46. So also, there is nothing in this section upon which a distinction can be made between an encroachment upon private land and that of an encroachment upon public land. Whether the wrong is a continuing one or not depends upon the nature of the wrong and not upon the nature of the land—*Kuseshwar* v. *Umakant*, 22 Pat.L.T. 1001, A.I.R. 1942 Pat. 188, 197 I.C. 818. Where the plaintiff has a right to use the land on which certain sheds have been erected as a passage, and those sheds are obstructing his passage way, there is a continuing wrong and a suit for declaration of plaintiff's right to use the land and for removal of sheds is governed by sec. 23. Section 3, Limitation Act, makes the provisions of Sch. I, Limitation Act, subject to the provisions contained in sec. 23, so that, if it can be shown that in this case there is a continuing wrong, a fresh period of limitation begins to run at every moment during which the wrong continues—*Saratchandra* v. *Nerodechandra*, A.I.R. 1935 Cal. 405, 156 I.C. 390.

Following *Raj Rup Koer* v. *Abdul Hossain*, (1881) 6 Cal. 394, (a case concerned with an obstruction which interfered with the flow of water), *Soojan Bibi* v. *Shamad Ali*, (1897) 1 C.W.N. 96 (a case of obstruction of a right of way), and *Nazimulla* v. *Wazidulla*, 21 C.L.J. 640 (a case where both flow of water and obstruction of right of way were concerned) it was held in *Moti Ram* v. *Hansraj*, A.I.R. 1936 Lah. 344, 162 I.C. 303 that an obstruction of light and air is analogous to the obstruction of a right of way or flow of water. An obstruction of this nature is a continuing wrong, and the cause of action arising with regard to it is renewed *de die in diem* so long as the obstruction causing such interference is allowed to continue.

Wrongful attachment before judgment, if the attachment continues for any length of time, will be a continuous tort, and a suit for damages for such act will be governed by this section—*Surajmal* v. *Maneekchand*, 6 Bom.L.R. 704. But the Allahabad High Court is of opinion that a wrongful attachment before judgment is not a continuing wrong, as the wrong is complete as soon as the property is seized. That the intention of the Legislature is not to make section 23 applicable to such a case is indicated by comparison with Arts. 19 and 42 under which limitation runs from the date of cessation of the wrong—*Ram Narain* v. *Umrao*, 29 All. 615 (618). The same view is taken by the Madras High Court in *Pannajii* v. *Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (637), 126 I.C. 721.

A wrongful attachment of property by a Magistrate under section 146, Cr. P. Code is a continuing wrong during the time that the attachment continues—*Brojendra* v. *Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242, (dissenting from *Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410); *Panna Lal* v. *Panchu*, 49 Cal. 544; *Jurawan* v. *Ram Sarekh*, 12 Pat. 261, A.I.R. 1933 Pat. 224 (233), 14 P.L.T. 113. So, a suit for recovery of land brought more than six years after attachment under sec sec. 146 Cr. P. Code, is not barred; *Ghamande* v. *Jagarnath*, 175 I.C. 256, A.I.R. 1938 Pat. 212. In Madras, however, it has been held that such an attachment is not a continuing

wrong, as the attachment is not a *wrong*, and the period of limitation for a suit for declaration of title runs from the date of attachment—*Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (416). In a Nagpur case also it has been held that where it is not known whether it was the plaintiff or the defendant who was guilty of interference with possession which led to the proceeding under Ch. XII of the Cr. P. Code, all that one can say as to what led the Magistrate to take possession is that it is either his inability to decide who was in actual possession or his decision that no party was in possession, and that neither of these can be said to be a 'wrong' by the defendant; hence there was no continuing 'wrong' within the meaning of this section during the period of attachment—*Yeknath* v. *Bahia*, 20 N.L.R. 105, A.I.R. 1925 Nag. 236, 85 I.C. 631.

This section applies to a suit for compensation against railway administration for injuring goods if there is a continuing cause of action right upto the date on which the plaintiff is permitted to remove the goods. The deterioration of goods being due to the continuous negligence of the defendant's servants amounts to a continuing wrong—*Sitaram* v. *G. I. P. Railway*, 1947 N.L.J. 540, A.I.R. 1947 Nag. 224, I.L.R. (1947) Nag. 726.

Where the mortgagee in possession who is bound by the terms of the mortgage-deed to pay the Government revenue due on the land neglects to do so, and the mortgaged land is sold, *held* that there is a breach of the cevenant, and the breach is a continuing one The reason is that by the terms of Order 34, rule 7 of the C. P. Code of 1908, the mortgagor on payment of the mortgage-debt is entitled to be put in possession of the mortgaged properties, and this obligation is a continuing obligation on the mortgagee which cannot cease so long as the right of redemption is not barred; therefore the mortgagee's failure to put the mortgagor in possession of the land after redemption, by reason of the land being sold, amounts to a continuing breach of covenant—*Siva Chidambara* v. *Kamatchi Ammal*, 33 Mad. 71.

222. Suit for restitution of conjugal rights:—The refusal of a wife to return to her husband, and allow him the exercise of conjugal rights, constitutes a continuing wrong giving rise to constantly recurring causes of action—*Bai Sari* v. *Sankla Hirachand*, 16 Bom. 714; *Hemchand* v. *Shiv*, 16 Bom. 715 (Note); *Binda* v. *Kaunsilia*, 13 All. 126; *Basawanewa* v. *Shivappa*, A.I.R. 1936 Bom. 289.

Arts. 34 and 35 of Act XV of 1877 required a suit for the recovery of wife or for the restitution of conjugal rights to be instituted within two years from the date of *demand;* but as the personal law of Hindus and Muhammadans does not require an antecedent demand in such suits, Articles 34 and 35 could not apply to those suits. The limitation applicable to those suits was held to be Article 120 read with section 23, so that those suits were practically exempt from the bar of limitation—*Binda* v. *Kausilia*, 13 All. 126. Articles 34 and 35 have been omitted from the present Act, so that those suits are now totally saved from limitation. See notes after Article 35.

But a suit for dissolution of marriage or for a declaration that a divorce had taken place between the parties is essentially different in cause of action from a suit for restitution of conjugal rights. Section 23 has no application to the former kind of suits—*Md. Hamidullah* v. *Fakhr Jahan*, 65 I.C. 425, A.I.R. 1922 Oudh 109. Under Mahomedan law marriage is a civil contract and husband's impotency is a continuing breach of contract of marriage within the meaning of this section. Hence a suit by wife for dissolution of her marriage with her husband on the ground of husband's impotency continuing from the date of marriage upto the date of the suit is not capable of being barred by limitation; *Mt. Sahibzadi* v. *Abdul*, 185 I.C. 744, 41 P.L.R. 867, A.I.R. 1939 Lah. 454.

223. What are not continuing breaches and wrongs:—Where a lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent-free for six years, and that in the beginning of the 7th year he should cause the lands to be measured and a settlement of rent made in respect of reclaimed lands, failing which the land-lord would be entitled to possession, *held* that the period of limitation for a suit by the lessor for ejectment on the ground of lessee's failure to comply with the above-mentioned provision ran (under Art. 143) from the lessee's failure to cause the measurement, and there was no *continuing* breach of contract under this section, because when the tenant failed to cause the measurement at the time prescribed by the lease, the breach was *complete*—*Goohi Sheikh* v. *Mathewson*, 11 C.W.N. 661 (663). Where the suit is for ejectment of the defendant from a specific field, the fact that the field has been recorded as part of a thoroughfare and *shamilatti-deh* does not bring the suit under sec. 23—*Achar Singh* v. *Badhawa*, 124 P.R. 1912, 15 I.C. 285 (286).

Upon failure to pay the principal and interest secured by a bond on the day appointed for such payment, a breach of the contract to pay is at once committed, but the fact that no payment is subsequently made does not constitute a continuing breach—*Mansab Ali* v. *Gulab Chand*, 10 All. 85; *Bhagwant* v. *Daryao*, 11 All. 416. Where a mortgage-deed provided that interest should be paid annually and that on failure of the payment of any year's instalment the mortgagee should be entitled to take possession, the mortgagee's cause of action accrued on the first failure to pay interest, and there was no continuing breach of contract—*Achhar Mal* v. *Hukman*, 28 P.R. 1897. A clause in a *wajib-ul-arz* of a village ran as follows: "If a resident of this village shall leave his residence and go to and settle in another village, he shall not be entitled to cultivation and possession." *Held* that though it should be treated as an agreement between the proprietors on the one hand and the tenants on the other that the abandonment by a tenant of his residence in the village and his settling elsewhere involved a forfeiture of the lease, still it was not an agreement capable of continuous breach within the meaning of this section, and the period of limitation (under Art. 143) would run from the time when the forfeiture was incurred or the condition was broken—*Dhian Singh* v. *Mehan Singh*, 180 P.R. 1883.

An illegal distress or attachment of the tenant's crops by the landlord is not a continuing worng. The wrong is complete and the cause of action arises on the date when the unlawful distress is made—*Pamu Sanyasi* v. *Zemindar of Jayapur*, 25 Mad. 540; *Venkataramier* v. *Vaithilinga*, 38 Mad. 655. But where the landlord detained the tenant's moveables even after the attachment had been set aside, the detention was held to be a continuing wrong—*Yamuna Bai* v. *Solayya*, 24 Mad. 339. The Allahabad High Court lays down the general rule that wrongful distraint is always a continuing wrong which is renewed every day that the distraint lasts and limitation runs from the date on which the distraint comes to an end—*Jhabhu* v. *Batul*, 45 All. 208, A.I.R. 1923 All. 146, 73 I.C. 299. So also, seizure of the property of a stranger by wrongful attachment in execution is not a continuing wrong within the meaning of this section as once the property is attached the judgment-creditor does nothing and has no duty, analogous to that of a bailee, towards a stranger whose property has been attached—*Eng. Gim Moh* v. *Chinese Merited Banking Co. Ltd.*, A.I.R. 1940 Rang. 276 (F.B.).

An inamdar gave his permanent tenant notice to pay enhanced rent or quit the land on a certain date, and more than 12 years after the date mentioned in the notice, sued the tenant to recover the enhanced rent or to eject. It was held that the suit was barred and that this section had no application to the case—*Gopalrao* v. *Mahadevrao*, 21 Bom. 394 (396). No reason has been stated in the judgment, but it appears from the argument of counsel that the right to demand at the usual rate

may be a recurring right giving rise to a continuous cause of action, but the claim to demand *enhanced* rent is not a recurring right.

The starting point for computing limitation in a suit for the return of the share money contributed by a person to an unregistered association of more than 20 members is the date on which the money is paid and there will be no recurring cause of action—*Kumaraswami* v. *Chinnathambi*, A.I.R. 1951 Mad. 291.

A *rowak* or platform was erected by the defendant as an integral part of his building, and was in existence for about 50 years, but the land upon which the *rowak* stood belonged to the Municipality. It was held that the Municipality lost their right, under Article 146A of this Act, to that portion of the land upon which the *rowak* stood, and that section 23 had no application as there was no *continuing* wrong, the injury being *complete* on the erction of the *rowak;* and the mere fact that its effect continued could not extend the time of limitation—*Ashutosh Sadhukhan* v. *Corporation of Calcutta*, 28 C.L.J. 494, 49 I.C. 93. An encroachment on the highway is not a continuing wrong. As soon as the encroachment is made, the wrong is complete—*Municipal Commissioners* v. *Sarangapani*, 19 Mad. 154 (157). This section has no application in a suit for the removal of an encroachment made by the defendant by projecting his eaves on a part of the plaintiff's holding as the projection of the eaves amounts to an act of trespass and it is complete as soon as the projection is completed and the continuance of the projection does not amount to a continuing wrong—*Ambadas* v. *Dattatraya*, I.L.R. (1944) Nag. 753, 1944 N.L.J. 467, A.I.R. 1945 Nag. 78. Plaintiffs and defendants were joint owners of a courtyard. The defendants erected certain *chappars* or thatched sheds in front of the plaintiff's house. Plaintiffs brought a suit for perpetual injunction directing the defendants to remove the thatched sheds and to restore the court-yard to its former condition. *Held* that this section was inapplicable, in as much as the moment the *chappars* were erected the injury complained of and sought to be removed by the injunction was complete, and there was no continuing injury under this section—*Lal Singh* v. *Hira Singh*, 3 Lah.L.J. 128, 60 I.C. 20. Where the defendant threw sulphuric acid on the face of the plaintiff, the period of limitation for a suit for damages for personal injury (Art. 22) ran from the date on which the sulphuric acid was thrown on the plaintiff, and the continuance of its effects up to a later date resulting in loss of one eye did not make the wrong a continuing wrong within the meaning of this section—*Abdulla* v. *Abdulla*, 25 Bom.L.R. 1333, A.I.R. 1924 Bom. 290.

Where a surety for a judgment debtor undertakes to produce him on each date of hearing, and further stipulates that in case of default he will be liable to pay the whole amount due under the decree, the right to apply for execution against the surety accrues when the surety fails to produce the debtor on a certain date. It is not a case of continuous breach of surety bond and sec. 23 has no application—*Jalan Din* v. *Mehanga Ram*, A.I.R. 1935 Lah. 174, 37 P.L.R. 72, 153 I.C. 459.

This section does not apply to a suit brought by a Union Board for the recovery of a strip of land alleged to be a part of a public road—*Dhajadhari* v. *Union Board of Kendragoria*, 45 C.W.N. 802, 73 C.L.J. 608, A.I.R. 1942 Cal. 151.

Declaratory suit:—The principle of this section has no application to a declaratory suit (*e.g.*, a suit for a declaration that properties improperly alienated are the subject of a trust), and there is no recurring cause of action for a declaratory relief—*Moulvi Md. Fahimul* v. *Jagut Ballabh*, 2 Pat. 391 (403), A.I.R. 1923 Pat. 475, 74 I.C. 403. This section applies to a continuing *wrong* and not to a continuing *right*. A declaratory suit under sec. 42, Specific Relief Act can be brought when the plaintiff's title is denied by some person, and the denial itself gives a cause of action for a

declaratory relief. To such a suit, sec. 23 of the Limitation Act cannot apply—*Krishnaji* v. *Annaji*, 54 Bom. 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom. 61 (63), 124 I.C. 774. It has been observed by the Calcutta High Court that suit for a declaratory relief, except in cases specifically provided for by the Limitation Act (*e.g.*, Arts. 118, 124) cannot be held to be barred so long as the right to the property in respect of which the declaration is sought for is a subsisting and continuing right—*Chukkan* v. *Lolit Mohan*, 20 Cal. 906 (925). But this ruling has been dissented from in the Patna and Bombay cases cited above, as well as in *Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (416).

A suit to set aside an order passed under sec. 147 Cr. P. C. directing that no organised procession of certain communities should pass along certain streets until a Civil Court had declared that there was a right to do so, is governed by Art. 120. There is no continuing wrong caused by the defendants—*Punna Nadar* v. *Kumaru*, A.I.R. 1935 Mad. 967, 69 M.L.J. 739, 42 L.W. 599.

Suit for compensation for act not actionable without special damage.

24. In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

Illustration.

A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.

224. Specific injury:—The section applies only to suits based on tort and does not apply to a case of negligence which constitutes a breach of contract—*Annamalai* v. *Firm of Advocates*, A.I.R. 1938 Rang. 258, 176 I.C. 608. The principle of this section is this: Where the cause of action lies, not in a specific act or omission, but in the resulting damage, the statute runs from the time when the plaintiff sustains the loss—*Whitehouse* v. *Fellows*, (1861) 10 C.B.N.S. 765. Where an act is rightful in itself, *i.e.*, unless and until damage results from it to another, the right of action is not complete and the time therefore does not run until the damage—*Roberts* v. *Read*, 16 East 215. This section should not be construed to mean that if a suit for compensation for malfeasance or misfeasance arises out of some specific injury to the plaintiff's property, the case will be taken outside Article 36, and would fall under the residuary Article 120. The effect which this section causes in the operation of the statute of limitation is not to extend or to restrict any period of limitation, but to modify the date or time from which the cause of action arises. That is to say, if a suit is for compensation for any malfeasance or misfeasance independent of contract, and not otherwise provided for, the limitation will be 2 years under Art. 36, and time will run not from the date of the malfeasance or misfeasance but from the time when the injury results—*Jagannath* v. *Kalidas*, 8 Pat. 776, 10 P.L.T. 191, A.I.R. 1929 Pat. 245 (246). See also *Kothari & Sons* v. *Krishna Rao*, A.I.R. 1953 Mad. 726.

But where the wrongful act of the defendant itself gives rise to a cause of action, irrespective of any specific injury, this section does not apply. Thus, where the defendant threw sulphuric acid on the face of the plaintiff, which resulted in the loss of one of his eyes, the act of the defendant was itself sufficient to give rise to a cause of action for damages for personal injury (Art. 22) as such an act was clearly punishable

under the I. P. Code. Time would run from the date when the act of throwing sulphuric acid was committed, and not from the date when the specific injury (*viz.*, loss of eye) resulted—*Abdulla* v. *Abdulla*, 25 Bom.L.R. 1333, A.I.R. 1924 Bom. 290.

Where the directors of a company misapplied the company's funds in speculative transactions, a suit (application) against the directors under sec. 235 of the Indian Companies Act is a suit for compensation, and the specific injury may be said to have resulted to the company on the date of the annual meeting when the balance-sheet showing the losses to the company was placed before the meeting—*Govind* v. *Rangnath*, 54 Bom. 226, A.I.R. 1930 Bom. 572 (585), 127 I.C. 305. Sec. 24, Limitation Act cannot have any control over Art. 115 or for that matter Art. 116. Sec. 24 applies not to suits based on contract, but to suits based on tort. As sec. 24 has nothing to do with Art. 115 time for the purpose of limitation must be computed from the date on which the contract was broken, that is, the date on which the cause of action arises—*V. M. Gany* v. *Leong Chye*, A.I.R. 1936 Rang. 510. The breach of contract *per se* gives rise to a cause of action, and time begins to run from the date of the breach and not from the date of the actual loss or damage.

The word "injury" in this section includes a legal injury—*Govind* v. *Rangnath*, supra.

When a municipality caused subsidence of the plaintiff's house by carrying on certain excavations in the suboil and the plaintiff claimed damages, *held* that the right to sue accrued to the plaintiff not from the date of excavation or subsidence but from the happening of the damage caused by the subsidence which followed the excavations —*Dwarkanath* v. *Corporation of Calcutta*, 18 Cal. 91 (99). A second or further subsidence may give rise to a second cause of action. But as no suit lies without damage, if the second subsidence does not cause to the plaintiff fresh damage, such subsidence does not give him a fresh right to sue—*Dwarka Nath* v. *Corporation of Calcutta*, supra.

Each separate specific injury constitutes a fresh cause of action, and a separate period of limitation will run for each. Thus, if the defendant excavates in his own land and thereby causes a subsidence in the plaintiff's, the person injured ought to sue in one action for all the effects, both existing and prospective, of that subsidence. But if in consequence of the defendant not supporting the plaintiff's land, another subsidence occurs some years afterwards, in consequence of the same excavation, the plaintiff will be entitled to bring a second suit for the subsidence, and limitation will run from the date on which it occurred—*Mitchell* v. *Darley Main Colliery Co.*, 14 Q.B.D. 125; on appeal, (1885) 11 App. Cas. 127.

This section applies to a suit for damages against a railway company for allowing the goods delivered for carriage to be injured by rain etc., as no suit will lie unless and until specific injury occurs to the plaintiff—*Sitaram* v. *G. I. P. Railway*, I.L.R. (1947) Nag. 726, 1947 N.L.J. 540, A.I.R. 1947 Nag. 224.

The illustration to this section is based on *Backhouse* v. *Bonomi*, (1858) 9 H.L.C. 503.

Sec. 24 does not give, as the date from which time begins to run, the date on which the plaintiff becomes aware of the loss but mentions the date on which the loss actually results—*Tavoy Municipality* v. *U. Khoo Zun*, A.I.R. 1936 Rang. 313, 9 R.R. 87, 164 I.C. 410.

25. All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

Computation of time mentioned in instruments.

Illustrations.

(*a*) A Hindu makes a promissory note bearing a Native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiration of four months after date computed according to the Gregorian calendar.

(*b*) A Hindu makes a bond, bearing a Native date only, for the re-payment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiration of one year after date computed according to the Gregorian calendar.

225. Native date:—This section creates no presumption as to the date of document but merely provides that periods of limitation shall be worked out according to the Gregorian calendar—*Achuthan* v. *Achuthan*, (1941) 1 M.L.J. 502, A.I.R. 1941 Mad. 587. Thus where a promissory note bears both the English date, 16th November, 1934 and the Malayalam date Thulam 30. 1110, corresponding to 15th November 1934 and a suit is filed on 16th November 1937, the question as to the date of the promissory note is to be decided by evidence and probabilities according to section 96 of the Evidence Act—*Achuthan* v. *Achuthan*, supra. In a simple unregistered bond, the date for repayment of money was fixed as 30th Chait 1286 (11th April 1880). The parties computed the time according to the Bengali Calendar, and 30th Chait 1289 being a holiday, the suit to recover money on the bond was instituted on the 1st Baisakh 1290 (13th April 1883). The suit was held to be barred; time must be computed according to the English Calendar and the suit ought to have been instituted within 11th April 1883 (29th Chait 1289)—*Deb Narain* v. *Ishan*, 13 C.L.R. 153. See also *Dwarka* v. *Raja Ram*, 13 A.L.J. 486, 29 I.C. 980. The plaintiff sued on a note bearing a native date, Ashad Vadya 13th, Shak 1799 (7th August 1877), and containing a stipulation for payment of the money to this effect:—"In the month of Kartic, Shak 1799,—that is to say, in four months,—we shall pay in full the principal and interest." The plaint was filed on the 6th December 1880. It was held the period of four months for repayment of the debt was to be calculated according to the Gregorian Calendar; that the mention of Kartic 1799 as the time for repayment did not affect the question; that the period of four months expired on the 7th December 1877 (although that date corresponded with Margashirsha Shudhi 3rd), and that therefore the suit was not barred—*Rango* v. *Babaji*, 6 Bom. 83. Similarly, where a registered bond dated 16th April 1924 provided for payment in six months, the date of payment being fixed as Kuar Sudhi Puran Mashi 1332 Fasli, which corresponded to 13th October 1930, it was held that the date of payment should be calculated as six months from 16th April 1924, *i.e.*, it would fall on 16th October 1924; and therefore a suit filed on 15th October 1930 was within time. Kuar Sudhi Puran Mashi of the Fasli year was a moveable date and could not be taken as the date of payment with reference to which limitation should be calculated—*Pulai Ram* v. *Sanchit*, 8 O.W.N. 834, 134 I.C. 601, A.I.R. 1931 Oudh 357 (358). Where a deed was to operate for 16 years, and the parties meant it to run for 16 Telegu years, *held* that notwithstanding the intention of the parties, the years must be deemed to be Gregorian Calendar years. Section 25 is absolute and there is no saving of cases in which it appears on the face of the contract that lunar months were intended by the parties—*Venkatasubrahmanya* v. *Bhiravaswami*, 53 M.L.J. 447, 105 I.C. 241, A.I.R. 1927 Mad. 917. A mortgage bond was dated 8th Asar 1283 Fasli (14th June 1876) and the money was stipulated to be repaid in the "month of Jeyth 1289 Fasli, being a period of six years." The last day of Jeyth 1289 answered to the 1st June 1882. It was held that the period of six years from the date of the bond ended on the 14th June 1882, the time being calculated according to the Gregorian Calendar, and therefore a suit instituted on 12th June 1894 was in time—*Latifunessa* v. *Dhan Kunwar*, 24 Cal. 382. Where a deed provides for payment

within a stipulated period of years, the year shall mean the year reckoned according to the British Calendar—*Raja Ram* v. *Rameshwar*, A.I.R. 1936 Oudh 270.

If a starting point is to be calculated as so many months or so many years from a particular date, that point must be calculated according to the Gregorian Calendar. But if the starting point is otherwise fixed by the stipulation itself, as for instance where the intention was that the interest should be payable at the expiry of six months according to the Hindi Calendar, (that is to say on a *particular* date and not at the expiry of six months) and that the cause of action should arise on default, this section is not applicable—*Roshan Lal* v. *Chowdhury Bashir Ahmed*, 22 A.L.J. 902, 82 I.C. 330, A.I.R. 1925 All. 138.

PART IV.

ACQUISITION OF OWNERSHIP BY POSSESSION.

Acquisition of right to easements.

26. (1) Where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

(2) Where the property over which a right is claimed under sub-section (1) belongs to the Government, that sub-section shall be read as if for the words "twenty years" the words "sixty years" were substituted.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a*) A suit is brought in 1911 for obstructing a right of way. The defendant admits the obstruction, but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption from 1st January 1890 to 1st January 1910. The plaintiff is entitled to judgment.

(*b*) In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff, on one occasion during the twenty years, had asked his leave to enjoy the right. The suit shall be dismissed.

The word "Government" in sub-section (2) was substituted for the word "Crown" by the A. O. 1950.

This section may be compared with sec. 15, Easements Act.

226. Scope of section:—This section is concerned only with *the acquisition* of the easement, and does not purport to measure the *extent* of the right or to indicate the *remedy* by which a disturbance of the right is to be vindicated; for that recourse must be had to the English law—*Paul* v. *Robson*, 39 Cal. 59 (76), 12 I.C. 60.

227. Easement defined:—Section 4 of the Indian Easements Act (V of 1882) defines an easement as "a right which the owner or occupier of certain land possesses, as such, for the beneficial enjoyment of that land, to do and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of, certain other land not his own. ...'Land' includes also things permanently attached to the earth: 'beneficial enjoyment' includes also possible convenience, remote advantage, and even a mere amenity; and the expression 'to do something' includes removal and appropriation by the dominant owner, for the beneficial enjoyment of the dominant heritage, of any part of the soil of the servient heritage or any thing growing or subsisting thereon." This definition of 'Easement' however will prevail only in those provinces (*viz.*, Madras, C. P., Coorg, Bombay and U. P.) to which the Easements Act applies. The other provinces will be guided by the definition given in sec. 2 of this Act.

On the other hand, the present section and the one following as well as the definition of easement in sec. 2 will not apply to those provinces to which the Easements Act extends. See sec. 29, sub-sec. (4).

For a discussion of the characteristics of an easement as understood in the English law, see Re Ellenborough Park, 1955, 3 All. E.R. 667.

228. Profit a prendre:—In India, it has been held that the word 'easement' as defined in sec. 2 of this Act has a much more extensive meaning than the word bears in the English law and embraces what in English law is called a *profit a prendre*, that is to say, a right to enjoy a profit out of the land of another. A prescriptive right of fishery is therefore an easement and may be claimed by any one who can prove a 'use' of it, that is, who can prove that he has of right claimed and enjoyed it without interruption for a period of twenty years, although he does not allege and cannot prove that he is, or was, in possession and enjoyment or occupation of any dominant tenement—*Chundee* v. *Shib*, 5 Cal. 945; *Loknath* v. *Jahania*, 12 I.C. 305, 14 C.L.J. 572; *Hill & Co.* v. *Sheoraj*, 1 Pat. 674, 64 I.C. 346, A.I.R. 1923 Pat. 58. So also, a right to take earth from the land of another person is a *profit a prendre in gross*. Nevertheless, it falls within the extended meaning given to the word 'easement' in this Act and a right of this kind can, in consequence, be acquired by prescription—*Darbari* v. *Khatir*, A.I.R. 1950 Pat. 202.

229. Air and light:—The Indian law, unlike the English Prescription Act places light and air on the same footing—*Delhi and London Bank* v. *Hem Lall*, 14 Cal. 839 (855). The only amount of light for a dwelling house which can be claimed by prescription or by length of enjoyment without an actual grant, is such an amount as is *reasonably necessary* for the convenient and comfortable habitation of the house—*Ibid* (at p. 854), following *Bagram* v. *Khettranath*, 3 B.L.R.O.C. 45 (46); *Modhoosoodun* v. *Bissonath*, 15 B.L.R. 361. The amount of light enjoyed during the period of prescription should not be taken into consideration in measuring the amount

of light to which the dominant owner is entitled. He does not obtain by his easement a right to *all* the light he has enjoyed. He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind, having regard to the locality and surroundings—*Jolly* v. *Kine*, [1907] A.C. 1; *Colls* v. *Home and Colonial Stores*, [1904] A.C. 179; followed in *Paul* v. *Robson*, 42 Cal. 46 (P.C.). Where there has been an interference with ancient lights, no action can be maintained unless the comfort and convenience of dominant premises have been affected considering their nature and locality, and the amount of light still left—*Debendra* v. *Surendra*, 31 C.W.N. 419 (425), A.I.R. 1927 Cal. 345, 102 I.C. 370. An interference with the access of light and air to plaintiff's house, by building on adjoining land, is not actionable unless the obstruction is such as to cause what is technically called a *nuisance* to the house, in other words, it must be such as to render the house unfit for the ordinary purposes of habitation or business; there is no such thing as a right to the uninterrupted flow of south breeze; and the only amount of light for a house which can be claimed by prescription or by length of time without an actual grant is such an amount as is reasonably necessary for the convenient and comfortable habitation of the house—*Delhi and London Bank* v. *Hem Lal*, 14 Cal. 839.

The ownership of the aperture through which the light and air have been enjoyed, or the ownership of the structure surrounding the aperture, is immaterial. It makes no difference if the wall through the aperture of which the light has come to the plaintiff's building belongs to the plaintiff or to the defendant. The question is, has the plaintiff's building enjoyed the access of light and air from the defendant's premises through a *defined channel*. Light and air might have come from the defendant's premises without obstruction of any kind or through an opening or aperture in the defendant's premises, but if for 20 years it has come to the plaintiff's building in a *defined channel* by the *same access*, the conditions of this section are fulfilled—*Jotindra* v. *Probodh Kumar Dutt*, 59 Cal. 260, 35 C.W.N. 963 (968), A.I.R. 1932 Cal. 249, 138 I.C. 193.

A lessee of land, who owns a building thereon, can acquire by prescription a right to light and air against another lessee under the same landlord in respect of the adjacent plot. In such cases, there is no question of unity of ownership as regards the two tenements and the principle that the possession of the tenant is really the possession of the landlord cannot really affect the situation—*Nagendra* v. *Priya*, 43 C.W.N. 636. But in the case of joint property, every co-sharer has a right to use it, consistently with the rights of other co-sharers until partition. Where therefore one of the co-owners of a joint wall erects a wall on the joint wall and keeps ventilators in the wall so erected, he does so consistently with the rights of the co-owner and hence cannot acquire a right of easement in respect of ventilators against the co-owner—*Onkar* v. *Lala Muni Lal*, 41 P.L.R. 267, A.I.R. 1939 Lah. 28, 182 I.C. 498.

229A. Peaceably:—The word "peaceably" means that the plaintiff who claims to be the dominant owner has neither been obliged to resort to physical force himself at any time to exercise his right within 20 years, nor had he been prevented by the use of physical force by the defendant in his enjoyment of such right—*Muthu Goundan* v. *Anantha*, 29 M.L.J. 685, 31 I.C. 528. Whether the user has been peaceable or not is a pure question of fact—*Sitakanta* v. *Radha Gobinda*, 56 Cal. 927, 33 C.W.N. 517 (518). Repeated obstructions or interruptions by or on behalf of the servient owner show that the enjoyment has not been as of right—*Eaton* v. *Swansea Water Works Co.*, 17 Q.B. 267.

230. "Openly enjoyed":—There is a difference between the mode of enjoyment of air and light on the one hand and of the other easements on the other hand. It is sufficient if the air and light have been enjoyed peaceably, but the other easement must have been enjoyed *openly* and peaceably. The reason of this difference is that every one can see what light and air his neighbour is enjoying by looking at the outside of his neighbour's house, but other easements such as a right of way may be used clandestinely.

The word "openly" means that the enjoyment has from the very beginning been visible and manifest, not furtive or secret—*Ram Sarup* v. *Abdul Haq*, 12 Lah. 741, A.I.R. 1931 Lah. 395 (397), 135 I.C. 51.

Where a party in the course of acquiring a right of way by user, himself blocks up the passage permanently, which renders the enjoyment of the easement impossible so long as the obstruction continues, there cannot be said to be an open enjoyment of the way within the meaning, of this section—*Sham Churn* v. *Tariney*, 1 Cal. 422.

Under the English law, a right of way cannot be gained by prescription unless with the *knowledge* of the owner of the servient tenement. "In order that such user may confer an easement it follows that the owner of the servient tenement must have *known* that such an easement was being enjoyed and also have been in a position to interfere with and obstruct its exercise, had he been so disposed"—Gale on Easements; *Dalton* v. *Angus*, 6 App. Cas 828. But this rule seems to be inapplicable to India, because nothing is said in the Indian Limitation Act as to the knowledge of the servient owner being necessary for the acquisition of the right. The words "peaceably and openly" have been introduced into the Indian Act for the purpose of preventing those rights being acquired by stealth or by a constantly contested user. but actual knowledge of the user on the part of the servient owner is not necessary—*Arzan* v. *Rakhal Chunder*, 10 Cal. 214 (218). It must at least been shown that the servient owner might be expected to have known of the assertion of the right of easement on the part of the dominant owner; *Murugappa* v. *Chettyar Firm*, A.I.R. 1939 Rang. 34, 180 I.C. 477.

231. "As an easement":—A right of ownership and a right of easement are incompatible. If a person claims a site as owner, he cannot claim a right of way or user of watercourse over the same as an easement—*Chunilal* v. *Mangal Das*, 16 Bom. 592. The words "as an easement" show that the acts relied upon as evidence of the existence of a right must be done by one person upon the land of *another*. The acts must not be done by him upon his own land or land in his possession. While unity of possession lasts, no question of easement can arise—*Anderson* v. *Juggodumba*, 6 C.L.R. 282 (284); *Murugappa* v. *Chettyar Firm*, A.I.R. 1939 Rang. 34, 180 I.C. 477. A person as dominant owner cannot enjoy an easement against himself as servient owner—*Modhoosoodun* v. *Bissonauth*, 15 B.L.R. 361. On this principle, an easement is extinguished when the ownership of the dominant and the servient tenements vests in the same person.

A right of easement cannot be acquired against the landlord by the tenant in other lands of his landlord; since the landlord cannot enjoy a right of easement as against himself, so his tenant would not be able to have such a right as against him—*Moni Chunder* v. *Baikantha*, 29 Cal. 363. But a lessee can acquire a right of easement against another lessee of the same landlord—*Nagendra* v. *Priya*, 43 C.W.N. 636.

232. Enjoyment "as of right":—The term "as of right" is a well known legal expression which is not synonymous with "rightfully," but it signifies enjoyment

by a person in the assertion of a right—*Ram Sarup* v. *Abdul Haq*, 12 Lah. 741, A.I.R. 1931 Lah. 395 (397), 135 I.C. 51, 33 P.L.R. 139; *Modhoosoodun* v. *Bissonauth*, 15 B.L.R. 361. The expression "as of right" means more than 'rightfully' or 'without trespass and under a strict legal right," and imports a claim or assertion of right to act against the will of the servient owner—*Dwarka*, v. *Patna City Municipality*, 19 Pat.L.T. 511, A.I.R. 1938 Pat. 423, 177 I.C. 315. The words "as of right" connote that the person claiming the right must have exercised it as if he had been true owner *without permission or license* from any one.—*Sunder* v. *Nag*. 4 P.R. 1917, 37 I.C. 788; *Futteh Ali* v. *Asghar Ali*, 17 W.R. 11; *Diwan* v. *Jagta*, 1 Lah. 206 (209), 56 I.C. 728. Enjoyment of a right by a person really means that there must be an exercise of that right by *that person*. So an owner of a latrine cannot claim a right of way over a passage belonging to another person even though the said passage is used by the sweepers employed by the Municipal Committee for bringing the night soil from the said latrine. Such user cannot be accounted as an enjoyment by the owner of the latrine of the right of way claimed by him as of right—*Murugappa* v. *Chettyar Firm*, A.I.R. 1939 Rang. 34, 180 I.C. 477. To become an easement, the enjoyment of a right must be open, peaceable and as of right; therefore the ability of the servient owner to stop the enjoyment irrespective of the dominant owner's will is inconsistent with the idea of a real easement existing—*Sunder* v. *Nag*, *supra*. The expression 'enjoyment as of right' means enjoyment *nec vi nec clam nec precario*. It means enjoyment had, not secretly or by stealth or by tacit sufferance or by leave or favour, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly, notoriously, without particular leave at the time by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right—*Ram Sarup* v. *Abdul Haq*, supra. It is now settled law that in order to establish a right of easement it is enough for the plaintiff to prove that he has been exercising the right without interruption, witout express or implied permission of the owner of the dominant (? servient) tenement and without secrecy or stealth—*Behari* v. *Asutosh*, 41 C.L.J. 379, A.I.R. 1925 Cal. 788, 87 I.C. 19. An open user continued without interruption for more than 20 years and not shown to be attributable to permission or sufferance on the owner's part is *prima facie* evidence of enjoyment as of right within the meaning of sec. 26—*Bishan Das* v. *Beharilal*, A.I R. 1935 Lah. 937, 157 I.C. 871. Where by reason of a partition of the plaintiff's and defendant's premises, the defendant had been entitled to block up the plaintiff's window in any way he liked or to obstruct the access of light and air thereto by erecting anything he liked on his own premises, but in spite of his right to do so he had allowed the access of light, and air to the plaintiff's room to continue for 20 years, the plaintiff's enjoyment of the light and air was "as of right." The 20 years' enjoyment by the plaintiff of the light and air to which he was not entitled after the partition, was enjoyment as of right—*Jotindra Mohan* v. *Probodh Kumar*, 59 Cal. 260, 35 C.W.N. 963 (966), A.I.R. 1932 Cal. 249, 138 I.C. 193.

The burden lies on the plaintiff to show that he has been enjoying the easement as of right—*Baroda* v. *Sreenath*, 18 I.C. 211; *Sheikh Khoda* v. *Sheikh Tajuddin*, 8 C.W.N. 359. Whether an enjoyment is as of right or not is a pure question of fact; and enjoyment as of right cannot be inferred as a matter of course from a finding of long user only—*Siti Kanta* v. *Gobinda Chandra*, 56 Cal. 927, 33 C.W.N. 517 (519), A.I.R. 1929 Cal. 542. But the Madras High Court is of opinion that where long user is proved, the presumption is that the enjoyment is as of right until the contrary is proved—*Kunjammal* v. *Rathinam Pillai*, 45 Mad. 633 (637).

When the enjoyment of an easement is open and manifest, and when it is not had in such wise as to involve the admission of any obstructive right in the owner of the servient tenement, the enjoyment is "as of right." The phrase does not

imply a right obtained by grant from owner of the servient tenement—*Mathuradas* v. *Bai Amthi*, 7 Bom. 522.

In questions regarding user of way as of right, the Court should consider the character of the ground, the space for which the right is claimed, the relation between the parties and the circumstances under which the user took place. The mere fact of frequent or constant user of the defendants' *utthan* (court-yard) by the plaintiff, the parties being relations and neighbours, does not amount to proof of user as of right —*Meser* v. *Hafizuddi*, 13 C.L.J. 316, 9 I.C. 965. The nature and character of the servient land, the friendship or relation between the dominant and servient owners, and the circumstances under which the user had taken place, may induce the Court to hold that the user was not as of right but permissive—*Sheikh Khoda Buksh* v. *Sheikh Tajuddin*, 8 C.W.N. 359. Where the pathway claimed by the plaintiff lay through the courtyard of the defendant's house close to their kitchen and not far from a tank used by the female members of the defendant's family, it was held that the inference might be drawn that the user was permissive and not as of right—*Baroda* v. *Sreenath*, 18 I.C 211. Plaintiffs and defendants were co-sharers of a well. To gain access to this well from the road, it was necessary for the plaintiff to go across certain fields belonging to the defendants. Plaintiffs had used this road without let or hindrance for a period of 20 years and this road was the only road they could use to gain access to the well. It was held that having regard to the habits of the people of this country, the enjoyment of the road as of right would be presumed—*Diwan* v. *Jagta*, 1 Lah. 206 (209), 56 I.C. 728.

Where the plaintiffs had been enjoying the right to work a watermill on the land of the defendants for nearly 50 years and it was found that they had been paying rupee one per annum in lieu of the privilege of working the mill, it was held that the fact of payment was fatal to the plaintiffs' case because they failed to establish their enjoyment "as of right"—*Sunder* v. *Nag*, 4 P.R. 1917, 37 I.C. 788. The payment of a fee for fishing in a *beel* negatives the acquisition of the right of fishery by prescription—*Brojendra* v. *Bama Charan*, 37 C.W.N. 18 (22). The defendant, who had been using the water of the plaintiff's tank for irrigation purposes for more than forty years had paid a sum of money to the plaintiff for repair of the embankment of the tank about 50 years ago; it was held that since the defendant was interested in the repair of the *bundh* as he had the right of irrigation, the money paid by him about 50 years ago for repair of the *bundh* and the arrangement entered into at that time to use the water of the tank did not make the user permissive—*Ghasiram* v. *Asirbad*, 15 C.W.N. 259 (261); 9 I.C. 69. A *Kumki* right in South Canara is not an easement, because it is a right to do certain things over Government waste land *by permission* of Government—*Nagappa* v. *Subba*, 16 Mad. 304.

Where an owner of a vacant site having full power to build a house thereon irrespective of any sources of light and air, does not build for 20 years, the enjoyment of the access and use of light and air by the openings to the adjacent house cannot be said to be as of right but simply permissive. Hence there can be no prescriptive right under sec. 26—*Sher Md.* v. *Mt. Mahbub*, A.I.R. 1936 Lah. 905.

233. "Without interruption":—The term *interruption* means an obstruction or prevention of the user of the easement by some person acting adversely to the persons who claim it. The expression is altogether inapplicable to any voluntary discontinuance of the user by the claimant himself—*Sham Churn* v. *Tariney Churn*, 1 Cal. 422. Mere protests or verbal denials of the right claimed, not followed by any act to prevent the user, will not constitute an interruption of the right or prevent its acquisition by prescription—*Angus* v. *Dalton*, 6 App. Cas. 740. A right of ease-

ment is not interrupted by mere verbal quarrels or contentions—*Muthu Goundan* v. *Anantha*, 29 M.L.J. 685, 31 I.C. 528. An interruption to be effective must result in actual discontinuance of the enjoyment of the right of the claimant. Mere denial of the plaintiffs' right by the defendant and the latter's unsuccessful attempt to have this right negatived in a court of law does not affect the plaintiff's acquisition of easement—*Ram Sarup* v. *Abdul Haq*, 12 Lah. 741, A.I.R. 1931 Lah. 395 (398), 135 I.C. 51. In case of light and air, the interruption must be such an obstruction as amounts to a *nuisance*, that is, it must be such as to render the house unfit for the ordinary purposes of habitation or business—*Delhi and London Bank* v. *Hem Lall*, 14 Cal. 839; *Paul* v. *Robson*, 42 Cal. 46 (P.C.); *Colls* v. *Home and Colonial Stores*, [1904] A.C. 179. The word 'interruption' in this section does not apply to the final period of cessation of enjoyment which may have lasted till the institution of the suit, but only to a period of cessation of enjoyment followed by a further period of enjoyment—*Amir Haidar* v. *Fajja*, 73 P.R. 1905.

Actual and continuous user not necessary:—There is a distinction between the enjoyment of a right and actual user. The statute only requires enjoyment and not *actual* or *continuous* user; it is sufficient if it is proved that the right has been substantially enjoyed for the requisite period whenever occasion required, although it may not be exercised every moment—*Ghasiram* v. *Asirbad*, 15 C.W.N. 259, 9 I.C. 69; *Koylash* v. *Sonatum*, 7 Cal. 132; *Budhu* v. *Maliat*, 30 Cal. 1077; *Gopal* v. *Bankim*, 26 C.W.N. 121; *Mangulal* v. *Chandicharan*, 40 C.W.N. 222. Proof of absolute continuous user is not necessary. The right can be established by proof of periodical user, so long as the full period is covered, and the user has existed openly and uninteruptedly—*Bholanath* v. *Momena*, 50 C.W.N. 682, A.I.R. 1946 Cal. 444. [Illustration (*b*) in sec. 26 of Act XV of 1877, which spoke of actual user, has been omitted from the present section.] Mere non-user cannot deprive a man of his right to enjoy the easement unless there was an intentional *abandonment* by which the person can be said to have relinquished it—*Vinayak* v. *Martand*, 6 Bom.L.R. 287; *Gopal* v. *Bankim*, supra.

An enjoyment of a watercourse may be said to be continuous even though it is dry for the greater part of the year and flows only in the rainy season—*Mohanth Krishna Dayal* v. *Bhowani*, 3 P.L.T. 51 (59), 43 I.C. 235.

There may be an easement of right of passage along a certain channel over the defendant's land, although the right is exercised during the monsoon only—*Ramsoonder* v. *Woomakant*, 1 W.R. 218. A temporary cessation of a right of way during the rainy season cannot affect the right of user—*Shaikh Mahomed* v. *Shaikh Sefatoola*, 22 W.R. 340. The use of light may be said to be actually enjoyed if the owner of the building has had the amenity or advantage of using the access of light whenever he chooses to use it although there may not have been an actual continuous user, as in the case of a window with shutters capable of being opened but which were often kept closed—*Cooper* v. *Straker*, 40 Ch. D. 21. The cessation of the user of an easement of grazing cattle during a time when the claimant has no cattle to graze does not put an end to the easement—*Carr* v. *Foster*, 3 Q.B. 581; *Durga* v. *Bhonatu*, 106 P.R. 1883.

234. Within two years before suit:—Para. 1 of sub-sec. (1) is clearly controlled by para. 2, because the latter explains how the period of 20 years necessary under the first para. is to be computed. A title to easement is not complete merely upon the effluxion of the statutory period of 20 years and however long the period of actual enjoyment may be, no absolute and indefeasible right can be acquired until the right is brought in question in some suit, and until it is so brought, the right is

inchoate only; and in order to establish it when brought into question, the enjoyment relied on must be an enjoyment for 20 years up to within 2 years of the institution of the suit—*Siti Kanta* v. *Radha Gobinda*, 56 Cal. 927, 23 C.W.N. 517 (518), A.I.R. 1929 Cal. 542, 119 I.C. 293; *Traders and Miners Union Ltd* v. *Dhirendra*, 23 Pat. 115, A.I.R. 1944 Pat. 261. So, the right so acquired is not enforceable against a mortgagee whose mortgage is prior to the suit—*Traders and Miners Union Ltd.* v. *Dhirendra*, supra. A claim for prescriptive right would be defeated if the period of user had terminated more than two years before the filing of the suit—*Maung Pwe* v. *Maung Chan*, 7 Rang. 487, A.I.R. 1929 Rang. 300 (301). But the section does not speak of actual user. The plaintiff sued the defendant for a declaration of a right of way over a plot of land belonging to the defendant. It was alleged that in April 1892, the defendant dispossessed the plaintiffs from the dominant tenement; and that the plaintiffs sued the defendant for recovery of possession of it under section 9 of the Specific Relief Act, and having obtained a decree, got possession on the 19th June 1895. But they did not use the right of way. The defendant, on the 21st June 1895, obstructed the disputed way by erecting sheds. The present suit was instituted on the 25th November 1895. It was held that as there was no enjoyment of the right of way on the part of the plaintiffs within two years before the institution of the suit, the suit must fail —*Jahnavi* v. *Bindu Basini*, 26 Cal. 593.

235. Easement against Government:—See sub-section (2); and compare section 15 of the Easement Act (V of 1882) which provides: "When the property over which a right is claimed under this section belongs to Government, this section shall be read as if for the words 'twenty years' the words 'sixty years' were substituted."

Sub-section (2) did not exist in the Limitation Act of 1877, and so it was held that nobody could acquire any right of easement against the Government by any lentgh of time—*Secy. of State* v. *Mathurbhai*, 14 Bom. 213; *Gangaram* v. *Secy. of State*, 21 S.L.R. 195, A.I.R. 1927 Sind 270 (272). In *Arzan* v. *Rakhal Chandra*, 10 Cal. 214 (219), in which the Government was a party, the Judges proceeded on the assumption that 20 years' enjoyment of easement would give a prescriptive right against Government. But it should be noted that in this case Government was merely a lessee and could not claim a better position than its lessor who was a mere subject of the Crown.

However, sub-section (2) of the present Act contains an express provision for the acquisition of easement against the Government by 60 years' enjoyment. See also *Secretary of State* v. *Debendra*, 61 Cal. 262 (P.C.), 38 C.W.N. 285, A.I.R. 1934 P.C. 23. 147 I.C. 545.

Against transferee from Government:—An easement against a transferee of the servient tenement from the Crown can be acquired by an enjoyment as of right without interruption for a period of 20 years, and to make up this period during which the land remains in the hands of the Government can be tacked on. The word 'belongs' in sub-sec. (2) of the section should be given its plain meaning and should not be interpreted by a forced construction as equivalent to 'has belonged'—*Saya* v. *Lahore Electric Supply Co. Ltd.*, I.L.R. (1943) Lah. 129, 44 P.L.R. 116, A.I.R. 1942 Lah. 124. Under the Jamnagar Law, no one can acquire any right of easement against the Government. Therefore the period of ownership of State cannot be tacked on to the period of the transferee from the State—*Chhotalal* v. *Babulal*, A I.R. 1951 Sau. 5.

236. 'Explanation'—Obstruction:—The explanation only defines the interruption contemplated by the section. An interruption within the meaning of the explanation for more than a year will operate to prevent the claimant from adding the

period of his previous enjoyment of the right to any period of enjoyment after such interruption so as together to make up the requisite total of 20 years, but will not, by itself, suffice to nullify any right that may have been already acquired by twenty years' uninterrupted enjoyment, for the section entitles the claimant to sue within two years—*Dwarka* v. *Patna City Municipality*, 19 Pat.L.T. 511, A.I.R. 1938 Pat. 423, 177 I.C. 315. The plaintiff continued to use a water-course for a period of 19 years, 6 months and 19 days, when his enjoyment was interfered with by the defendant. Before one year from the date of interference had expired, the plaintiff instituted the present suit for an injunction restraining the defendant's interference. It was held that as the suit was brought after the expiration of 20 years from the date of the commencement of the enjoyment and within one year from the date of obstruction, and as the statutory period had expired within two years next before the institution of the suit, the plaintiff had established his right to easement. It was further held that as the obstruction in this case lasted for less than a year, the obstruction should be ignored for the purpose of calculating the period of 20 years, with the result that an easement could be acquired after an enjoyment of 19 years and a fraction, and that the requisite period of 20 years is curtailed by the Explanation to this section—*Sawan* v. *Chattar*, 48 P.R. 1918, 46 I.C. 17.

237. Acquiescence:—Acquiescence in the sense of mere submission to the interruption of the enjoyment does not destroy or impair an easement. To be effectual for that purpose, it must be attributable to an intention on the part of the owner to abandon the benefit before enjoyed—*Ponnusami* v. *Collector of Madura*, 5 M.H.C.R. 6.

238. Other easements:—The right of the owner of a high land to drain off its surplus surface-water through the adjacent lower grounds is incident to the ownership of land in this country—*Abdul* v. *Ganesh*, 12 Cal. 323. Where the defendants had erected a dam across a natural water-course which was found to interfere with the natural drainage of the surplus rain-water of the adjacent lands of the plaintiff, it was held that the plaintiff was entitled to have only so much of the dam removed as interfered with his right—*Ibid.* A certain 'al' formed the boundary of two pieces of land belonging to the plaintiff and the defendant respectively. The plaintiff's land was on a higher level than that of the defendant, and from time immemorial the surplus water used to flow from the plaintiff's land through certain passages in the 'al' and across the defendant's land. It was held that the defendant could not do anything which would interfere with the egress of the water—*Imam* v. *Paresh*, 8 Cal. 468. A plaintiff who seeks to enforce the right to discharge surplus water or to establish the existence of an easement in respect thereof is required to prove the acquisition of the easement under this section—*Maung Tha* v. *Ko Shwe*, 10 Bur.L.T. 38, 35 I.C. 394. Where the surplus water of the plaintiff's tank used to be discharged over the land of the defendant, openly and uninterruptedly year by year, for more than twenty years, the plaintiff will be presumed to have acquired an easement—*Poorno Chundur* v. *Shurut*, 24 W.R. 228. Where a right to discharge dirty water is claimed as an easement, the onus is on the dominant owner to prove all the points which are necessary to establish his right under this section to discharge dirty water from his house on the servient owner's house—*Bija Ram* v. *Brij Lal*, 26 P.L.R. 42, 84 I.C. 676, A.I.R. 1925 Lah. 297. An easement of the supply of water from a natural stream may be acquired by 20 years' user under this section—*Abdul Rahman* v. *Muhammad Alam*, 57 P.R. 1918, 104 P.L.R. 1918, 46 I.C. 441. So also, uninterrupted enjoyment of water diverted from its natural course by erection of a bund for about 40 years confers title to the plaintiff by prescription—*Ramaswami* v. *Harriram*, A.I.R. 1948 P.C. 23.

Right to discharge rain water:—A right to discharge rain water flowing from the

roof of the plaintiff's house upon the roof of the defendant's house can be acquired by prescription—*Mohan Lal* v. *Amratlal*, 3 Bom. 174. Where rain water from the plaintiff's buildings used to flow on to the defendant's land from time immemorial, the plaintiff had, by long user, acquired a prescriptive right independently of the Limitation Act—*Punja* v. *Bai Kuvar*, 6 Bom. 20.

Pasturage:—A tenant may have a right of pasturage on his landlord's waste lands by immemorial user—*Bholanath* v. *Midnapur Zemindary Co.*, 31 Cal. 503 (P.C.).

Fishery:—A right of fishing in another's waters falls within the description of an easement under this section—*Lokenath* v. *Jahania Bibi*, 14 C.L.J. 572, 12 I.C. 305 (306). A right of fishery can only be claimed when the *same person or persons* are shown to have exercised it for a particular length of time. Where the defendants alleged that they in common with all the inhabitants of a *zamindari* had all along exercised a right of fishing in certain bhils, it was held that their act amounted to mere trespass, and not to dispossession of the plaintiff and that no prescriptive right of fishery could be acquired by an *unascertained* mass of persons, such as the inhabitants of a *zamindari*—*Lutchmeeput* v. *Sadaulla*, 9 Cal. 698; *Brojendra Kishore* v. *Bama Charan*, 37 C.W.N. 18 (22), 146 I.C. 427, A.I.R. 1933 Cal. 539. A right in the nature of a *profit a prendre* cannot be claimed by prescription by a large and indefinite class of persons, such as "owners and occupiers"—*Tilbury* v. *Silva*, 45 Ch. D. 98.

A distinction should be drawn between an exclusive right of fishery involving an ouster of the real owner and a mere right to fish not excluding the rightful owner. An exclusive right of fishery is an interest in immovable property (see Notes under Article 144) and may be acquired by 12 years' adverse possession by operation of Art. 144 read with section 28. But a mere right to fish not excluding the real owner is a *profit a prendre* and falls within the definition of an easement under sec. 2 (5) and may be acquired only by 20 years' possession under section 26—*Hill & Co.* v. *Sheoraj*, 1 Pat. 674, 3 P.L.T. 53, 64 I.C. 346. In order to establish an exclusive right of fishery in a tidal navigable river it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish—*Abhoy Charan* v. *Dwarka*, 39 Cal. 53; *Province of Bengal* v. *Indra*, I.L.R. (1945) 2 Cal. 581, 49 C.W.N. 539, A.I.R. 1946 Cal. 12. It is doubtful whether an exclusive right of fishery in a tidal and navigable river can be acquired by proof of mere enjoyment in the manner provided by section 26; such right can only be acquired by a grant from the Crown—*Ibid.*; *Prosunno* v. *Ram Coomar*, 4 Cal. 53.

Ferry:—The right to maintain a ferry over the property of another is a right of easement which can only be acquired by user for 20 years—*Pardip Singh* v. *Secretary of State*, 5 P.L.J. 500, 57 I.C. 516; *Lachmeswar Singh* v. *Manowar Hossain*, 19 Cal. 253 (P.C.); *Parmeshari* v. *Mahomed*, 6 Cal. 608.

Cornice:—Where the roof of one person overhangs the land of another for more than thirty years, such enjoyment will vest in the former a proprietory right in the space covered by the overhanging roof—*Mohan Lal* v. *Amratlal*, 3 Bom. 174.

239. Acquiring easement in other ways:—The Limitation Act is remedial and is neither prohibitory nor exhaustive. It does not interfere with other modes of acquiring easements. In other words, the mode of acquiring an easement provided by this section is not the only way in which an easement may be acquired. An easement may be acquired otherwise than by 20 years' user, as for instance, by grant, express or implied; and if it is so acquired, the rule as to obstruciton for more than two years does not apply—*Rajrup* v. *Abdul*, 6 Cal. 394 (404) (P.C.); *Sheikh Abdul Khani* v. *Harnam Singh*, 7 P.L.T. 260, A.I.R. 1925 Pat. 748, 90 I.C. 356; *Charu* v. *Dokouri*, 8

Cal. 956; *Punja* v. *Bai Kuvar*, 6 Bom. 20; *Abdul* v. *Ahmed*, 45 C.W.N. 486. Thus, a right to the uninterrupted flow of water along a defined channel over the lands of others may exist independently of the provisions of sec. 26, and when such a right is claimed as a customary and hereditary right and evidence is given in support of long user, such evidence may be sufficient to justify the Court in presuming a grant of the easement, and a Court is not justified in dismissing the suit on the ground that there had been no user by the plaintiff within two years prior to suit—*Srinivasa* v. *Secretary of State*, 5 Mad. 226. A person claiming a right of way based on *custom* need not rely on section 26 of this Act. Such a right may be established by proof of custom—*Ali Mahomed* v. *Sheikh Kalu*, 75 I.C. 263, A.I.R. 1923 Cal. 200. But where a well which has been used by the people of a mohalla was constructed in living memory and property in it has been changing hands by sale, it cannot be said that *qua* the user of the well an ancient custom has been established for which it is necessary to trace the legal origin to a dedication—*Walaiti* v. *Nathi*, 41 P.L.R. 536, A.I.R. 1939 Lah. 191, 184 I.C. 76 (reversing A.I.R. 1939 Lah. 12). Section 26 is not exhaustive and does not exclude or interfere with other modes of acquiring easements, and therefore it is open to the plaintiff to show, if he can, that he is entitled to a right which may be of the nature of an easement, although not actually within the strict meaning of the term. Thus, in Bengal, where the mode of dedication of tanks to the public for bathing and drinking purposes is well known, when one finds that a tank exists for a long time past, and the public, that is, the people of its neighbourhood, have enjoyed the use of the water of such a tank, it is open to the Court to presume that the water of such a tank was dedicated by the owner for public use. Such a dedication can be inferred from the manner and the duration of such use. It is not necessary therefore to seek the aid of sec. 26 for the acquisition of a right to the use of the water—*Bhabadev* v. *Bhusan Chandra*, 53 Cal. 1016, 91 I.C. 712, A.I.R. 1926 Cal. 507. So a right of storing manure on land belonging to another, being a right which is beneficial to the enjoyment of the property of the persons enjoying that right over the land of another can be acquired in the same way as other similar right by prescription, if the user has continued for the prescribed period—*Ladha* v. *Mahi*, 224 I.C. 86.

For raising a presumption of a lost grant of an easement from proof of long user, the law does not require any absolute period although since the enactment of sec. 26 of the Limitation Act, 1871, which prescribes a period of 20 years, enjoyment alone for a lesser period will ordinarily be insufficient—*Bholanath* v. *Momena*, 50 C.W.N. 682, A.I.R. 1946 Cal. 444.

240. Issues in easement suit:—In a suit to establish an easement, when limitation is pleaded, the proper issues to be framed under this section are—

(i) whether the easement in question was enjoyed peaceably, openly and as of right, by the plaintiff or those through whom he claims, within two years of the institution of the suit, and

(ii) in the event of the above issue being found in the negative, whether there is evidence of enjoyment on the part of the plaintiff or those through whom he claims, of such a character and duration as to justify the presumption of a grant or other legal origin of the plaintiff's right, independent of the provisions of this section—*Achul Mahta* v. *Ranjun Mahta*, 6 Cal. 812 (814).

Exclusion in favour of reversioner of servient tenement.

27. Where any land or water upon, over or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoy-

ment of such easement during the continuance of such interest or term shall be excluded in the computation of the period of twenty years in case the claim is, within three years next after the determination of such interest or term, resisted by the person, entitled on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

241. This section is similar to section 8 of the English Prescription Act, and is almost word for word the same as section 16 of the Indian Easements Act. It may also be compared with sec. 7 of the English Prescription Act which lays down that the time during which an infant, an insane person or a married woman is the owner of the servient tenement is excluded from the period during which a prescriptive right is in course of acquisition.

Extinguishment of right to property.

28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

Compare sec. 34 of the Real Property Limitation Act, 1833 (3 & 4 Wm. IV, c. 27).

242. Application of section:—In cases where a special period of limitation is prescribed by a special or local law, it has been held that although this section does not apply to suits under special or local laws, yet the general principle embodied in this section may be applied to such suits. Thus the Calcutta High Court applied the principle of this section to a case under Schedule III, Art. 3 of the Bengal Tenancy Act—*Nanda Kumar* v. *Ajodhya*, 16 C.W.N. 351, 11 I.C. 465. See also *Dalip* v. *Deoki*, 21 All. 204 (suit under N. W. P. Rent Act).

Section 28 does not in terms apply to cases under special and local laws, but the principle underlying it is of general application and can be applied to cases governed by local laws—*Kartar Sing* v. *Kharkha*, A.I.R. 1935 Lah. 787. Failure to sue for possession within the time prescribed by Art. 6 of the Punjab Limitation Act has the effect of extinguishing the right and title of the person entitled to sue, and the person in possession becomes the absolute owner of the property—*Gokal* v. *Haria*, A.I.R. 1949 E.P. 414. This section has been made expressly applicable to tenancies in the Central Provinces by sec. 104 (4) of the Central Provinces Tenancy Act, the extinguishment spoken of by this section occurs at the end of the period specified in the second schedule to the Tenancy Act and not at the end of the period prescribed by the Limitation Act. As soon as the period has elapsed, the tenancy is extinguished—*Punjaram* v. *Ramu*, I.L.R. (1940) Nag. 348, 1940 N.L.J. 121, A.I.R. 1940 Nag. 49 (F.B.).

Where no period of limitation is prescribed, this section does not apply. Thus, the Madras Regulation VI of 1831 does not prescribe any period of limitation for a suit under that Regulation, nor does the first Schedule to this Act prescribe any limit for suits under that Regulation. Consequently such suits are not barred by any lapse of time, and there can be no extinction of title by operation of this section, nor an

acquisition of the title by prescription—*Pichuvayyan* v. *Velakkundayan*, 21 Mad. 134. A suit for possession referred to in this section is a suit for which the period of limitation is prescribed by the schedule to the Limitation Act and not by the Oudh Rent Act. Therefore this section does not apply to a suit under sec. 108 (10), Oudh Rent Act, limitation for which is provided by sec. 129 of that Act—*Hit Lal* v. *Ram Oudh*, 1943 O.W.N. 99, A.I.R. 1943 Oudh. 296, 206 I.C. 274.

In Kutch there is no limitation to title by acts of adverse possession. So title is not extinguihed by any length of adverse possession—*Bhura* v. *Kala*, A.I.R. 1950 Kutch. 69.

This section does not apply unless there is some one in adverse possession of the property. Until some one is in adverse possession, the owner of the property does not lose his right to the property merely because he happens not to be in possession of it for 12 years. Under this section his right is extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself—*Swamirao* v. *Bhimabhai*, 45 Bom. 1020 (1023); *Sukhdeo* v. *Ram Dulari*, 29 O.C. 131, 92 I.C. 825, A.I R. 1926 Oudh 313; *Mubinulnissa* v. *Ali Husain*, 6 O.W.N. 652, 119 I.C. 866, A.I.R. 1929 Oudh 402 (405).

This section applies only to *suits* and not to applications; it does not say that at the termination of the period of limitation for an application, any right shall be extinguished—*Bhaiga Parida* v. *Gannath*, 3 P.L.J. 478 (481), 46 I.C. 569; *Jokhu Mal* v. *Sudama Mal*, (1955) All.L.J. 417, A.I.R. 1955 All. 526; *Tincowrie* v. *Srikishan*, 59 C.W.N. 220, 94 C.L.J. 219,, A.I.R. 1955 Cal. 369; *Province of Bengal* v. *Probash*, A.I.R. 1955 Cal. 400. Section 28 does not apply to an application under sec. 95 (n) of the N. W. P. Rent Act, 1881, for the recovery of the occupancy of land of which the tenant has been dispossessed—*Dalip Rai* v. *Deoki Rai*, 21 All. 204 (206).

This section only applies to persons *out of possession*; to persons who *are in possession* and have no occasion to sue for it, this section can have no application and does not prevent them from making use of any legal defence open to them in order to maintain their possession. Thus, the plaintiffs induced the defendant by fraud and misrepresentation to execute in their favour a deed of sale of the property in dispute. They did not pay the purchase-money, nor obtained possession of the property. More than twelve years after this transaction the plaintiffs sued for possession of the property on the sale-deed; the defendant impeached the deed as fraudulent. The plaintiffs contended that as the defendant had not sued to set aside the deed on the ground of fraud, within 3 years under Article 91 or 95, or within 12 years from the date of sale, his plea of fraud was barred by limitation. *Held* that the plea of the defendant is not barred; this section applies only to a *plaintiff* instituting a suit for possession and does not apply to a *defendant* who relies on actual possession which has never been disturbed. The plaintiffs in this suit cannot seek to get a wider meaning put on section 28 so as to get it treated as a law of limitation applicable to the *defendant*; and the law of limitation cannot therefore be taken to have barred the right of the defendant to make use of any legal defence open to him (*e.g.*, to impeach the sale on the ground of fraud)—*Hargavandas* v. *Bajibhai*, 14 Bom. 222; *Orr* v. *Sundra*, 17 Mad. 255; *Krishnacharya* v. *Lingawa*, 20 Bom. 270; *Gokulchand* v. *Niadarmal*, 1 P.R. 1916, 32 I.C. 485. Section 28 cannot apply to persons who are in possession. The section presupposes that a person has, by force of limitation, lost his remedy by a suit for possession, and it is only in regard to such person that the section declares that his right to the property is extinguished—*Gopal Bhaurao* v. *Jagannath*, A.I.R. 1935

Bom. 326, 59 Bom. 502, 37 Bom.L.R. 471, 159 I.C. 213. The institution of a suit for possession within 12 years of dispossession is sufficient to bar the operation of this section, although possession is actually obtained under the decree passed in the suit after the period of dispossession—*Maharam* v. *Mobarak*, 46 C.W.N. 551. Neither sec. 28 nor the principle thereof can be applied to a case where during the period of the alleged adverse possession no suit for possession could have been instituted in a Civil Court because of some special enactment—*Ramlingam* v. *Veera Bhadrudu*, A.I.R. 1935 Mad. 914, 69 M.L.J. 890, 1935 M.W.N. 1071, 42 L.W. 558. See also Note 7 *ante* under heading "Suits". Although the right of a person to bring a separate suit for possession may be barred, still his right cannot be extinguished by the operation of sec. 28, if he has been made a party (defendant) to a suit instituted by some other person within the prescribed period, in which his right to the property in suit can be effectually determined—*Narsingh* v. *Vaman*, 34 Bom. 91 (99), 11 Bom.L.R. 1102, 4 I.C. 249. Thus, if out of two reversions, one reversioner brings a suit for possession under Art. 141 within 12 years after the death of the Hindu female, and the other reversioner is made a defendant in the suit, and the latter files a written statement claiming possession of his share, such a claim would not be barred by reason of the fact that the written statement has been filed more than 12 years after the death of the female—*Rayegavda* v. *Ramlingappa*, 53 Bom. 472, 31 Bom.L.R. 647, 119 I.C. 656, A.I.R. 1929 Bom. 345 (346). This is also another instance of the rule that limitation does not apply to a defence.

243. Suits not under this section—Limitation bars the remedy but does not extinguish the title:—It is a well-established rule of law, that in cases which are not governed by this section, *limitation merely bars the remedy but does not extinguish the title.* Thus, this section is confined to suits for *possession* and does not apply to a suit by a mortgagee for recovery of the money due to him by sale of the mortgaged property. The mortgagee's remedy may be barred if he omits to sue within the statutory period, but his right is not extinguished—*Jokhu* v. *Sitla*, 1930 A.L.J. 750, A.I.R. 1930 All. 416 (417), 122 I.C. 411. This section contemplates that the person whose right is extinguished by lapse of time is a person *entitled to institute a suit for possession* of the property. Thus, if after the grant of a simple mortgage the mortgagor is dispossessed, he is the person entitled to recover possession against the trespasser, and if he does not sue within twelve years, his right (*i.e.*, the equity of redemption) is extinguished. But it does not affect the title of the simple mortgagee, as he *is not entitled to institute a suit for possession;* consequently the dispossession of the mortgagor does not extinguish the title of the mortgagee by lapse of time. His right to bring the property to sale remains unaffected—*Priya Sakhi* v. *Manbodh*, 44 Cal. 425 (438, 439). Where the property of which there has been adverse possession is subject to a mortgage, the adverse possession does not affect that mortgage, if such possession has been (and usually it will be) consistent with the continuance of the mortgage—Banning, 3rd Ed., p. 85. Similarly, the fact that a Hindu widow's right to recover property has become barred does not make this section applicable so as to extinguish the right of the reversioners, because they are not entitled to institute a suit for possession during the lifetime of the widow. See Note 589 under Art. 141.

Section 28 of the Limitation Act is limited to cases in which the bar of limitation applies to suits for *possession of property*. Therefore, where a property was attached by the Magistrate under section 146 Cr. P. Code, such attachment did not amount to dispossession, and a suit brought by the real owner for a declaration of his right to the lands was not a suit for *possession of property*. And although the declaratory suit, if brought after more than six years, was barred under Art. 120, such bar only

affected the remedy or the relief by way of declaration, but *did not extinguish the right and title* of the true owner to the property, however long the attachment continued; and the attachment did not work a forfeiture in favour of Government—*Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (417). This section is inapplicable where the plaintiff could only have sued to set aside certain instruments or for a declaration that they were not binding on him, and not for possession, the possession remaining with the plaintiff—*Chintaman* v. *Bhagvan*, 30 Bom.L.R. 1095, A.I.R. 1928 Bom. 383 (384). Thus where a person *is in possession* merely sues for a declaration that a sale deed executed by his certificated guardian during his minority without permission of the District Judge is void and ineffectual, and for partition, this section does not apply, and the fact that the suit is brought more than three years after he has attained majority (Art. 44) merely *bars the remedy but does not extinguish his title* to the property, and consequently his main relief, *viz.*, for partition, which is based on title, is not affected in any way—*Mahomed Reza* v. *Zahoor Ahmad*, 52 All. 979, 1930 A.L.J. 1416, A.I.R. 1930 All. 858 (860), 132 I.C. 21. Similarly, the act of the Government in occupying the land of the plaintiffs and maintaining a ferry over it, when there is no intention to oust the plaintiffs from the ownership of the land, is merely an act in the exercise of a right of easement and does not constitute adverse possession so as to bring into operation the rule of 12 years' limitation; consequently the plaintiffs are not required to bring a suit for *possession* within 12 years, on pain of losing their property under this section; they can bring a suit for injunction against the Government within 20 years (*i.e.*, before the Government acquires an easement)—*Pardip Singh* v. *Secretary of State*, 5 P.L.J. 500, 1 P.L.T. 395, 57 I.C. 516.

A suit contemplated under Or. 21, r. 103 C. P. Code, is not a suit for recovery of possession within the meaning of this section. So the title of the person affected by an order passed under Or. 21, r. 98 or r. 99 is not extinguished if he does not bring a suit under Or. 21, r. 103 C. P. Code within a year as provided for in Art. 11A of the Act—*Gobardhan* v. *Sukhomoy*, 83 C.L.J. 373. This section does not apply to a suit for setting aside an order rejecting a claim; and the claimant's right to the property is not extinguished by his failure to get the order set aside within one year of the date of the order by a regular suit, when the execution proceedings including the attachment come to an end subsequent to the claim order, the claimant is not precluded from suing for a declaration of his title to the property after a lapse of a year from the date of the adverse claim order—*Bamapada* v. *Ramanath*, 40 C.W.N. 146, 165 I.C. 84.

A suit for possession of the office of mutawalli is an action of a personal nature and is not a suit for possession of any property. Consequently, if the action for office is time-barred, the right to the wakf property is not necessarily extinguished—*Abdul Alim* v. *Abdul Hamid*, 129 I.C. 375, A.I.R. 1930 All. 866.

This section applies to all property for the possession of which a suit can be instituted, whether the property be moveable or immoveable—*Kanharamkutti* v. *Uthotti*, 13 Mad. 491. A contrary view has been taken by the Bombay High Court in *Surat Borough Municipality* v. *Sarifa*, I.L.R. (1939) Bom. 685, 41 Bom.L.R. 1002, A.I.R. 1939 Bom. 494, where it has been held that this section does not affect the right to moveable property. This section does not apply to suits for property which cannot be recovered in specie, *e.g.*, debts whether ordinary or judgment debts—*Ganda Mal* v. *Nanak Chand*, 3 P.R. 1887. A suit for recovery of a *debt* is not a suit for possession of property; therefore limitation only bars the remedy, but does not extinguish the right to the *debt* —*Nursingh* v. *Hurryhur*, 5 Cal. 897 (899); *Mohesh Lal* v. *Busunt Kumaree*, 6 Cal. 340 (348) (overruling *Nocoor* v. *Kally*, 1 Cal. 328, *Krishna* v. *Okhilmoni*, 3 Cal. 333, and *Ram* v. *Jagotmonomohini*, 4 Cal. 283); *Administrator General* v. *Hawkins*, 1 Mad. 267; *Abdul Rafiq* v. *Bhajan*, 53 All. 963, A.I.R. 1932 All. 199 (206); *Ganda Mal* v. *Nanak*

Chand, supra. Therefore though an attorney's action for costs under Art. 84 may be barred by limitation, his right to get the costs is not extinguished; so that if he has any form of lien upon any property in respect of his bill of costs, he can enforce that lien, notwithstanding that he cannot bring a suit to recover the costs—*Narendra Lal* v. *Tarubala*, 48 Cal. 817, 25 C.W.N. 800. Though a vendor's suit to recover purchase-money may be barred, still if he retains possession, he can claim payment before giving up possession—*Subramania* v. *Poovan*, 27 Mad. 28.

A suit to recover assessment is not a suit for possession of property within the meaning of this section. A right to recover assessment is a mere right in action, and cannot be lost by failure to bring a suit for possession of such property for 12 years—*Balkrishna* v. *Anantabaji*, I.L.R. (1942) Bom. 326, 44 Bom.L.R. 288, A.I.R. 1942 Bom. 174.

Although a person may fail to bring a suit for possession of property within the prescribed period, his right to such property will not be extinguished if he is entitled to enforce such right in *another capacity*. Thus, although a mortgagee may be barred after 12 years under Article 135 from suing for possession of the mortgaged property, that does not prevent him from suing for foreclosure, and from getting possession under the foreclosure decree. In the first case his right to possession is as *mortgagee*; after foreclosure he takes possession as *owner*—*Rallia Ram* v. *Sundar*, 88 P.R. 1883.

Where the plaintiff as the agent of the defendant (landlord) let out the land to a tenant who was in possession, and the plaintiff for more than 12 years appropriated to himself the rents collected and asserted a title in himself, and then brought a suit for possession on the ground of acquisition of title by adverse possession, *held* that so long as the tenant held possession under the tenancy he was the tenant of the defendant (landlord) and so long as actual possession was with the tenant, the possession must be taken to be legally with the defendant who could not (and need not) have brought a suit for possession; the defendant's title was not therefore extinguished under this section—*Krishnadixit* v. *Baldixit*, 38 Bom. 53, 21 I.C. 763. This section does not apply where there is no question of instituting a suit for *possession* against the party claiming title by prescription—*Muhammad Mumtaz Ali* v. *Mohan Singh*, 45 All. 419 (425) (P.C.), 74 I.C. 476, 21 A.L.J. 757. The application of sec. 28 is confined to suits for possession. It does not apply to a suit by a mortgagee for recovery of money due to him either by sale or foreclosure of the mortgaged property. Even if his remedy for the mortgage money becomes barred by his omission to sue for sale or foreclosure within the period of limitation his right as a mortgagee cannot be extinguished under sec. 28—*Ram Adhar* v. *Shankar*, A.I.R. 1935 Oudh 139, 1935 O.W.N. 40, 153 I.C. 808.

244. Extinguishment of right:—The Indian Limitation Act lays down a rule of substantive law in section 28. It declares that after the lapse of the period provided by this enactment, the *right itself* is gone and the title ceases to exist, and not merely the remedy. Therefore, unless the plaintiff in a redemption suit gives *prima facie* evidence to show that his suit is brought within the time allowed by the Act, he fails to show that he has a subsisting right to the property in suit, or in other words, he fails to prove his title—*Parmanand* v. *Sahib Ali*, 11 All. 438 (F.B.). Want of possession for 12 years after the date of purchase would extinguish the purchaser's title—*Lakshman* v. *Bisan*, 15 Bom. 261. Where, in spite of an auction sale, the judgment debtor remained in possession for more than twelve years after the confirmation of sale, and thereafter the auction purchaser obtained a sale-certificate and obtained formal delivery, *held* that the auction-purchaser's title had become extinguished; and that the subsequent obtaining of formal delivery of possession was of no avail,

as his right commenced from the date of confirmation of the sale and not from the date of the sale-certificate—*Mahmudunnissa* v. *Syed Zahid Raza*, 11 O.L.J. 466, 1 O.W.N. 139, A.I.R. 1925 Oudh 20. A suit to recover the office of trustee of a temple involves a claim to the possession of the temple properties; and if such suit is barred by Art. 124, the right to the possession of the properties is lost—*Govindasami* v. *Dakhinamurthi*, 35 Mad. 92; *Ram Piari* v. *Nand Lal*, 39 All. 636; *Kassim Hassan* v. *Hazra Begum*, 32 C.L.J. 151, 60 I.C. 165.

The possession necessary to found a title by adverse possession under this section is not different in character (though it may be in duration) from the possession required to prevent limitation under Art. 142 or Art. 144. So it is not necessary for the plaintiff to prove affirmatively physical possession of every bit of land. The only thing to be considered in such a case is whether the acts of possession which have been proved will legitimately show that the plaintiff had enjoyed such dominion over the property in the manner in which such dominion is normally exercised, so as to acquire title under this section—*Hafiz* v. *Swarup*, 50 Bom.L.R. 632, 52 C.W.N. 382, (1948) 2 M.L.J. 70. A.I.R. 1948 P.C. 76, 1948 A.L.J. 221 (P.C.).

Twelve years' adverse possession of land by a wrong-doer not only bars the remedy and extinguishes the title of the rightful owner but confers a good title upon the wrong-doer—*Gossain Das* v. *Issur Chandra* 3 Cal. 224 (226); *Abhoy* v. *Kally*, 5 Cal. 949; *Jagrani* v. *Ganeshi*, 3 All. 435; *Daya Ram* v. *Badi Mal*, 16 P.R. 1886; *Masjid* v. *Shiromani*, 40 P.L.R. 319, A.I.R. 1938 Lah. 369, 175 I.C. 945 (F.B.); *Mahomed* v. *Sarju*, 1941 A.L.J. 676, A.I.R. 1942 All. 42, 198 I.C. 496; *Fakirappa* v. *Ningappa*, 45 Bom.L.R. 491, A I.R. 1943 Bom. 265, 209 I.C. 251. The title which is acquired by adverse possession is a new title; in strictness of law, it is not the old title which is transferred to the new owner, but only a title corresponding in quantity and quality to the old title. Therefore, if the property of which there has been adverse possession is a lease-hold subject to a rent and to covenants, the new owner is not liable *as an asignee of the lessee* to that rent or to those covenants, but he is liable on the ground that the lessor's right to the rent and his right also to re-enter under the proviso for re-entry are not prejudiced by the adverse possession which has only been between the lessee and the adverse possessor—*Banning*, 3rd Edn., pp. 84-85.

Adverse possession for more than 12 years not only extinguishes the title of the true owner and debars him from suing for its recovery, but also creates a title by negation in the occupant *which he can actively assert*, if the loses possession, even against the true owner—*Nawab Bahadur* v. *Gopi Nath*, 13 C.L.J. 625, 6 I.C. 392; *Budesab* v. *Hanmanta*, 21 Bom. 509. The principle is that when the title of the true owner has been extinguished by prescription, his title is not revived by re-entry. In other words, even if the lawful owner should re-acquire possession, he is not thereby remitted to his original title. He will be treated as a trespasser—*Kassim Hassan* v. *Hazra Begum*, 32 C.L.J. 151, 60 I.C. 165; *Lilabati* v. *Bishun Chobay*, 6 C.L.J. 621; *Brassington* v. *Llewellyn*, (1858) 27 L.J. Ex. 297; *Mahmuddunnissa* v. *Zahid Reza*, 11 O.L.J. 466, A.I.R. 1925 Oudh 20; *Salamat Ali* v. *Nur Muhammad*, 9 Luck. 475, 11 O.W.N. 317, A.I.R. 1934 Oudh 303 (307), 149 I.C. 258; *Nando* v. *Bhupurain*, 14 Pat. 424, A.I.R. 1935 Pat. 164, 16 P.L.T. 183, 155 I.C. 1094; *Mahomed* v. *Sarju*, supra. "It is an accepted doctrine in our Courts that if a party who has been 12 years out of possession and whose suit is therefore barred, should again get into possession, he is not (to use an English phrase) remitted to his old title, our Court adopting the English rule that there is no remitter to a right for which the party had no remedy by action at all—*per* Markby, J. in *Bindraban* v. *Tarachand*, 11 B L.R. 237. So where on the expiry of the period prescribed by sec. 96 (e) of the N. W. P. Rent Act. 1881, for recovery of the occupancy of the land of which

the tenant had been wrongfully dispossessed by the landlord, the tenant's right to the occupancy of the land was extinguished, but he afterwards forcibly obtained possession, such possession was not that of a tenant who could only be ejected by a Revenue Court, but that of a trespasser who might be ejected through a Civil Court —*Dalip Rai* v. *Deoki Rai*, 21 All. 204 (208).

A property acquired under this section by adverse possession by a widow who claims and holds a widow's estate enures to the estate of her deceased husband, and descends upon her death accordingly. She does not acquire the property as her *stridhan* but she makes it good to her husband's estate—*Lajwanti* v. *Safachand*, 5 Lah. 192 (P.C.), 28 C.W.N. 960, A.I.R. 1921 P.C. 121, 80 I.C. 788. Therefore, if a Hindu widow remains in possession of her first husband's property, even after her re-marriage, for more than twelve years, the re-marriage has the effect of making her possession adverse, but it cannot enlarge her estate, that is, it cannot make her estate absolute. She acquires title only to the widow's estate which enures to the estate of her deceased husband—*Parbati* v. *Ram Prasad*, 7 Luck. 320, 10 O.W.N. 21, A.I.R. 1933 Oudh 92 (93), 141 I C. 831. See also *Harisingh* v. *Ramchandra*, A.I.R. 1957 M.P. 238.

A right to an office in a temple and to the possession of the lands attached thereto or its emoluments can be acquired by adverse possession for more than 12 years—*Alagiriswami* v. *Sundareswara*, 21 Mad. 278. Where the members of one of the two branches of a family of hereditary trustees to a temple discontinued possession of the properties as also the performance of the duties of the temple for more than twelve years, and the members of the other branch have been holding the office and endowments during the period, the rights of the former branch as a body would be wholly extinguished by operation of sec. 28—*Ramanathan* v. *Murugappa*, 27 Mad. 192. When the land in suit was alleged to have formed an endowment, it was held that the plaintiff (purchaser) by his twelve years' occupation had acquired a title, even though his vendor had not had power to alienate the property—*Nursingh* v. *Moosharoo*, 25 W.R. 282. Where the provision in a will creating a charitable trust is inoperative in law, the property is held by the executor adverse to the heir at law, the true owner and if he so holds it for the statutory period on behalf of the charity for which it was dedicated the title acquired by prescription vests in the charity and the title of the heir of the testator becomes extinguished by the operation of this section—*Hemchand* v. *Peary*, I.L.R. (1942) Kar. (P.C.) 166, 45 Bom.L.R. 275, 47 C.W.N. 46, 1942 A.L.J. 718, 45 P.L.R. 36, (1943) 1 M.L.J. 11, A.I.R. 1942 P.C. 64. Where an insolvent has been in possession of land from before the date of insolvency, and for more than 12 years after the insolvency, the official assignee not having taken possession, *held* that the insolvent has acquired a right by adverse possession—*Suja Hossein* v. *Monohar Das*, 24 Cal. 244. Where a suit brought by a ward after attaining majority to set aside an alienation made by his guardian and to recover the property alienated, is barred under Article 44, the right of the ward to the property is also extinguished by the operation of this section. See Note 331 under Article 44.

Where a *khorposedar* who is entitled under his grant only to the cultivated area in a village and to no part of jungle therein, enjoys the usufruct of the jungle and the receipts obtained by cutting and selling timber show that it was enjoyed openly as of right and to the knowledge of the grantor for over 12 years, this section is applicable and the right of the grantor in the timber of the jungle is lost to him by adverse possession —*Jagadish* v. *Pratap*, A.I.R. 1939 Pat. 587, 181 I.C. 777.

A mortgagee of melwaram interest in certain land leased back that interest to the mortgagors under a lease for a term of years. The tenancy terminated, but

the mortgagee as landlord did not sue within 12 years for recovery of possession but after 12 years he brought a suit for his mortgage money and for profits for 3 years prior to suit. The mortgagor leasee did not pay any rent to the mortgagee. It was held that by operation of sec. 28 read with Art. 139 all the rights of the mortgagee as landlord had become extinguished and that the suit was barred—*Ambalam* v. *Periakaruppan*, A.I.R. 1935 Mad. 377; 1935 M.W.N. 257, 41 L.W. 398, 157 I.C. 569.

Government:—If the plaintiff can establish that he and his predecessors-in-title have for 60 years been in possession adverse to the Crown (Art. 149), any right of the Crown to the property is extinguished, and the plaintiff is entitled to succeed in his claim—*Secretary of State* v. *Debendra*, 61 Cal. 262 (P.C.), 38 C.W.N. 285 (289), A.I.R. 1934 P.C. 23, 147 I.C. 545.

Joint property:—The expression "right to such property" includes the right to joint possession and enjoyment. If a person entitled to joint possession fails to sue within the period of limitation, his right to joint possession is extinguished—*Atchamma* v. *Papiah*, 44 Mad. 131 (138); *Jagatram* v. *Pitai*, 26 N.L.R. 160, 122 I.C. 270, A.I.R. 1930 Nag. 142 (143). If the right to joint possession is estinguished, the right of survivorship (upon death of the other joint owner) is also lost, because such right is not separable from the right of possession and enjoyment—*Atchmma* v. *Papiah*, supra. So also, if the right to joint possession is extinguished, the right to claim damages for being out of passession is also barred, because the latter right is not independent of the right to claim possession or joint possession —*Jagatram* v. *Pitai*, supra. Similarly, if the plaintiff's right to joint possession is lost, a suit for partition and for recovery of a share in the property is also lost. He cannot evade the operation of this section by framing his suit as one for partition, because a suit for partition is another name for a suit for recovery of possession —*Atab Sunarri* v. *Talib Husain*, 51 C.L J. 461, A.I.R. 1930 Cal. 612 (614), 128 I.C. 106.

PART V.

SAVINGS AND REPEALS.

Savings.

29. (1) Nothing in this Act shall affect section 25 of the Indian Contract Act, 1872 (IX of 1872).

(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law—

(a) the provisions contained in section 4, sections 9 to 18, and section 22 shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law; and

(b) the remaining provisions of this Act shall not apply.

(3) Nothing in this Act shall apply to suits under the Indian Divorce Act (IV of 1869).

(4) Sections 26 and 27 and the definition of "easement" in section 2 shall not apply to cases arising in territories to which the Indian Easements Act, 1882, (V of 1882) may for the time being extend.

245. Change in the law:—Sub-sections (1) and (2) were substituted for the original sub-section (1), the original sub-section (2) was re-numbered as (3) and the original sub-section (3) was re-numbered as (4) by sec. 3 of the Indian Limitation (Amendment) Act, 1922 (X of 1922). The original sub-section (1) ran as follows:—

"Nothing in this Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special or local law now or hereafter in force in British India."

The Select Committee gave the following reasons for the change:—"We have carefully considered each section in parts II and III of the Act for the purpose of deciding whether it should apply to periods of limitation prescribed by special or local laws or not. We think provision should be made that section 4, sections 9 to 18 and section 22 should apply, unless they are expressly excluded by the special or local law, and that the remaining provisions of the Act should not apply. This will, of course, not preclude amendments of special or local laws with a view to the application of such provisions"—*Gazette of India*, 1922, Part V, page 74.

The words "affect or alter" gave rise to good deal of misunderstanding, and consequently these words have not found a place in the amended section. The amendment was rendered necessary not because the word "prescribed" in Part III of the

Act did not mean prescribed by any law for the time being in force but because certain Courts had held that the application of the general provisions of the Limitation Act laid down in Part III to special and local Acts did "affect or alter" the periods of limitation prescribed by those Acts and the Legislature disapproved of those decisions —*Durga* v. *Pancham*, I.L.R. (1939) All. 647, 1939 A.L.J. 522, A.I.R. 1939 All. 403, 182 I.C. 242 (F.B.).

The effect of this change and the cases overruled or modified thereby have been pointed out in the notes to sections 3, 4, 5, 6, 12, 14, 15 and 18.

246. "Period of limitation":—All that sec. 29 (2) lays down is that where a special or local law prescribes a period of limitation the excluded portion of the limitation Act shall not apply—*Venkataramayya* v. *Venkatasubbayya*, (1946) 1 M L.J. 271, A.I.R. 1946 Mad. 351. If the Land Revenue Court decides to take action under sec. 111 of the U. P. Land Revenue Act (III of 1901), the Court must require the party concerned to institute within three months a suit in the Civil Court for the determination of the question of title. Such period of three months is clearly a "period of limitation" prescribed by a local law within the meaning of sub-section 2 (*a*) of this section, and consequently, if the last day of the period of three months is a Sunday, the provisions of sec. 4 of this Act will apply, and the suit instituted on Monday will be in time—*Dhanpati* v. *Kandhaiya*, 7 O.W.N. 586, A.I.R. 1930 Oudh 371 (374), 127 I.C. 28.

The period of 7 days prescribed for an appeal under sec. 39 (2) of Ordinance II of 1932 is a "period of limitation prescribed by a special law," and if the appeal is not presented within that period, it must be dismissed according to the provisions of sec. 3 read with sub-sec. (2) of this section—*Nil Ratan* v. *Emp.* 60 Cal. 571, 37 C.W.N. 195 (198), A.I.R. 1933 Cal. 124.

The Agriculturists' Relief Act which merely mentions some periods of limitation for some suits, different from those prescribed in the Limitation Act, has not prescribed any period of limitation for the suits referred to in it in the above sense. Therefore the provisions of Limitation Act, including those contained in sections 19 and 20 apply to suits under that Act except to the extent the Act indicates the Limitation Act to be read as modified—*Adinaranappa* v. *Mallamma*, A.I.R. 1950 Mys. 13.

The Delhi and Ajmer-Merwara Rent Control Act, 1947, though a special law, nowhere prescribes for an appeal a period of limitation different from the period prescribed therefor by Sch. 1 to the Limitation Act. Section 5 of the Limitation Act is therefore applicable to an appeal under sec. 9, Rent Control Act—*Moti* v. *Thandiram*. A.I.R. 1951 Ajmer, 52.

Sec. 31 (2), Alwar Pre-emption Act does not prescribe a special period of limitation for all suits for pre-emption within the meaning of sec. 29, Alwar Limitation Act which corresponds to this section—*Bhonra* v. *Shivram*, A.I.R. 1951 Rajasthan 22.

247. Special or local law:—A special law means law enacted for special cases in special circumstances as distinguished from the general law which applies generally. Thus, the Limitation Act is an example of the general law of limitation which applies to all classes of cases dealt with by the Act. While, the rules framed under the Defence of India Act containing provisions about limitation are rules made for purposes of emergency and the exigencies of the war. And such provisions do come within the purview of special law within the meaning of this section—*Surya* v. *The State of Bihar*, 30 Pat. 126, A.I.R. 1951 Pat. 462; *Kandaswami Pillai* v. *Karrappa Chetty*, A I.R. 1952 Mad. 186 (F.B.). The Limitation Act is not intended to apply to applications under the Provincial Insolvency Act, 1920, because that Act is a complete Code on the insolvency law applicable to

the areas to which it applies, and prescribes its own period of limitation. Where no period of limitation has been prescribed in the Provincial Insolvency Act for applications by creditors to be brought on the schedule of creditors, the matter is intended to be left to the discretion of the Insolvency Court, but no Article of the Limitation Act would apply to such applications—*Jhan Bahadur* v. *Bailiff*, 5 Rang. 384, 104 I.C. 816, A.I.R. 1927 Rang. 263 (264); *Raja* v. *Sheopujan*, I.L.R. (1943) All. 84, 1942 A.L.J. 592, A.I.R. 1942 All. 429 (F.B.). The distinction made between special or local laws which are complete codes as regards limitation and those which are not complete codes as regards limitation in considering the applicability of the general provisions of section 29 (2) does not arise after the amendment of that section. Under this section certain sections of the Limitation Act are applicable unless excluded and other sections are not applicable unless included, whether the special or local laws provide or do not provide a separate or self-contained body of provisions with regard to limitation of suits, appeals or applications—*Adinaranappa* v. *Mallamma*, A.I.R. 1950 Mysore 13. See *Bangalore Municipal Corporation* v. *Setty*, A.I.R. 1955 Mys. 110.

But the Rules of the High Courts under the Letters Patent are not included in the expression, "special law." The Letters Patent themselves constitute neither a special nor a local law. The High Court Rules approximate closely to bye-laws. They are subordinate and domestic enactments. They must be *intra vires* of the Act from which they derive their power. Therefore no Rule of the High Court can prescribe a period of limitation different from that prescribed by the Limitation Act—*Abdul Ganny* v. *Mrs. Russell*, 8 Rang. 380 (F.B.), 127 I.C. 161, A I.R. 1930 Rang. 228 (235). In this case it has been held that Rule 9 (2) of the Appellate Side Rules (Rangoon High Court) is *ultra vires* in so far as it prescribes a period of limitation less than that prescribed in Art. 168, Limitation Act. The Rules of the High Court under the Letters Patent not being included in the term "special or local law," sec. 29 does not apply, and the provisions of the Limitation Act need not be applied in computing the period of limitation prescribed by such Rules. Therefore in computing the period of limitation for an appeal under cl. 10 of the Letters Patent, the time taken in obtaining a copy of the judgment appealed from shall not be excluded—*Mukund* v. *Niranjan*, 15 P.L.T. 301, A.I.R. 1934 Pat. 353 (354), 151 I.C. 108. The Letters Patent of the Patna High Court is neither a local or special law within the meaning of this section—*Lalit* v. *Mohaprosad*, 26 Pat. 157, A.I.R. 1947 Pat. 329 (S.B.). But a contrary view has been taken by the Lahore High Court in *Punjab Co-operative Bank, Ltd.* v. *Official Liquidators*, I.L.R. (1941) Lah. 191, 43 P.L.R. 297, A.I R. 1941 Lah. 257 (F.B.), where it has been held that the statutory rules framed by the High Court under Clause 27 of the Letters Patent under the authority delegated to it by His Majesty who, in turn, was acting under the powers conferred on him by Act of Parliament are a 'special law' within the meaning of this section. The Patiala Judicature Farman and the rules framed thereunder provide a special law as to the period of limitation—*Khub Ram* v. *Lachhman*, A.I.R. 1952 Pepsu. 21.

The C. P. Code is not a special or local law—*Narendra* v. *Oudh Commercial Bank*, 11 O.W.N. 1103, 151 I.C. 541, A.I.R. 1934 Oudh 465 (471); *Subbarayan* v. *Natarajan*, 45 Mad. 785.

The Code of Criminal Procedure is a general law relating to procedure and not a special or local law—*P. Venkata Subbareddi* v. *Duvuru Papireddi*, A.I.R. 1957 Andh. Pra. 406.

The Dekkan Agriculturists Relief Act is a special or local law and in view of this section, sec. 20 of the Limitation Act will not apply to a suit falling under sec. 3 (w) of the Deccan Agriculturists Relief Act—*Keshav* v. *Bhagwan*, 44 Bom.L.R. 138, A.I.R. 1942 Bom. 131. So also, in a suit for ejectment of a trespasser by a sir-holder under

sec. 180 (1) of the U. P. Tenancy Act, twelve years limitation under Limitation Act does not apply. The suit is to be instituted within 3 years as prescribed in that Act —*Tilakdhari* v. *Dhondha*, A.I.R. 1950 All. 439. Bengal Act II of 1942 inserting sec. 37A in the Bengal Agricultural Debtors' Act is a local and special Act and the period of limitation applicable will be governed, as regards added parties, by sec. 22, Limitation Act—*Kunja* v. *Mritunjoy*, A.I.R. 1950 Cal. 54. The Delhi and Ajmer-Marwara Rent Control Act (1947) is a special Law—*Moti* v. *Thandiram*, A.I.R. 1951 Ajmer 52.

248. "Expressly excluded":—The term "expressly excluded" in clause (*a*) of sub-section (2) means specifically mentioned as excluded. Unless an express reference is made in the special or local law to the sections of the Limitation Act and by that reference they are expressly excluded, they would apply to the special or local law—*Raja Sati Prasad* v. *Gobinda*, 33 C.W.N. 227 (229), A.I.R. 1929 Cal. 325. Thus, the Sikh Gurudwaras Act, 1925, does not expressly exclude section 4 of the Limitation Act; therefore sec. 4 would apply to a suit brought under the Sikh Gurudwaras Act, and would allow the plaintiff to institute his suit on the re-opening day of the Court, if the period of limitation prescribed for the suit expires on a Court-holiday—*Jiwan Singh* v. *Gurudwara Tahli Saheb*, A.I.R. 1930 Lah. 800 (801). So also as the operation of sec. 15 (2) of the Limitation Act has not been excluded by the Assam Municipal Act the said section is applicable in a suit under sec. 320 of the Assam Municipal Act for malicious prosecution against a Municipality—*Tinsukia Municipal Board* v. *Bankim*, A.I.R. 1950 Assam 101.

Where a local or special law is silent on the matter of limitation in respect of suits, appeals or applications contemplated or authorised by it, and some Article of Schedule 1, Limitation Act covers them, the whole of section 3 will be applicable. The amendment of this section by Act X of 1922 does not affect the position. But where in cases covered by some Article of the Schedule the local or special law prescribes a period of limitation different from that prescribed in the relevant Article in Schedule 1, either by altering the period of time mentioned in column 2 of the relevant Article of Schedule 1 or by prescribing a starting point different from that indicated in column 3 thereof, the whole of section 3 is made applicable unless that section has been excluded by special or local law with the result that the aid of sections 4 to 25 of the Act can be invoked. But where none of the Articles are applicable and the local or special law itself prescribes limitation, sections 4, 9 to 18 and 22 are made applicable unless the special or local law excludes them or any of them, and the remaining sections, namely, 5 to 8, 19 to 21, 23 to 25 are not to apply unless they or any of them are made applicable by the special or local law. The very fact that a period of limitation has been prescribed by the local or special law will carry with it the power to dismiss the suit, appeal or application contemplated by the local or special law, if presented out of time prescribed, provided that the same has not been filed in circumstances attracting any of the sections 4, 9 to 18 and 22 of the Act—*Province of Bengal* v. *Amulya*, 54 C.W.N. 297, A.I.R. 1950 Cal. 356.

249. The phrase "the remaining provisions of this Act shall not apply" in clause (*b*) of sub-section (2) can only mean that the remaining provisions of this Act shall not apply *unless they are expressly made applicable* by the special or local Act. To hold otherwise is to hold that it is a prohibition of the future as well as the past application of those provisions by a special or local Act, which is obviously impossible. The amendment of sec. 29 of the Limitation Act in 1922 did not restrict its scope but extended it. Under the old section 29, none of the provisions of the Limitation Act were applicable unless they were expressly included by the special or local Act. Under the new sec. 29, some of them are applicable without being expressly included, unless they are expressly excluded; the rest remain, as before, applicable only when they are

expressly included—*Madho Rao* v. *Balaji*, 91 I.C. 563, A I.R. 1926 Nag. 236. The expression 'the remaining provisions of the Act shall not apply' in the amended section simply means that they are not to apply *pro prio vigore* that is merely by virtue of the Limitation Act itself and that if they are to apply, the grounds of applying them must be found in the special or local Act itself—*Cheddalal* v. *Officer Commanding*, I.L.R. (1941) All. 356, 1941 A.L.J. 267, A.I R. 1941 All. 207. What clause (*b*) means clearly is that the remaining provisions of the Limitation Act shall not apply of their own force. *i.e.*, they shall not apply unless the Act is expressly applied by the special or local law. This Act has been made applicable expressly by sec. 185 (2) of the Bengal Tenancy Act, and consequently secs 19 and 20 of the Limitation Act must be held to apply to a case under Art. 2 (*b*) of the Schedule to the Bengal Tenancy Act —*Hasan Imam* v. *Brahmdeo*, 9 Pat. 747, 126 I.C. 299, A.I.R. 1930 Pat. 301 (304); *Wazed Ali* v. *Brojendra*, 36 C.W.N. 833 (836) But in *Susamabala* v. *Profullamayee*, A.I.R. 1951 Cal. 402, it has been held that by reason of sec. 29, Limitation Act read with sec. 184, B. T. Act, section 5 of the Limitation Act has no application in case of delay in making deposit under sec. 174 (5), B T. Act.

Section 5 of the Limitation Act does not apply to appeals from Special Magistrates under sec. 39 (2) of Ordinance II of 1932, because the provision of sec. 5 is not expressly made applicable to appeals under the Ordinance—*Nil Ratan* v. *Emp.*, 60 Cal. 571, 37 C.W.N. 195 (199), 143 I.C. 802. A.I.R 1933 Cal. 124; nor does it apply to an appeal against an award in a land acquisition case made under Rule 75A, Defence of India Rules read with sec. 19 of the Defence of India Act—*Surya* v. *The State of Bihar*, 30 Pat. 126, A.I.R. 1951 Pat. 462; nor where the period of limitation has been prescribed by the rules of Patiala High Court for Letters Patent Appeal—*Hari* v. *Hazari*, A.I.R. 1951 Pepsu 132; *Khub Ram* v. *Lachman*, A.I.R. 1952 Pepsu 21. Section 29 (2) (b) can not be read as excluding the operation of sec. 5 of the Act. Section 29 (2) (b) only applies for the purpose of determining the period of limitation prescribed for a suit, appeal or application—*Rameshwar* v. *Matuki*, 12 B.R. 62.

30. [*Provision for States for which the period prescribed is shorter than that prescribed by any law previously in force in a Part B State. Omitted by Adaptation of Laws (No. 2) Order, 1956 published in Gazette of India, Extraordinary, Part II Section 3 page 2277 dated 1. 11. '56.*]

This section was inserted by Act 3 of 1951 and stood as follows:—

Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by any law corresponding to this Act in force in a Part B State which is repealed by the Part B States (Laws) Act, 1951 (III of 1951), may be instituted within the period of two years next after the coming into force of this Act in that Part B State or within the period prescribed for such suit by such corresponding law whichever period expires first.

Previous to insertion of this section 30 by Act 3 of 1951, the section 30 which provided for suits for which the period prescribed by the Indian Limitation Act of 1908 was shorter than that prescribed by the Act of 1877 was repealed by the Repealing and Amending Act, (8 of 1930), s. 3 and sch. 11 and stood as follows:—

30. Notwithstanding anything herein contained, any suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the Indian Limitation Act, 1877, may be instituted within the period of two years next after the passing of this Act, or within the period prescribed for such suit by the Indian Limitation Act, 1877, whichever period expires first.

31. [*Provision for suits by certain mortgagees in territories mentioned in the second schedule. Repealed by the Repealing and Amending Act, (8 of 1930), Sec. 3 and Schedule II.*]

This section stood as follows:—

31. (1) Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first; and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable.

(2) Where in the aforesaid territories the claim of a mortgagee for foreclosure or for sale has been wholly or in part dismissed or withdrawn after the twenty-second day of July 1907 and before the passing of this Act, either in a Court of first instance or of appeal on the ground that a twelve years' rule of limitation applied to such claim, the case may be restored on an application in writing to the Court by which the claim was dismissed or in which it was withdrawn, provided the application is made within six months from the date of the passing of this Act: and on such restoration, the provisions of sub-section (1) shall apply.

Section 31 must be interpreted as prescribing a period of limitation even for the purposes of acknowledgments, part payments, and renewals under sections 19 and 20. The operation of the section cannot be limited or restricted to such acknowledgments or renewals made between 1908 and 1920. It also applies to one made before 1908. Hence a simple mortgage of 1892 renewed in 1905 is effective and has priority over one executed in 1902—*Suryanaryana Rao* v. *Venkataraju*, A.I.R. 1935 Mad. 64, 58 Mad. 270, 68 M.L.J. 12, 1934 M.W.N. 1343, 40 L.W. 893, 153 I.C. 2 (F.B.).

32. [*Repeals*] *Repealed by the Second Repealing and Amending Act, (17 of 1914), Sec. 3 and Schedule II.*

THE FIRST SCHEDULE.

(See Section 3.)

FIRST DIVISION: SUITS.

253. The periods of limitation prescribed in this schedule are to be computed subject to the provisions contained in the body of the Act—*Dhonessur* v. *Roy Gooder*, 2 Cal. 336 (F. B.). So the period of limitation prescribed in this schedule lapses not on the expiry of the definite number of years prescribed therein but on the expiry of that number of years together with the time which is excluded from the calculation—*Chheda* v. *Baldeo*, 1949 A.L.J. 291, A.I.R. 1949 All. 764.

If a suit falls under two Articles of the Limitation Act, the one more general and the other more particular and specific, the latter Article will apply on the principle *"Generalia specialibus non derogant"* (the special excludes the general)—*Sharoop* v. *Jogessur*, 26 Cal. 564 (567) (F. B.); *Madras Steam Navigation Co.* v. *Shalimar Works*, 42 Cal. 85 (108); *Venkatasubba* v. *Asiatic Steam Navigation Co.*, 39 Mad. 1 (12); *Mangu* v. *Dolhin*, 25 Cal. 692 (698, 699); *Municipal Board* v. *Goodall*, 26 All. 482 (487). See Note 6, *ante*.

In determining the particular Article of the Limitation Act applicable to a case, much depends on the nature of the plaintiff's claim. If the plaintiff is entitled to so frame his suit as to make a certain Article giving a favourable period of limitation applicable, it is not a valid objection to say that he could have framed it otherwise as to make a less favourable Article applicable—*Zia Uddin* v. *Akbar Ali*, 1932 A.L.J. 317, A.I.R. 1932 All. 358 (358, 360), 136 I.C. 829.

The Limitation Act is in a sense a purely arbitrary enactment and the various starting points for purposes of limitation laid down in this Schedule are equally arbitrary. It is not absolutely necessary that there should be a consistency or uniformity of any definite principle in fixing the various starting points. It is a mere matter of choice dependent on public policy. In some cases the starting point is fixed as the date of execution of a bond, in other cases the starting point is the date for payment. In some other cases it is the date of the first default. Each article has therefore to be interpreted according to the particular language employed in that article, and ordinarily irrespective of somewhat similar language employed in other articles—*Jowahar* v. *Mathura*, 1934 A.L.J. 1035 (F. B.), A.I.R. 1934 All. 661 (664), 151 I.C. 585.

Part I.—Thirty days.

Description of Suit.	Period of limitation.	Time from which period begins to run.
1.—To contest an award of the Board of Revenue under the Waste Lands (Claims) Act, 1863 (XXIII of 1863).	Thirty days.	When notice of the award is delivered to the plaintiff.

This Article contemplates a suit to contest an award, and not an *application* to set aside an award; consequently the time taken in obtaining a copy of the award cannot be deducted under sec. 12 (4). If no suit is brought within the period prescribed by this Article, the order of the Board becomes final, under sec. 5 of the Waste Land Claims Act (XXIII of 1863). The Court has no power to extend the time —*Taramath* v. *Collector of Sylhet*, 5 W.R. 1 (Waste Land Ref.).

Part II.—Ninety days.

2.—For compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in India.	Ninety days.	When the act or omission takes place.

The word "India" was substituted for the words "The States" by Act 3 of 1951.

This Article may be compared with the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), sec. 1.

254. Application of Article:—This Article applies where the defendant professes to do an act *bona fide* in pursuance of an enactment; it does not apply where the defendant knows that he has not, under a statute, authority to do a certain thing, and yet knowingly and intentionally does that thing in contravention of the provisions of the statute—*Ranchordas* v. *Municipal Commissioner*, 25 Bom. 387 (393); *Maung Kyaw* v. *Maubin Municipality*, 3 *Rang.* 268, 4 Bur.L.J. 139, A.I.R. 1925 Rang. 311. No doubt this Article makes no reference whatsoever to *bonafides* or *malafides*. But the protection of the Article cannot be claimed by a defendant where it is shown and found that the act complained of was a malicious act which the defendant could not have committed in the honest belief that he was justified in doing it under any enactment—*Bisheshwar* v. *Lachman*, 1942 A.L.W. 63. When a public officer is acting *bona fide* in pursuance of the law and commits a tort, Art. 2 is the proper Article to apply. That Article which lays down a short period of 90 days for a suit is for the protection of public officers who have acted *bona fide* in the exercise of their duties. Art. 2 will not protect a public officer who has acted *mala fide* under colour of his office. It is when a public officer acts *bona fide* in the exercise of his lawful authority but heedlessly exceeds his authority then a suit will lie and the limitation prescribed by Art. 2 will apply—*Jaques* v. *Narendra*, A.I.R. 1936 Cal. 653. The intention of this Article is to meet those cases where the defendant does an act injurious or possibly injurious to another, under powers conferred or honestly believed to be conferred by some Act of the Legislature. It does not apply to a case where the damages arise not from the doing of the act or from the failure to do it, but from doing it in an improper manner out of malice and carelessness. Such a case would be governed by Article 36—*Waliulla* v. *Raj Bahadur*, 16 O.C. 211, 21 I.C. 426. A suit for damages against a Municipality for malicious prosecution will be governed by this Article, if the defendant Municipality has acted in the honest belief that it was empowered to institute the prosecution by the Municipal Act; if at the time it instituted those prosecutions the defendant Municipality knew that it had no power to prosecute, then the suit would be governed by Article 23 —*Maung Kyaw* v. *Maubin Municipality*, supra. The statutory protection is intended for the benefit of persons who intend to act right but by mistake act wrong—*Parton* v.

Williams, (1820) 3 B. & A. 330; *Hughes* v. *Buckland*, (1846) 15 M. & W. 346 (*per* Pollock, C. B.); Lightwood, p. 392.

In order to enable a defendant to take advantage of the shorter period of limitation prescribed by this Article, he must allege and shew that he had reasonable grounds for justifying his action under the particular enactment relied upon by him and not that he arbitrarily asserted or thought so. He must have assumed to act in the honest exercise of a supposed statutory power—*Ganeh* v. *Elliot*, 124 P.R. 1881; *Narpat Rai* v.*Sardar Kripal*, 65 P.R. 1886; *Punjab Cotton Press Co.* v. *Secy, of State*, 4 Lah. 428, A.I.R. 1924 Lah. 169, 79 I.C. 208. The *reasonableness* of the belief is immaterial if he *honestly* believed in the existence of those grounds, though it is an important element in determining the question of honesty—*Ganesh* v. *Elliot*, 160 P.R. 1883; *Roberts* v. *Orchard*, (1863) 2 H. & C. 769; *Heath* v. *Brewer*, (1864) 15 C.B.N.S. 803. A person acting under statutory powers may erroneously exceed the powers given or inadequately discharge the duties imposed by the Statute; yet if he acts *bonafide* in order to execute such powers or to discharge such duties, he is to be considered as acting "in pursuance" of the Act, and is to be entitled to the protection conferred upon persons whilst so acting—*Smith* v. *Shaw*, (1829) 10 B. & C. 277.

This Article is intended to afford protection to persons acting in pursuance of an enactment against stale claims. A short period of limitation is provided for such cases in order that such acts which are of public nature shall not give rise to protracted litigation—*Mohamed Saadat* v. *Administrator, Corporation of City of Lahore*, I.L.R. (1945) Lah. 523, 47 P.L.R. 302, A.I.R. 1945 Lah. 324 (F.B.).

The object of the Article is the protection of public officials who, while *bona fide*, purporting to act in the exercise of a statutory power, have exceeded that power and have committed a tortious act. If the act complained of is within the terms of the statute, no protection is needed, for the plaintiff has suffered no legal wrong; the protection is needed when an actionable wrong has been committed and to secure the protection there must be in the first place a *bona fide* belief by the official that the act complained of was justified by the statute, secondly, the act must have been performed under colour of a statutory duty, and thirdly, the act must be in itself a tort in order to give rise to the cause of action. It is against such actions for tort that the statute gives protection—*Per* Courtney-Terrell, C.J., in *Secy. of State* v. *Lodna Colliery Co.*, A.I.R. 1936 Pat. 513, 15 Pat. 510, 17 P.L.T. 279, 164 I.C. 860. Applying the principle of this decision it has been held that where it is admitted that the act was performed under the powers given by the statute and the cause of action alleged against the Secretary of State is a failure to allot the statutory compensation provided, then this Article has no application—*Amar* v. *Secretary of State*, A.I.R. 1939 Lah. 583.

Under this Article, any *malice* on the part of the defendant is immaterial. If the defendant had acted under the *bona fide* belief that he had a legal right to do the act complained of, (*viz.*, arresting and handcuffing the plaintiff who was a suspected dacoit, whom the defendant had a legal right to arrest under sec. 54, Cr. P. Code), then even though he might have cherished malice against the plaintiff, the latter's suit for damages for malicious arrest fell under Art. 2 and not under residuary Article 36 —*Shariful* v. *Lachmi Narain*, 1931 A.L.J. 858, 135 I.C. 558, A.I.R. 1932 All. 16 (18).

This Article is not intended to apply only to those cases in which the defendant at the time of doing the act, *informs* the other party in so many words that he is acting under such and such a provision of law. The Article being evidently intended to allow protection to persons doing acts in pursuance of some enactment in force, it is sufficient for them to show that in doing the act they were at the time under the honest belief that their act was authorised by some Statute—*Richard*

Watson v. *Municipal Corporation of Simla*, 72 P.R. 1909, 108 P.L.R. 1909, 2 I.C. 819; *Amar Singh* v. *D. C. Gajranwalla*, A.I.R. 1937 Lah. 748.

This Article gives protection not only to acts done but also to acts *omitted*. See also *Wilson* v. *Mayor of Halifax*, (1868) L.R. 3 Ex. p. 119.

This Article is wide and general in its terms and must be read subject to the provisions of any specific Article, *i.e.*, it should not be applied where there is a more specific Article applicable to the case. Thus, it is not applicable to a suit against a Municipal Board for compensation for illegal or excessive distress; such a suit would be more properly governed by Art. 28—*Municipal Board* v. *Goodall*, 26 All. 482 (487, 488).

Article 2 does not apply to a suit to recover money paid under protest to a Municipal Committee who has no authority to realise the amount under the law—*Notified Area Committee, Chichwaatni* v. *Ladha Ram*, A.I.R. 1935 Lah. 47, 152 I.C. 680. Where a person brings a suit for damages for libel against an Inspector of Police submitting report in compliance of an order of a Magistrate acting under Ch. 16, Cr. P Code, the period of limitation for the suit is the ordinary one for a suit in tort, and not Art. 2—*Raja Veni Madho* v. *M. Wajid Ali*, A.I.R. 1937 All. 90.

255. Compensation:—For the meaning of this word, see Note 305 under Article 29. In the cases cited therein it has been pointed out that according to some High Courts, the term 'compensation' should be applied to those cases in which the plaintiff does not claim only the specific amount realised by the defendant, but a much larger sum by way of *damages* to be assessed by the Court; whereas according to some other Courts the word should be interpreted in a much wider sense and would cover all cases whether the plaintiff asks only for a refund of the specific sum of money realised by the defendant, or for damages to be assessed by the Court for the defendant's wrongful act. In *Rajputana Malwa Railway Stores* v. *Ajmere Municipal Board*, 32 *All.* 491 the word was applied in the former sense, and it was held that a suit to recover the excess amount of duty realised by the defendant-Municipality from the plaintiff (and not to recover any damages) was not a suit for 'compensation' under this Article but would fall under Article 62. This case was followed in *Municipal Board* v. *Deokinandan*, 36 All. 555, 12 A.L.J. 952, 25 I.C. 943.

256. Cases:—Where a certain Municipality asked the Magistrate to direct the removal of a hut under section 144 of the Cr. P. Code on the ground that it was dangerous and insanitary, and the Magistrate after a full inquiry on the spot passed an order for demolition, it was held that a suit for compensation for damage caused by the order of the Magistrate purporting to be under sec. 144, Cr. P. Code, fell under this Article—*Hari* v. *Surendra*, 18 I.C. 84 (Cal.). A suit for damages against a Municipality for an alleged omission to repair a road quickly, and for closing the road at both ends which injured the business of the plaintiff, is governed by this Article—*Municipal Board* v. *Behari Lal*, 24 A.L.J. 682, A.I.R. 1926 All. 538, 95 I.C. 1030. A suit to recover damages from a Municipal Committee on the ground that they had been negligent in the repairing of a drain outside the plaintiff's house and had thereby caused the fall of a wall is governed by this Article and not by Art. 36 which is a residuary Article—*Baizakhan* v. *Municipal Committee*, 31 P.L.R. 159, 122 I.C. 111. But a suit claiming compensation for damage said to have been caused by the failure of a local body to maintain its water system in proper order is outside the scope of this Article —*Mahomed Saadat* v. *Administrator, Corporation of City of Lahore*, I.L.R. (1945) Lah. 523, 47 P.L.R. 302, A I.R. 1945 Lah. 324 (F.B.). In execution of a simple money decree, certain immoveable property belonging to the plaintiff was advertised

for sale. On the date fixed for sale, the *amin* came to sell the property. Before the sale, the plaintiff tendered the decretal amount to the *amin*, but the latter wrongfully refused to accept the money and went on with the sale. The sale was subsequently set aside on plaintiff's application under O. XXI, r. 89, C. P. Code. He then brought a suit for damages against the amin 19 months after the date of sale. It was held that the suit fell under Article 2 (and not 36) because the whole foundation of the plaintiff's claim was the alleged omission by the defendant to perform a duty imposed by the C. P. Code, *i.e.*, the omission to accept the decretal amount and stop the sale. The suit was therefore barred—*Mukat Lal* v. *Gopal Sarup*, 41 All. 219, 16 A.L.J. 1017, 48 I.C. 815. A suit for damages for wrongful attachment of standing crops does not fall under this Article but under Article 36—*Hari Charan* v. *Hari Kar*, 32 Cal. 459 (461), 9 C.W.N. 376. A suit for damages against the defendant who arrested the plaintiff (a suspected dacoit) under the *bona fide* belief that he had the legal right to arrest the plaintiff, falls under this Article and not under the residuary Article 36—*Sharifal* v. *Lachmi Narain*, 1931 A.L.J. 858, 135 I.C. 558, A.I.R. 1932 All. 16 (18). A claim for compensation for illegal arrest falls under this Article—*Rohini* v. *Niaz*, 77 C.L.J. 93, A.I.R. 1944 Cal. 4, 212 I.C. 421.

Where bricks were wrongfully seized and used by a Municipal Committee, but not in the exercise of any powers conferred upon them by the Municipal Act, a suit to recover the value thereof need not be brought within three months—*Harbhagwan* v. *Hassan*, 79 P.R. 1884.

257. Any enactment in force:—Article 2 applies to suits for compensation only when the act or omission complained of was done in *pursuance of some enactment* in force for the time being in India. The defendant will have to show that what was done by him falls within the provisions of some Act of the Legislature. The expression '*in pursuance of any enactment*' must be interpreted as meaning acting in conformity with an enactment and not merely pretending to act or acting under colour of such an enactment. Where a person honestly believes that he is acting under some enactment he is protected. But where a person pretends that he was so acting and knows that he should not act under that enactment, he cannot be said to be acting in pursuance of any such enactment. Where a defendant has done an act or omitted to do an act, knowing that he had no ground whatsoever for so acting or omitting to do an act, he does not come within the purview of Art. 2. It is only defendants who have acted honestly, although they might have exceeded the actual power conferred upon them by an enactment, who would be protected. Of course, where it is established that the act done was in strict accordance with an enactment, there would be an obvious protection. But even where the power was exceeded, there would be protection in cases of good faith and *bona fide* belief—*Shiamlal* v. *Abdul Raof*, A.I.R. 1935 All. 538, 1935 A.L.J. 459, 155 I.C. 131; *Amarsingh* v. *G. C. Gujranwalla*, A.I.R. 1937 Lah. 748. Where the canal authorities (defendants) cut the bank of a canal to avoid accident to the adjoining railway, and not to the canal, and the plaintiff's adjacent mills were destroyed, *held* that the defendant's act did not fall under the Canal Act, and Article 2 was therefore not applicable—*Punjab Cotton Press Co., Ltd.* v. *Secretary of State*, 10 *Lah.* 161 (P. C.), 28 P.L.R. 453, 31 C.W.N. 835 (837), A.I.R. 1927 P.C. 72, 103 I.C. 1. It is not enough for the defendant pleading the Article in bar of a suit, to assert that he honestly believed that the Act, in pursuance of which the alleged acts were committed, was in force. He must show that the Act was actually in force at the time and place of the acts complained of—*Jai Ram* v. *Gurmukh*, 105 P.R. 1886.

This Article does not contemplate an act done in pursuance of an agreement;

it relates to an act done in pursuance of an enactment; *Municipal Corporation, Karachi* v. *Province of Sind*, A.I.R. 1947 Sind. 69, 230 I.C. 311.

258. Starting point of limitation:—When the cause of action depends on the happening of special damage, it accrues when the damage happens, and not at the time of the act which causes it—*Backhouse* v. *Bonomi*, (1858) 9 H.L.C. 503; Lightwood, p. 398. See section 24. If the damage results to the plaintiff's estate not immediately but after the lapse of some months after the acts of the defendant, the accrual of the cause of action is postponed under section 24 until such time as the damage occurs; in such a case the plaintiff's suit must be brought within 90 days from the time when damage accrues to the plaintiff from the defendant's acts—*Richard Watson* v. *Municipal Corporation*, 72 P.R. 1909, 2 I.C. 819. The *terminus a quo* in calculating limitation is the date of the damage and not the date of construction of the work which caused the damage—*Punjab Cotton Press Co.* v. *Secretary of State*, 4 Lah. 428 (430), A.I.R. 1924 Lah. 169, 4 Lah. 432, A.I.R. 1924 Lah. 192, 79 I.C. 185. Cf. *Dwarka* v. *Corporation of Calcutta*, 18 Cal. 91.

The starting point of limitation in a suit for damages for wrongful restraint or confinement purported to have been done *bona fide* in discharge of statutory duty is to be computed from the date of occurance and not from any subsequent date when the plaintiff might have suffered physical injury consequent on his detention—*Maharani Gur Charan* v. *Province of Madras*, I.L.R. (1942) Mad. 696, (1942) 2 M.L.J. 14, A.I.R. 1942 Mad. 539.

Part III.—Six months.

3.—Under the Specific Relief Act, 1877, (1 of 1877), section 9, to recover possession of immoveable property.	Six months.	When the dispossession occurs.

259. Section 9 of the Specific Relief Act contemplates summary suits to recover possession, independently of any question of *title*; if a question of title is raised, the suit will not fall under section 9—*Ramasami* v. *Paraman*, 25 Mad. 448; and will not be governed by this Article.

It has been said in some cases that if the plaintiff brings a suit on the basis of *possession* only, and is unable to make out a title, such suit must be brought under sec. 9, Specific Relief Act within six months from the date of dispossession. If the plaintiff comes in after six months, he can succeed only on proof of some *title*. Mere anterior possession is not enough—*Debi Churan* v. *Issur*, 9 Cal. 39; *Ertaza* v. *Bany Mistry*, 9 Cal. 130; *Krishnarav* v. *Vasudev*, 8 Bom. 371; *Premraj* v. *Nibaran*, 6 Bom. 215; *Bapuji* v. *Bhagwant*, 42 Bom. 357 (358). But in several other cases it has been held that, if the plaintiff (bringing a suit after the expiry of 6 months) shows a previous possession, and nothing more, such possession is *prima facie sufficient evidence of* title against a trespasser—*Mohabeer* v. *Mohabeer*, 7 Cal. 591; *Hanmantrav* v. *Secy. of State*, 25 Bom. 287; *Narayana* v. *Dharmachar*, 26 Mad. 514; *Nisa* v. *Kantiram*, 26 Cal. 579.

Where a non-occupancy raiyat has been dispossessed of his holding by a trespasser or by his landlord otherwise than in execution of a decree, then if his tenancy has not yet been determined, he has a *title* to the land, *viz.*, the title of a tenant, and a suit by the raiyat to recover possession by establishment of his *title* is not a suit

under section 9 of the Specific Relief Act; consequently Article 3 cannot apply, but either Art. 120 or 142 applies—*Tamizuddin* v. *Ashrub Ali*, 31 Cal. 647, 651, (F.B.) (overruling *Bhagabati* v. *Luton Mandal*, 7 C.W.N. 218).

A suit under sec. 9 Specific Relief Act I of 1877 to recover possession of immovable property may be brought even as against the rightful owner of the property. (See sec. 9, Specific Relief Act I of 1877).

4.—* * * * * * * * * *

Article 4 relating to suits under the Employers and Workmen (Disputes) Act 1860, repealed by the Repealing and Amending Act, 1937 (20 of 1937), Sec. 3 and Schedule II.

Part IV.—One year.

5.—Under the summary procedure referred to in section 128 (2) (*f*) of the Code of Civil Procedure, 1908 (V of 1908) *where the provision of such summary procedure does not exclude the ordinary procedure in such suits and under O. XXXVII of the said Code.*	One year.	When the debt or liquidated demand becomes payable or when the property becomes recoverable.

259A. Change:—The italicised words have been added in Article 5, and the period of limitation has been extended from six months to one year, by the Indian Limitation Act XXX of 1925. The reasons have been thus stated: "Article 5 of the First Schedule to the Indian Limitation Act 1908 (IX of 1908) provides a period of limitation of six months for a suit under the summary procedure referred to in section 128 (2) (*f*) from the date on which the debt or liquidated demand becomes payable or when the property becomes recoverable. As the Article stood in the Act of 1877, it referred to suits on negotiable instruments under Ch. 39 of the Code of Civil Procedure of 1882. In the Code of 1908 powers were given in section 128 (2) (*f*) to High Courts to extend the summary procedure, and a reference to that section was substituted for Chapter 39 of the Civil Procedure Code, when the Limitation Act was consolidated in 1908. The fact that the provisions of chapter 39 of the Code were also retained in Order 37 of the new Code of Civil Procedure seems to have been overlooked. Accordingly if Article 5 is strictly construed, it applies now only to suits under the summary procedure made by rules under sec. 128 (2) (*f*) of the Code since the Code was enacted. The Bill proposes to make the intention clear, and to make a similar consequential change in Article 159 of the same Schedule. The Bill further proposes to extend the period of limitation now fixed in Article 5 for suits to which the summary procedure applies from six months to one year, as the existing period has been represented to be too short"—*Statement of Objects and Reasons* (Gazette of India, V, Page 181).

This amenment has been made as a result of the recommendation of the Civil Justice Committee. See the Civil Justice Committee Report, pp. 489-490. The case of *Rabindra* v. *Abdul Ahad*, 52 Cal. 954, 29 C.W.N. 589, A.I.R. 1925 Cal. 781, 88 I.C. 400 in which it was held that suits under O. 37, C. P. Code were not governed by Article 5, is hereby overruled.

6.—Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture.	One year.	When the penalty or forfeiture is incurred.

260. A suit for the recovery of a fine imposed under the terms of a contract or agreement is a suit based on contract and is governed not by Article 6 but by Article 68 or 115 *President of Taluk Board* v. *Lakshminarayana*, 31 Mad. 54; see also *Meri Lal* v. *Mukhta*, 3 P.R. 1875. A suit for recovery of profession tax under the Towns Improvement Act (III of 1871) is not governed by this Article, the same not being a penalty or forfeiture—*President of Municipal Commission* v. *Padmarazu*, 3 Mad. 124. A clause in a lease from the Government entitling the lessees to certain grazing fees and authorising them to impound and levy an extra fee in the case of cattle grazed with permission, is a 'byelaw' within the meaning of this Article—*Meri Lal* v. *Mukhta*, 3 P.R. 1875.

This Article applies to a suit for penalty under a Statute, Act, etc.: a penalty in a *bond* does not fall under this Article. Further, it applies to *pecuniary* penalties and forfeitures: therefore a suit for *possession of immoveable* property to which the plaintiff is entitled by reason of any forfeiture or breach of contract is not governed by this Article but by Article 143.

7.—For the wages of a household servant, artisan or labourer * *	One year.	When the wages accrue due.

The words "not provided for by this schedule, article 4" were omitted by sec. 2 and Sch. of the Repealing and Amending Act, 1939 (34 of 1939).

261. Scope:—This article is applicable only to a suit for wages brought by a servant against the master, and not to a suit brought by one servant against a superior servant who has drawn the wages of the whole establishment from the master and has failed to pay therefrom the portion due to the plaintiff—*Shiva Rama* v. *Turnbull*, 4 M.H.C.R. 43; *Obhoy Charan* v. *Haro Chandra*, 13 W.R. 150, 4 B.L.R. 68. Such a suit falls under Art. 62.

262. Wages:—The term *wages* is confined to the earnings of labourers and artisans, and the word 'salary' is used for payment of servants of a higher class—*Gordon* v. *Jennings*, (1882) 9 Q.B.D. 45. In ordinary language the term 'wages' is usually restricted to the remuneration for mechanical or muscular labour, specially to that which is ordinarily paid at short intervals—U. N. Mitra's Limitation, 5th Edn., p. 871. A suit by a painter for the price, when there is an agreement to pay a certain price for the whole work done upon delivery and acceptance, is not a suit for *wages* under this article—*Virasvami* v. *Sayambabay*, 2 M.H.C.R. 6.

263. Household servant:—The word 'servant' applies to all those between whom and some one else as employer there is a contract for service in consideration

of wages—*Siva Rama* v. *Turnbull*, 4 M.H.C.R. 43. This section does not apply to *all* servants, but only to *household* servants. A *bisardar* in Oudh is not such a servant—*Ghasi Ram* v. *Uma Datt*, 26 O.C. 327, 79 I.C. 576, A.I.R. 1924 Oudh 189. A cook is a domestic servant, although he may be an expert in cooking; and a suit for wages brought by him is governed by this Article—*Kuppu Rao* v. *Narasier*, 2 L.W. 723, 28 I.C. 956; but a cook engaged in a hotel is not a household servant. It is not the nature of the work rendered by the servant but the place of employment that is the determining factor—*Kunhi* v. *Govindam*, (1937)) 1 M.L.J. 329, A.I.R. 1937 Mad. 340, 171 I.C. 72. A wet-nurse is not a domestic servant and a suit by her to recover her wages falls under Art. 102—*Mohan* v. *Jumerat*, 10 A.L.J. 395, 17 I.C. 658. A weighman employed to do work in a shop is not a household servant nor an artisan nor a labourer—*Mutsaddi* v. *Bhagwan*, 48 All. 164, 23 A.L.J. 1059 (cited below). A person whose duties are to sweep and clean a *temple*, provide flowers for daily worship and garlands for the idol is not a *household* servant or labourer—*Bhavathradan* v. *Rama*, 7 Mad. 99; *Baradwaja* v. *Arunachala*, 41 Mad. 528; nor is one so whose duty is to instruct in fencing and wrestling—*Pylwan* v. *Jenaka*, 8 M.H.C.R. 87. A person who is engaged to supervise a work is not a household servant, artisan or labourer. So this Article is not applicable to a suit by such a person for his remuneration—*Anupchand* v. *Nimraji*, I.L.R. (1949) Nag. 578, 1949 N.L.J. 200, A.I.R. 1949 Nag. 329. The term "household servant" must be read *ejusdem generis* with the words "artisan or labourer" which follow it. It cannot apply to a person who is employed for the purpose of collecting rents of houses and as a companion in his employer's journey abroad—*Subhani Begam* v. *Imtiaz Ahmad*, 8 Luck. 119, A.I.R. 1933 Oudh 393, 147 I.C. 227.

Where a servant is appointed on a fixed monthly salary, limitation commences from the end of each month and not from the date of dismissal of the servant—*Kali Charan* v. *Mahomed Saleem*, 6 W.R. (Civ. Ref.) 33. A suit for wages as a domestic servant must be brought within one year after the same became due. But where the master, instead of paying the salary to the servant then and there gives credit in his account books and treats the servant as his creditor, the law of limitation applicable is not that under Art. 7 but the ordinary rule of limitation as to debtors. It is the same as if the master gave a pro-note to his servant for wages—*Chinnan* v. *Vilathan*, 27 L.W. 30, A.I.R. 1928 Mad. 27, 106 I.C. 229.

264. Artisan:—According to Webster's Dictionary, an artisan is one trained to mechanical dexterity in some mechanical art or trade. A motor-car driver is an artisan, because he is required to know how to start the car, how to steer it and how to stop it, and for such purposes he must possess some skill in manipulating the different parts of the mechanism—*Sewram* v. *Lachminarayan*, 5 Rang. 477, A.I.R. 1927 Rang. 279, 104 I.C. 520. A motor driver is an artisan within the meaning of Art. 7 and the suit for wages by him is governed by Art. 7—*Khagendranath* v. *Kantibhusan*, A.I.R. 1936 Cal. 808, 62 C.L.J. 562; *Noor Ali* v. *Kanpur Omnibus Service Ltd.*, A.I.R. 1955 All. 707. A suit by a motor driver for recovery of the arrears of his salary is governed not by Article 7 but by Article 102—*Maniklal* v. *Ramesh Chandra*, 59 C.W.N. 466, A.I.R. 1955 Cal. 290. A village carpenter is an artisan within the meaning of Art. 7—*Namdeo* v. *Ramkrishna*, A.I.R. 1934 Nag. 260, 152 I.C. 885. A mechanical engineer is not an artisan within the meaning of this Article. The word 'artisan' means a mechanic or a workman who has acquired some manual skill, and does not mean persons undertaking higher classes of work which involve responsibility and intellectual training. A suit by an engineer for wages would be governed by Article 102—*Navalmal* v. *Mangaldas*, 12 S.L.R. 140, 50 I.C. 37. So also this Article does not apply to a suit by a goldsmith for recovering the price of his labour in making ornaments—*Lakminarayan* v. *Shri Ram*, I.L.R. 1938 Nag. 592, A.I.R. 1938 Nag. 286, 177 I.C. 345. A village

barbar is not a household servant nor is he a labourer or artisan. So this section does not apply to a suit by him for recovery of wages—*Tulsi* v. *Paikan*, 1941 N.L.J. 102, A.I.R. 1941 Nag. 132, 194 I.C. 580.

265. Labourer:—A workman or labourer is one who enters into a contract to employ his personal services and to receive payment for that in wages—*Riley* v. *Ward*, 2 Exch. 59. A labourer is a man who digs and does other work of that kind with his hands. But a carpenter is not a labourer because though he works with his hands, his work requires skill and training—*Morgan* v. *London General Omnibus Co.*, (1884) 13 Q.B.D. 832. A labourer is a servant in husbandry or manufacture not living *intra maenia*, who labours in a toilsome occupation and does work that requires little skill, as distinguished from an artisan (Bouvier's Law Dictionary, Vol. 2, p. 1819). A person who is a contractor or sub-contractor and who engages to get work done but does not engage in any work himself is not a workman or labourer—*Gilby* v. *Subbu Pillai*, 7 Mad. 100; *In re Bal Krishna*, 10 Bom. 196; *Arupchand* v. *Nimraji*, I.L.R. (1949) Nag. 578, 1949 N.L.J. 200, A.I.R. 1949 Nag. 329. A man who agrees, in consideration of the use of the land and a share of the produce for the season, to provide seed and labour and carry on the cultivation of the land, is not labourer—*Andi Konan* v. *Venkata Subbaiyan*, 2 M.H.C.R. 387. A weighman employed to work at a shop cannot be treated as a mere labourer, employed to do task work, that is, to hold the scales and weigh goods in a shop for a monthly salary. He can be asked to do other work of the shop when free. He has to count and add up and calculate the price on the total quantity weighed, and his work cannot therefore be treated as purely manual labour. He may be regarded as shopkeeper's assistant, and Article 102 applies to a suit by him to receive his dues from the shopkeeper—*Mutsaddi* v. *Bhagwan*, 48 All. 164, 23 A.L.J. 1059, A.I.R. 1926 All. 172, 90 I.C. 120. A suit for wages by a person employed as a salesman is governed by Art 102, and not by Art. 7—*Musa Meah Sawdagar* v. *Shirazulla*, A.I.R. 1935 Rang. 235, 8 R.R. 107, 157 I.C. 732.

8.—For the price of food or drink sold by the keeper of a hotel, tavern or lodging house.	One year.	When the food or drink is delivered.

Food and drink, the price of which would come under this Article must be meals or articles of food which are either consumed on the premises or are sent out or taken away by the consumer which are intended for, or capable of, immediate consumption in the state in which they are sent out, that is to say, without cooking. If from the restaurant is sent out, for instance, a case of beer, that would scarcely be drink in that sense of the words. It would be goods; and the same principle applies to articles in tins which do not require immediate consumption—*Pershad* v. *The Firm of Unica*, 1939 Rang.L.R. 626, A.I.R. 1940 Rang. 17, 186 I.C. 582.

9.—For the price of lodging.	One year.	When the price becomes payable.
10.—To enforce a right of pre-emption, whether the right is founded on law, or general usage, or on special contract.	One year.	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or,

where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.

266. Scope:—This Article governs suits for pre-emption of all kinds without any exception, in other words, exhausts the law of limitation in respect of pre-emption suits and one would not be justified in referring to any other article for determining the period of limitation for any suit for pre-emption. It is because sec. 54 of the Transfer of Property Act does not contemplate a sale of property incapable of physical possession through an unregistered instrument of sale that the law of limitation contained in this Article while purporting to be exhaustive, does not deal with a sale of a property incapable of phpsical possession through an unregistered instrume .t of sale—*Sahadeo* v. *Kuber*, 1950 A.L.J. 467, A.I.R. 1950 All. 632; *Kaluram* v. *Bastimal*, A.I.R. 1955 Ajmer 50. In certain earlier Allahabad cases it was held that the sale referred to in this Article was a sale *ab initio*, *i.e.*, an absolute sale having *immediate* effect and operation, either by physical possession or by a registered instrument, and that this Article did not apply to a mortgage by conditional sale which became a sale only on foreclosure. A suit for pre-emption in the latter class of sale was held to be governed by Article 120. See *Nath Prosad* v. *Ram Paltan*, 4 All 218 (F.B.); *Rasik Lal* v. *Gajraj*, 4 All. 414; *Udit* v. *Padarath*, 8 All. 54. But this view has been disapproved of in the Full Bench case of *Batul* v. *Mansur Ali*, 20 All. 315 (319). In this case the Judges have observed (at p. 319): "We cannot see how a sale is any the less an absolute one because it is not to take immediate effect and operation. There is certainly nothing in Article 10 to suggest that the sale mentioned in that article is limited to a sale which is to have immediate effect and operation. In our opinion, the other conditions being present necessary to make Article 10 applicable, Article 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which either by the operation of Reg. XVII of 1806 or by the operation of Act IV of 1882 (Transfer of Property Act) had become in effect an absolute sale with the right of redemption gone. In such a case, the other conditions existing, Article 10 would apply as soon as the mortgagee had acquired the complete interest of the mortgagor." As this view has been upheld by the Privy Council in *Batul* v. *Mansur*, 24 All. 17, the earlier Allahabad rulings must be deemed as overruled. The principle underlying this Article and sec. 30, Punjab Pre-emption Act is that of the notice afforded to the pre-emptor by transfer of physical possession or by the registration of the sale-deed—*Kharati* v. *Ram Lal*, A I.R. 1951 Punjab 45. Whether a particular case, whether of sale or foreclosure, falls within this Article or not depends upon whether column 3 is applicable to it, where that column is wholly inapplicable, Art. 120 will apply—*Zamu Tukaram* v. *Ishwardas Amerchand Shop*, I.L.R. (1950) Nag. 745, 1951 N.L.J. 165, A.I.R. 1951 Nag. 295, See also *Kharati* v. *Ramlal*, supra; *Jorawarkhan* v. *Mukhram*, I.L.R. (1949) Nag. 465, 1949 N.L.J. 422, A.I.R. 1952 Nag. 40.

Although this Article remains in its original form even after the promulgation of the U. P. Regulation of Agricultural Credit Act (14 of 1940) it must be held as a natural consequence of the provisions of this Act that the period of limitation for a suit for pre-emption must be calculated in every case of a permanent alienation of protected land only from the date on which the alienation has been sanctioned by the Assistant Commissioner. Where the permission precedes the alienation, this Article will apply in terms, but where it follows the alienation, so that what is till then only an

usufructuary mortgage and becomes a permanent alienation as a result of the permission, the period must be taken to run from the date of such permission—*Dhapal* v. *Gopichand*, A.I.R. 1949 All. 471.

267. Pre-emption:—The right to pre-emption arises when the sale becomes complete, *i.e.*, when there is an entire cessation of right on the part of the vendor—*Buksha* v. *Tofer*, 20 W.R. 216. Therefore no right of pre-emption can arise on a mere conditional sale or mortgage so long as the right of redemption remains with the mortgagor—*Goordyal* v. *Rajah Teknarain*, 2 W.R. 215.

The word 'pre-emption' in this Article refers only to those cases in which the vendor has actually *purchased* the property, and not to those cases where the intending purchaser has *not yet completed* his purchase; because the third column of this Article does not provide a starting point of limitation for a case in which the sale has not taken place. Where the intending purchaser has only intended or contracted to purchase the property, a suit for pre-emption (*i.e.*, to enforce the plaintiff's claim to purchase) is governed by Article 120, and the right to sue accrues under that Article when the plaintiff first becomes aware that the vendor did not intend to sell the land to him—*Rai* v. *Sidakali*, 65 I.C. 959, A.I.R. 1922 Nag. 14.

When a document was really a deed of sale, but was therein called *a hiba-bil-ewaz*, it was held to be an instrument of sale within the meaning of this Article—*Abdul Rahman* v. *Parsotam*, 5 Luck. 492 (P.C.), A I.R. 1931 P.C. 12 (15), 128 I.C. 257. The word 'possession' evidently means *possession as purchaser*, and not in any other capacity. A perpetual lease is not a sale; and a suit to enforce a right of pre-emption (or pre-lease) in respect of such lease does not fall under this Article but under Article 120—*Muklal* v. *Hiranand*, 19 A.L.J. 442, 62 I.C. 884; *Gopal* v. *Lachmi*, A.I.R. 1926 All. 549, 95 I.C. 138. The word 'possession' means possession as *purchaser* and not in some other capacity as mortgagee, lessee, etc.: therefore, where a mortgagee in possession purchases the mortgaged property, he obtains physical possession when the sale to him is actually completed (*i.e.*, when the sale deed is registered), as then his possession which was previously that of a mortgagee, becomes that of an owner—*Lachmi* v. *Sheoamber*, 2 All. 409. Where the property, which was the subject-matter of sale, consisted of fractional shares of zemindaries situate in several different *khatas*, it was held that the property was not capable of physical possession—*Umrao Beg* v. *Mukhtar*, 17 A.L.J. 269, 50 I.C. 80.

The vendee of a house covenanted to give the vendor and his heirs the first option to purchase the house at a certain price, if he were to sell the house at any time. In a suit to enforce this convenant, it was held that it was not a suit to enforce a right of pre-emption, but one for specific performance (Art. 113)—*Khemchand* v. *Mohson*, 17 S.L.R. 1, A.I.R. 1921 Sind 118, 80 I.C. 962.

Effect of fraud:—Where in order to avoid pre-emption a sale was disguised in the form of a mortgage, there can be no question that the parties acted fraudulently in giving the transaction the shape of a mortgage, and the plaintiff in a suit for pre-emption would be entitled to compute the period of limitation from the time when the fraud first became known to him—*Bhagwana* v. *Shadi*, 36 P.L.R. 114, A.I.R. 1934 Lah. 878.

268. Physical possession:—An undivided share of a Zemindari mahal is not capable of physical possession; the word 'physical possession' in this Article means *personal and immediate possession*, regard being had to the form in which the property may exist at the time of the sale—*Batul* v. *Mansur*, 28 I.A. 248, 24 All. 17 (P.C.), affirming 20 All. 315 (F.B.); the period of limitation for a suit to enforce pre-emption

in respect of such share must be computed from the date of the registration of the sale-deed—*Unkar* v. *Narain*, 4 All. 24; *Bholi* v. *Imam*, 4 All. 179. Physical possession means *immediate* physical possession; therefore where a certain zemindary property in the possession of mortgagees is sold to the vendee subject to the mortgage, it is not capable of immediate physical possession at the time of sale; limitation for a pre-emption suit runs from the date of registration of the sale-deed, and not from the date when the vendee subsequently takes possession from the mortgagees—*Narendra* v. *Wali Muhammad*, 28 I.C. 208, 2 O.L.J. 109; *Tikaya Ram* v. *Dharam Chand*, 45 P.R. 1859; *Viswanathan* v. *Ethirajulu*, 45 M.L.J. 389, A.I.R. 1924 Mad. 57, 76 I.C. 467. Where the property, at the date of sale, is in the possession of the holder of a particular or intermediate estate, *e.g.*, where it is in the cultivating possession of a mortgagee or is in the possession of an unfructuary mortgagee or a tenant for a time, the property is not capable of immediate physical possession by the purchaser—*Darabali* v. *Hussain*, 32 P.L.R. 743, A.I.R. 1932 Lah. 98, 135 I.C. 512; *Jairam* v. *Sitaram*, 16 N.L.R. 37 (F.B.), 52 I.C. 940. The constructive possession by receipt of rents from the tenants is not physical possession within the meaning of this Article—*Batul* v. *Mansur*, 20 All. 315, 320 (F.B.). And so, an undivided zemindary share which is incapable of physical possession cannot become capable of physical possession, merely because a lease of it for a fixed period has been granted and the lessee is collecting rents from the tenants separately—*Ram Charan* v. *Mathura*, 1930 A.L.J. 375, A.I.R. 1930 All. 255. A property consisting of a *share in a joint estate* is not capable of physical possession, for until a partition takes place no one has a definite share which he can call his own—*Lahra* v. *Bhagat*, 68 P.R. 1918, 108 P.L.R. 1918, 47 I.C. 359; *Sohan* v. *Himmat*, 61 P.R. 1885; *Maluk Singh* v. *Muhammad*, 65 P.R. 1889; *Karm* v. *Fazl*, 10 P.R. 1881; *Jowala Singh* v. *Tekchand*, 23 P.R. 1882; *Sardar Ali* v. *Fazal*, 68 I.C. 895 (Lah.). So also a sale of an undivided share of a joint holding does not admit of physical possession and the *terminus-a-quo* is the date of the registration. The reason for this is that the date of registration is the date on which the public must be presumed to know that the transfer has taken place—*Wasakha* v. *Mahomed*, 44 P.L.R. 99, A.I.R. 1942 Lah. 118, 200 I.C. 81. But where the sale is of a *specified* plot whether in actual possession of the vendor or in joint possession of himself and others, then the property is capable of physical possession, and limitation runs from the date of giving possession. The determining factor is the factum of actual physical possession, and not the whole property of which the plot sold is a part—*Jhanda* v. *Ditt*, A.I.R. 1928 Lah. 705 (706), 109 I.C. 382.

Property (*e.g.*, house, shop or agricultural land) which is in the possession of tenants is not capable of immediate and personal possession at the date of sale; and therefore limitation commences from the registration of the sale-deed—*Panna Lal* v. *Bhagvandas*, 16 P.R. 1902; *Sharif Hussain* v. *Muhammad Yusuf*, 88 P.R. 1905; *Ganga Ram* v. *Sardara*, 64 P.L.R. 1916, 35 I.C. 278; *Ganwa* v. *Joti Prosad*, 73 I.C. 903, A.I.R. 1924 Lah. 302; *Partab Singh* v. *Gulab*, 26 P.L.R. 780, 105 I.C. 501, A.I.R. 1927 Lah. 784. The words 'capable of physical possession' must be construed with reference to the *time* of sale, and has nothing to do with the question whether physical possession is easy of attainment or otherwise, or with the nature of the obstruction to the taking of such possession. Therefore property held by a tenant-at-will or a tenant by sufferance cannot be said to be in the physical possession of the vendee, although it is easy to take possession from the tenant—*Ghulam Mustafa* v. *Sahabudain*, 49 P.R. 1908 (F.B.); *Panna* v. *Bhagvan*, 15 *P.L.R.* 1902, 16 P.R. 1902. And hence, when the subject of sale is in the possession of tenants, it must be held to be property which is not capable of physical possession at the date of sale, and it is immaterial that the property afterwards became capable of physical possession—*Ganwa* v. *Joti Prasad*, supra.

The above rule (*viz.*, that the words 'physical possession' must be construed with reference to the date of the sale) must be applied only to property such as an undivided share in a mahal which is by its nature not capable of physical possession; but this rule cannot be applied to houses and shops over which physical possession is always possible and practicable. In such a case, the period of limitation will commence to run only when the physical possession is actually taken, whether the possession is taken at the time of sale or at some time later. Therefore, where a house was sold in 1921, but was *in the possession of a trespasser* at the time of sale, and the vendee had to sue him in ejectment and obtained possession in execution of the decree in the ejectment suit in 1922, the period of limitation in respect of a suit for pre-emption of the house commenced to run when the vendee obtained actual possession in 1922 by virtue of the decree in the ejectment suit, and not when the sale-deed was registered in 1921—*Jagamaya* v. *Tulsa* ,48 All. 12, 23 A.L.J. 885, A.I.R. 1926 All. 70, 89 I.C. 444; *Mohanlal* v. *Satyabhama*, 23 N.L.R. 178, A.I.R. 1928 Nag. 89.

An equity of redemption is not capable of physical possession; therefore, on a sale of the mortgagor's equity of redemption to the mortgagee in possession, the pre-emptor's cause of action arises on the date of the registration of the sale-deed—*Shiam Sundar* v. *Amanant*, 9 All. 234; *Bhawani* v. *Attar*, 68 P.R. 1884; *Gaffarkhan* v. *Satar*, 160 P.R. 1889; *Sahadeo* v. *Kuber*, 1950 A.L.J. 467, A.I.R. 1950 All. 632; *Kaluram* v. *Bastimal*, A.I.R. 1955 Ajmer 50.

The physical possession contemplated by this Article does not consist of formal statements by third parties but of physical control visible to other people, which gives notice of a decree. A sale deed contained a statement that "the immoveable property as above has been sold for the above amount and the possession has also been delivered". It was held that such a statement cannot be regarded as evidence for the purpose of showing that transfer of physical possession has taken place at the time of sale—*Ganapat* v. *Chandrabhayabai* I.L.R. (1943) Nag. 209, 1942 N.L.J. 567, A I.R. 1943 Nag 90.

Where the *whole* of the property is not capable of physical possession at the time of sale, the period of limitation commences from the date of registration of the sale-deed—*Umar Baksh* v. *Choghatta*, 156 P.R. 1882. The words 'takes physical possession' must be construed as meaning 'takes physical possession of the whole land'; where the vendee takes possession of the different portions of the property at different periods, time runs from the last date, when he obtains possession of the *whole* of the property—*Dewa* v. *Dia Ram*, 98 P.R. 1876. Where the purchaser cannot take physical possession of the *whole* of the property sold, the third column of this Article cannot be attracted and therefore, this Article becomes inapplicable—*Govardhan* v. *Mukhram*, I.L.R. (1949) Nag. 465, 1949 N.L.J. 290.

Shymbolical possession is not tantamount to physical possession—*Achutananda* v. *Biki Bibi*, I Pat. 578 (581), A.I.R. 1922 Pat. 601, 4 P.L.T. 277, 69 I.C. 666.

When the property is not capable of physical possession, limitation runs from the registration of the sale-deed and not from any subsequent date on which the parties have by mutual consent rectified the wrong description given in the sale deed of the property sold—*Ganga Ram* v. *Sardara*, 64 P.L.R. 1916, 35 I.C. 278. Thus, where at the time of mutation, the parties to the sale-deed agreed that the *khasra* numbers different from those entered in the deed numbers were intended to be sold and mutation was accordingly effected, the starting point of limitation was the date of registration of the sale-deed, and not the date of the mutation—*Ibid*; *Kali Shankar* v. *Raghubir*, 9 I.C. 309 (All.).

269. Registered sale-deed:—A sale-certificate granted under sec. 316, C. P. Code (1882) is not an instrument of sale for the purposes of this Article, as it does not apply to a sale in execution of a decree; even if it be so regarded, still a copy of the certificate forwarded to the registering officer, in accordance with sec. 89 of the Registration Act, and duly filled in the register of non-testamentary documents relating to immoveable property prescribed in sec. 51 of the Act, is not a 'registered' document within the meaning of this Article—*Fateh Singh* v. *Dropodi*, 142 P.R. 1908. It is immaterial for the purposes of this Article whether the registration was effected with or without the consent of the vendor. In either case, the starting point of limitation is the date of registration—*Nagina Singh* v. *Duni Chand*, 62 I.C. 797 (Lah.).

Date of registration:—Limitation for a suit for pre-emption depending on registration begins from the date when the certificate required by sec. 60, Registration Act is signed and dated by the registering officer on the document, and not from the date on which the document is presented for registration, nor from the date when the registering officer signs under section 59 the endorsements made under secs. 52 and 58 of the Act embodying admission of execution—*Karam* v. *Fazl*, 10 P.R. 1881; *Bhanjan Ram* v. *Gopal Ram*, 92 P.R. 1906. A sale-deed was registered at G on 6th October 1921. Only a very small portion of the property sold was situated in G. The rest of the property was situated in B. After registration at G, the registration office at B was informed of the registration and an entry was made by the Sub-Registrar of B in his register on the 24th November 1921. *Held* that time began to run from 6th October, which was the date of registration, and not from 24th November 1921 on which a mere entry was made in the register of B—*Sheopujan* v. *Mangu*, 23 A.L.J. 104, A.I.R. 1925 All. 324, 86 I.C. 130.

270. Possession by vendee or pre-emptor before sale:—Where *prior* to the execution and registration of the sale deed, actual possession of land was taken by one of the vendees under a convenient arrangement, limitation for the purpose of the pre-emption suit ran from the date of the actual sale (*i.e.*, execution of the sale-deed); and the prior possession of one of the vendees must in law be referred to the subsequent deed of sale—*Ram Peara* v. *Rup Lal*, 80 P.R. 1918, 48 I.C. 102. Where the pre-emptor had already been in possession of the land (originally under an agreement and afterwards as a trespasser), and there was no registered deed of sale, a suit for pre-emption was held to be governed by Article 120 and not by this Article—*Velayudhan* v. *China Velayudhan*, 40 M.L.J. 443, 62 I.C. 27; *Mammali* v. *Kunhipakhi*, 38 Mad. 67 (69). In the Punjab, if there is no registered deed of sale, and physical possession is not given because the vendee had already been in possession of the property, but there is mutation of names, the suit for pre-emption is not governed by Article 10 or 120, but by sec. 30 of the Punjab Pre-emption Act, and time runs from the date of mutation—*Tola Ram* v. *Lorindra Ram*, 3 Lah. 261, A.I.R. 1922 Lah. 210, 69 I.C. 715; *Gurudas* v. *Qadir Baksh*, 28 P.L.R. 192, 102 I.C. 423, A.I.R. 1927 Lah. 388.

270A. Addition of transferee from vendee after limitation:—Where a purchaser under a sale deed in respect of which a cause of action for the suit for pre-emption has arisen subsequently transfers the property to another, the original cause of action for pre-emption is not thereby affected, for the subsequent transferee must take the transfer only subject to the right of pre-emption. Though such a transferee is impleaded in the suit more than a year after the date of transfer to him, the suit filed within a year from the original sale, is not barred by limitation—*Sri Thakurji* v. *Sujan*, I.L.R. (1939) All. 220, 1939 A.L.J. 35, A.I.R. 1939 All. 158.

271. Where Article does not apply:—Where the whole or a portion of the subject of sale is not capable of physical possession and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120 and not by this Article —*Ali Cauhar* v. *Jawahir*, 30 P.R. 1892; *Govardhon* v. *Mukhram*, I.L.R. (1949) Nag. 465, 1949 N.L.J. 290. Thus, a suit to enforce a right of pre-emption against a mortgagee by conditional sale who has foreclosed under Reg. XVII of 1806 is governed by Art. 120, when part of the property sought to be pre-empted is a share in an undivided zemindari mahal, and there is no registered deed of sale—*Batul* v. *Mansur*, 20 All. 315 (321) (F.B.), affirmed in *Batul* v. *Mansur*, 24 All. 17 (P.C.). A suit for pre-emption in respect of an *oral* sale, the property sold being a share in an undivided holding not succeptible of physical possession is governed by Article 120—*Kishen Chand* v. *Keher Singh*, 14 P.R. 1904. Where the property does not admit of physical possession, and being under rupees one hundred in value, is conveyed by an unregistered instrument, this article does not apply. See Whiteley Stokes' *Anglo-Indian Codes*, Vol. II, p. 977. Where the purchaser has obtained only symbolical possession but not physical possession, and there is no registered deed of sale, the property having been sold in execution of a decree, this Article does not apply—*Achutananda* v. *Biki Bibi*, 1 Pat. 578 (581), A.I.R. 1922 Pat. 601, 69 I.C. 666.

A suit by one pre-emptor against another for the determination of the question as to whether the plaintiff or the defendant has the better right to pre-empt the property, is not governed by this Article but by Art. 120—*Durga* v. *Haider*, 7 All. 167; *Ilahi Bux* v. *Muhammad Rab Nawaz Khan*, 80 P.R. 1912, 14 I.C. 328; *Ram Pershad* v. *Ganga Datt*, 20 P.R. 1908; *Mutsadda* v. *Hamira*, 11 P.R. 1893. This Article applies to a suit by the pre-emptor against the vendee. A suit against a *transferee of* the vendee falls under Article 120 and not under this Article—*Karamdad* v. *Ali Muhammad*, 31 P.R. 1913 (F.B.), 18 I.C. 70, 61 P.L.R. 1913; *Fazal Hussain* v. *Malik*, 49 P.R. 1914, 25 I.C. 443; *Hari Ram* v. *Allah Ditta*, 17 P.R. 1915, 186 P.L.R. 1915, 28 I.C. 695; *Razawand* v. *Dukchor*, 1 O.L.J. 196, 24 I.C. 116 (117).

271A. Starting point of limitation:—Where physical possession can be obtained then that is the date whence the period of limitation runs, otherwise it runs from the date of the registration of the document of sale. (Starling, p. 158). Where physical possession is obtained by the vendee after the execution of the sale deed and before registration, in a suit for pre-emption time runs from the date of the delivery of possession and not from the date of registration—*Ram Gopal* v. *Baikunth*, A.I.R. 1947 All. 252. It is neither necessary nor this Article requires that the sale deed should be registered before the vendee is put to possession to enable the vendee to claim that he is put in possession of the property under sale deed——*Ram Gopal* v. *Baikunth*, 1950 A.L.J. 1, A.I.R. 1950 All. 290.

272. Right not extinguished—Defence of pre-emption:—A suit by a pre-emptor is not a suit for possession of property in respect of which he has the right of pre-emption, and therefore, the right is not extinguished by operation of section 28. Consequently, a defendant may plead his right of pre-emption by way of defence, though a suit by him to enforce such right would then be time-barred—*Kanharam Kutti* v. *Uthotti*, 13 Mad. 490; *Krishna Menon* v. *Kesavan*, 20 Mad. 305. Contra—*Viswanathan* v. *Ethirajulu*, 45 M.L.J. 389, A.I.R. 1924 Mad. 57; *Ramasami* v. *Chinnan Asari*, 24 Mad. 449. The right of pre-emption is an incohate right and in order to be completed it must be exercised. If that right is not still enforceable, it cannot be a ground of a valid defence—*Sabed* v. *Sahatulla*, 42 C.W.N. 1028.

11.—By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the order: (1) Order under the Code of Civil Procedure, 1908 (V of 1908), on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree; (2) Order under section 28 of the Presidency Small Cause Courts Act, 1882 (XV of 1882).	One year.	The date of the order.

This Article and the one following correspond to Art. 11 of the Act of 1877. The old Article ran thus:—"By a person against whom an order is passed under section 280, 282 or 335 of the Code of Civil Procedure, to establish his right to or to the present possession of, the property comprised in the order—One year—The date of the order."

273. Scope:—This Article is wider in its scope than the corresponding Article of the old Act. A suit contemplated by the old Article was a suit by a person against whom an order was passed under secs. 280—282 of the C.P.Code, 1882 (O. XXI, rr. 60—62 of the new Code). But article 11 of the new Act speaks of a suit by a person against whom an "order on a claim or objection has been passed, *i.e.*, *any* order passed in claim proceedings, and is not restricted to an order passed under O. XXI, rr. 60—62. Therefore, where upon attachment of the properties of the judgment-debtor, a simple mortgagee of the judgment-debtor preferred a petition praying that the properties should be described in the sale proclamation as being subject to the simple mortgage in favour of the petitioner, and the petition being dismissed, he brought a regular suit to enforce his mortgage more than one year after the order of dismissal, it was held that although the objection did not purport to be put in under rule 58, and the order of dismissal was not under rules 60—62 still it was an "order on an objection" and therefore one contemplated by this Article; and the suit by the mortgagee to enforce his mortgage against the execution-purchasers and their representatives, brought more than a year after the order of dismissal, is barred by this Article—*Lakshumanan*,v. *Parasivan*, 37 M.L.J. 159, 52 I.C. 720 (721); *Velu Padayachi* v. *Arumugam*, 38 M.L.J. 397, 56 I.C. 481; *Muthia Chetty* v. *Palaniappa*, 45 Mad. 90, 41 M.L.J. 594, 70 I.C. 432; *Debidas* v. *Maharaj Rupchand*, 25 A.L.J. 609, A.I.R. 1927 All. 593, 102 I.C. 792. See also *Nawal Kishore* v. *Khiyali*, 11 Lah. 369, 31 P.L.R. 752, A.I.R. 1929 Lah. 865 (866); *Venkanna* v. *Brahmadu*, (1944) 1 M.L.J. 438, 1944 M.W.N. 384, A.I.R. 1944 Mad. 417. Contra—*Ganesh* v. *Damoo*, 41 Bom. 64, 26 I.C. 627 (decided under the old Act) in which under exactly similar circumstances it was held that the suit did not fall under Article 11. In *Co-operative Credit Society* v. *Narasimma*, (1940) 2 M.L.J. 402, A.I.R. 1941 Mad. 77 it was held that such an order is not *against* the mortgagee and this Article does not apply. But this decision has been over-ruled in *Cannanore Bank* v. *Madhair*, I.L.R. (1942) Mad. 336, A.I.R. 1942 Mad. 41 (F.B.). But if such an objection is made before the Collector or Mamladar to whom the proceeding for execution is transferred and is dismissed without

investigation, this Article has no application as the provisions of or. 21 r. 63 do not apply to such a case—*Ganesh* v. *Gopal*, I.L.R. (1943) Bom. 104, 44 Bom.L.R. 819, A.I.R. 1943 Bom. 12.

A property mortgaged to A was attached and brought to sale by execution by the defendant, and after the sale had taken place, A preferred a claim petition that the sale proceeds should be kept in Court deposit to satisfy his mortgage and must not be paid over to the defendant. The Court dismissed the application holding that as the sale had taken place, it had no jurisdiction to hear the petition. In a suit by the plaintiff to enforce his mortgage and recover the mortgage money from the defendant, it was held that the suit did not fall under Article 11 but was governed by Article 132, because in this case there was no "order on a claim or objection" within the meaning of Art. 11. The claim was preferred after the sale had already taken place, so that the proceeding was not one under O. 21, and the Court had dismissed the claim on the ground that it had no jurisdiction to hear it—*Abdul Kadir* v. *Somasundaram*, 43 M.L.J. 467, 70 I.C. 648, A.I.R. 1923 Mad. 76 [distinguishing 41 Mad. 985 (F.B), 37 M.L.J. 157 and 38 M.L.J. 397].

The word "attachment" in this Article means a *de facto* attachment and *not a mere order of attachment*. Of course, such an order is a necessary preliminary to an attachment, but until further steps prescribed in the Code have been taken in execution of it, the attachment cannot be said to have been accomplished. Unless there had been a completed attachment of this character, there can be no order on an objection made to it or a claim preferred to the property, such as is contemplated in this Article. Without such order, there is *no terminus a quo* for the running of limitation, and therefore no limitation at all. Thus, in execution of a money-decree the Court had ordered the attachment of the property of the judgment-debtor, but no attachment was actually made, and neither the Court nor the parties were aware of the absence of the attachment. The sale-proclamation was duly issued, and a mortgagee of the judgment-debtor preferred a claim-petition that the sale should be subject to his mortgage. The claim having been dismissed, he brought a suit for sale on his mortgage, more than one year after the date of dismissal, and contended that the claim-proceedings being illegal for absence of attachment, the order of dismissal of his claim was a nullity and was not required to be displaced by a suit under Article 11. *Held* that the order was a nullity, that Article 11 was not applicable, and that the suit was not barred—*Muthia Chetty* v. *Palaniappa*, 51 Mad. 349 (P.C.), 55 M.L.J. 122, 32 C.W.N. 821, A.I.R. 1928 P.C. 139, overruling *Muthia Chetty* v. *Palaniappa*, 45 Mad. 90.

Unlike Article 11 of the old Act, the present Article does not refer to any particular section (or Order and Rule) of the Civil Procedure Code, so that this Article is general in its scope and applies to all orders in claim-proceedings, whether they are passed after full investigation under the claim sections of the Code, or are passed summarily *without any investigation* at all. See *Venkataratnam* v. *Ranganayakamma*, 41 Mad. 985 (995) (F.B.); *Gangadhar* v. *Abdul Majid*, A.I.R. 1923 Nag. 69, 69 I.C. 522, *Ran Bahadur* v. *Salig Ram*, A.I.R. 1931 Oudh 1 (F.B.), 6 Luck. 461, 131 I C. 77. This Article read with Or. 21, r. 63, Civil Procedure Code shows that this Article covers a final order in a proceeding, whether it falls specifically under Or. 21 r. 60, 61 or 62 or not and whether it is made with or without investigation—*Dwarika* v. *Mt. Anandi*, A.I.R. 1950 Pat. 25. Thus, it is applicable where the objection of the claimant was dismissed for default of appearance and there was no investigation—*Gulab* v. *Mutsaddi*, 41 All. 623; *Debi Das* v. *Maharaj Rupchand*, 25 A.L.J. 609, A.I.R. 1927 All. 593; *Nagendra* v. *Phani Bhusan*, 45 Cal. 785, 23 C.W.N. 357; *Ponnuswami* v. *Samu Ammal*, 31 M.L.J. 247, 38 I.C. 937 (938); *Nawal Kishore* v. *Khiyali Ram*, 11 Lah. 369,

31 P.L.R. 752, A.I.R. 1929 Lah. 865 (866). The fact of the claim being dismissed for default and not on contest makes no difference whatever—*Badri* v. *Chowdhury Mangaraj*, 8 Cut.L.T. 93. It is applicable where the claim or objection was dismissed under the proviso to rule 58 of O. 21, C. P. Code (without investigation) as being filed too late. A suit brought by him more than a year after the date of the order dismissing his application is barred by this Article—*Velu Padayachi* v. *Arumlgam*, 38 M.L.J. 397, 56 I.C. 481 (483); *Nagendra* v. *Phani Bhusan*, 45 Cal. 785; *Narasimha* v. *Vijiapala*, 2 L.W. 206, 27 I.C. 944 (945); *Gobardhan Das* v. *Mokundi*, 45 All. 438; *Narsayya* v. *Lakshminarayana*, 19 N.L.R. 34, A.I.R. 1923 Nag. 187; *Venkataratnam* v. *Ranganayakamma*, 41 Mad. 958 (F.B.); *Trimbak* v. *Ziparu*, 57 Bom. 213, 35 Bom.L.R. 147, 144 I.C. 193, A.I.R. 1933 Bom. 190 (191). An action based on the rejection of a petition under Or. 21, r. 58, C. P. Code, is barred by limitation if brought after one year even where the petition had been rejected on the ground that the character with which the petitioner clothed himself was not one which would establish a right under O. 21, r. 58 or 59 to have the attachment set aside—*Srikrishna Sahu* v. *Dhirja Mathu*, A.I.R. 1935 Pat. 31; *Subedar* v. *Ramprit*, A.I.R. 1929 Pat. 116, 115 I.C. 703, followed. In a suit under Or. 21 r. 63, Civil Procedure Code to set aside an order passed in a claim petition, this Article is applicable—*Andalamma* v. *Natesam*, (1948) 2 M.L.J. 85, A.I.R. 1949 Mad. 114, 1948 M.W.N. 493. The test to see whether an order is covered by Or. 21 r. 63, Civil Procedure Code is whether the order is against the claimant or the decreeholder, but does not mean that the order must involve an adjudication on the merits after investigation. If in substance and in effect it negatives the claimant's claim and refuses to recognise it the order is one which falls under Or. 21 r. 63, C. P. Code and this Article applies—*Chet Singh* v. *Anjman*, 51 P.L.R. 90, A.I.R. 1949 E.P. 318. Therefore, where the Order "Petition not pressed. It is dismissed" is passed on a petition which falls under Or. 21 r. 58, C. P. Code, and the petitioner does not seek permission to withdraw without prejudice to his rights it is obviously an order which is against him and requires him to file a suit within a year from the date of the order under this Article—*Cannanore Bank* v. *Madhavi*, I.L.R. (1942) Mad. 336, A.I.R. 1942 Mad. 41 (F.B.) over-ruling—*Co-operative Credit Society* v. *Narasimma*, (1940) 2 M.L.J. 402, A.I.R. 1941 Mad. 77.

274. Suits under this Article:—It has been held in some cases that a suit under sec. 283, C. P. Code, 1882 (O. 21, r. 63) is not a suit to establish *title*. The words "the right which he claims to the property" has been interpreted to mean the right to have the property attached and sold or the right to have the property released from attachment. They do not mean the *right or* title to the property. Therefore a suit by an unsuccessful claimant to recover possession of the property on the strength of *title*, brought more than one year after the date of the order, is not barred by this Article—*Morshia* v. *Elahi*, 3 C.L.J. 381; *Kedar Nath* v. *Rakhal Das*, 15 Cal. 674. Rules 58 to 61 of O. 21, C. P. Code simply deal with the rights of the parties to attach the property in execution, and not the rights of the parties to the property itself. An adjudication under those rules has not the force of *res judicata* but it is only operative to conclude rights in execution. The nature of the inquiry is a summary one. Rights relating to property (which may be far beyond the pecuniary jurisdiction of the executing Court) cannot be disposed of on the claim petition. The Legislature cannot have contemplated such far-reaching consequences to an order made under such circumstances as to conclude the right and title of the parties for all time to come—*Vedalingam* v. *Veerathal*, 37 M.L.J. 547, 54 I.C. 530 (533). If the order passed on the claim petition decides only the question about possession, and leaves the question of title open, it cannot be said that the decision as to possession concludes title as well. The 'possession' contem-

plated by O. 21, r. 60 is barre possession and not possession indicative of title. Consequently a suit by the unsuccessful party based on title need not be brought within one year—*Vendalingam* v. *Veerathal*, supra. On the contrary it has been observed by the Privy Council: "The policy of the Act evidently is to secure the speedy settlement of questions of *title* raised at execution sale, and for that reason a year is fixed as the time within which the suit must be brought"—*Sardhari Lal* v. *Ambika Pershad*, 15 Cal. 521 (526) (P.C.), followed in *Najimunnessa* v. *Nachamuddin*, 51 Cal. 548, 39 C.L.J. 418, 83 I.C. 233, A.I.R. 1924 Cal. 744 (751), where it has been held (dissenting from 15 Cal. 674) that in a suit instituted under O. 21, r. 63, C. P. Code, the object is to establish the plaintiff's title to the property and not merely to establish his right to have the attachment released. See also the cases of *Nilo* v. *Rama*, 9 Bom. 35 (38), *Khub Lal* v. *Ramlochan*, 17 Cal. 260 (262), and *Bibi Aliman* v. *Dhakeswar*, 1 C.L.J. 296, where a suit to recover property on the basis of title was held to be governed by this Article.

In a suit against an order on a claim petition, the plaintiff is not confined to the relief which can be given by the Court which heard the claim, but is entitled to ask both for declaration of his title to the property, and for all *consequential reliefs*, e.g., recovery of its value where the property had been sold prior to the order on the claim-petition. A suit to "establish" a right means a suit to establish it effectively by obtaining appropriate relief for the infringement of his right. Therefore a suit for the recovery of the value of the property sold falls under this Article and must be broughut within one year—*Basivi Reddi* v. *Ramayya*, 40 Mad. 733 (736, 739) (F.B.); *Shiboo Narrain* v. *Mudden Ally*, 7 Cal. 608 (612); *Sadu* v. *Ram*, 16 Bom. 608 (614). A decree-holder, whose attachment was raised at the instance of the alienees from the judgment-debtor of the properties attached, sued to establish his right to proceed against the properties and for a declaration that the alienations were not binding on him. It was held that the suit was governed by this Article, and was in time if brought within one year of the order raising the attachment. The fact that there was a secondary relief prayed for in the suit (*viz.*, a declaration) does not take the case out of this Article, as the Article is applicable to all cases in which the main relief (*viz.*, to establish his right to proceed against the property) falls within its scope—*Venkateswara* v. *Samasundaram*. 1918 M.W.N. 244, 44 I.C. 551. Upon attachment of a property, the claimant preferred a claim that he was in possession of the property under a *mokarari* lease granted by the judgment-debtor. This claim was allowed, and the property was ordered to be sold subject to the *mokarari*. More than a year after this order, the decree-holder who purchased at the execution sale, brought a suit for a declaration that the *mokarari* was fraudulent and *benami* and for possession and mesne profits. *Held* that the order of sale being a judicial determination under sec. 280, C. P. Code, 1882, the present suit ought to have been brought within one year from the date of the order, and was barred under this Article —*Rajaram* v. *Raghubansman*, 24 Cal. 563. A claimant whose objection is disallowed is bound to bring a suit within one year notwithstanding the fact that he retains his possession; and if he fails to bring a suit, he is liable to be evicted by the auction-purchaser—*Badri* v. *Muhammad*, 1 All. 381 (F.B.). Claims founded on mortgages are as much within the purview of O. 21, r. 58 as any other claim. An order rejecting the claim of a mortgagee who applied to have the attached properties sold subject to his mortgage must be challenged within the period of limitation prescribed by Article 11—*Ponnusami* v. *Samu Ammal*. 31 M.L.J. 247, 38 I.C. 937 (938); *Nemagauda* v. *Paresha*, 22 Bom. 640 (643); *Lakshumanan* v. *Parasivan*, 37 M.L.J. 159, 52 I.C. 720 (721); *Velu Padayachi* v. *Arumugan*, 38 M.L.J. 397, 56 I.C. 481 (482). A certain property being attached in execution, a mortgagee of the property objected to it on the grround that the Court should allow his mortgage to the extent of Rs. 164.

The Court allowed only Rs. 64. It was held that the mortgagee was bound to establish his right to the full amount within one year from the date of the order—*Yashwant* v. *Vithoba*, 12 Bom. 231. When in execution of a decree against a widow in respect of a mortgage executed by her, the property was attached, and the reversioner's objection to the attachment of the property mortgaged by the widow was disallowed and he sued to have it declared that the mortgage was invalid as against his reversionary interest, it was held that this Article applied and the suit was maintainable —*Sant Ram* v. *Ganga Ram*, 1904 P.L.R. 122. But it should be noted that if the reversioner had brought no suit under this Article within one year, his right would not have been lost, because under Article 141 the reversioner's right to sue accrues only on the death of the widow. During her life-time he is not bound to make any application for possession, and the fact that he has made an unsuccessful application for possession in the execution-proceedings and has not sued under this Article, does not debar him from filing a regular suit after the widow's death—*Tai* v. *Ladu*, 20 Bom. 801. Where, on the date of hearing, the claimant failed to produce evidence and wanted time, but the Court refused to grant time and dismissed the claim petition, a suit to challenge the validity of the order of dismissal must be brought within one year under this Article; if this is not done, the order would become conclusive—*Gokul* v. *Mohri Bibi*, 40 All. 325; *Rahim Bux* v. *Abdul Kader*, 32 Cal. 537. Where after the issue of a sale proclamation by the certificate officer under the Public Demands Recovery Act, objections are preferred and an order is passed against the objector, the order is one passed under sec. 24 of the Public Demands Recovery Act. A suit by the objector is governed by this Article and must be filed within one year from the date of the order rejecting his objections—*Jamuna* v. *Atma*, 17 Pat. 446, 1938 P.W.N. 677, A.I.R. 1939 Pat. 109.

275. Parties to suit under this Article:—*Judgment-debtor*:—This Article does not apply to a suit by a person who was not a party to the proceedings in which the order sought to be set aside was made; *Sardar* v. *Harsukh*, 42 P.L.R. 601, A.I.R. 1940 Lah. 497. The judgment-debtor is not necessarily a party to the claim proceedings and unless he is a party to the proceedings, any order passed therein is not conclusive against him. Therefore, a judgment-debtor who was not a party to the claim-proceedings is not bound by the one year's rule of limitation of this Article in respect of any suit which he may bring for the purpose of establishing his right to the property—*Imbichi* v. *Upakki*, 1 Mad. 391; *Kedar Nath* v. *Rakhal Das*, 15 Cal. 674 (679); *Narayan* v. *Umbar*, 35 Bom. 275 (279); *Moidin Kutti* v. *Kunhi Kutti*, 25 Mad. 721 (723); *Sadaya* v. *Amurthachari*, 34 Mad. 533 (534); *Gurava* v. *Subbarayudu*, 13 Mad. 366 (368); *Munshi Lal* v. *Bihsnu*, 10 P.L.T. 581, A.I.R. 1929 Pat. 604 (605), 120 I.C. 762; *Shivapa* v. *Dod Nagayya*, 11 Bom. 114. *Nemagauda* v. *Paresha*, 22 Bom. 640 (645); *Karsan* v. *Ganpatram*, 22 Bom. 875 (879). This view has been to some extent modified by a later decision of the Madras High Court where it has been held that a judgment-debtor will not be bound by an order on a claim petition unless he has been a party to it and *unless the order in terms adjudicates upon his title*—*Vedalingam* v. *Veerathal*, 37 M.L.J. 547, 54 I.C. 530 (534). The judgment-debtor is not a necessary party to a claim proceeding, and the proper parties to such proceedings are the decree-holder and the claimant. Of course if the judgment-debtor intervenes and actively opposes the claim along with the decree-holder, and the claim petition succeeds, he may be bound by the order unless he sets it aside within one year, as the order may be then said to be passed against him also. But ordinarily it is the decree-holder's right to bring the property to sale against the claim of the claimant, and the claimant's right to have the property released, which are litigated in the claim proceeding—*Velu Padayachi* v. *Arumugam*, 38 M.L.J. 397,

56 I.C. 481 (485). The judgment-debtor is not a party to the claim proceedings, but persons who are parties to such proceedings and persons claiming through them do not cease to be parties to the proceedings merely because subsequent to such proceedings they happen to stand in the shoes of the judgment-debtor—*Ramu Aiyar* v. *Palaniappa*, 35 Mad. 35 (37).

Claimants and decree-holders:—This Article applies to suits not only by claimants but by decree-holders as well. Where, after investigation under sec. 280 of the Code, the release of the property attached was ordered as against the decree-holder, he is limited to one year within which to sue for a declaration that the property is that of his judgment-debtor—*Sardhari* v. *Ambika*, 15 Cal. 521 (P.C.). Where the claim proceedings were decided *ex parte* by reason of the decree-holder's non-appearance notwithstanding that he was given opportunity to appear and produce evidence, and an order was made for the release of attachment after an investigation under section 280, it was held that there was an adjudication as to the merits, and a regular suit by the decree-holder for establishing that the property was that of his judgment-debtor must be brought within one year from the date of such order—*Jiwani* v. *Nathumal*, 28 P.R. 1910, 5 I.C. 890.

Auction-purchaser:—Although the auction-purchaser was not a party to the claim proceedings, still when the claimant's objection was disallowed (and the property was sold) and he afterwards brings a suit under this Article, more than a year after the date of the order passed in the claim proceedings, the auction-purchaser can come in and resist the suit. He is very much interested in obtaining a good title to his purchase, and, being a party to the suit, can take advantage of the fact that the claim was dismissed, and can raise any objection such as limitation that may serve as a bar to the maintenance of the suit—*Velu Padayachi* v. *Arumugam*, supra. But the auction-purchaser is not bound by the order passed in the claim proceeding, as he was not a party to that proceeding, and cannot be regarded as a representative either of the judgment-debtor or of the judgment-creditor—*Narayan* v. *Umbar*, 35 Bom. 275 (277).

Assignees:—A person who is an assignee of the judgment-creditor-purchaser in Court sale is bound by an order against the judgment-creditor in the claim proceedings, and a suit by him must be brought within the period prescribed by this Article—*Ramu Aiyar* v. *Palaniappa*, 35 Mad. 35 (37). An assignee from the claimant who has been successful in the claim proceedings in releasing the property from attachment, must be made a party in a suit to set aside the order of release, if it is intended to bind him by the result of the suit—*Pratap Chandra* v. *Sarat Chandra*, 25 C.W.N. 544, A.I.R. 1921 Cal. 101, 62 I.C. 348, 33 C.L.J. 201.

Claimant as defendant:—The rule is that the unsuccessful objector or intervenor must *himself* bring a regular suit within a year, and if he fails to do so, and a suit is brought against him (*e.g.*, by the auction-purchaser) he cannot assert his right to the property in that suit, even though it was filed within a year of the adverse order—*Nemagauda* v. *Paresha*, 22 Bom. 640 (644); *Bailur Krishna* v. *Lakshmana*, 4 Mad. 302 (308); *Velayuthan* v. *Lakshmana*, 8 Mad. 506.

276. "Property":—The word 'property' includes a debt and other intangible property. When a debt not secured by a negotiable instrument is attached, a claim can be preferred by a third party and investigated under sec. 278, C. P. Code, and an order disallowing the claim is subject to the operation of sec. 283, C. P. Code, and Art. 11, Limitation Act. The words "possess" and "possession" in the claim sections of the Code include constructive possession or possession in law of debts and other intangible property, and are not restricted to properties which are capable of tangible or physical possession—*Chidombara* v. *Ramasamy*, 27 Mad. 67.

277. Where Article does not apply:—This Article does not apply to a case where subsequent to the order disallowing the claim, the decretal amount is paid off by the judgment-debtor and the *attachment released*, so that the claimant's interests are not affected. The reason is that as soon as the attachment is removed, there is no longer an attachment or any other proceeding in execution in which the order disallowing the claim could operate to the prejudice of the claimant. As soon as the attachment is released, the parties are restored to their *status quo ante*. The claimant in such a case need not bring a suit under this Article to establish his right to have the property released, or a suit under Article 13 to set aside the order passed in the claim proceedings; he can sue to recover possession on ground of title within 12 years—*Monilal* v. *Nathalal*, 45 Bom. 561 (565); *Krishna* v. *Bipin*, 31 Cal. 228 (231); *Umesh* v. *Rajbullabh*, 8 Cal. 279; *Ibrahimbhai* v. *Kabulabhai*, 13 Bom. 72; *Gopal* v. *Bai Divali*, 18 Bom. 241. See also *Rati Ram* v. *Berhmajit*, 46 All. 45 (47), A.I.R. 1924 All. 302, 77 I.C. 82. The conclusiveness of an order in a claim case contemplated by Or. 21 r. 63, C. P. Code, is conditional on the continuance of the execution proceedings and the attachment issuing therefrom. Consequently, where a claim is dismissed, but the execution proceedings terminate and the attachment ceases in any manner to have effect, the parties are put back in the same position as before, and the failure of the defeated claimant to sue within one year does not preclude him from afterwards bringing a suit for a declaration of title in respect of the same property beyond one year. It makes no difference whether the attachment terminates within one year or beyond one year. This Article does not apply in such a case—*Ramchandra* v. *Khodaijatul*, 24 Pat. 462, 26 P.L.T. 245, A.I.R. 1945 Pat. 369. Thus, a claim preferred to the attachment of property was dismissed for default in 1911. Nevertheless, the decree-holder took no further steps to bring the attached property to sale, and the execution proceedings were dismissed very soon afterwards for default, whereupon the attachment ceased. In 1918 the decree-holder issued execution against the same lands and purchased them at the auction sale. Thereupon the claimant brought the present title suit. It was contended that the suit was barred under Article 11 as it was not brought within one year after the order of dismissal of the claim case in 1911. *Held* that the object of making a claim in execution being to remove the attachment, that object was gained when the attachment was withdrawn, and if there existed no attachment or proceeding in execution on which the order in the claim case could take effect, the claimant was not bound to bring a suit complaining of the order of dismissal of the claim, within a year after the order of dismissal. This Article did not apply and the present suit was not barred—*Najimunnessa* v. *Nacharuddin*, 51 Cal. 548, 39 C.L.J. 418, 83 I.C. 233, A.I.R. 1924 Cal. 744. Whether the decree is satisfied or set aside or reversed, or whether the decretal amount is paid into Court under O. 21 rule 55, or whether the attachment is voluntarily withdrawn by the decree-holder, or whether the order of attachment is discharged, in all these cases the same result follows, *viz.*, the attachment of the property is released and the parties are put back in the same position in which they were before the execution proceedings were lodged, and the claimant is not bound to institute a suit under rule 63 within a year after his claim has been rejected, when the object sought by him in making the claim has been attained by the release of the property from attachment within the time limited by this Article—*Ibid.*

The dismissal of a claim petition preferred under Or. 21, r. 58, C. P. Code on the ground that it is not tenable after the execution sale has taken place, is not an order falling under Or. 21, r. 63, C. P. Code, and the failure to file a suit within one year as provided by this Article will not debar the claimant from setting up his rights afterwards. This principle applies even in cases where the claim petition is filed before

sale but the order is passed after sale—*Ningouda* v. *Nabinsahib*, I.L.R. (1942) Bom. 636, 44 Bom. L.R. 543, A.I.R. 1942 Bom. 263.

Where a mortgagee having attached the mortgaged property in execution of his decree the property was released under sec. 280, C. P. Code at the instance of a third party who alleged to have purchased the property prior to the mortgage, and then the mortgagee, more than a year afterwards, brought a suit against such third party and the mortgagor, to have his lien over the mortgaged property declared, to bring it to sale in execution of his decree alleging that the title set up by the third party was fraudulent and made in collusion with the mortgagor, and to have the order under sec. 280 set aside; *held* that the right that was in litigation in the proceeding under sec. 280 was the right to attach and sell the property in dispute in execution of the decree which the plaintiff had obtained against the mortgagor, and so far as that right is concerned, the present suit is barred under Art. 11, but as regards the other rights upon which the plaintiff brought the present suit, *viz.*, that he held a mortgage prior to the purchase of the claimant, and that the purchase of the claimant was not real, the suit is not barred, as it is not a suit contemplated by sec. 283, C. P. Code, and therefore does not fall under this Article—*Bukshi Ram Pergash* v. *Sheo Pergash*, 12 Cal. 453 (457). Where a Court refuses to investigate the claim on the ground that the proper Court for its adjudication is a Court of a higher grade, and dismisses the claim petition, such an order is not one under Or. 21, r. 63, and need not be set aside by a suit brought within one year—*Lakshmi Ammal* v. *Kadersan*, 41 M.L.J. 198, 63 I.C. 431, A.I.R. 1921 Mad. 488. A debt due to A from B was attached before judgment and A was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of A's estate applied to the Court for payment of the money to him and to the attaching creditor by virtue of sec. 34 of the Provincial Insolvency Act (1907). The application was dismissed. More than a year afterwards the Offcial Receiver filed a suit to recover the money. *Held* that at the time of attachment the Official Receiver had no interest in the money within the meaning of O. 21, rule 58; his application therefore was not a claim petition under rules 58 to 63 of order 21, nor was it an application under any other provision of the C. P. Code, but was a statutory claim under sec. 34 of the Provincial Insolvency Act. Article 11 therefore did not govern the present suit—*Official Receiver* v. *Veeraraghavan*, 45 Mad. 70. It should also be noted that Article 11 was inapplicable on the further ground that the Official Receiver's cloim was made in proceedings before judgment and not in proceedings "in execution of a decree."

Where a proceeding for execution is sent to the Collector, the Collector or a Mamlatdar executing the decree is not a court and hence Or. 21, r. 58 and 63, C.P. Code will not apply, and r. 63 of Or. 21, C. P. Code, cannot be invoked so as to make the order passed by the Collector or Mamlatdar final. Though the Collector or Mamlatdar may be said to act under the code when exercising the powers conferred by the Code, he has no power to consider objections to an attachment. Thus, where a person applies to the Collector or Mamlatdar to make a sale subject to a mortgage in his favour and the application is dismissed by the Collector or Mamlatdar without investigation, the order is not one against the applicant under r. 63 of Or. 21 C. P. Code, or within the meaning of this Article. The applicant is not therefore bound to bring a suit under Or. 21, r. 63, C. P. Code, within one year of the order as prescribed by this Article—*Ganesh v. Gopal*, I.L.R. (1944) Bom. 104, 44 Bom.L.R. 819, A.I.R. 1943 Bom. 12

Order 21, rule 63, C. P. Code, has no application to cases where a claim has not been disposed of on the merits or rejected as being too late. All other modes of disposal are treated as modes of disposal which do not entail on the party on whom

an adverse order is made the duty of filing a suit to set it aside. Hence where a claimant applies for withdrawal of claim stating that he will bring a suit and the claim is dismissed, a suit need not be filed within one year under Art. 11 as the order does not fall under Or. 21, r. 63—*Kandasami* v. *Sivagurunatha*, A.I.R. 1935 Mad. 328, 1935 M.W.N. 831, 41 L.W. 500 (41 Mad. 985, F.B., Expl.)

This section does not apply to a case where the claimant (who is a purchaser from the judgment-debtor), having failed to set aside the attachment of the property claimed by him, subsequently brings a suit not against the auction-purchaser for the recovery of the property but against the judgment-debtor for refund of the consideration money paid by him (claimant) for its purchase—*Rati Ram* v. *Berhamajit*, 46 All. 45, A.I.R. 1924 All. 302, 21 A.L.J. 770.

This Article does not apply unless there has been an attachment in the manner prescribed by the C. P. Code. In cases where the property has been, or is sought to be, sold under a mortgage-decree, there can be no attachment, and a suit to contest an order passed or an objection to such a sale need not be filed within one year—*Mathra Das* v. *Amin Chand*, 33 P.L.R. 1033, 141 I.C. 252, A.I.R. 1933 Lah. 75 (76).

Claim in attachment before judgment:—This Article applies only to an order passed on a claim to property which is attached 'in execution of a decree' and not attached *before judgment*. Such an order on a claim (passed before execution) falls under O. 38, rule 8 and need not be set aside like an order under O. 21, r. 63, and the party against whom such an order is passed is not precluded from asserting his rights to the property in any other proceedings. Neither Art. 11 not Art. 13 has any application to such an order—*Ramanamma* v. *Kamaraju*, 41 Mad. 23 (this case has been overruled by 41 Mad. 849 on another point). So, this Article does not apply to a suit brought by an unsuccessful claimant whose claim to property attached before judgment has been preferred and rejected before the decree has been passed; *Dhan Bibi* v. *Mrinalini*, 49 C.W.N. 111, 79 C.L.J. 181, A.I.R. 1945 Cal. 449. The rule in Art. 11 is expressly limited to claims or objections made to the attachment of property attached in execution of a decree. There being no special provision of limitation of suits arising out of objections to attachment before judgment, Art. 120, Limitation Act must be applied to such suits—*Mt. Babbalkumari* v. *Mulchand*, A.I.R. 1934 Pat. 580, 152 I.C. 297. But if the property is attached before judgment in a suit and is ordered to be sold in execution of the decree subsequently passed in the suit, the property may be said to be "attached in execution of the decree," and a suit to contest an order passed on a claim preferred in the execution proceedings falls under this Article—*Arunachalam* v. *Periasami*, 44 Mad. 902 (F.B.), 70 I.C. 439, 41 M.L.J. 252. On an attachment before judgment being ordered, a claim petition was put in but dismissed on the 28th Feb. 1914. Subsequently the proceedings, in which the attachment was obtained ended adversely to the attaching creditor in the Court of first instance on the 22nd January 1915 but was reversed on appeal in 1918; thereupon he again attached the property in 1921. Again an objection to the attachment was put in and being dismissed on the 2nd August 1921, a suit was filed on the 3rd August 1921 challenging the order. *Held* that the suit was not barred. The attachment before judgment was withdrawn upon the dismissal of the proceedings by the Court of first instance, on the 22nd January 1915, and the reversal of the judgment of dismissal on appeal in 1918 did not operate to revive the attachment which had been cancelled in 1915. And therefore, when in the execution proceedings of 1921 a fresh attachment was effected, the plaintiff had a right to prefer a fresh claim which was dismissed on 2nd August 1921, and the period of one year should be counted from this date, and not from 28th February 1914—*Saliesh* v. *Joy Chandra*, 87 I.C. 756, A.I.R. 1925 Cal. 1147.

278. Starting point of limitation:—The period of limitation runs from the date of the order. A suit by the claimant for declaration of his title to the property and for recovery of the value of the property, when it has been sold prior to the order on the claim petition, is in time if brought within one year from the date of the order, though after more than one year from the date of the attachment and sale of the property—*Basivi Reddi* v. *Ramayya*, 40 Mad. 733 (F.B.), 36 I.C. 445. Where there has been an appeal against an order passed on the claim petition, and the appeal has been dismissed, time runs from the date of the order passed on appeal. The word 'order' should be construed as meaning the only subsisting order in the case, which is the appellate order when there has been an appeal—*Venugopal* v. *Venkatasubbiah*, 39 Mad. 1196 (1201). In this case, the following observations have been made (at p. 1202), though by way of *obiter*: if there has been a petition for review and the Court refuses to interfere with the order sought to be reviewed, the original order is and continues to be the subsisting and final order. In this respect an order rejecting a review petition stands on a different footing from a decision passed on appeal confirming the lower Court's judgment and dismissing the appeal. If the Appellate Court dismisses the appeal on the ground that the appeal is not entertainable, the lower Court's order is the subsisting order. If the order passed on a review petition or revision interferes with the order of the lower Court, the order passed on review or revision becomes the only subsisting order and will become the starting point for limitation. The starting point should be taken to be the date of the final order whether that order is passed on appeal or passed in a civil revision petition from that order—*Venkataswami* v. *Sara*, (1943) 2 M.L.J. 41, 1943 M.W.N. 455, A.I.R. 1943 Mad. 633.

A suit in respect of an adverse order passed under O. 21, r. 63 against a minor must be brought within one year after attaining majority. If however, the guardian files a suit within one year of the order, and that suit is dismissed, it cannot extend the period of limitation for a suit by the minor—*Subbia* v. *Arunachela*, 80 I.C. 992. A.I.R. 1925 Mad. 379.

Effct of bar of limitation:—If the unsuccessful party in the claim proceedings does not bring a suit within one year as prescribed by this Article, he cannot assert his right *even as a defendant* after the expiration of the year—*Badri Prasad* v. *Muhammad Yusuf*, 1 All. 381 (387) (F.B.); *Nilo Pandurang* v. *Rama*, 9 Bom. 35 (39); *Velayuthan* v. *Lakshmana*, 8 Mad. 506; *Nemakauda* v. *Paresha*, 22 Bom. 640 (644).

11A.	By a person against whom an order has been made under the Code of Civil Procedure, 1908, (V of 1908), upon an application by the holder of a decree for the possession of immoveable property or by the purchaser of such property sold in execution of a decree, complaining of resistance or obstruction to the delivery of possession thereof, or upon an application by any person dispossessed of	One year.	The date of the order.

such property in the delivery of possession thereof to the decree-holder or purchaser, to establish the right which he claims to the present possession of the property comprised in the order.

In the Act of 1877, this Article was included in Article 11; in the present Act, it has been separated from that Article and framed more elaborately. See the old Article cited under Article 11 *ante*.

279. Application of Article:—It has been held by the Patna High Court that the language of Article 11A is more comprehensive than that of the old Article 11, that this Article is sufficiently wide to cover cases in which the order is passed *without investigation*, and there is no justification for restricting the operation of this Article only to those cases where investigation has taken place. Therefore, where an application under Or. XXI, rule 100 has been dismissed (without investigation) on account of the applicant's failure to adduce evidence on the date of hearing, a suit for declaration of title falls under this Article—*Saiyid Raziuddin* v. *Bindeshri Prasad*, 5 P.L.J. 652 (655), 58 I.C. 37. The same High Court has held in *Dwarika* v. *Anandi*, A.I.R. 1950 Pat. 25, that this Article has no application where, in the summary proceedings arising out of the claim in the execution case, there has been no investigation. The case of *Saiyid Rajiuddin* v. *Bindeshri Prasad*, supra has been explained and distinguished on the ground that Art. 11A was not considered at all.

But the Calcutta High Court is of opinion that although Article 11A of the Limitation Act does not refer to any section or rule of the Civil Procedure Code and is general in its terms, still the order referred to in this Article must be an order under Order XXI, rule 103 of the C. P. Code. That rule expressly refers to rules 98, 99 and 101, and these rules provide for *investigation* into a petition of objection. The right of suit is given by rule 103 only when there is any order under rules 98, 99 and 101, and Article 11A provides for limitation applicable to such suits. Article 11A therefore does not apply where the petition of objection had been dismissed for *deafult of appearance*, without any investigation, for an order of dismissal of such petition without investigation is not contemplated by rules 98, 99 and 101 of the O. XXI of the Code—*Nirode Barani* v. *Monindra*, 26 C.W.N. 853 (856), 35 C.L.J. 537, A.I.R. 1922 Cal. 229, 68 I.C. 524. In this case the Judges further pointed out (at pp. 856, 857) that although the language of O. XXI, rule 63 of the Code of 1908 has been altered from that of sec. 283 of the Code of 1882, the language of secs. 332 and 335 of the old Code has been retained in O. XXI, rule 103 of the Code of 1908, and therefore although Article 11 governs a case in which the claim petition had been dismissed for default of appearance (45 Cal. 785), Article 11A cannot apply where the petition of objection made under rule 100 had been dismissed for default of appearance. See also *Sarat* v. *Tarini*, 34 Cal. 491 and *Kunj Behary* v. *Kandh Prasad*, 6 C.L.J. 362 (both decided under the old Act) in which it was similarly held that this Article did not apply to a suit brought by the unsuccessful applicant whose application for possession had been dismissed for default of appearance. See also *Meeruddin* v. *Rahisa Bibi*, 27 Mad. 25 (under the old Act) where this Article has been held to be inapplicable where the Court has *refused to investigate* the matter of resistance. But where on the day of hearing of an application made by an auction-purchaser under O. 21, r. 97, the auction-purchaser adduced no evidence but

a witness was examined by the opposite party, and thereupon the Court dismissed the application, *held* that the order made after investigation, and a suit by the auction-purchaser under O. 21, r. 103 fell under Art. 11A—*Hari Saday* v. *Mahendra*, 39 C.W.N. 164 (165), A.I.R. 1935 Cal. 267, 155 I.C. 702.

Where the decree-holder gets possession under the decree and is then dispossessed by reason of an order under sec. 332, C. P. Code, a subsequent suit by him for recovery of possession is governed by Article 142 and not by this Article as it contemplates only an order passed under sec. 335, C. P. Code—*Maindi* v. *Gora Chand*, 16 C.W.N. 971, 14 I.C. 92.

The suit contemplated by O. 21, r. 103 is not confined to a suit for possession of the property. It is a suit to *establish a right* which the plaintiff claims to the present possession of the property. And this right may be established either on account of his right to possession or on account of his *title*. And so, even if the suit contemplated by r. 103 is brought on the strength of *title*, it must be brought within one year under this Article—*Lakshman* v. *Dattatraya*, 53 Bom. 668, 31 Bom.L.R. 765, A.I.R. 1929 Bom. 379 (380, 381), 120 I.C. 362. Where a purchaser at an auction sale instituted proceedings under O. 21, r. 103, C. P. Code, against the defendant who resisted to his taking possession of the property, and the proceedings were dismissed on the ground that the property belonged to the defendant, a subsequent suit to *establish the title* must be brought within one year under this Article—*Bai Jamna* v. *Bai Ichha*, 10 Bom. 604. Under similar circumstances a suit to recover *possession* must also be brought within a year after the order—*Ganpat Rai* v. *Husaini*, 19 A.L.J. 53, 60 I.C. 905.

A purchaser of a coparcener's share at a Court sale, having been obstructed, applied for removal of the obstruction and for possession and his application was rejected. More than a year after the order of rejection, he filed a suit praying that the order in the miscellaneous proceedings might be set aside and that a *partition* might be directed, and that the whole of the plot of land which he purchased might be allotted to the share of his judgment-debtor and that he might be placed in present possession of it. *Held* that the suit though in name a suit for partition was in substance a suit for *possession* of that very property under the self-same right put forward without avail in the miscellaneous proceedings, and so it was a suit to establish his right to the same property covered by the order, and having been brought more than a year after the date of the order in the miscellaneous proceedings, which he asked to have set aside, it was barred—*Bhimappa* v. *Irappa*, 26 Bom. 146. But the Madras High Court holds, under similar circumstances, that the suit for partition is not barred by the one year's rule of Article 11A, because the claim for partition asked for in the suit is *different* from the claim for declaration of his title to actual possession which was asked for in the miscellaneous proceedings. The plaintiff in the present suit is exercising the equitable right of the coparcener whose share he has purchased to demand a partition at any time. The Bombay case was distinguished on the ground that in Bombay even before partition the purchaser of the interest of one coparcener is a tenant-in-common with the others, but in Madras the purchaser is not a tenant-in-common but has only an equity to enforce his rights by partition—*Shanmugan* v. *Panchali*, 49 Mad. 596, 50 M.L.J. 681, A.I.R. 1926 Mad. 683, 95 I.C. 209; *Lakshmipathiraju* v. *Venkataswami*, (1946) 1 M.L.J. 104, 1946 M.W.N. 128, A.I.R. 1946 Mad. 324. The Calcutta High Court has also taken the same view in *Satya* v. *Mukhram*, I.L.R. (1938) 1 Cal. 685, 66 C.L.J. 537, A.I.R. 1938 Cal. 384. Where the basis of the claim in the suit is the same as that put forward in the miscellaneous possession proceedings, Article 11A would apply; but where the basis of the claim in the suit is *distinct* and different, and the possession claimed is not present

possession but only by way of consequential relief to the decree being set aside, the Article cannot apply. Thus, R and F had a dispute about a house and the matter was referred to an arbitrator. He decided that R should pay Rs. 200 and retain possession of the house. The compromise decree was passed in December 1920. R paid the money in Court, but in seeking to obtain possession, was obstructed by F. On proceedings being taken, the obstruction was removed in October 1921. F thereupon field a suit for a declaration in 1923, that the award and the decree had been vitiated by fraud. *Held* that the suit did not fall under Art. 11A because what is sought to be set aside is the original decree of 1920, and not the order in the possession-proceedings—*Rukhmabai* v. *Fakirsa*, 51 Bom. 158, 101 I.C. 40, A.I.R. 1927 Bom. 184. See also, *Jnanendra* v. *Atansenajit*, A.I.R. 1951 Assam 145.

If an execution-purchaser asks to be put in actual possession when he is not entitled to such possession, and his application is dismissed under O. XXI, r. 99, C. P. Code, a suit for actual possession must be brought within one year under this Article —*Baldeo v. Kanhaiya Lal*, 16 N.L.R. 103 (P.C.), 24 C.W.N. 1001, 58 I.C. 21.

This Article applies only to a suit to *recover present possession*. If an objection under section 335, C. P. Code, preferred by a mortgagee of the property sold in execution is rejected, a suit by the objector to *enforce his mortgage lien* over the property does not fall under this Article but under Article 132. Such a suit is not a suit to establish the plaintiff's right to the property, but only to recover a debt which is owing to him and as security for which he has got a charge upon the property—*Bhiku* v. *Shujat Ali*, 29 Cal. 25 (29). This Article applies to a suit by a person who has been *disturbed in his possession* by reason of the auction-purchaser taking possession of the property. If his possession has not been disturbed, and the auction-purchaser has obtained only a symbolical possession of the property, he is not required to make an application under Or. XXI, rule 100 asking for possession of the property (when as a matter of fact he remains in possession thereof) and on the dismissal of the application, to bring a suit under this Article—*Atormoni* v. *Ramananda*, 50 Cal. 311, A.I.R. 1923 Cal. 601, 84 I.C. 876. This Article applies where the plaintiff had been dispossessed *in the course of the delivery* of possession to the decree-holder or auction-purchaser. The terms of this Article go to show that it applies only to cases where a person who has been actually dispossessed of the property and who made an application under Or. XXI, r. 100 and whose application has been dismissed, then brings a suit. Where the plaintiff was actually dispossessed *long* after the date of the order dismissing his application under O. XXI, r. 100, limitation for a suit to establish his title and recover possession is that provided under Art. 142 and not Art. 11A—*Satyanarain* v. *Jinsi*, 10 P.L.T. 872, 117 I.C. 634, A.I.R. 1929 Pat. 553 (554, 555). Dispossession under Or. 21, r. 100 must be in course of the execution proceedings. Where the alleged dispossession is not in the course of the execution proceedings but subsequent to the alleged delivery of possession in course of the execution case, this Article does not apply. The words "to the delivery of possession thereof" in this Article put the matter beyond the shadow of any doubt—*Hare Krishna* v. *Jamini*, 85 C.L.J. 155, A.I.R. 1950 Cal. 555. (The contrary view expressed by Guha J. in *Rajendra* v. *Asir*, 65 C.L.J. 416, A.I.R. 1948 Cal. 192 has been dissented). The plaintiff having purchased certain property in execution of a decree, the defendent applied under Or. XXI, rule 100 that the property belonged to him, and objected to the plaintiff's taking possession. This application was dismissed for default on two different occasions and was ultimately allowed on the 5th August 1916. In 1920, the plaintiffs brought a suit for possession of the property and urged that as the order of 5th August 1916, allowing the plaintiffs' application after it had been previously dismissed for default was without jurisdiction and a nullity, they could disregard that order and bring a suit for possession within 12 years.

Held, overruling the contention, that Or. IX, rule 4, which provides for restoration of suits dismissed for default of appearance, was applicable to a proceeding under Or. XXI, rule 100 and the order restoring and allowing for default was not a nullity and could not be ignored and that therefore the present suit fell under this Article and was barred—*Sheonandan* v. *Debi Lal*, 2 Pat. 372, 4 P.L.T. 93, 71 I.C. 484, A.I.R. 1923 Pat. 239.

The words 'resistance or obstruction' in this Article imply that it applies to those cases where an order has been passed (under O. XXI, rules 98, 99 and 101) on an application made by the decree-holder or purchaser under rule 97, and not where an order has been passed on an application made under rule 95. In an application by the purchaser under rule 95 for delivery of possession of property, there can be no allegation and complaint of obstruction or resistance, and if he is prejudiced by an order passed under rule 95, his suit for possession does not fall under Article 11A, and is not governed by the one year's rule of limitation—*Sobha Ram* v. *Tursni Ram*, 46 All. 693, 22 A.L.J. 626, A.I.R. 1924 All. 495, 83 I.C. 923. The suit contemplated by O. XXI, r. 103 is a suit by a person who is kept out of possession of the property purchased in execution of the decree and claims possession *under his auction purchase*.. The plaintiff in execution of a rent decree against his tenants, purchased and took possession of the holding in suit. Meanwhile the tenants had sold away their holding to the defendants, who made an application under O. XXI, r. 100 for restoration of possession. In 1917, an order was passed in their favour under O. XXI r. 101. The plaintiff instituted the present suit in 1920 for ejectment of the defendants on the ground that the tenants had parted with the holding wrongfully. *Held* that the present suit was not one under O. XXI, rule 103, because it was brought by the plaintiff not in his character as auction-purchaser but as *landlord*. The present suit is totally unconnected with the possession proceedings and does not fall under Article 11A—*Ambica Charan* v. *Rama Proad*, 30 C.W.N. 163, 42 C.L.J. 578, A.I.R. 1926 Cal. 377.

Before this Article applies there must have been an act of dispossession by the decree-holder or the auction purchaser. An order for delivery of possession of land in the actual possession of tenants made in favour of the decree-holder purchaser under Or. 21, r. 96, C. P. Code, does not amount to *dispossession* within the meaning of this Article—*Bisweswar* v. *Naba Kumar*, 44 C.W.N. 251, 70 C.L.J. 111, A.I.R. 1940 Cal. 16. Where a person has not been dispossessed of the property when the order under Or. 21, r. 99, C. P. Code is passed against him and the application under Or. 21, r. 99, C. P. Code is held to be incompetent the suit is not covered by this Article—*Mohammad Jamil* v. *Kewal*, A.I.R. 1940 Lah. 349, 191 I.C. 160.

Before this Article can be invoked, it must be shown that there was a *decree* for possession of immoveable property, or that immoveable property was sold in execution of a *decree*. A decree, as defined in sec. 2 (2), C. P. Code, presupposes a suit. A proceeding taken under Ch. VII of the Presidency S. C. C. Act cannot be said to be a *suit*, and the decision of the Court therein is not a *decree*. Consequently Article 11A does not apply to a suit for recovery of possession of moveable property after proceedings under Ch. VII of the Pres. S. C. C. Act have failed—*Hyder Ali* v. *Aminuddin*, 56 M.L.J. 199, A.I.R. 1929 Mad. 69 (70), 115 I.C. 504; *Madhavprasad* v. *Chandavarrkar*, 50 Bom.L.R. 747, A.I.R. 1949 Bom. 104.

280. Parties:—The suit contemplated by this Article is a suit instituted only against the person *in whose favour the order was made*. Therefore, where a suit was filed in time against the party in whose favour the order was made, the mere fact that other persons were added as defendants after the period of limitation on the representation of the defendant that he was only a benamidar for those persons, would

not make the suit liable to be dismissed as barred by limitation—*Aiyyam* v. *Poongavanam*, 18 M.L.J. 464. Similarly, where the suit was brought in time by the person against whom an order under sec. 335 was made, and at the hearing it was found that he was only a benamidar, and the second plaintiff was brought on the record as the real owner after the expiry of the period of limitation, it was held that the suit was not barred, and that the first plaintiff, though a benamidar, was entitled to sue as the person against whom the order under sec. 335, C. P. Code was made—*Venkatachala* v. *Subramania*, 1910 M.W.N. 633, 8 I.C. 264. So also, where a suit as originally instituted is brought within one year from the date of order under Or. 21, r. 101, C. P. Code but the prayer for amendment, whereby a person, who after the institution of the suit obtains possession of the property in suit, is sought to be brought on record, is made at a time when the period of one year is already passed, the relief against such person is not barred by limitation—*Sekandar* v. *Joychand*, 85 C.L.J. 208, A.I.R. 1950 Cal. 566.

The words "any person against whom an order has been made include the *decreeholder* (either in his capacity as decree-holder for khas possession or as purchaser in execution of his own decree)—*Bhikhari* v. *Abdulla*, 44 *All.* 607, 20 A.L.J. 578, 68 I.C. 241; *Ganpat Rai* v. *Husaini Begum*, 19 A.L.J. 53, 60 I.C. 905, A.I.R. 1921 All. 92.

280A. When time runs:—Time runs ordinarily from the date of the order. If there has been an application for revision and that application has been dismissed, time does not run from the date of the order of dismissal passed in revision. There is a clear distinction between an appeal and an application for revision. Whereas the right of appeal is a substantive right created by statute, interference by the High Court by way of revision is entirely discretionary; and when the High Court dismisses an application for revision, it is not as if the order of dismissal is the only subsisting order in the case. It only amounts to the High Court abstaining from exercising jurisdiction and allowing the order of the subordinate Court to stand—*Laxman* v. *Chunni Lal*, 27 N.L.R. 251, 130 I.C. 145, A.I.R. 1931 Nag. 17 (18); *Meghmala* v. *Saday*, 42 C.W.N. 1051, 68 C.L.J. 261, A.I.R. 1938 Cal. 577.

But if the petition for revision is accepted by the High Court, the order passed in revision is the subsisting order and gives the starting point for limitation—*Venugopal* v. *Venkatasubbiah*, 39 Mad. 1196 (1202) (by way of *obiter*). See this case cited in Note 278 under Art. 11; *Meghmala* v. *Saday*, supra.

280B. Effect of bar of limitation:—The terms of Or. 21 r. 103, C P. C. by themselves do not lead to the conclusion that the title of the person affected by the order passed under Or. 21 r. 98 or r. 99 is extinguished if he does not bring his suit within one year as provided in this Article—*Gobardhan* v. *Sukhamoy*, I.L.R. (1949) 1 Cal. 378, 83 C. L. J. 373, A.I.R. 1951 Cal. 481.

12.—To set aside any of the following sales:—		
(*a*) sale in execution of a decree of a Civil Court;	One year.	When the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.
(*b*) sale in pursuance of a decree or order of a Collector or other officer of revenue;		

(*c*) sale for arrears of Government revenue, or for any demand recoverable as such arrears;

(*d*) sale of a patni taluq sold for current arrears of rent.

Explanation.—In this article "patni" includes any intermediate tenure saleable for current arrears of rent.

281. Application of article:—This Artocle applies only to those cases in which the sale would be binding on the plaintiff if not set aside—*Vishnu* v. *Ram Chandra*, 11 Bom. 130 (132); *Payidanna* v. *Lakshminarasamma*, 38 Mad. 1076 (1081); *Paregh* v. *Bai Vakhat*, 11 Bom. 119 (123). The true criterion is to determine whether the sale is merely voidable or void *ab initio*.

Article 12 does not therefore apply to *void* sales. Where a sale is in its inception void, it is not necessary for the plaintiff to have it set aside as he is not bound by it—*Ram Narain* v. *Brij Nath*, 29 Cal. 36 (42); *Purna Chandra* v. *Dinabandhu*, 34 Cal. 811 (819) (F.B.); *Ahmed Yar Khan* v. *Dinath*, 42 C.L.J. 69, A.I.R. 1925 Cal. 1148; *Khiarajmal* v. *Daim*, 32 Cal. 296 (315) (P.C.); *Bhulaki* v. *Kesri*, 50 All. 686, A.I.R. 1928 All. 363 (365); *Amjad* v. *Ejaz*, 17 Luck. 456, 1941 O.W.N. 1328, A.I.R. 1942 Oudh 120; *Karashiddayya* v. *Gazanan Urban Co-operative Bank Ltd.*, I.L.R. (1943) Bom. 400, 45 Bom.L.R. 553, A.I.R. 1943 Bom. 288; *Ram* v. *Hari*, 52 Bom.L.R. 358, A.I.R. 1950 Bom. 346. The words "set aside" are inapplicable to the case of a sale which is null and void. That which is a nullity cannot from its very nature be set aside—*Shirin Begum* v. *Aghastikhan*, 18 All. 141 (145). Arts. 12 and 14 refer to orders and proceedings of a public functionary, to which by law is given a particular effect in favour of one person or against another, subject in the regular course to a further judicial proceeding having for its object to quash them or set them aside. When an order does not fall within the authority of an official who makes it, it is legally a nullity, and, therefore, need not be set aside—*Shivaji* v. *Collector*, 11 Bom. 429 (432). Thus, where the Court or officer ordering the sale had no *jurisdiction* to do so, as for instance, where the Collector brought to sale any property in excess of that which was covered by the decree, the sale of the excess share was null and void, and the plaintiff's suit for possession of the excess share would not be governed by this Article—*Mazar Ali* v. *Kedar*, 19 All. 308; *Bulaki* v. *Kesri*, supra. Where a property was sold in execution of a decree in 1882 and there was no interest left to be sold to another purchaser, but still it was sold again in execution, and thereupon the first purchaser brought a suit for a declaration that the second sale was invalid, it was held that there was no occasion for setting aside the second sale which did not at all affect the right of the first purchaser, and that therefore Article 12 had no application. This Article does not apply where the suit is brought not to set aside the sale, but to declare that it does not affect the rights of the plaintiff. Between setting aside a sale and holding that the plaintiff's rights are not affected by it, there is a wide difference—*Moti* v. *Karrabuldin*, 25 Cal. 179 (186) (P.C.); *Fazalar* v. *Khorsed*,

I.L.R. (1941) 1 Cal. 339, 45 C.W.N. 277, A.I.R. 1941 Cal. 333; *Banarsi* v. *Bhawani*, 23 Pat.L.T. 364, A.I.R. 1942 Pat. 386, 202 I.C. 52; *Nahal* v. *Felu*, A.I.R. 1941 Pat. 490. The debtor having died, the creditor sued the debtor's mother in the character of heiress; whereas the real heiress was the debtor's widow In 1878 the creditor obtained a decree *ex parte* upon which execution took place and the debtor's property was sold. Afterwards in 1881, the son adopted by the debtor's widow brought a suit to recover the land. *Held* that the sale being a nullity, there was no necessity to set it aside, and the suit did not fall under Article 12—*Baswantappa* v. *Ranu*, 9 Bom. 86. Where a Hindu father executes a mortgage of ancestral property without any consideration and a suit is brought by the mortgagee, the sons are brought on record as the legal representatives of the mortgagor on his death after preliminary decree and a final decree is passed against them without allowing them to question the existence and binding nature of the mortgage and the property is sold and the sons are dispossessed a suit by the sons for possession on the gound that the mortgage, the decree and the execution sale are void is not hit by this Article as the sale being void it is unnecessary for them to set aside the sale—*Lakshmadu* v. *Ramudu*, I.L.R. (1940) Mad. 123, 1939 M.W.N. 918, A.I.R. 1939 Mad. 867. See, however, *Neelakanta* v. *Narayana*, A.I.R. 1956 T.C. 262. Under sec. 49K of the Bengal Tenancy Act, the right of an aboriginal tenure-holder or raiyat in his tenure or holding cannot be sold in execution of any decree or order; the sale of such a tenure is a nullity and an application to set aside such a sale is not governed by Article 12—*Jogeshwar* v. *Jhapal*, 51 Cal. 224, 28 C.W.N. 556, A.I.R. 1924 Cal. 638, 82 I.C. 848. Where a sale takes place under the Public Demands Recovery Act (Bengal) without any previous notice to the defaulter, the sale is an absolute nullity, and a suit to set aside the sale and to recover possession of the property sold is governed by Art. 142, and not by this Article or Art. 120.In such a suit the plaintiff need not ask that the sale should be set aside; he is entitled to recover possession upon the footing that the sale has not affected his title—*Purna Chandra* v. *Dinabandhu*, 34 Cal. 811 (821) (F.B.) (practically overruling *Hari Charan* v. *Chandra Kumar*, 34 Cal. 787); see also *Syam Lal* v. *Nilmoney*, 34 Cal. 241, where the suit was held to be governed by Article 95 or 120, and not by Article 12.

This Article has no application where the suit is to set aside a sale on the ground of *fraud*. Such a suit is governed by Art. 95, which is more specific than Article 12 —*Rameshwar* v. *Mahabir*, 5 Pat. 759, A.I.R. 1926 Pat. 401, 96 I.C. 529; *Madho Saran* v. *Manna Lal*, 14 *P.L.T.* 441, A.I.R. 1933 Pat. 473 (480); *Venkatapathi* v. *Subramanya*, 9 Mad. 457; *Bhoobun Chunder* v. *Rani Sunder*, 3 Cal. 300; *Syam Lal* v. *Nilmoney*; 34 Cal. 241; *Bajaji* v. *Pirchand*, 13 Bom. 221; *Parekh* v. *Bai Vakhat*, 11 Bom. 119; *Natha* v. *Jodha*, 6 All. 406. But see *Raj Chunder* v. *Kinoo Khan*, 8 Cal. 329 where it has been held that a suit to set aside a sale falls under this Article even though fraud is alleged. Where the sale is only voidable at the instance of the plaintiff, he cannot avoid the application of this Article by seeking reliefs which though different are inconsistant with the validity of the sale—*Gauri* v. *Jaishi*, A.I.R. 1950 H.P. 1. In this case the suit was brought for a declaration that the sale was null and void on the ground of fraud practised on Court.

Where the plaintiff, a puisne mortgagee, did not seek to set aside the sale held at the instance of the first mortgagee, but only sought to participate in the sale proceeds on the ground that the first mortgagee was not entitled to draw the whole amount, the suit did not fall under this Article—*Sivarama* v. *Subramanya*, 9 Mad. 57.

This Article does not apply if the plaintiff was not a party to, and therefore not bound by, the proceedings in which the sale was held—*Venkata* v. *Subbamma*, 4 Mad. 178; *Sadagopa* v. *Jamunabhia*, 5 Mad. 54; *Amjad* v. *Ejaz*, 17 Luck. 456, 1941 O.W.N.

1328, A.I.R. 1942 Oudh. 120; *Abdul Hameed* v. *Provident Investment Co. Ltd.*, I.L.R. 1954 Mad. 1039, (1954) 2 M.L.J. 416, A.I.R. 1954 Mad. 961 (F.B.). The Court has not jurisdiction to sell the property of persons who are not parties to the proceedings or properly represented on the record. As against such persons the decrees and sales purporting to be made will be a nullity and may be disregarded without any proceedings to set them aside—*Khiarajmal* v. *Dain*, 32 Cal. 296 (312) (P.C.). Thus, where property belonging to the plaintiff has been sold in execution of a decree against a third party, the sale was without jurisdiction and a nullity, which the plaintiff is not bound to have set aside before he can recover possession. A suit by the plaintiff for recovery of the property is not governed by Art. 12 but by Art. 144—*Jwala* v. *Masiat*, 26 All. 346 (353); *Narasimha* v. *Ramasami*, 18 Mad. 478; *Natha* v. *Badri*, 5 All. 614; *Kadar Hussain* v. *Hussain Sahib*, 20 Mad. 118 (F.B.) (overruling *Suryanna* v. *Durji*, 7 Mad. 258); *Sarfuddin* v. *Hansraj*, 15 P.R. 1912, 11 I.C. 76, 203 P.L.R. 1911. Where the plaintiff had been a minor at the time of the sale, and had not been properly represented in the proceedings in which the sale was held, a suit by the plaintiff after attaining majority to set aside the sale and to recover the property does not fall under this Article —*Vishnu* v. *Rama Chandra*, 11 Bom. 130; *Daji* v. *Dhirajram*, 12 Bom. 18; *Payiddanna* v. *Lakshminarasamma*, 38 Mad. 1076. See also *Rashidunnissa* v. *Muhammad Ismail*, 31 All. 572 (P.C.); *I. Ebrahim* v. *M. Cheriyan*, I.L.R. (1955) T.C. 341, A.I.R. 1956 T.C. 70. Where a suit was brought to recover money from the defendant who was the *karnavan* of a *tarwad*, but it was not alleged in the plaint that the defendant was sued as *karnavan* or that the debt was a *tarwad* debt, a sale of the *tarwad* property in execution of the decree was not binding on the members of the *tarwad*, and this Article does not apply to a suit brought by them to recover the land sold in execution of the decree—*Haji* v. *Atharaman*, 7 Mad. 512.

A sale held under sec. 112 of the Madras Estates Land Act is not held in pursuance of an *order or a decree* of the Collector or other officer of revenue within the meaning of clause (*b*) of Article 12, because the scheme of sec. 112 and the subsequent section of that Act does not contemplate that the Collector shall pass an *order* directing the sale; and consequently this Article cannot apply to a suit to set aside such a sale—*Kootoorlingam* v. *Sennappa*, 61 M.L.J. 203, 134 I.C. 184, A.I.R. 1931 Mad. 724 (726); *Venkatasubbayya* v. *Narayan*, 1927 M.W.N. 174; *Subbayya* v. *Kristayya*, 52 M.L.J. 390, 100 I.C. 1007, A.I.R. 1927 Mad. 488; *Satyanarayana* v. *Rayalamma*, (1943) 1 M.L.J. 386, A.I.R. 1943 Mad. 501, 213 I.C. 255; *Venkataswarlu* v. *Veeraswami*, (1946) 1 M.L.J. 291, A.I.R. 1946 Mad. 461, 226 I.C. 411 (case of sale after notice of relinquishment). The sales in disregard of the absolute provisions of any of the sections of the Estates Land Act such as secs. 116 and 117 apart from cases where there is no jurisdiction to sell at all, relate only to *illegalities* which make the sale voidable and in such cases the sale must be got set aside within the time fixed by this Article. It will not be open to the plaintiff where it is necessary to set aside the sale before he can get the relief for possession simply to ignore the sale and ask for possession, after the expiry of the period to set aside the said sale—*Avudainayagam* v. *Pitchiah*, (1950) 1 M.L.J. 43, 1950 M.W.N. 84, A.I.R. 1950 Mad. 358.

Voidable sales:—As observed before, this Article will apply to cases in which a sale would be binding on the plaintiff if not set aside, *i.e.*, where the sale is merely *voidable* and not void *ab initio*. Thus, it applies to a suit to set aside a sale on the ground that the decree-holder purchased the property without the permission of the Court, such sale being voidable only and not void—*Chinnakannu Padayachi* v. *Paramasiva*, 101 I.C. 89, A.I.R. 1927 Mad. 1135; or to a suit to set aside a sale, when there was a defect in the sale notification—*Baijnath* v. *Ravaneswar*, 6 C.L.J. 163; or where the sale took place within 30 days from the sale proclamation—

Tasadduk v. *Ahmed*, 21 Cal. 66 (P.C.); *Kokil* v. *Edal*, 31 Cal. 385; or where the plaintiff's lands were sold by the Revenue Court for arrears of assessment whereas in fact the lands were exempt from payment of assessment—*Mahadev* v. *Sadashiv*, 45 Bom. 45, 22 Bom. L.R. 1082, 59 I. C. 118. If a Court erroneously holds that an application for execution is not barred and orders a sale, such order though erroneous and liable to be set aside is not a nullity, but remains in full force until set aside, and a sale held thereunder would be valid till set aside. A suit to annul such a sale falls under this Article—*Mahomed Hossein* v. *Purundur*, 11 Cal. 287 (292). Where a decree was passed against the judgment-debtor, and after his death an application for execution was made against his estate and against a person as heir who was in fact not the heir, but the Court erroneously decided that he was the heir, and the property was sold without notice to the proper heirs, *held* that though the execution proceeded against a wrong person, still since it was made 'against the estate' of the deceased judgment-debtor, and since the Court decided, though wrongly, that the person proceeded against was the real heir, the sale was not a nullity, and could not be treated as invalid, notwithstanding this material irregularity. Therefore, the sale was merely voidable and a suit to set aside the sale falls under this Article —*Malkarjun* v. *Narhari*, 25 Bom. 337 (P.C.), 27 I.A. 216. A suit brought by the son to set aside a sale of his share which has been sold in Court-auction in execution of a decree against his father, falls under this Article. The sale is not void but voidable only, and if the son does not challenge it by a suit, the auction-purchaser would get a good title to the extent of the son's share purchased by him—*Narayana* v. *Venkataswami*, 51 M.L.J. 845, A.I.R. 1926 Mad. 1190, 98 I.C. 31. If a decree-holder having been refused permission by the Court to bid for or purchase the property to be sold under his decree, nevertheless purchases it through a *benamidar*, its effect is to render the sale voidable and not void. Consequently, a suit to set aside the sale must be brought within one year under this Article—*Rai Radha Krishna* v. *Bisheshar*, 1 Pat. 733 (P.C.), 3 P.L.T. 529, 67 I.C. 914. Where a house not included in the mortgage was sold by mistake in execution of a decree on the mortgage, the sale is not an absolute nullity, but voidable only, therefore a suit to set aside the sale falls under this Article—*Nagabhatta* v. *Nagappa*, 46 Bom. 914, 25 Bom.L.R. 423, 67 I.C. 857, A.I.R. 1923 Bom. 62. Where, notwithstanding the attainment of majority *pendente lite* by the minor defendant, the suit was continued as if he was still a minor, and a decree was passed against him and his property was sold in execution, it was held that neither the decree nor the sale was a nullity, and a suit to set aside the sale was governed by this Article—*Seshagiri* v. *Hanumantha Rao*, 39 Mad. 1031. Where in a certificate issued under the Public Demands Recovery Act, the blank spaces in the form were not filled up, although it contained all the necessary information as to the specific sum due and the particulars thereof, and the notice issued under sec. 7 of that Act bore only the lithographic signature of the certificate officer, *held* that the certificate could not be held to be *invalid* or void, and a suit to set aside the sale under the Act is governed by Article 12—*Hara Prasad* v. *Gopal Chandra*, 31 C.W.N. 299 (301, 304), 100 I.C. 997, A.I.R. 1927 Cal. 315. A suit for possession by setting aside the execution sale and the decree passed on the basis of an award given by the arbitrator on a reference by Court without giving permission to the guardian of the minor a party to the suit to enter into the agreement to refer the case to arbitration—*Nahar* v. *Tekchand*, 1951 A.L.J. 751, A.I.R. 1952 All. 184.

281A. In execution of a decree:—The language of Art. 12 (a) is wide and there is no reason to restrict the application of the expression "in execution of a decree" to cases of simple money decrees. The article applies to the case of sales

on the basis of mortgage decrees also—*Mohamad* v. *Allahdin*, 17 Luck. 1, 1941 O.W.N. 1077, A.I.R. 1942 Oudh 33, *Dunichand* v. *Ram*, A.I.R. 1949 E. P. 20.

281B. Demand recoverable as such arrears:—An award under section 59 (1) (b) of the Bombay Co-operative Societies Act is recoverable as arrears of land revenue and a suit to set aside a sale by the Collector in execution of the award must be brought within the period prescribed in this Article—*Laxman* v. *Bhut Ashte Co-operative Credit Society*, 48 Bom. L.R. 610, A.I.R. 1947 Bom. 144, 231 I.C. 131.

281C. "Order of a Collector":—An 'order' of a Collector means an order in the nature of a decree or made by the Collector in his judicial capacity—*Sakharam* v. *Collector of Ratnagiri*, 8 Bom. H. C. Rep. 219

282. Suit for declaration, possession or other relief:—The one year's limitation prescribed by this Article is not confined only to suits brought to set aside a sale, but applies also to suits where other relief (*e.g.*, declaration, possession) is sought which can only be granted on annulment of the sale. A sale, if it is a reality at all, and not a nullity, can be legally and literally set aside, and anybody who desires any relief which is inconsistent with it may and should pray to set it aside; and even when there is no such prayer, the suit will be governed by Art. 12, if the objection is to obtain a relief which is inconsistent with the validity of the sale—*Malkarjun* v. *Narhari*, 25 Bom. 337 (350, 352) (P.C.). Where the sale is operative as against the plaintiff though liable to be set aside for want of jurisdiction or other just cause, the suit to set aside the sale must be brought within one year, even though it is framed as a suit for possession—*Baldeo Das* v. *Lal Nilmoni*, 8 Pat. 122, A.I.R. 1928 Pat. 615 (618), 113 I.C. 681, following 25 Bom. 337 (P.C.). If a suit is not expressly brought for setting aside a sale, but if it is of such a nature that it cannot succeed without the sale being set aside, it will be governed by this Article, *e.g.*, a suit by an auction purchaser for refund of the purchase money—*Mohamed* v. *Novroji*, 10 Bom. 214 (217). A suit for *possession of* property sold in execution of a valid decree is governed by this Article, because the plaintiff cannot ignore the decree but must get it set aside before he can recover possession—*Imam Din* v. *Puran Chand*, 1 Lah. 27, 84 P.L.T. 1920, 55 I.C. 833; *Parshadi* v. *Mohammad Zainulabdin*, 5 All. 573. A property was sold by auction in execution of a decree; but before confirmation of sale the judgment debtor sold the property to another (the plaintiff) who paid the decree-money and got the sale set aside. In appeal the sale was confirmed and the auction-purchaser obtained possession. Thereafter the plaintiff sued the auction-purchaser for *possession* of the property. It was held that this Article governed the suit because he must first get the sale set aside—*Nagina Singh* v. *Puran*, 11 P.R. 1906, 4 P.L.R. 1906. Where plaintiff's land having been sold by the revenue authorities for default of payment of assessment due thereon, he instituted a suit for *possession, held* that the sale being in pursuance of an order of a Revenue Officer, the plaintiff was bound by that sale unless and until it was reversed. His suit for possession was governed by this Article, since he could not get possession without setting aside the sale—*Bajaji* v. *Pirchand*, 13 Bom. 221. A decree was obtained upon a mortgage against a Mitakshara father (mortgagor), but his sons were not made parties in the suit. The mortgaged property was purchased by the mortgagee who obtained possession in 1900. In 1911, the mortgagor's sons sued for accounts and for redemption. It was held that as the suit for redemption was not maintainable without first getting a declaration that the sale should be set aside, and the limitation for the latter suit was one year under this Article, the present suit was barred—*Bhola* v. *Lala Kali Prasad*, 1 P.L.J. 180, 34 I.C. 288, following *Ram Taran* v. *Rameswar*, 11 C.W.N. 1078. See *Kishori* v. *Suraj*, A.I.R. 1955 Pat. 386. Where the mortgagee

purchases the mortgaged property at an execution sale held under a money decree of a third person, and the sale is liable to be set aside for some irregularity, a suit for redemption of the mortgagee is not maintainable before getting the sale cancelled by a suit under this Article—*Malkarjun* v. *Narhari*, 25 Bom. 337 (P.C.). Where the plaintiff's interest in a certain land has been sold under the Madras Rent Recovery Act, a suit for possession of the same cannot succeed without setting aside the sale, and would therefore fall within this Article—*Ragavendra* v. *Karuppa*, 20 Mad. 33.

283. "When the sale is confirmed":—If the sale is not confirmed, this Article does not apply—*Narasimha* v. *Ramasami*, 18 Mad. 478 (479).

An *execution sale* is confirmed when the Court makes an order under O. 21, r. 92; the language of r. 92 is clear on this point. Even if an appeal is preferred against the order of confirmation, the time nevertheless runs from the date of confirmation and not from the date of dismissal of the appeal—*Mahomed Hossein* v. *Punundur*, 11 Cal. 287 (292); *Prosunno* v. *Kali Das*, 19 Cal. 683 (686). But the law is otherwise in the case of *revenue-sales*. Thus, where the Board of Revenue discharged an order of the Commissioner, dated January, 1884, which had confirmed a sale by the Collector held in 1882, but afterwards in 1886, reversed its own order and revived that of the Commissioner, it was held that the confirmation of sale dated only from 1886, and that a suit to set aside the sale brought within one year from that date was not barred —*Baijnath* v. *Ramgut*, 23 Cal. 775 (P.C.). Where subsequent to the confirmation of a sale held under the Public Demands Recovery Act an application was made to the certificate-officer to set aside the sale, and it succeeded and the sale was set aside, and thereupon an appeal was taken to the Collector who reversed the above order and restored the sale, *held* that the period of limitation for a suit to set aside the sale ran from the date of the Collector's *order in appeal*, because the suit could be brought only after the sale was confirmed by the Appellate Court, and no suit to set aside the sale could have been brought between the date of the order of the certificate officer and the date of the order of the Collector—*Hara Prasad* v. *Gopal Chandra*, 31 C.W.N. 299 (305), 100 I.C. 997, A.I.R. 1927 Cal. 315. A sale having been effected by order of a Deputy Collector, an appeal was made to the Collector who set aside the sale. The Commissioner, however, set aside the order of the Collector. *Held* that the sale did not become final and conclusive before the date of the Commissioner's order—*Pran Nath* v. *Troylucko*, 14 W.R. 284.

Under this Article, time begins to run from the date of the confirmation only in those cases in which such confirmation is required by the law under which the sale is held, and in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held. Thus, a sale held under the Bengal Patni Taluq Regulation (VIII of 1819) does not require confirmation; it becomes final and conclusive on payment of the full amount of purchase-money. Therefore time runs from the date of the payment of the purchase-money and not from the date of a superfluous order of confirmation, nor from the date of issue of a certificate of payment—*Bhuban* v. *Girish*, 13 C.L.J. 339, 10 I.C. 87. In the Madras Estates Land Act, there is no provision for the *confirmation* of a sale held under that Act; consequently the period of limitation is to be counted from the date when the sale 'would otherwise have become final and conclusive.' A sale under the Madras Estates Land Act becomes final 30 days after the date of sale, in the absence of any application made under sec. 131 of that Act to set aside the sale—*Kamalammal* v. *Chokkalingam*, 45 M.L.J. 840, A.I.R. 1924 Mdd. 278, 76 I.C. 840.

284. Effect of bar of limitation:—Though the right of a person to set aside the sale of a property (which is still in his possession) may be time-barred under

this Article, still there is nothing to prevent him from setting up the invalidity of the sale as a defence to a suit brought by the plaintiff to recover possession of the property from him—*Venkatachalapathi* v. *Robert Fischer*, 30 Mad. 444; *Mahadev* v. *Sadashiv*, 45 Bom. 45 (50), 22 Bom. L.R. 1082, 59 I.C. 118. The Calcutta High Court, however, holds that such defence is not available—*Ramsona* v. *Nabokumar*, 16 C.W.N. 805, 13 C.L.J. 404, 10 I.C. 90.

13.—To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit.	One year.	The date of the final decision or order in the case by a Court competent to determine it finally.

285. Application of Article:—This Article does not apply where the suit does not pray, and the plaintiff need not pray, for any relief by way of altering or setting aside a decision or order. But a suit which is virtually and substantially a suit to set aside a summary decision or order (*e.g.* a decision or order in a miscellaneous proceeding) is governed by this Article, even if the plaint, does not in terms seek to set aside such decision or order. The test is, whether the summary decision or order could be set up as a bar or impediment to the maintenance of the suit. If it could, then it must be said that the suit is brought in reality, though not in words, to set aside the summary decision or order—*Durgaram* v. *Nundocoomar*, 1 Shome, 26, cited in U. N. Mitra's Limitation, 5th Ed., p. 894. A suit for a declaration that the appointment, by the District Judge, of the defendant as a member of a Temple Committee is invalid, and for an injunction against his acting as such member, is in reality a suit to have the order of appointment set aside, and such a suit is governed by this Article and should be brought within one year from the date of the order sought to be impeached—*Subramania* v. *Minakshi*, 3 M.L.J. 128. Where the suit is framed as one for possession, but the plaintiff cannot get a decree for possession without first having the order set aside, the suit is really a suit to cancel the order and is governed by this Article—*Kishori Lal* v. *Kuber*, 33 All. 93, 7 A.L.J. 937, 7 I.C. 503. But if a Court passes an order releasing certain properties from attachment before judgment, a suit by the plaintiff for a declaration that the properties are liable to attachment is not governed by this Article, because it is not necessary for the plaintiff to set aside the order before he can sue for the declaration prayed for—*Ramanamma* v. *Kamaraju*, 41 Mad. 23, 39 I.C. 863. If the order is passed by a Court which is not competent to pass it, it is a nullity, and the plaintiff need not bring a suit under this Article for cancellation of the order, but may sue for a substantial relief—*Ram Kishen* v. *Bhawani Das*, 1 All. 333 (F.B.).

Where the order of the Court had already ceased to have any binding effect, no suit is necessary to be brought under this Article to set aside the order. Thus, during the course of an execution proceedings the Court decided that the attached property belonged to the defendant, that it was attachable in execution of a money-decree against the defendant, and that the claimant had no title to the property as his purchase of the property was invalid. Then the claimant deposited the decretal amount in Court and the property was released from attachment. Thereafter he instituted a suit for a declaration of his title to the property based on the ground that his purchase was valid and not void. *Held* that the suit did not fall under this Article; the decision of the Court ceased to have any valid and binding effect when the attachment was set aside by payment into Court of the decretal amount by the

plaintiff; therefore it is quite unnecessary for him to have that order set aside, and the suit for a declaration is not barred by this Article—*Lal Shaha* v. *Kado Mahto*, 6 P.L.J. 85 (F.B.), A.I.R. 1921 Pat. 1, 60 I.C. 849, 2 P.L.T. 345.

A suit to set aside a sale of ancestral property, made by the plaintiff's guardian after taking the sanction of the District Judge, and for recovery of plaintiff's share therein, is not a suit to set aside an *order* of a Civil Court, under Article 13 (because the *sanction* of the Judge is not an *order*), but is governed by Art. 144—*Sikker* v. *Dulputty*, 5 Cal. 363. A suit not to set aside an order but for an injunction restraining the defendant from enforcing the order, on the ground of error and illegality in the proceedings, is not governed by this Article—*Dhuranidhar* v. *Agra Bank*, 5 Cal. 86.

A certificate of heirship only confers the right of management of the property and does not determine the title to the property; therefore if the person to whom such a certificate has been refused seeks to recover the property on the basis of his *title*, he need not bring a suit under this Article to set aside the order granting the certificate for the possession of the property, and the suit will be governed by the rule of limitation respecting the possession of property—*Bai Kashi* v. *Bai Jamna*, 10 Bom. 449. If the party who fails to get a succession certificate seeks to set aside *the order* granting the certificate to the defendant, he must bring his suit within one year from the date of that order. But if he does not care to disturb that order, a suit to obtain possession of the property of the deceased upon proof of his title need not be brought within one year from the date of the order—*Kalee Prosunno* v. *Koylash Monee*, 8 W.R. 126. The same remarks apply also to orders passed under Act XIX of 1841. If a party seeks to *set aside a summary order passed* by a Civil Court under Act XIX of 1841, he must bring his suit within a year from the date of the Judge's order, but if he prefers to leave that order alone, he is not debarred from bringing a suit for possession upon proof *of his title* within the period prescribed for the institution of suits for immoveable property, *viz.*, 12 years—*Momeedunnissa* v. *Mahomed Ali*, 1 W. R. 40; *Lokenarain* v. *Rani Mayna Koer*, 7 W.R. 199 (F.B.).

If a claim petition filed under O. XXI, r. 58 is allowed by the Court, a suit by the decree-holder to establish his right to attach the property is not a suit to set aside the decision of a Civil Court under this Article, but is covered by the specific provisions of Art. 11—*Venugopal* v. *Venkatasubbiah*, 39 Mad. 1196 (1198).

A Receiver appointed by the Court under the provisions of the Provincial Insolvency Act is not a Court; he is merely an officer of the Court; consequently this Article does not apply to a suit to set aside the Receiver's order—*Basodi* v. *Lala Muhammed*, 13 N.L.R. 210, 42 I.C. 799.

An order passed under Ch. VII of the Presidency S. C. C. Act cannot be regarded as a *decision or order* on the question of title. In a subsequent suit against any order under that chapter, there is no necessity to set aside or alter any such decision or order; consequently this Article has no application. The Article may be Art. 120 or 144—*Hyder Ali* v. *Amiruddin*, 56 M.L.J. 199, A.I.R. 1929 Mad. 69 (72), 115 I.C. 504.

Though this Article in terms applies only to a "decision or order of a Civil Court in any proceeding other than a suit" it must be deemed to apply to decision or orders of a certificate officer also by virtue of sec. 65 (2), Bihar and Orissa Public Demands Recovery Act which says clearly that the provisions of the Limitation Act shall apply to all proceedings under that Act as if a certificate were a decree of Civil Court. Hence a suit under sec. 37, Public Demands Recovery Act to set aside an order of the Certificate Officer under sec. 35 of that Act will be governed by this Article—*Mani* v. *Lokenath*, A.I.R. 1950 Orissa 140.

286. Proceeding other than a suit:—All proceedings in execution are

proceedings in suit; this Article is therefore inapplicable to a suit to set aside an order passed in such proceedings—*Ayyasami* v. *Samiya*, 8 Mad. 82; *Sital* v. *Mohan*, 3 O.C. 84; *Official Receiver* v. *Veeraraghavan*, 45 Mad. 70 (76) (dissenting from *Kishori Lal* v. *Kuber Singh*, 33 All. 93 where an execution proceeding was held to be a proceeding other than a suit). Orders passed in miscellaneous applications in the course of execution proceedings are not governed by Article 13. This Article relates to orders passed in disputes which did not begin with the filing of plaint in a suit, such as disputes initiated by applications under the Guardians and Wards Act, the Succession Certificate Act, and so on, such applications and the proceedings connected with such applications being not proceedings in suit—*Shankur* v. *Mejo Mal*, 23 All. 313 (P.C.). A suit by the plaintiff to recover the sale-proceeds paid to the defendant under an order of the Court passed under section 295, C. P. Code, 1882 (section 73, C. P. Code, 1908), is not governed by this Article, because the order for distribution is an order in the suit itself and therefore a proceeding in a suit—*Shankur* v. *Mejo Mal*, 23 All. 313 (P.C.); *Vishnu v. Achut*, 15 Bom. 438 (dissenting from *Gauri* v. *Ram Ratan*, 13 Cal. 159); *Sivarama* v. *Subramaniya*, 9 Mad. 57; *Sohan Lal* v. *Boldeo* 65 P. R. 1895.

287. Final decision of a competent Court:—"Order by a Court competent to determine it finally" means the final decision of a Court which has competent jurisdiction to decide the case finally, and does not include the order of an Appellate Court rejecting an appeal on the ground of want of jurisdiction—*Oleunissa* v. *Buldeo*, 7 W.R. 151.

14.—To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for.	One year.	The date of the act or order.

288. Void act or order:—The Article refers to orders and proceedings of a functionary to which by law is given a particular effect in favour of one person, or against another, subject in the regular course to further judicial proceedings to quash them or set them aside—*Shivaji* v. *Collector of Ratnagiri*, 11 Bom. 429. This Article does not apply to a case where the order of the officer is *null and void*. This Article refers to acts or orders done in the exercise of powers legally exercisable by the executive; in other words, the Article applies to those acts or orders which require to be set aside. It has no application where jurisdiction has been usurped, and the order is *ultra vires*. An order made without jurisdiction is a nullity and need not be set aside; to an order of this description Article 14 has no application—*Peary Lal* v. *Secretary of State*, 39 C.L.J. 454, A.I.R. 1924 Cal. 913, 83 I.C. 446; *Laxmanrao* v. *Shrinivas*, 51 Bom. 830 (P.C.) A.I.R. 1927 P.C. 217 (223); *Shivaji* v. *Collector*, 11 Bom. 429; *Dhanji* v. *Secretary of State* 45 Bom. 920; *Rasulkhan* v. *Secretary of State*, 39 Bom. 494, 29 I. C. 490; *Balvant* v. *Secretary of State*, 29 Bom. 480 (489); *Malkajeppa* v. *Secretary of State*, 36 Bom. 325; *Secretary of State* v. *Gulam Mahabub*, 42 Mad. 673; *Ananda Kishore* v. *Daiji Thakurain*, 36 Cal. 726; *Birbar Narayan* v. *Secretary of State*, 14 C.L.J. 151, 11 I.C. 899; *Wasif Ali Mirza* v. *Saradindu*, 29 C.W.N. 839, A.I.R. 1925 Cal. 953, 89 I.C. 193; *Mallappa* v. *Tukko*, I.L.R. (1937) Bom. 464, 39 Bom. L.R. 288, A.I.R. 1937 Bom. 307; *Bruusgoarel* v. *Secretary of State*, 42 Bom. L. R. 532, A.I.R. 1940 Bom. 294. Therefore where a Collector, who can, under

sec. 48 of Bengal Act VI of 1870, only settle *Chaukidari Chakran* lands with the Zemindar within whose estate the lands lie, ordered the lands to be settled with the defendant who was the Zemindar of adjacent lands, and the plaintiff who was the proprietor of the estate in which the lands lay brought a suit for possession, it was held that this Article did not apply, as the order was an absolute nullity and need not be set aside—*Bijoy Chand* v. *Kristo Mohini*, 21 Cal. 626. The power of a Criminal Court with regard to property dealt with under section 524 of the Criminal Procedure Code is limited to making arrangements for the custody and production of the property. That section does not empower the Government to confiscate the property. Such an order of confiscation being illegal and without jurisdiction, the plaintiff's suit for recovery of possession is not barred by reason of his omission to institute a suit under this Article within one year of the order for the purpose of setting it aside—*Secretary of State* v. *Lown Karan*, 5 P.L.I. 321, 56 I.C. 507, 1 P.L.T. 451. An order passed by the requisitioning authority under R. 75A, Defence of India Rules (1939) without forming the opinion required by the rules or acquiring for purposes other than mentioned in the rule is null and void from its inception. This Article does not apply—*Dinbai v. Dominion of India*, 53 Bom. L.R. 229, A.I.R. 1951 Bom. 72.

Where a person who was entitled to the possession of a village, in pursuance of an order of the Collector, was put into possession of a wrong village, by reason of a mistake having been made as to the village mentioned in the order, the act done under a mistake of fact was a nullity, and a suit by the plaintiff for possession of the right village was not governed by this Article—*Maharaja of Vijianagram* v. *Satrucherla*, 30 Mad. 280. Where land belonging to the plaintiff was entered as Government waste land in the Revenue Survey Register by order of the Revenue Commissioner who afterwards gave the land to the defendant, proporting to act under section 37, Bombay Land Revenue Code, a suit by the plaintiff to recover possession was not governed by this Article, as the order was *ultra vires* (because sec. 37 does not give power to dispose of lands of private individuals) and the plaintiff was not bound to set it aside—*Surannanna* v. *Secretary of State*, 24 Bom. 435. Where a Collector passes an order under section 37 of the Bombay Land Revenue Code with reference to land which is *prima facie* the property of a private individual, and not of the Government, the order is a nullity, because sec. 37 of the Land Revenue Code does not give power to deal with the lands of private individuals. The Collector is acting *ultra vires* and there is no occasion for this Article to apply—*Malkajeppa* v. *Secretary of State*, 36 Bom. 325, 15 I.C. 517. Where the relief sought is primarily a declaration that the plaintiffs are entitled to succeed a deceased Hindu female owner as her next reversioners, and where for such a declaration the setting aside of the order of a Sub-Divisional officer would not be necessary, Article 14 has no application, even though the plaint may contain a prayer for the setting aside of the order of the Sub-Divisional Officer—*Haro Mandol* v. *Dhiranath*, 7 P.L.T. 67, A.I.R. 1925 Pat. 784, 90 I.C. 691. Where the notice required under sec. 10 of the Bengal Act VII of 1880 (Public Demands Recovery Act) was not served, and in execution of the certificate the judgment-debtor's property was sold, it was held that the whole of the proceedings which resulted in the sale was invalid and that a suit to set aside such a sale did not come under this Article but was governed by Art. 120—*Saroda* v. *Kisto*, 1 C.W.N. 516. A Collector in a partition proceeding under the Bengal Estates Partition Act (VIII of 1876) can only adopt one of two courses, if an objection is taken that a certain plot of land does not appertain to the estate under partition; he may either strike off the partition, or proceed with it treating the disputed land as part of the estate. So where a Collector merely passed an order excluding the disputed lands from the partition, the order of the Collector was *ultra vires*, and

therefore a nullity, and a suit brought by the plaintiff for a declaration of his right to those lands was not subject to the limitation under Art. 14—*Alimuddin v. Ishan*, 33 Cal. 693. Where a Collector purporting to act under the Bengal Estates Partition Act (V of 1897) passed an order refusing to put a party to a partition in possession of the land allotted to him, *held* that the order was one for which there was no provision of the law, and consequently Article 14 did not apply to a suit to set aside the order and recover the land—*Wasif Ali Mirza* v. *Saradindu*, 29 C.W.N. 839, A.I.R. 1925 Col. 953. A temporary alienation of a portion of the inam lands by a trustee, although it is beyond the power of the trustee, does not amount to a violation of the conditions of the grant, and does not justify an order of resumption of the grant by the Government. Such an order of resumption is a nullity and does not require to be set aside under this Article, and a suit by the trustee for a declaration that the resumption is invalid and for recovery of possession of the inam property from the Government would be governed by Art. 144—*Secretary of State* v. *Gulam Mahabub*, 42 Mad. 673, 51 I.C. 366. Where the order of the Collector, not being referable to any statutory provision or any rule which has the force of law, is *ultra vires*, the plaintiff need not bring a suit for setting aside the Collector's order, but may sue for a declaration or other relief, and this Article does not apply—*Patdaya* v. *Secretary of State*, 48 Bom. 61, 26 Bom. L. R. 1160, A.I.R. 1924 Bom. 273, 82 I.C. 577.

An order by which a land belonging to the plaintiffs was given by the Collector to others without any warrant of law, is an absolute nullity, and need not be set aside under this Article. The plaintiffs can bring a suit for possession of the land—*Rajani Kant* v. *Ram Dulal*, 17 C.W.N. 55, 17 I.C. 881.

289. Suits under this Article:—Where the act of the Government in respect of which a declaration or injunction is sought is an act which is illegal or *ultra vires* and the declaration is sought on that basis, Article 14 does not apply. But if the ground of such a suit is not that the act of Government was *ultra vires* or illegal, but a mere *irregularity* which does not vitiate the main proceedings but merely relates to some question of detail (such as the exact amount to be collected under the Madras Revenue Recovery Act) or something of that kind, which does not make the proceedings *ultra vires*, Article 14 will apply—*Thiruvenkatacharyulu* v. *Secretary of State*, 57 Mad. 501, A.I.R. 1934 Mad. 147 (154), 66 M.L.J. 715; *Sadhu Singh* v. *Chandra Singh*, A.I.R. 1957 Punj. 108. This Article applies only to orders which require to be set aside in a regular suit before any relief inconsistent with the order can be obtained—*Bhopisketti* v. *Bhat*, 42 Bom.L.R. 223, A.I.R. 1940 Bom. 188. In considering the applicability of this Article one has to look to the real object of the suit. If the plaint as a whole is really with regard to the title to the land and does not seek to set aside any order of the Revenue Court, this Article has no application—*Kunjbehari* v. *Buni*, A.I.R. 1941 Pat. 50, 190 I.C. 817. Where the act or order of the Government officer is not a nullity, but is binding on the plaintiff unless and until it is set aside so that it is necessary for the plaintiff to get rid of that order before he can obtain a certain relief, a suit by the plaintiff to obtain that relief, even though it is framed not as a suit to set aside the order but *as a suit for possession or for declaration*, would be governed by this Article—*Gangu* v. *Mahanraj*, 15 Lah. 389 (F.B.), 149 I.C. 661, 36 P.L.R. 337, A.I.R. 1934 Lah. 384; *Province of Sind* v. *Kalomal*, I.L.R. (1943) Kar. 404, A.I.R. 1944 Sind 44, 210 I.C. 513. Thus, a suit for a declaration that the plaintiff is entitled to hold the land free of the assessment and for recovery of the assessment collected by the Government, is governed by this Article, as the plaintiff is not entitled to the declaration without getting the Collector's order set aside—*Subanna* v. *Secretary of State*, 1915 M.W.N. 915, 31 I.C. 267. So also, where

a Municipal Corporation sues for possession of land resumed by Government under an agreement on the ground that it was not resumed for public purpose, it must have the impedement of the order resuming the land removed within one year under this Article. It cannot get round the act of the Government resuming the land by contending that the suit is not one for setting aside the Official act, but for recovery of possession —*Municipal Corporation, Karachi* v. *Province of Sind*, A.I.R. 1947 Sind 69, 230 I.C. 311. In a partition proceeding before the Collector under the Estates Partition Act, the plaintiff contended that certain land measured as part of the estate under partition was not part of the estate but appertained to his *howla*. The Revenue authorities enquired into his contention under sec. 116 of the Act and decided it against him. More than a year afterwards, the plaintiff brought a suit for a declaration that the disputed land was part of his *howla*. *Held* that as the Revenue authorities had jurisdiction to enquire into his plea, the plaintiff was bound by their order; and the present suit being in effect a suit to set aside that order should have been brought within one year from the date of the order, as provided by this Article—*Parbati* v. *Raj Mohan*, 29 Cal. 367. Certain Bhagdari lands were lost by diluvion. The Commissioner ordered them to be treated as Government waste lands. Subsequently, the submerged lands were reformed by alluvion. The occupants filled a suit claiming them as part of their holdings. *Held* that the suit was governed by this Article and must be brought within one year of the date of the Commissioner's order—*Surajlal* v. *Secretary of State*, 28 Bom.L.R. 641, A.I.R. 1926 Bom. 467, 95 I.C. 950. A suit for cancellation or modification of rent settled by a Settlement Officer having jurisdiction to settle the rent, is governed by this Article, although the suit is in the guise of one for the modification of the certificate of rent granted by the officer—*Ashutosh* v. *Abdul*, 28 Cal. 676. A suit for a declaration that the order of the Commissioner under sec. 178 of the Bombay District Municipalities Act is illegal, is governed by the one year's rule prescribed by Article 14, and time runs from the date of the Commissioner's order—*Manibhai* v. *Nadiad City Municipality*, 51 Bom. 105, A.I.R. 1927 Bom. 55, 100 I.C. 98. Where on an application by the plaintiff for redemption under the Punjab Redemption of Mortgages Act (II of 1913) the Collector passed an order that the mortgage had ceased to exist and redemption was barred, a suit by the plaintiff to redeem the mortgage is eventually a suit to set aside the Collector's order and falls under Article 14; therefore it is barred if brought more than a year after the date of the Collector's order—*Kaura* v. *Ram Chand*, 6 Lah. 206, 26 P.L.R. 383, 88 I.C. 945. Where an auction-purchaser at an execution sale held by a Collector, which was subsequently ordered to be set aside, brought a suit for a declaration that the order seting aside the sale be declared ineffectual, and for possession of the property, it was held that the suit was in effect one to set aside the order, though there were not the precise words in the prayer, and that it was governed by Art. 14—*Raghunath* v. *Kaniz*, 24 All. 467. A suit under sec. 83 of the C. P. Land Revenue Act for the amendment of settlement entries is not a suit for a declaration that the entries are erroneous but a suit for nullifying something which an officer of Government has done, and is governed by Article 14 and not by Article 120—*Onkar Lal* v. *Shaligram*, 5 N.L.J. 199, A.I.R. 1922 Nag. 76. A suit for possession of land on the ground that it was plaintiff's property and that the grant of a lease thereof by the Collector to the defendant for building purposes under section 37 of the Bombay Land Revenue Code was not proper, is governed by this Article, because the Collector's order leasing the land to the defendant is binding on the plaintiff unless it is set aside— *Nagu* v. *Salu*, 15 Bom. 424.

290. Suits not under this Article:—This Article has no application when it is not necessary for the plaintiff to set aside the act or order in order to obtain

the relief which he claims—*Bimalendu* v. *Shebaits of Deity Gopal Deb*, I.L.R. (1945) 1 Cal. 466, 49 C.W.N. 117, 80 C.L.J. 252, A.I.R. 1946 Cal. 480; *Dhani* v. *Bishun*, 20 P.L.T. 136, A.I.R. 1938 Pat. 524, 178 I.C. 633. So where a plaintiff does not ask to set aside any act or order of an officer of Government in his official capacity but only seeks a declaration that his dismissal was no dismissal in the eye of law, this Article has no application—*Abdul* v. *Secy. of State*, 19 Luck. 163, 1943 O.W.N. 118, A.I.R. 1943 Oudh 368, 207 I.C. 178.

A suit for a declaration that an order of dismissal from service passed against the plaintiff, a Government servant, is wrongful, illegal and *ultra vires* with a claim for arrears of pay is governed by Article 120 and not by this Article—*Jagdish* v. *U. P. Government*, A.I.R. 1956 All. 114. But a suit lies under this Article for a declaration that the distinction of the Order of British India which was a military honour conferred on the plaintiff has been unlawfully taken away from him by the Government and that he is entitled to the award of monetary allowance attached to that distinction —*Chandra Van* v. *Union of India*, A.I.R. 1956 Bom. 601.

If the act or order of the Government officer is a mere nullity, so that no suit is necessary to set it aside (Note 288 above) and the suit is one for declaration of the plaintiff's proprietary right to a land and for possession, Art. 14 has no application Such a suit is not barred if not brought within one year of the date of the order—*Balvant* v. *Secy. of State*, 29 *Bom.* 480 (488, 489); *Agin Bindh* v. *Mohan Bikram*, 30 Cal. 20 (27). Thus, a suit under section 109 of the Bengal Tenancy Act for a declaration that an undisputed entry in the *Khawati* and *Khatian* is erroneous does not fall under this Article—*Agin Bindh* v. *Mohan Bikram*, supra. Art. 14 does not apply to an order of enhanced assessment which is a nullity or in excess of authority —*Secy. of State* v. *Faredoom*, A.I.R. 1934 Bom. 434, 36 Bom.L.R. 761.

Where the plaintiff was not a *party* to the order of the Collector passed under sec. 116 of the Bengal Estates Partition Act, he will not be affected by the order, and is not bound to set it aside by a suit brought under this Article; he can sue for possession of the land—*Laloo Singh* v. *Purna Chander*, 24 Cal. 149. Where the Revenue Officer rejected the plaintiff's application for partition of a shamilat, a suit for a declaration of his title to a share therein is governed by Art. 120. As the Revenue Officer had no jurisdiction to decide the question of title, and as this suit is not one for setting aside his order, Art. 14 is not applicable—*Kalu Khan* v. *Umda*, 47 P.R. 116, 34 I.C. 546, 150 P.L.R. 1916.

This Article does not apply if the plaintiff's claim is independent of the order of the Government officer. Thus, where a Commissioner passed an order directing payment of a cash allowance (*toda giras hak*) to the 1st defendant, and the plaintiff thereupon brought a suit to recover his share of the allowance, more than one year from the date of the order, the suit was not barred, as the plaintiff's claim was entirely independent of the order of the Commissioner. It is not necessary for him to set aside the order so long as he gets his share. It is a matter of indifference to him if the Commissioner had directed payment in the first instance to the 1st defendant or to any other person—*Dolatsingh* v. *Joravarsingh*, 33 Bom.L.R. 783, A.I.R. 1931 Bom. 474 (478), 133 I.C. 851.

This Article does not govern a suit for possession against another person to whom Sanad under sec. 133 of the Bombay Land Revenue Code has been granted, as it is not necessary for such a person to obtain an order setting aside that sanad before he can obtain an order for recovery of possession as the order granting sanad is not an act or order of a Government Officer within the meaning of this Article—*Narbheramji* v. *Vivekramji*, I.L.R. (1939) Bom. 564, 41 Bom.L.R. 939, A.I.R. 1939 Bom. 425.

The Civil Court has no power to set aside an order passed by the Revenue Authorities under the Land Registration Act; therefore no suit lies in a Civil Court to set aside such order. If, however, a suit is brought to have such order set aside and for a declaration of the plaintiff's right and title to a certain property, the prayer to have the order set aside must be treated as a surplusage, and the suit is one simply for a declaration of the plaintiff's title in respect of the property, and therefore outside the scope of this Article—*Luchmon Sahai* v. *Kanchun*, 10 Cal. 525. A suit which is essentially one for declaration of title under sec. 66 (2), C.P. Land Revenue Act, though its effect is to set aside an order passed by a Settlement officer, does not come within the purview of Art. 14, but falls under Art. 120—*Rao Sardarsingh* v. *Rao Vishalsingh*, 26 N.L.R. 94, A.I.R. 1930 Nag. 92 (95), 120 I.C. 321.

Where an application for redemption of land under the Punjab Redemption of Mortgages Act is dismissed by the Assistant Collector not on the merits but on the ground that the dispute is of a complicated nature and that parties should have recourse to the Civil Court, the substantive part of the order is not against the applicant and he need not, therefore, sue to set it aside. In such circumstances this Article is inapplicable. Accordingly a suit brought by the applicant for possession of the land by redemption more than one year after the date of the order of the Assistant Collector, is not barred by this Article—*Prabhu v. Chandan*, 40 P.L.R. 245, A.I.R. 1938 Lah. 512, 181 I.C. 63.

In a partition proceeding under the Bengal Estates Partition Act a dispute arose as to whether certain plots of land were included in the property to be partitioned, and upon enquiry the Collector passed an order under sec. 115 of that Act, directing that the partition proceedings be struck off. Four years after, the plaintiffs brought a suit for possession of certain plots of land on declaration of title thereto. *Held* that the suit was not governed by this Article, as it was not a suit to set aside the order of the Collector but to obtain possession of certain lands. The order of the Collector striking off the partition proceedings until the parties had had the matter in dispute between them decided by a Court could not be regarded as in any way standing in the way of the plaintiffs' obtaining the relief which they claim in the suit, and it was therefore unnecessary for the plaintiffs to have that order set aside—*Rajchandra* v. *Faizuddin*, 32 Cal. 716. Where a property which did not fall in any way within the estate which was being partitioned under the Bengal Estates Partition Act 1897, was allotted to one of the persons who was a party to the partition proceedings, the owner of that property can bring a suit for declaration of his title and if necessary for recovery of possession, within 12 years. Article 14 cannot apply. In such a case there is no act or order of an officer of Government in his official capacity. Moreover, it matters not whether the plaintiff in such a suit was a party to the partition proceedings or not—*Ajodhya Prasad* v. *Ram Khelawan*, 6 Pat. 73, A.I.R. 1926 Pat. 421, 96 I.C. 632. See also *Kedar Nath* v. *Naresh Chandra*, 52 C.L.J. 247, A.I.R. 1931 Cal. 29 (32), 130 I.C. 232 (following 6 Pat. 73 and 5Pat 735 P.C. cited below); *Rao Sardar Singh* v. *Rao Vishal Singh*, 26 N.L.R. 94, A.I.R. 1930 Nag. 92, 120 I.C. 321. The plaintiff attempted to take possession of certain lands allotted to him in batwara proceedings (under the Bengal Estates Partition Act, 1897) but he was resisted by the defendant who was in possession of those lands, and this led to criminal proceedings in the Magistrate's Court. The plaintiff was referred to assert his right in the Civil Court and he brought a suit for possession of those lands. Held that the suit did not fall under this Article, as it was not a suit to set aside any order of the Revenue Officer (on the other hand it was a suit based on the order of the Revenue Officer alloting certain lands to the plaintiff). It was simply an action in ejectment, its main purpose being to recover possession of certain lands allotted to

the plaintiff—*Dhakeshwar* v. *Gulab Koer*, 5 Pat. 735 (P.C.), 7 P.L.T. 483, A.I.R. 1926 P.C. 60, 97 I.C. 217. Where during partition proceedings under Bengal Estates Partition Act an objection is disposed of without deciding the real point at issue and a suit for declaration is filed, this Article has no application—*Gopaldas* v. *Satindra*, A.I.R. 1939 Cal. 749.

This Article does not apply to a suit to set aside an order of mutation and for possession of immoveable property brought less than eight years after the order of mutation and within twelve years of the death of the last owner—*Asa Ram* v. *Fatima*, A.I.R. 1939 Lah. 135, 183 I.C. 853. So also, this Article has no application to a suit filed under sec. 36, proviso (3) of the Bombay Hereditary Offices Act, for a declaration that the plaintiff is the nearest heir of the deceased last holder of a watan as against the defendant who has been recognised by the Government as the representative watandar without any express prayer for setting aside the order of the Collector entering the defendant's name as the successor to the watan—*Basangowda* v. *Fakirgowda*, I L.R. (1939) Bom. 123, 40 Bom.L.R. 1288, A.I.R. 1939 Bom. 56.

The Article applies to acts or orders done in the exercise of powers legally exercisable by the Executive. It has no application in cases where jurisdiction has been usurped or the order was passed not by an officer of Government but by the Ruler himself—*Chintamoni* v. *Paika*, I.L.R. 1956 Cut. 174, A.I.R. 1956 Orissa 136. See also *Bhura* v. *Ghandu*, I.L.R. 1956 Pepsu 33.

291. Act or order of Government officer:—A Judge exercising his *judicial* functions is a Civil Court, and not a Government Officer acting in his *official* capacity within the meaning of Art. 14—*Gobindabala* v. *Ganu*, 10 Bom.L.R. 749. The words "act" or 'order' means an 'act' or 'order' made by an officer of Government in his official capacity, purporting to act under the law, which is of a *quasi-judicial* character—*Bruusgaard* v. *Secy. of State*, 42 Bom.L.R. 532, A.I.R. 1940 Bom. 294; *Satyanarayana* v. *Rayalamma*, (1943) 1 M.L.J. 386, A.I.R. 1943 Mad. 501, 1943 M.W.N. 445. The 'act' is not that of an executive officer carrying out the will of the land-holder, acting as his agent and permitting his department to be used for the purpose of conducting sale—*Satyandrayana* v. *Rayalamma*, supra. Where a statutory duty *viz.*, the preparation and submission of a liquidation scheme in pursuance of sec. 17 (1) of the Sind Incumbered Estates Act, is performed it is neither an 'act' or 'order' within the meaning of this Article—*Manager, Encumbered Estates in Sind* v. *Kanyalal*, I.L.R. (1947) Kar. 168, A.I.R. 1948 Sind 14. Where an objection under sec. 103A of the Bengal Tenancy Act, to an entry in the Draft Record of Rights has been rejected by the Revenue Officer, such rejection has no finality and cannot be said to be an order of a Government Officer within the meaning of this Article—*Ram Golam* v. *Bishnu*, 11 C.W.N. 48. So also, an order of the Collector under sec. 3 (5) of the Madras Estates Land Act is temporary or provisional order, and no finality is given to it. The order will *ipso facto* be vacated whenever a Civil Court pronounces on the rights of the contending parties, and need not be set aside within one year under this Article—*Vannisami* v. *Chellasami*, 1921 M.W.N. 193, 62 I.C. 276. Certain lands in a village were held on *khoti* tenure by the defendants and the plaintiffs were the *khots* of the village. A Survey Settlement Officer decided in 1882 that the lands held by the defendants were *dhara* lands of the defendants and in 1889 an entry to that effect was made in the Survey Register. Meanwhile in 1887 the plaintiffs brought the present suit for a declaration that the lands in dispute were their *khoti* lands. *Held*, that the *decision* of the Survey Settlement Officer in 1882 was not an order, because sec. 21 of the Khoti Settlement Act (Bombay Act I of 1880) does not contemplate an "order" being made by the Survey Officer between the parties. Even if the framing of the register be regarded as an 'act' of the Survey

Officer, that act was not done until 1889, nearly two years after the suit. The suit is not therefore affected by Article 14 of the Limitation Act. It falls under Article 120 and is not barred, being brought within six years from 1882—*Faki* v. *Sajnak*, 18 Bom. 244.

The following persons are officers of Government acting in official capacity:—Collector holding proceedings under the Bengal Estates Partition Act, see *Parbati* v. *Raj Mohan*, 29 Cal. 367; Collector acting under the Bombay Land Revenue Code, see *Nagu* v. *Salu*, 15 Bom. 424; Commissioner, see *Manibhai* v. *Nadiad City Municipality*, 51 Bom. 105; Settlement Officer, see *Ashutosh* v. *Abdul*, 28 Cal. 676; Manager under the Sind Encumbered Estates Act, see *Sufan* v. *Khem Chand*, 124 I.C. 369, A.I.R. 1930 Sind 150. Assistant Collector of customs under the Sea Customs Act, see *Bruusgaard* v. *Secy of State*, 42 Bom.L.R. 532, A.I.R. 1940 Bom. 294, 191 I.C. 867.

292. When time runs:—Time runs from the date of the order, and not from the date of the final order in appeal confirming the original order—*Ctaturbhuj* v. *Secretary of State*, 22 Bom.L.R. 146, 55 I.C. 591. On the 6th May 1911 the Collector ordered that a survey number belonging to the plaintiff be forfeited to Government for arrears due on the *khata*. The plaintiff appealed to the Commissioner against this order, but the appeal being dismissed, the plaintiff filed a suit on the 14th October, 1915 to get the order of forfeiture set aside. It was contended that the time taken up in appealing to the Commissioner be excluded in reckoning the period of limitation. *Held*, overruling the contention, that the suit was barred by limitation as it was not brought within one year from the date of the Collector's order of forfeiture—*Ganesh* v. *Secretary of State*, 44 Bom. 451, 57 I.C. 587.

15.—Against Government to set aside any attachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue.	One year.	When the attachment, lease or transfer is made.

292A. When a *ghatwal* becomes a defaulter, the Government can transfer the tenure to some other person. A suit to set aside the transfer in such a case is governed by this Article—*Chittra Narain* v. *Assistant Commissioner*, 14 W.R. 203.

16.—Against Government to recover money paid under protest in satisfaction of a claim made by the revenue-authorities on account of arrears of revenue or on account of demands recoverable as such arears.	One year.	When the payment is made.

293. Application of Article:—Where penal assessment was levied for unauthorised occupation of Government land, and this amount had been paid under

coercion, a suit to recover the amount so paid would be subject to the one year's rule of limitation under Art. 14 or Art. 16—*Meera* v. *Secretary of State*, 13 M.L.J. 269. A suit for refund of a certain amount paid as village service cess (under sec. 27 Madras Proprietary Estates Village Service Act, II of 1894) by the plaintiff under protest is governed by this Article—*Gopalaswami* v. *Secretary of State*, 61 M.L.J. 754, 132 I.C. 130, A.I.R. 1931 Mad. 525 (529).

Where a person pays water-cess under protest on a demand being made by the Government for alleged unauthorised use of water belonging to Government, and then brings a suit for the recovery of the water cess illegally levied by the Government, the suit does not fall under sec. 59 of the Madras Revenue Recovery Act, because the mere demand of the water-cess by the Government does not amount to a proceeding under that Act, and the person making the payment cannot be said to be a person 'aggrieved by a proceeding' within the meaning of sec. 59 of that Act. The suit falls under Article 16 of the Limitation Act.—*Secretary of State* v. *Venkataratnam*, 46 Mad 488 (501, 502), 45 M L.J. 12, A.I.R. 1923 Mad. 652 (dissenting from *Orr* v. *Secretary of State*, 23 Mad. 571); *Secy. of State v. Nagaraja*, 44 M.L.J. 645, 74 I.C. 281, A.I.R. 1923 Mad. 665; *Ravula Vengala Reddi* v. *Secy. of State*, 46 Mad. 502 (Footnote); *Puchalapalli Pichi Reddi* v. *Secretary of State*, 70 I.C. 884, 46 Mad. 503 (Footnote); *Rawal Nagamma* v. *Secretary of State*, 1913 M.W.N. 75, 18 I.C. 699; *Secretary of State* v. *Ranganayakamma*, 12 L.W. 334, 59 I.C. 98; *Pitchayya* v. *Secretary of State*, 21 L. W. 155, A.I.R. 1925 Mad. 474; *Thiruvenkatacharyulu* v. *Secretary of State*, 57 *Mad.* 501, A.I.R. 1934 Mad. 147 (153).

Actual formal protest is not necessary every time the payment is made. An objection to the Collector against payment of Revenue assessment, followed by a fruitless appeal to the Commissioner, would constitute sufficient protest; and *subsequent payments*, though made without any further protest, would fall within the description of "money paid under protest"—*Kebul Ram* v. *Government*, 5 W.R. 47 (*per Seton-Kerr*. J.). But. Macpherson, J. held in this case that the subsequent payments did not amount to payments made under protest.

Where a person has paid several years' assessment under protest, he can only recover the payment for the last of such years under this Article—*Bhujang v. Collector of Belgaum*, 11 B H.C.R. 1; *Kebul Ram* v. *Government*, 5 W.R. 47; *Secretary of State* v. *Ranganayakamma*, 12 L.W. 334, 59 I.C. 98. But he may sue to set aside the order of the Collector within six years under Article 120—*Kebul Ram* v. *Government*, supra; or he can bring a suit to establish his right to hold the land free of assessment, within 12 years from the time when his right was first interfered with—*Bhujang* v. *Collector*, supra.

'Recoverable as such arrears':—Article 16 requires for its application that the demand, if not for arrears of revenue, should be recoverable as such arrears. To show that it is recoverable as a 'public demand' is not to the point. Rents "settled" by Revenue Authorities under sec. 104 of the Bengal Tenancy Act are not arrears of revenue and unless it can be shown that by some enactment they have been made to come under that description or have been made recoverable as arrears of revenue, this Article cannot be applied to them—*Secy. of State* v. *Midnapore Zemindary Co., Ltd.*, 61 I.A. 281, I.L.R. (1937) 2 Cal. 769, 66 C.L.J. 145, 41 C.W.N. 1061, (1937) 2 M.L.J. 834, A.I.R. 1937 P.C. 244; 1957 Raj. 396.

17.—Against Government for compensation for land acquired for public purposes.	One year.	The date of determining the amount of the compensation.

294. Article 17 has no application where the amount of compensation has not been determined. Where the Collector refuses to award any compensation for the land acquired, on the ground that the plaintiff is not entitled to any compensation, a suit to recover compensation would be governed by Art. 120 and not by this Article—*Rameswar Singh* v. *Secretary of State*, 34 Cal. 470. This Article is confined to a suit against Government; it does not apply to a suit by a person who is entitled to compensation awarded by Government against a person who has wrongfully received it —*Nund Lal* v. *Mir Abu*, 5 Cal. 597. Article 62 would govern such a suit.

Where the Government has acquired the land and has paid the money to one who was apparently entitled to it a suit by a person who has also got interest in the land and claims the money paid by the Government is governed by Art. 120, and not by Art. 17, or Art. 62—*Soma Singh* v. *Jaigobind Pande*, A.I.R. 1935 Pat. 42.

The old Land Acquisition Act X of 1870 did not provide for or contemplate an award for compensation being enforced against the Collector by execution proceedings, and there was no general law which enabled a Civil Court to enforce the award by means of execution proceedings. The ordinary mode of enforcing an award was by a suit against the Collector and such suit was governed by Art. 17 of the Limitation Act—*Nilkanth* v. *Collector of Thana*, 22 Bom. 802 (807) (F.B.).

18.—Like suit for compensation when the acquisition is not completed.	One year.	The date of the refusal to complete.

295. Article 18 applies to suits for compensation for damages suffered by the owner by reason of the Government's withdrawing from the acquisition (see section 48 of the Land Acquisition Act I of 1894). But where the acquisition has been completed, and the Collector refuses to award any compensation, a suit to recover compensation is governed by Art. 120—*Romeswar* v. *Secretary of State*, 34 Cal. 470. The plaintiffs' land was taken by the Government for railway purposes and the Collector took possession of it before an award was made. He, however, refused to pass an award in as much as he held that the land was Government land and that in consequence no compensation was payable to the plaintiffs. The plaintiffs brought a suit for declaration of title, and for possession or in the alternative for damages for the wrongful refusal of the Collector to make an award, stating the amount of compensation payable to them. *Held* that as the land had already vested in the Government, the plaintiffs were not entitled to recover possession or to a declaration of title; but that they were entitled to claim damages for breach of statutory duty on the Collector's part (*viz.*, refusal to make an award), the measure of damages being such compensation as would have been recovered by the plaintiffs if the Collector had made an award, and the suit was governed by Article 120. Article 18 which applies to a suit for compensation when the acquisition is not completed, could not apply, as in this case the acquisition had been completed in this sense that the property had absolutely vested in the Government—*Mantharavadi* v. *Secretary of State*, 27 Mad. 535.

19.—For compensation for false imprisonment.	One year.	When the imprisonment ends.

296. Imprisonment:—Imprisonment amounts to total restraint of liberty for some period however short. A partial restraint as the prevention from going in one direction or in all directions but one, will not constitute an imprisonment—*Bird*

v. *Jones*, (1845) 7 Q.B. 742. Nothing short of actual detention and complete loss of freedom will support an action for false imprisonment. A person who is released on bail can no longer be regarded as under imprisonment so long as he is on bail; his imprisonment ceases to run from the date on which he was liberated on bail. And a suit for compensation for false imprisonment must be brought within one year of such release—*Mahammad Yusufuddin* v. *Secretary of State*, 30 Cal. 872 (P.C.).

In a case of false imprisonment, the question arises, who is liable for the imprisonment?—the party who takes out the warrant, or the Court which issues the warrant? The principle is that when a Court acts within its jurisdiction, but erroneously, then the party who takes out the warrant is not liable; but when the Court has no jurisdiction to issue the warrant, the whole proceeding is *coram non judice*, and the party is liable. In this case, two officers of the Court by mistake, inspite of the decree having been already completely satisfied, issued a certificate of non-payment of the judgment-debt and a writ of arrest of the judgment-debtor. The Court has jurisdiction over the matter; and therefore the liability fell upon the two officers (and consequently upon the Court), because the proceedings which ended in the wrongful arrest arose from some fault on their part—*Fisher* v. *Pearse*, 9 Bom. 1.

A suit for damages for false imprisonment or malicious prosecution, even though it is brought against several joint tort-feasors is governed by the one year's rule under Article 19 or 23. The fact that there are several tort-feasors and that there was a conspiracy between them does not constitute a distinct cause of action by itself so as to take the case out of this Article. A tort when committed by several individuals is not different from the same tort committed by a single individual. A malicious prosecution is a malicious prosecution, whether it is brought about by one person or by more. The combination in such cases may be an element of aggravation in the assessment of damages, but does not make it a different tort. The Legislature has made a general provision that suits for damages for false imprisonment or malicious prosecution must be brought within a certain period, and no distinction is made in respect of the number of persons by whom the wrong may have been perpetrated—*Weston* v. *Peary Mohan Das*, 40 Cal. 898 (949, 951, 952), 18 C.W.N. 185.

Limitation runs from the time when the imprisonment *ends*, and not from the *date of imprisonment*, as erroneously remarked by Scott, J. in *Fisher* v. *Pearse*, 9 Bom. 1 (at p. 9).

20.—By executors, administrators or representatives under the Legal Representatives' Suits Act, 1855 (XII of 1855).	One year.	The date of the death of the person wronged.
21.—By executors, administrators or representatives under the Indian Fatal Accidents Act, 1855 (XIII of 1855).	One year.	The date of the death of the person killed.

297. The word 'representative' in this Article and in Act XIII of 1855 does not mean only executors or administrators but includes all or any of the persons (*e.g.*, widow, children) for whose benefit a suit may be brought under that Act, and

it makes no difference whether the deceased was a European or a Eurasian—*Johnson* v. *Madras Railway Company*, 28 Mad. 479 (481).

22.—For compensation for any other injury to the person.	One year.	When the injury is committed.

298. This Article has no application to proceedings under the Workmen's Compensation Act, because such proceedings are not treated as suits, and also because that Act makes special provisions for limitation—*Hagan* v. *Gafur*, 58 Bom. 128, 35 Bom.L.R. 1142, A.I.R. 1934 Bom. 28 (29), 149 I.C. 247.

The word 'injury' in this Article has a wider connotation than physical hurt. Assault even though it causes no hurt is an offence to the human body, and wrongful obstruction to a person by preventing him from entering into a temple is an 'injury' to his person —*Manikyaswami* v. *Lakamma*, 35 L.W. 392, A.I.R. 1932 Mad. 432, 138 I.C. 84. According to the Allahabad High Court injury to person in this Article means physical injury to the plaintiff—*Sobha* v. *Tika*, 58 All. 903, 1936 A L.J. 574, A.I.R. 1936 All. 454.

A suit for damages or compensation for injury caused to a person's reputation and for mental pain arising out of an assault is governed by Art. 22 and not by Art. 36, because the cause of action is the injury to the person caused by the assault, and the insult arising from assault does not constitute a separate cause of action. Assault itself is the cause of action, though damages may be awarded for the resulting insult—*Arhat* v. *Baldeo*, 5 I.C. 124 (125). A suit for damages for personal injury caused by throwing sulphuric acid on the face is governed by this Article and not by Article 36, because the case is specially provided for by Article 22. Time begins to run from the date of the injurious act done, and the continuance of the effect up to a later time does not make the wrong a continuing wrong giving rise to a continuous cause of action under sec. 23; sec. 24 also would not extend the period, because the cause of action arose as soon as the sulphuric acid was thrown, irrespective of any subsequent specific injury—*Abdulla* v. *Abdulla*, 25 Bom.L.R. 1333, A.I.R. 1924 Bom. 290, 84 I.C. 796.

23.—For compensation for a malicious prosecution.	One year.	When the plaintiff is acquitted, or the prosecution is otherwise terminated.

See *Watson* v. *Peary Mohan*, 40 Cal. 898 cited under Art. 19.

299. Prosecution:—The word 'prosecution' means in strict technical language a proceeding either by way of indictment or information of the Criminal Court in order to put an offender on his trial, the exhibition of a criminal charge against a person before a Court of justice, and in general language the institution and carying on of legal proceedings against a person (Murray's English Dictionary). The word 'prosecution' has not been defined in any statutory enactment. It is a word of very wide significance and does not merely mean an actual trial or an inquiry which may result in a conviction and the imposition of imprisonment and fine. An application in revision under section 436, Cr. P. Code for ordering a further inquiry or retrial is a prosecution—*Madan Mohan* v. *Ram Sunder*, 52 All. 553, 1930 A.L.J. 885, A.I.R. 1930 All. 326 (327), 125 I.C. 464. The word 'prosecution' in this Article is used in the general and not in the technical sense. It is used in a wider sense than a trial and includes criminal proceedings by way of appeal or revision before a District Magistrate,

a Sessions Court or a High Court—*Sheikh Mehtab* v. *Bolaji*, I.L.R. (1946) Nag. 358, 1946 N.L.J. 113, A.I.R. 1946 Nag. 46, 221 I.C. 666. Malicious prosecution means the setting of the machinery of the criminal law in motion without reasonable or probable cause—*Bishun Narain* v. *Phulman*, 19 C.W.N. 935, 27 I.C. 449. The word "prosecution" in this Article relates to a case where the criminal law is set in motion. This Article has no application to a suit filed for damages for maliciously and without reasonable and probable cause presenting the insolvency petition—*Nagappa* v. *Trojan & Co.*, I.L.R. (1949) Mad. 29, (1948) 1 M.L.J. 173, A.I.R. 1948 Mad. 446. An application for binding down a person under sec. 107, Cr. P. Code amounts to a prosecution—*Md. Nizullah* v. *Jai Ram*, 41 All. 503, 50 I.C. 140; *Crowdy* v. *Reilly*, 17 C.W.N. 554, 18 I.C. 737. A statement made to the Police against the plaintiff, which is afterwards found to be false, in consequence of which no action is taken by the Magistrate, is not a ground for an action for malicious *prosecution* but may constitute libel or slander—*Ishri* v. *Muhammad*, 24 All. 368; *Nagendra* v. *Basanta*, 57 Cal. 25, A.I.R. 1930 Cal. 392, 125 I.C. 667; *Harnamsingh* v. *Doolasingh*, A.I.R. 1937 Lah. 709. When proceedings are taken against a person under the Bengal Disorderly Houses Act, it cannot be said that he has been prosecuted; therefore a suit for damages in respect of the proceedings is not one for malicious prosecution under this Article. The suit falls under Article 24—*Dhirajbala* v. *Gopalchandra*, 18 C.L.J. 352, 20 I.C. 768.

Suit against police-officer:—A suit against a police-inspector for damages for malicious prosecution falls under this Article and is not barred if brought within one year as prescribed herein. Section 42 of the Police Act (V of 1861) which provides a period of three months must be deemed to have been repealed by the general law of limitation contained in the Limitation Act, and ceases to be operative —*Muhammad Sharif* v. *Nasir Ali*, 1930 A.L.J. 1443, A.I.R. 1930 All. 742 (744).

Suit against Municipality:—An action against the municipality for malicious prosecution falls under sec. 206 of the Bombay Municipal Boroughs Act and this Article has no application to such a suit as sec. 206 of the Act is a specific section which covers the case on the point of limitation—*Parvetappa* v. *The Hubly Municipality*, 39 Bom.L.R. 881, A.I.R. 1937 Bom. 491, 172 I.C. 430 But the Assam High Court has held in *Tinsukia Municipal Board* v. *Bankim*, A.I.R. 1950 Assam 101 that section 320 of the Assam Municipal Act has no application to a suit for damages for malicious prosecution in as much as malicious prosecution is not something done under but outside the Act. Such a suit is governed by this Article.

300. Starting point of limitation:—If the prosecution ends in *acquittal*, then according to the clear language of the third column of this Article, the period of limitation for a suit for damages for malicious prosecution begins to run from the date of the acquittal, and not from the date of dismissal of a revision petition preferred before the District Magistrate against the order of acquittal. It could not be said that by reason of the complainant's moving the District Magistrate for making an order of reference to the High Court, the order of acquittal had ceased to be final and the prosecution had not terminated—*Narayya* v. *Sheshayya*, 23 Mad. 24 (25). If an order of *discharge* is passed, and *no further* proceedings are taken, the prosecution must be deemed to have terminated on the date of discharge, and limitation for a suit for damages for malicious prosecution would run from that date—*Madan Mohan* v. *Ram Sundar*, 52 All. 553, 1930 A.L.J. 885, 125 I.C. 464, A.I.R. 1930 All. 326 (328); *Purshottam* v. *Ravji*, 47 Bom. 28 (30). The Bombay High Court further holds that even if proceedings by way of revision petition are taken against an order of discharge, the plaintiff's cause of action for a suit for damages for malicious prosecution would arise immediately on the Magistrate's order of discharge (since the discharge of an

accused person is the termination of the prosecution) and would not be suspended because further proceedings might be taken by way of revision petition to the High Court either by the Government or by the complainant in order to get the order of discharge set aside. No fresh cause of action would arise on the dismissal of the revision petition—*Purshottam* v. *Ravji*, 47 Bom. 28, 24 Bom.L.R. 507, A.I.R. 1922 Bom. 209. The Madras High Court is of opinion that where the Magistrate passed an order of discharge and the complainant moved the District Magistrate in revision who *directed further inquiry*, but on further application the High Court set aside the District Magistrate's order and altered the order of the first Court into an order of acquittal, whereupon the accused brought a suit for damages for malicious prosecution, *held* that time ran from the date of the order of the High Court and not from the date of the first Court's order, because owing to the proceedings resulting in an order for further inquiry, the *prosecution was revived* and did not terminate until the passing of the order of the High Court—*Tanguturi Sriramulu* v. *Viresalingam*, 57 I.C. 635 (636). This Article provides that time shall run when the plaintiff is acquitted or when the prosecution comes to an end in some other manner. The words "when the plaintiff is acquitted" cannot be divorced from the words "or the prosecution is otherwise terminated." If the acquittal is followed by other proceedings by way of revision etc., the prosecution is terminated not by the acquittal but by the order passed by the subsequent proceedings —*Kulasekara* v. *Tholasingam*, I.L.R. (1938) Mad. 675, (1938) 1 M.L.J. 344, A.I.R. 1938 Mad. 349, 174 I.C. 428 (F.B.). According to the Allahabad High Court also, if proceedings are taken up in revision against the order of discharge, the prosecution cannot be said to have finally terminated; it must be deemed to be continuing while the revisional proceedings are pending; its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person. If this view were not to be accepted, the result would be that the discharged person would be compelled to institute his suit for damages even though the matter is still subjudice and is being considered by the Revision Court—*Madan Mohan* v. *Ram Sundar*, 52 All. 553, 1930 A.L.J. 885, A.I.R. 1930 All. 326 (328), 125 I.C. 464 (dissenting from 47 Bom. 28); *Bhagat* v. *Garai*, I.L.R. (1938) All. 89, 1937 A.L.J. 1281, A.I.R. 1938 All. 49. The same view has been taken by the Nagpur and Oudh Courts in *Sheikh Mehtab* v. *Bolaji*, I.L.R. (1946) Nag. 358, 1946 N.L.J. 113, A.I.R. 1946 Nag. 46, 221 I.C. 666; *Bhikhan* v. *Darshan*, 1942 O.W.N. 446, A.I.R. 1942 Oudh 489, 204 I.C. 429. The Bombay High Court has drawn a distinction between cases in which the revision petition is *dismissed* and cases in which a revision petition made to the District Magistrate or Sessions Judge is successful but is finally unsuccessful in the High Court. If the revision petition is dismissed, the cause of action arises on the Magistrate's order of discharge, but if a revisional application is successful, and the criminal proceedings are directed to be continued, then there is no longer any cause of action because the plaintiff is no longer a discharged person, and he has to wait until the prsecution terminates in his favour (by a final order of the High Court) before his cause of action arises again—*Pusshottam* v. *Ravji*, 47 Bom. 28 (30), A.I.R. 1922 Bom. 209.

If the plaintiff (accused) is convicted by the Magistrate, but is acquitted on appeal, limitation will run from the date of acquittal on appeal—*Huri Mohan* v. *Naimuddin*, 20 Cal. 41. Limitation runs from the date of actual acquittal or discharge by the Magistrate as it appears from the records of the case, and not from any earlier date on which the Court expressed an opinion that there was no case to put the accused on trial and that he should be discharged—*Shuppu* v. *Sivarama*, 1912 M.W.N. 951, 16 I.C. 584. If there is an appeal by the Government against the order of acquittal, the prosecution cannot be said to have terminated while the appeal is pending—*Madan Mohan* v. *Ram Sundar*, supra; *Narayya* v. *Sheshayya*, 23 Mad. 24 (25). Where an accused is discharged in the middle of the case *before the prosecution as a whole terminates*,

without any formal order of acquittal or discharge, the date of the judgment afterwards pronounced and not the date of the discharge, would be the starting point of limitation —*Venkataramana* v. *Swami Naik*, 17 M.L.J. 60. Where, however, a formal order of discharge is passed against one accused and charge is framed as against the other accused and no mention is made in the final order as to the accused discharged by previous order, it should be deemed that so far as he is concerned, the matter is closed when the order of discharge is passed and a suit filed after one year from the date of discharge is barred by limitation—*Subbayya* v. *Kesavalu*, (1945) 1 M.L.J. 287, A.I.R. 1945 Mad. 288, 58 L.W. 238. Under Art. 23 the limitation for filing a suit for compensation for malicious prosecution is one year from the date when the plaintiff is acquitted—*Shankar Prosad* v. *Sheo Narain*, A.I.R. 1935 Oudh 392, 1935 O.W.N. 392, 155 I.C. 706.

24.—For compensation for libel.	One year.	When the libel is published.

See 24 All. 368 and 18 C.L.J. 352 cited under Article 23.

301. Limitation runs from the date when the libel is published. But since each publication gives a fresh cause of action, it is not necessary that all or the first of the publications (*e.g.*, in a newspaper) should have been within a year; it is sufficient if any one publication is proved to have been within one year—*Duke of Brunswick* v. *Harmer*, (1849) 14 Q.B. 185. Thus, where the President of the Union Bench sends a report to the Magistrate in connection with an application for transfer of a case pending before the Bench, a suit for damages for libellous matter contained in that report may be brought within one year of the publication of the report to the Magistrate—*Hem Chandra* v. *Tarapada*, 40 C.W.N. 500.

A suit for damages against the defendant for making a false accusation against the plaintiff to the police, when no prosecution was instituted, is a suit for libel or slander and the limitation applicable to such a suit is that prescribed by this Article or Article 25—*Harnam* v. *Doola*, 39 P.L.R. 686, A.I.R. 1937 Lah. 709, 169 I.C. 640.

25.—For compensation for slander.	One year.	When the words are spoken, or, if the words are not actionable in themselves, when the special damage complained of results.

302. Slander—special damage:—The English law under which slanderous words are generally not actionable *per se* and are actionable only when special damage results, is not applicable to this country; the law of India recognises personal result conveyed by abusive language as actionable *per se* without proof of special damage—*Dawan* v. *Mahip*, 10 All. 425; *Parvati* v. *Mannar*, 8 Mad. 175; *Shoobhagee* v. *Bokhari*, 4 C.L.J. 390; *Jogeswar* v. *Dinaram*, 3 C.L.J. 140; *Ibin* v. *Haidar*, 12 Cal. 109; *Troilokya* v. *Chundra*, 12 Cal. 424.

But in *Girish* v. *Jatadhari*, 26 Cal. 653 (F.B.), it was held that if there was no *defamation* or intent to defame, mere abusive and insulting language was not actionable, even though it caused pain and distress of mind to the plaintiff.

The words in the third column "if the words are not actionable.....results" are words of English law, and should be applied only to Presidency Towns where

the English law is generally applied. Thus, in a case arising within the local limits of the town of Calcutta, it was held, following the English law, that slanderous words alone, (*e.g.*, imputation of unchastity to women) without proof of special damage are not actionable—*Bhoomi* v. *Natobar*, 28 Cal. 452. But in a mofussil case, where A used words imputing unchastity to the wife of B, it was held that the words were defamatory not only of the wife of B, but also of B himself and B was therefore entitled to sue on his own account—*Sukhan* v. *Bipad*, 34 Cal. 48.

26.—For compensation for loss of service occasioned by the seduction of the plaintiff's servant or daughter.	One year.	When the loss occurs.

303. If the daughter had been married but deserted by her husband, and was under her father's protection and performing household duties for him, he had by law and custom a right to the service of the daughter, and a suit by him was maintainable for the loss of his daughter's service through seduction—*Ram Lall* v. *Tula Ram*, 4 All. 97 (*per* Stuart, C.J.). But Oldfield, J. held in this case that such a suit was not maintainable by a Hindu father.

27.—For compensation for inducing a person to break a contract with the plaintiff.	One year.	The date of the breach.

303A. The plaintiff and defendant were rival transport contractors to the British Government in connection with certain military operations; the defendant improperly enticed the jamadars of the plaintiff into breaking their contracts by putting the camels, which they had contracted to supply to the plaintiff, at the disposal of the defendant. *Held*, that a suit for compensation against the defendant was governed by this Article—*Haveli* v. *Shaik Panda*, 96 I.C. 887 (P.C.), A.I.R. 1926 P.C. 88, 31 C.W.N. 174.

28.—For compensation for an illegal, irregular or excessive distress.	One year.	The date of the distress.

304. For a full discussion as to the meaning of the word "compensation," see Note 305 under the next Article. It has been held in a Bombay case that where the suit was to recover the amount that was illegally levied in excess, the suit was not governed by this Article but by Art. 62—*Ladji* v. *Musabi*, 10 Bom. 665. No reason has been stated for the inapplicability of this Article, but probably the learned Judge interpreted the word 'compensation' in its narrower sense (*i.e.*, in the sense of *damages*). A suit against a Municipal Board for compensation for illegal or excessive distress is governed by the specific provisions of this Article and not by Article 2 (which is more general)—*Municipal Board* v. *Goodall*, 26 All. 482 (487, 488). A suit against a landlord for compensation for illegal distraint of crops is governed by Art. 28 or 29—*Jagatjiban* v. *Sarat*, 7 C.W.N. 728. Where an illegal distraint was

made by a landlord under the Madras Rent Recovery Act VII of 1865, a suit for compensation brought within one year of the distraint was in time—*Yamuna Bai* v. *Solayya*, 24 Mad. 339. This Article applies even when the seizure is without jurisdiction as such a seizure is an illegal distraint covered by this Article; *Shridhar* v. *Godulal*, I.L.R. (1939) Bom. 721, 41 Bom.L.R. 1223, A.I.R. 1940 Bom. 20.

29.—For compensation for wrongful seizure of moveable property under legal process.	One year.	The date of the seizure.

304A. Scope:—To apply Art. 29 the suit must be one (*i*) for compensation, (*ii*) for wrongful seizure, (*iii*) of movable property, (*iv*) under legal process.

305. Compensation:—In *Murugesa* v. *Jattaram*, 23 Mad. 621 (626) it has been held that the word "compensation" must be interpreted in its wider sense, so as to include a claim to recover the *value* of the goods seized, as well as a claim by way of *damages* independent of the value of the goods, and is not restricted to the latter class of claim alone; and that this Article does not contemplate any such distinction. See also *Yellammal* v. *Ayyappa*, 38 Mad. 972 (at p. 984, *per* Sadasiva Aiyar J.) and *Narasimha* v. *Gangaraju*, 31 Mad. 431 (433) where the same opinion was expressed. Similarly, in *Jagjivan* v. *Gulam Jilani*, 8 Bom. 17, it was held that a suit simply to recover the money wrongfully taken under a decree was a suit for compensation under this Article; and so in *Venkatachellum* v. *Nagappa*, 23 M.L.J. 519, 16 I.C. 914, this Article was held to be applicable to a suit for refund of sale-proceeds realized by sale of plaintiff's property by wrongful attachment.

But the Calcutta and Allahabad High Courts are of opinion that the word 'compensation' presupposes that the plaintiff must have been damnified, and the suit must be by way of *damages*; a suit by the plaintiff merely to recover the money wrongfully attached and taken away by the defendant in execution of the latter's decree against a third party is not a suit for *compensation* under this Article but is governed by Article 61—*Lakshmi Priya* v. *Ramakanta*, 30 Cal. 440 (dissenting from 8 Bom. 17); *Nadar Singh* v. *Ganga Dei*, 38 All. 676 (dissenting from 8 Bom. 17; *Md. Mozaharal* v. *Md. Azimaddin*, A.I.R. 1923 Cal. 507. See also *Rajputana Malwa Railway Stores* v. *Ajmere Municipal Board*, 32 All. 491, and *Municipal Board* v. *Deokinandan*, 36 All. 555 (cited under Article 2) and *Yellammal* v. *Ayappa*, 38 *Mad.* 972 (*per Sundara* Aiyar, J. at p. 976), where the word has been applied only to a claim for *damages*.

306. Wrongful seizure:—Seizure or possession of property belonging to a party to a suit under an order of Court is not *wrongful* although the order was erroneous and was afterwards set aside—*Dakhina* v. *Saroda*, 21 Cal. 142 (148) (P.C.), Drawing out money from the Court under the terms of a subsisting decree is not *wrongful* seizure of property, even though the decree is afterwards set aside—*Narayan* v. *Narayan*, 13 Mad. 437. Where money belonging to the plaintiff, which was deposited in the Collectorate was wrongfully attached and drawn out by the defendant, a suit to recover the money does not fall under this Article (but under Art. 62), because the plaintiff is damnified by the wrongful *taking out* and not by the wrongful attachment or seizure of the money—*Lakshmi* v. *Ram*, 30 Cal. 440. Wrongful attachment of *money* deposited with the Collectorate is wrongful seizure of *moveable property*—*Jagjivan* v. *Gulam Jilani*, 8 Bom. 17. Where a warrant of attachment was executed by affixing the Court seal to the outer door of the warehouse where the goods

were stored, without breaking open the door and taking physical possession of the goods inside, this was held to be in effect an actual *seizure*, and a suit for damages for such seizure fell under Art. 29—*Multan Chand* v. *Bank of Madras*, 27 Mad. 346.

The word 'seizure' means the taking of something out of the possession of its *owner*. Where the moveable property (money) was in the custody of the *Court*, and the Court distributed it among the judgment-creditors of the owner, there was no 'seizure' within the meaning of this Article—*Ram Narain* v. *Brij Banke*, 39 All. 322 (329), 15 A.L.J. 295, 39 I.C. 532; *Rupabai* v. *Audimulam*, 11 Mad. 345; *Rajaram* v. *Mulchand*, 7 N.L.J. 140, A.I.R. 1924 Nag. 248. Where a certain amount deposited in court by the receiver appointed under Or. 40, r. 1, C. P. Code, is attached and paid to a person a suit to recover back such amount is not governed by this Article, as the attachment is neither seizure within the meaning of this Article nor wrongful —*Baldev* v. *Moolchand*, 40 P.L.R. 685, A.I.R. 1938 Lah. 493, 176 I.C. 731. Money paid by order of Court is not money seized by order of Court—*Rupabai* v. *Audimulam*, 11 Mad. 345 (355). This Article does not apply to a suit to recover money paid to the decree-holder out of the sale proceeds of the goods wrongfully attached in execution of a decree. The cause of action arises when the attached goods are sold and the money realised from the sale proceeds is paid to the decree-holder—*Ojha Bros.* v. *Volkart Bros.*, A.I.R. 1951 Pat. 602.

An *attachment of a debt* is not a seizure. Seizure involves something in the nature of a transfer of possession. The attachment of a debt is made by a written order prohibiting the creditor from receiving the debt and the debtor from making payment thereof, until the further order of the Court (see O. XXI, rule 46, C.P. Code). No *transfer of possession* is contemplated by the prohibitory order—*Yellammal* v. *Ayyappa*, 38 Mad. 972 (988). Not only in the case of debts, but also in the case of ordinary moveable property, where the attachment is made not by actual seizure but by prohibitory order under O. XXI, r. 46, C. P. Code, Article 29 does not apply. A suit for compensation for attachment of a moveable property by prohibitory order falls under Article 36—*P. Veeramma* v. *Subha Rao*, 31 M.L.J. 257, 35 I.C. 98 (100, 101).

The word 'seizure' means taking hostile possession, and not taking possession of what another *voluntarily* gives. Therefore where a debt is attached and the debtor makes a voluntary payment of the debt into Court, such payment does not constitute a seizure. Hence if the amount of debt is paid by the Court to the decreeholder, a suit by the claimant of the debt against the decreeholder is governed by either Art. 62 or 120—*Yellammal* v. *Ayyappa*, 38 Mad. 972 (974, 987), 26 M.L.J. 166, 22 I.C. 870. In this case it has been further held (at page 974) that a debt not being a moveable property, the attachment of a debt is not a seizure of moveable property under this Article.

The words "under legal process" in this Article cannot be interpreted as meaning according to law and there is no justification for holding that any process taken according to law is legal process. By "legal process" is meant by some sort of Court. The Collector acting under sec 154 of the Bombay Land Revenue Code is not acting as a Court, but is really acting as a ceditor. This Article applies to a seizure under a process issued by a Court, and does not apply to a seizure by the Collector under sec. 154 of the Bombay Land Revenue Code—*Shivrao* v. *Secy. of State*, 44 Bom. L.R. 668, A.I.R. 1942 Bom. 300, 203 I.C. 611. Where the defendants had brought a suit against the plaintiffs for sums due to them on account of maritime necessaries supplied to the plaintiffs' ship, and obtained an warrant of arrest of the ship, but the suit was afterwards dismissed for want of jurisdiction, *held* that the arrest of the ship was a seizure under legal process. The fact that the suit was dismissed for want of judrisdic-

tion did not render the order for arrest a nullity. The seizure was therefore under a 'legal process'—*Madras Steam Navigation Co., Ltd.* v. *Shalimar Works, Ltd.*, 42 Cal. 85 (108), 28 I.C. 463. This Article would apply both to cases of seizure under orders passed by a Court without jurisdiction, and cases of seizure under orders passed by a Court having jurisdiction but on insufficient grounds—*Pannaji* v. *Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (642), 126 I.C. 721. This Article governs those cases only where there has been attachment which is found to have been wrongful, because the Court had no jurisdiction or because the attachment was obtained on insufficient grounds and in which there were no additional factors such as misappropriation or theft or conversion of the attached property—*Venugopal* v. *Gopala*, (1946) 1 M.L.J. 241, A.I.R. 1946 Mad. 453, 226 I.C. 464. In *Muthuswami* v. *Dhanushkodi*, (1950) 1 M.L.J. 799, 1950 M.W.N. 345, A.I.R. 1950 Mad. 734 it has been held that where the property wrongfully seized from the plaintiff is alleged to be in possession of the defendant and the suit is for recovery of the said property coupled with a prayer for price thereof, Art. 49 applies. But where the goods wrongfully seized from the plaintiff has been sold and thereby passed into the hands of third parties, a suit against the defendant for the loss caused to the plaintiff by such wrongful seizure and sale, being the price of goods so sold, will be governed by this Article. Article 29 is not limited in its application to cases in which the seizure is intrinsically wrongful, as for instance, whether it is made without jurisdiction; it applies also to cases where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process but by misrepresentations to Court—*Sakkalinga* v. *Krishnaswami*, 38 M.L.J. 324, 55 I.C. 786 (790), 1920 M.W.N. 192. Where a seizure is under a writ of Court, it is *prima facie* not wrongful, and unless it is shown that the Court issuing the writ had no jurisdiction over the subject matter, a suit for compensation for the seizure would not fall within Art. 29. A mere improper attachment is not wrongful attachment—*Arjan Biswas* v. *Abdul*, 35 C.L.J. 480, 64 I.C. 513, A.I.R. 1921 Cal. 774.

The attachment by the decreeholder of the properties of his judgment-debtor is not 'wrongful' by reason of the fact that the vendor of those properties has got a lien on them for his unpaid purchase-money. The judgment-creditors are not under any obligation to enquire at the time of attachment whether the purchase-money due to the vendor has or has not been paid. The seizure is perfectly lawful—*Ram Narain* v. *Brij Banke*, 39 All. 322 (328).

This Article applies only to seizure and not to any suit arsing out of what happens later at the time of the sale. Where the suit is brought on an undertaking given by the defendants in a suit under Or. 21, r. 63, C. P. Code that they would indemnify the plaintiff if he succeeds in the suit, this Article has no application—*Haji* v. *Abdul*, 39 P.L.R. 948, A.I.R. 1938 Lah. 196, 175 I.C. 630.

Attachment before judgment.—The attachment of the debtor's property by the creditor *before judgment* is a lawful seizure, if a decree is afterwards passed in favour of the creditor. The seizure is not wrongful by reason of the fact that it has been effected before the decree. Since the suit is subsequently decreed, the attachment, to all intents and purposes, must be deemed to have been effected in execution of the decree—*Ram Narain* v. *Brij Banke*, 39 All. 322 (328); *Manga* v. *Changa Mal*, 22 A.L.J. 977, A.I.R. 1925 All. 131. An attachment before judgment is not wrongful merely because the suit in which the attachment has been made, is dismissed, if it appears that there were sufficient grounds for applying for the attachment—*Manavikraman* v. *Avisilan*, 19 Mad. 80 (81). If the suit in which the attachment before judgment takes place is decreed by the Court of first instance but is dismissed on appeal, the attachment was none the less a lawful seizure and not a wrongful one; the order of attachment might have been on *insufficient grounds*, but it was not intrinsically

wrongful, that is, there was no wrongful attachment on the day on which the attachment was made. In such a case, Article 39 or 49 applied—*Manga* v. *Changa Mal* 22 A.L.J. 977, 81 I.C. 1038, A.I.R. 1925 All. 131. But in a recent Madras case it has been held that this Article would apply to all cases of attachment before judgment, where the seizure is wrongful either because the Court had no jurisdiction or because the attachment was made by a Court having jurisdiction but on *insufficient grounds;* it is not restricted to seizures which are wrongful because made under the order of a Court without jurisdiction or in excess of the order of the Court—*Pannaji* v. *Senaji,* 53 Mad. 621, A.I.R. 1930 Mad. 635 (642), 59 M.L.J. 859.

Attachment of property of defandant:—It has been said in some cases that a distinction should be drawn between cases where the property of the defendant (in the previous suit) was attached, and cases where the property of a *third person* was attached. If the property that was attached did not belong to the defendant (in the previous suit) but to a third party, a suit brought by that party for wrongful seizure of his property falls under Article 29—*Narasimha* v. *Ganga Raju,* 31 Mad. 431; *Ram Narain* v. *Umrao,* 29 All. 615; *Murugesa* v. *Jattaram,* 23 Mad. 621 (626); *Multan Chand* v. *Bank of Madras,* 27 Mad. 346; *P. Veeramma* v. *Subba Rao,* 31 M.L.J. 257, 35 I.C. 98. But if the property that was attached belonged to the defendant, there was no wrongful seizure, and the present suit for compensation for the attachment does not fall under Article 29, but falls under Art. 36. See *Manavikraman* v. *Avisilan,* 19 Mad. 80; *Arjun v. Abdul,* 35 C.L.J. 480, 64 I. C. 513, A.I.R. 1931 Cal. 774; *Sakkalingam* v. *Krishnaswami,* 38 M.L.J. 324, 55 I.C. 786 (790). In a recent Madras case, however, the learned Judges after reviewing all these cases, have disapproved of this distinction, and have laid down that Article 29 (and not 36) should apply even though the property of the *defendant* had been attached—*Pannaji* v. *Senaji,* 53 Mad. 621, A.I.R. 1930 Mad. 635 (641), 126 I.C. 721, approving *Madras Steam Navigation Co.* v. *Shalimar Works,* 42 *Cal.* 85, in which Art. 29 was applied to a case where the property that had been attached in the previous suit belonged to the defendant.

307. Distraint and removal of crops:—A suit for damages for illegal distraint of standing crops is governed by Art. 36, and not by Art .29, because standing crops are not '*moveable property*' within the meaning of this Article—*Hari Charan* v. *Hari Kar,* 32 Cal. 459 (462); *Mohesh Chandra* v. *Hari Kar,* 9 C.W.N. 376. Growing crops until severed from the soil are treated as immoverable property. The definition of moveable property in sec. 2 (13) of the C. P. Code which includes standing crops will not prevail in the Limitation Act—*Devarasetti* v. *Devarasetti,* 18 M.L.T. 532, 31 I.C. 769; *Surat* v. *Umar,* 22 Cal. 877 (885); *Pandah* v. *Jennudi,* 4 Cal. 665 (667); *Hari Charan* v. *Hari Kar,* supra; *Murlidhar* v. *Mulu,* 11 N.L.R. 18, 27 I.C. 935 (936, 937). If the crops are, after the wrongful distraint, *cut and carried away* by the defendant, they become moveable property, and a suit for damages for wrongful distraint and removal of the crops is governed by Article 48 or 49 (which is more specific) and not by Art. 36, which is a general Article on torts. Article 29 cannot apply because this Article applies only to the act of wrongful distraint and not to the act of cutting and carrying away the crops—*Jadu Nath* v. *Hari Kar,* 17 C.W.N. 308 (311), 18 I.C. 253 (overruling *Jadunath* v. *Hari Kar,* 36 Cal. 141, 12 C.W.N. 1090). See Notes under Arts. 36 and 39.

307A. Starting point of limitation:—Limitation runs from the *date of the wrongful seizure,* and not from the time when the *seizure is declared to be wrongful* and the plaintiff obtains restoration of the property. A wrongful seizure is wrongful *ab initio,* and the starting point of limitation is the date of the seizure; it is not correct to say that the wrongfulness or otherwise of the seizure depends upon any

declaration of the Court. It is not rightful when the Court makes an order on allegations, which are subsequently found to be unproved, and becomes wrongful only when the Court on investigation of the facts holds that the defendant had no jurisdiction in attaching the properties. Nor is it correct to say that the period of limitation runs when the seizure terminates. It should be noted that in other Articles where termination of proceeding is necessary to give the plaintiff a cause of action, the Act specially provides for that contingency. For instance, under Art. 19, time runs from the date when the imprisonment *ends;* under Art. 23, the period runs when the accused is acquitted or the prosecution is otherwise *terminated;* under Art. 42, the period commences from the time when the injunction *ceases.* But in Art. 29 the Legislature has not made any such provision but has fixed the period as one year from the *date of the seizure.* Compare also Art. 28 under which the period similarly commences from the date of the distress—*Pannaji* v. *Senaji,* 53 *Mad.* 621, A.I.R. 1930 Mad. 635 (637), 126 I.C. 721. The words "date of the seizure" are explicit; and it would be doing violence to the language used, if the words are interpreted as meaning the date when the seizure is declared wrongful by a competent Court—*Ibid.*

A wrongful seizure is not a *continuing wrong* within the meaning of sec. 23; hence time runs from the date of seizure and not when the attachment ceases—*Pannaji* v. *Senaji,* supra; *Ram Narain* v. *Umrao,* 29 All. 615. But see *Manga* v. *Changa Mal,* 22 A.L.J. 977, 81 I.C. 1038, A.I.R. 1925 All. 131; *Eng. Gim Moh* v. *Chinese Merited Banking Com. Ltd., A.I.R.* 1940 Rang. 276, 1941 R.L.R. 1 (F.B.) The date of the seizure, and not the date of the attachment, is the date from which time begins to run—*M. C. Firm* v. *S. Bholat,* A.I.R. 1934 Rang. 329.

Time runs from the date of the wrongful seizure of the property; and the sale of the property after seizure does not give a new cause of action—*Krishna v. Sitaram,* A.I.R. 1931 Nag. 47, 130 I.C. 157.

30.—Against a carrier for compensation for losing or injuring goods.	One year.	When the loss or injury occurs.

[*N. B.*—The period of limitation under Articles 30 and 31 of the Act of 1877 was originally two years, but by the Amendment Act X of 1899, it was reduced to one year; and this reduced period has been maintained in the present Act.]

308. Carrier:—A'carrier' in its general sense means a person or a company who undertakes to transport the goods of another person from one place to another for a hire. It is not necessary for the purposes of Articles 30 and 31 that the carrier should be a 'common carrier' within the meaning of the Carriers Act, 1865—*Mylappa* v. *B. I. S. N. Co.,* 34 M.L.J. 553, 45 I.C. 485; *Alamgir Footwear Co.* v. *Secretary of State,* 1933 A.L.J. 796, 144 I.C. 703, A.I.R. 1933 All 466 (468); *Secy of State* v. *Golab,* I.L.R. (1937) 2 Cal. 614, A.I.R. 1938 Cal. 298, 175 I.C. 196. A landing agent is a carrier within the meaning of these Articles—*Mylappa* v. *B. I. S. N. Co.,* supra. Sea-going merchantships are carriers within the meaning of these Articles though they are not 'common carriers' as defined in the Carriers Act (III of 1865)—*B. I. S. N. Co.,* v. *Haji Mahomed,* 3 Mad. 107 (110). Railways owned or controlled by Government, which take upon themselves to carry goods belonging to the public from one place to another are carriers—*Secy of State* v. *Golab,* supra. In a subsequent case the same High Court has held that this Article does not apply to a suit against the Government relating to carriage by Railway, the reason being that the law relating to common carriers in India is contained in the Carriers Act and the definition of "common carrier",

in sec. 2 of the Act excludes the Government from that category—*Golab* v. *Secy. of State*, I.L.R. (1941) 2 Cal. 160. The Governor General in Council can come within the meaning of "carrier" in Articles 30 and 31—*Rahim* v. *Governor General*, (1955) M.L.J. 406.

309. Suit based on contract:—It was held in some earlier cases that where there was a *contract* to deliver, a suit for compensation for breach of the contract was governed by Art. 115. This Article applied to suits for compensation for loss or damage to goods arising from malfeasance, misfeasance or nonfeasance *independent of contract—British India Steam Navigation Company* v. *Hajee Mahomed*, 3 Mad. 107; *Kalu Ram* v. *Madras Ry. Co.*, 3 Mad. 240; *Danmull* v. *B. I. S. N. Co.*, 12 Cal. 477; *Mohan Singh* v. *Henry Conder*, 7 Bom. 478. But these decisions were given at a time when the word "non-delivery" did not exist in Article 31, and the Courts had therefore to apply Art. 115 to suits for compensation for non-delivery of goods, treating them as suits for breach of contract to deliver. Article 30 was confined to actions in tort, and Art. 31 to actions *ex contractu*. In *G. I. P. Ry. Co.* v. *Raisett*, 19 Bom. 165, Farran, J. however remarked (at p. 188) that "the Courts would have better fulfilled the intention of the Legislature by treating all claims against a carrier which would fairly be deemed to arise out of the loss or injury to goods as coming within the purview of articles 30 and 31, than by confining the general words of the former Article to a claim for compensation for loss of goods arising otherwise than out of contract."

Since then the Legislature has added the word "non-delivery" in Article 31 (by the Amendment Act X of 1899) so that that Article is now made more comprehensive and self-contained, and there is no longer any necessity for bringing Article 115 into a case of non-delivery. It is now settled law that under Articles 30 and 31 it is immaterial whether the liability of the defendant arises *out of contract or of tort*. Therefore Article 31 would apply to a suit against a carrier for compensation for non-delivery of goods irrespective of the question whether the suit was laid in contract or in tort—*Venkatasubba Rao* v. *Asiatic Steam Navigation Co.*, 39 Mad. 1 (12) (F.B.); *Secretary of State* v. *Dunlop Rubber Co.*, 6 Lah. 301, A.I.R. 1925 Lah. 478, 88 I.C. 979, 26 PL.R. 490; *B. N. Ry. Co.* v. *Hamir*, 5 Pat. 106, 6 P.L.T. 565, A.I.R. 1925 Pat. 727; *Moti Ram* v. *E. I. Ry. Co.*, 2 P.L.R. 1907, 108 P.R. 1906 (F.B.); *Chiranjilal* v. *B. N. Ry. Co.*, 52 Cal. 372, 29 C.W.N. 277. In an earlier case, (*Radha Shyam* v. *Secretary of State*, 44 Cal. 16 at p. 26) however, Chatterjee, J., of the Calcutta High Court expressed the opinion that a suit by the consignor against a railway company for compensation for non-delivery of goods would be governed by Article 115, as it was a case of breach of a written contract, the invoice being the contract (see Note 311 under Art. 31). The learned Judge in this case followed the old and obsolete rulings of 7 Bom. 478 and 12 Cal. 477. This decision seems to be of doubtful authority.

310. Loss:—A suit against a railway company for compensation for loss of goods, alleging the same to have been due to the wilful negligence or theft by the company's servants is governed by this Article—*E. I. Ry. Co.* v. *Ram Autar*, 20 C.W.N. 696, 38 I.C. 502. Article 30 is inapplicable to a case where the goods are not lost but are lying in the lost-property office of the railway company because delivery of them has not been claimed by any one. The case is one of non-delivery, and covered by Artible 31—*Mutsaddi Lal* v. *B. B. & C. I. Ry. Co.*, 42 All. 390 (392), 18 A.L.J. 377, 58 I.C. 547. So also, this Article has no application to a suit against the Railway Administration in respect of loss of goods deposited by a passenger in a cloak-room—*H. K. Roy* v. *Governor General in Council*, 53 C.W.N. 406, A.I.R. 1949 Cal. 591. This Article does not apply where the defendant does not plead or prove any loss, but on

the other hand pleads that no goods were given to them for consignment—*Radha Shyam* v. *Secretary of State*, 44 Cal. 16 (26).

If the plaintiff sued the railway company for non-delivery of goods within three years as provided by Article 115 (which was the law before the amendment of 1899) the defendant could not set up a case that the goods were *lost* in order to bring the case within the shorter period of limitation under Art. 30. The defendant could not ask the Court to infer from the mere non-delivery that the goods were lost; if he sought to avail himself of the shorter period of limitation prescribed by this Article, the burden lay on him to prove, as an affirmative fact, that the goods were lost—*Mohan Singh* v. *Henry Conder*, 7 Bom. 478 (488). This decision is no longer of any importance, because under the present law loss and non-delivery are governed by an equal period of limitation under Articles 30 and 31.

So also, the burden of proving the time when the goods were lost, lies on the defendent—*Madras & South Marhatta Railway Co.* v. *Bhimappa*, 23 M.L.J. 511, 17 I.C. 419; *E. I. Ry.* v. *Gopilal*, A.I.R. 1941 Cal 304, 199 I.C. 437; *Jainarain* v. *Governor General in Council*, 4 D.L.R. (Cal) 225, A.I.R. 1951 Cal. 462; *Setharama* v. *Hydrabad State*, (1949) 2 M.L.J. 298, 1949 M.W.N. 599, A.I.R. 1950 Mad. 30.

The words "against a carrier for losing or injuring goods" obviously suggest not a loss of the goods to the owner but an actual losing of the goods by the *carrier* himself; and the words "when the loss or injury occurs" in the third column mean that the period of limitation begins to run form the time when the *carrier* lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. Therefore, the burden of proving when the goods were lost is decidedly on the carrier company. Where the railway company did not prove or admit that the goods were lost but on the other hand they had been continually assuring the plaintiff that the matter was under inquiry and was receiving their special attention up to a period within a year of the suit, the claim of the plaintiff was not barred by Article 30, although the suit was brought more than a year after the despatch of the goods—*Jugal Kishore* v. *G. I. P. Ry.*, 45 All. 43 (45), 20 A.L.J. 792, 68 I.C. 981, A.I.R. 1923 All. 22; *Jainarain* v. *Governor General in Council*, 4 D.L.R. (Cal.) 225, A.I.R. 1951 Cal. 462.

The term 'loss' does not include *misdelivery*. The word 'loss' in this Article contemplates actual losing of the goods by the carrier himself, and therefore when the carrier delivers the goods to a wrong person, it cannot be said that he has lost the goods. Neither does Article 31 apply because misdelivery is not the same as non-delivery. The case of misdelivery therefore falls under Article 115—*Fakir* v. *Secretary of State*, 170 P.L.R. 1913, 19 I.C. 477, following *Changa Mal* v. *B. & N. W. Ry. Co.*, 6 P.R. 1897. The Allahabad High Court has held that the correct article of limitation applicable to a suit for misdelivery of goods consigned is Art. 31—*Secy. of State* v. *Daulat Ram*, 1937 A.L.J. 794 A.I.R. 1937 All. 632, 171 I.C. 532. In a Full Bench case of the Lahore High Court, however, it has been held that the word 'loss' in sec. 80 and other sections of the Railway Act should not be interpreted in the restricted sense of losing of the goods by the carrier, but should include loss to the owner as well, and therefore it clearly contemplates a case of *misdelivery—Hill Sawyers & Co.* v. *Secy. of State*, 2 Lah. 133 (F.B.), A.I.R. 1921 Lah. 1, 61 I.C. 926, overruling 6 P.R. 1897. But as it is a case under the Railway Act, it is doubtful whether it should be applied in construing Article 30 of the Limitation Act, since the two Acts are not in *pari materia*. (See 2 Pat.

Short delivery of goods does not amount to loss of goods. The loss or injury referred to in Article 30 is the loss or injury to the *goods* and not loss or injury to the *consignee*. And therefore it cannot be said that a case of short delivery falls under

Article 30 on the ground that it amounts to loss to the consignee to the extent of the goods short delivered. The case is governed by Article 31—*B. & N. W. Ry. Co.* v. *Kameshwar*, 12 Pat. 67, 141 I.C. 813, A.I.R. 1933 Pat. 45 (48). The Calcutta High Court has held that this Article applies to cases of short delivery. Article 31 is limited to cases of non-delivery and has no application to cases of short delivery—*Gangadhar* v. *Dominion of India*, A.I.R. 1950 Cal. 394. The view has been taken in *The Dominion of India*, v. *B. R. C. & Sons*, A.I.R. 1951 Mysore 68.

310A. Starting point of limitation:—Under Art. 30 time begins to run from a perfectly definite date that is when the loss or injury occurs—*Secy. of State* v. *Neaz Ali*, A.I.R. 1935 All. 407, 1935 A.L.J. 398, 157 I.C. 46; and not from the date of plaintiff's knowledge—*E. I. R.* v. *Gopilal*, A.I.R. 1941 Cal. 304, 199 I.C. 437; *Seetharam* v. *Hydrabad State*, (1949) 2 M.L.J. 298, 1949 M.W.N. 599, A.I.R. 1950 Mad. 30 or on account of correspondence with the Railway—*The Dominion of India* v. *B. R. C. & Sons*, supra. Where on the date on which the consignee went to the railway station to take delivery of the packages, they were missing and there was nothing to show that the goods were lost prior to that date, time ran only from that date—*G. I. P. Ry.* v. *Radhey Mal*, 47 All. 549, 23 A.L.J. 398, A.I.R. 1925 All. 656. In the absence of any evidence to the contrary the Court is entitled to assume that the loss occurred on the date on which the plaintiff was permitted to remove the goods and not earlier—*Sitaram* v. *G. I. P. Ry.*, I.L.R (1947) Nag. 726, 1947 N.L.J. 540, A.I.R. 1947 Nag. 224; *Gangadhar* v. *Dominion of India*, supra. See also *Union of India* v. *Gujrat Tobacco Co.*, 59 C.W.N. 278, 95 C.L.J. 119, A.I.R. 1955 Cal. 448.

31.—Against a carrier for compensation for non-delivery of, or delay in delivering, goods.	One year.	When the goods ought to be delivered.

311. Scope of section:—This Article applies not only to a suit brought by the consignee but also to a suit brought by the consignor. It provides for a suit for compensation for non-delivery, *i.e.*, a suit by a person who by reason of non-delivery has sustained loss. There may be cases in which it is not the consignee who sustains loss but the consignor. In such cases it would be a suit by the consignor for compensation for non-delivery. Thus, where the consignor (who had purchased a quantity of salt from the Salt Superintendent at Sambhar) despatched at Ramnagar station certain empty gunny bags through the railway company to be delivered to the Salt Superintendent at Sambhar who was to send back the bags filled with the salt to the consignor, but the bags were not delivered, it was held that in this case it was the consignor who would suffer loss by reason of non-delivery as he would not get the salt, and he would be the person to sue under Article 31. The consignee had nothing to do with the bags and would suffer nothing for non-delivery—*Mutsaddi Lal* v. *B. B. & C. I. Ry. Co.*, 42 All. 390 (393); *Chiranjilal* v. *B. N. Ry. Co.*, 52 Cal. 372, 29 C.W.N. 277, A.I.R. 1925 Cal. 559. In *Radha Shyam* v. *Secretary of State*, 44 Cal. 16 (26)), 20 C.W.N. 790, Chatterjee J. has laid down the narrow proposition that Article 31 seems to contemplate a suit by the party who is entitled to the delivery, namely the consignee, and does not apply to a suit by the consignor.

312. Non-delivery:—The word "non-delivery" means the failure to deliver the unit number mentioned in the consignment either as a whole or in part and not to the details of its contents—*The Dominion of India* v. *B. R. C. and Sons*, A.I.R. 1951 Mysore 68. A suit against a carrier for compensation in respect of goods not delivered

is governed by this Article and not by Art. 115—*I. G. N. Ry. Co. Ld.* v. *Nanda*, 13 C.W.N. 851; *Mutsaddi Lal* v. *B. B. & C. I. Ry. Co.*, 42 All. 390; *Ali Mahmad* v. *G. I. P. Ry. Co.*, 11 N.L.R. 174, 31 I.C. 474; *Moti Ram* v. *E. I. Ry. Co.*, 2 P.L.R. 1907, 108 P.R. 1906; *G. I. P. Ry. Co.* v. *Ganpat Rai*, 33 All. 544; *Haji Ajam* v. *Bombay & Persia S. N. Co.*, 26 Bom. 562 (570); *Venkata Subba* v. *A. S. N. Co.*, 39 Mad. 1; *E. I. Ry. Co.* v. *Sagar Mull*, 4 Pat. 482, 6 P.L.T. 559, A.I.R. 1925 Pat. 611; *B. N. Ry. Co.* v. *Hamir Mull*, 5 Pat. 106; A.I.R. 1925 Pat. 727, 90 I.C. 374.

The word "non-delivery" was introduced into the Act of 1877 by the Amendment Act, X of 1899. Previous to 1899, a suit for compensation for non-delivery of goods was treated as a suit for compensation for breach of an implied *contract* to deliver and was governed by the three year's rule of limitation under Art. 115—*Mohan* v. *Henry Conder*, 7 Bom. 478; *G. I. P. Ry. Co.* v. *Raisett*, 19 Bom. 165; *Hassaji* v. *E. I. Ry. Co.*, 5 Mad. 388; *Danmull* v. *B. I. S. N. Co.* 12 Cal. 477. These decisions are no longer of any authority. See Note 309 in Article 30 under heading "Suits based on contract". It has been pointed out in that Note that it is now settled law that a suit against a carrier for compensation for non-delivery of goods is governed by Article 31, whether the suit is laid in contract on ground of non-delivery, or in tort; therefore this Article applies to a suit for compensation for non-delivery, where the suit is grounded on tort, *viz.*, where in addition to non-delivery the plaintiff alleges that the railway company has wrongfully converted the goods. The suit would not be governed by Art. 48, because Article 31 is more specific than Art. 48—*Secretary of State* v. *Dunlop Rubber Co.*, 6 Lah. 301, 26 P.L.R. 490, A.I.R. 1925 Lah. 478, 88 I.C. 974. A suit against a carrier for compensation for non-delivery of goods is governed by Art. 31 whether the non-delivery is due to conversion or any other reason. There is a definite Article, namely Art. 30, for compensation for loss or injury, and a general article, namely Art. 31, for non-delivery or delay in delivery. A suit for compensation for non-delivery must be brought within one year, no matter what the circumstances are which occasion the non-delivery. Article 31 applies even where the plaintiff sues the carriers as tort-feasors for the detention of his property. So, this Article applies even if the goods are detained for non-payment of the carrier's charges for wharfage—*Ramlal* v. *B. N. Ry. Co.*, A.I.R. 1936 Nag. 21, 161 I.C. 867, 31 N.L.R. (Supp.), 79. A carrier is not entitled to set up a loss, whether or not such loss amounts to a tort to the goods, to bring a suit within the shorter period contemplated by Art. 30 when it clearly falls within this Article—*National Swadeshi Stores* v. *G. G. in Council*, I.L.R. (1947) Kar. 144, A.I R. 1948 Sind. 26.

Starling thinks that all suits against carriers in respect of goods delivered to them for carriage fall under one or the other of these two articles, (187). Rustomji considers this proposition to be too widely stated.

Where goods sent through a Railway Company were not taken delivery of by the consignee, and were not sent back to the consignor owing to defect in his address, and were therefore sold by the Company as unclaimed goods under sec. 56 of the Railways Act, a suit by the consignor to recover the sale-proceeds is not a suit for compensation for non-delivery under this Article but is governed by Art. 62—*Tara Chand* v. *M. & S. M. Ry. Co.*, 44 Mad. 823, A.I.R. 1921 Mad. 362. A suit for damages for wrongful conversion is not for compensation for non-delivery but one for damages for tort and as such Art. 31 is not applicable—*Firm Nawab Boot House* v. *Secy. of State*, A.I.R. 1935 All. 156, 1935 A.L.J. 61, 159 I.C. 40. Where goods had reached their destination and had never been lost from the possession of the railway company but were in the lost property office and were sold by public auction against the express direction of the plaintiff, it was held that the suit for damages against the railway company was not governed by Art. 31, but by Art. 48—*Secy. of State* v. *Simla Footwear Co.*, A.I.R.

1935 All. 601, 1935 A.L.J. 793, 157 I.C. 1080. Where the plaintiff, on being informed by the Railway Company of the arrival of the goods, did not take delivery of the goods and asked the Company to keep them till further instructions, it was held that the plaintiff's delay in taking delivery of the goods did not convert the carrier (Railway Company) into a bailee, so as to extend the period of limitation; the liability of the Railway Company continued as carrier, and the suit was governed by this Article, and not by Art. 48 or 49—*Alamgir Footwear Co.* v. *Secretary of State*, 1933 A.L.J. 796, 144 I.C. 703, A.I.R. 1933 All. 466 (467). This Article does not apply to a suit, in respect of loss of goods deposited by a passenger in a cloak-room—*H. K. Roy* v. *Governor General of India*, 53 C.W.N. 406. A.I.R. 1949 Cal. 591, 4 D.L.R. (Cal.) 209.

Short delivery amounts to non-delivery of the things short delivered, and therefore falls under Article 31. See *Haji Ajam* v. *Bombay & Persia S. N. Co.*, 26 Bom. 562; *Venkatasubba Rao* v. *A. S. N. Co.*, 39 Mad. 1; *B. & N. W. Ry. Co.* v. *Kameshwar*, 12 Pat. 67, 141 I.C. 813, A.I.R. 1933 Pat. 45 (48). In a previous case, the Patna High Court held that short delivery meant *loss* of the portion of the consignment undelivered and fell under Article 30; or it might fall either uner Art. 30 or Art. 31—*Rameshwar Dass* v. *E. I. Ry. Co.* 4 P.L.T. 331, A.I.R. 1923 Pat. 298 (299). The Calcutta High Court has held that such a suit falls under Art. 30 and not under this Article—*Gangadhar* v. *Dominion of India*, A.I.R. 1950 Cal. 394. The same view has been taken in *The Dominion of India* v. *B. R. C. & Sons*, A.I.R. 1951 Mysore 68.

312.A. Starting point of limitation:—As to the starting point of limitation under Article 31, the burden lies on the carrier defendant to show when the goods ought to have been delivered—*Radha Shyam* v. *Secretary of State*, 44 Cal. 16 (26). This Article, which lays down the starting point to be the time when the goods ought to have been delivered, cannot apply to a case where it is impossible to show or prove as to when the goods ought to have been delivered—*Ibid.* In a suit against a carrier for compensation for non-delivery the burden of proving when the goods consigned to him for carriage ought to have been delivered lies upon the carrier of goods—*Manasarovar Agencies* v. *Governor General in Council*, A.I.R. 1955 Mys. 123. Where on the date on which the consignee went to the railway station to take delivery of the goods the station master refused to give delivery, the period of limitation for a suit under this Article ran from that date as being the date on which the railway company ought to have delivered but failed to deliver the goods—*G. I. P. Ry.* v. *Radhey Mal*, 47 All. 549, 23 A.L.J. 398, A.I.R. 1925 All. 656. Time runs from the date on which the goods ought to be delivered, and the question as to when the recovery of the plaintiff's goods became hopeless is immaterial—*Secy. of State* v. *Dunlop Rubber Co.*, 6 Lah. 301, A.I.R. 1925 Lah. 478, 88 I.C. 974. The expression "when the goods ought to have been delivered" in the third column of this Article must be construed as meaning when the defendant company *finally* said that "the goods would not be delivered". Time would begin to run under this Article from after a definite refusal, or a declaration of inability, to deliver by the Railway Company—*Palanichami* v. *Governor General of India*, (1945) 2 M.L.J. 448, 58 L.W. 592, A.I.R. 1946 Mad. 133; *Raigarh Jute Mills Ltd.* v. *Commissioner for the Port of Calcutta*, A.I.R. 1947 Cal. 98; *G. G. in Council* v. *Khadi*, (1950) 1 M.L.J. 210, A.I.R. 1950 Mad. 438; *Jainarain* v. *G. G. in Council* 4 D.L.R. (Cal.) 225, A.I.R. 1951 Cal. 462; *Union of India* v. *Adam Hajee*, A.I.R. 1954 Trav. Co. 362; *Muhammadi Steamship Co.* v. *V. K. Vallabdas*, A.I.R. 1957 Trav. Co. 133; *Oudh Trihut Ry.* v. *Mrs. Karam Chand*, A.I.R. 1958 All. 234. It has, however, been held in the recent Full Bench decision in *Dominion of India* v. *Amin Chand Bhola Nath*, A.I.R. 1957 Punj. 49 overruling its previous decisions in 1951 Simla 254 and 1955 Punj. 83 that the Court must decide the reasonable time within which the consigned goods ought to have been

delivered having regard to all the circumstances of the case and fix that date as the date from which limitation under Art. 31 should start. See also *Chand & Co.* v. *Sree Ambica Steam Navigation Co. Ltd.*, 100 C.L.J. 45. Time runs under this Article, from the date when goods should have been delivered; but the difficulty it raises is that it fixes no specific time for the delivery of the goods, the ordinary rule being that goods have to be delivered by a carrier within a *reasonable time* specially when the railways are afflicted by war conditions and congestion of traffic—*Seetharama* v. *Hydrabad Estate*, (1949) 2 M.L.J. 298, 1949 M.W.N. 599, A.I.R. 1950 Mad. 30; *Raigarh Jute Mills Ltd.* v. *Commissioner for the Port of Calcutta*, supra. Where the plaintiff made over certain goods to the Railway Company in August 1918, but the goods not having arrived at their destination, there was continuous correspondence between the parties up to February 1920, and the plaintiff was being assured that the matter was being inquired into, and ultimately he instituted a suit in March 1920, *held* that since the plaintiff had all along been assured that inquiry was being made and he had even hopes of getting delivery of the goods within one year of the suit, it cannot be said that his claim was filed more than a year after the date when the goods ought to have been delivered. There is no inflexible rule that time must begin to run from the expiry of the ordinary period of transit—*Jugal Kishore* v. *G. I. P. Ry.*, 45 All. 43 (46), 20 A.L.J. 792, 68 I.C. 981; *G. G. in Council* v. *Kasiram*, 29 Pat.L.T. 477, A.I.R. 1949 Pat. 268, 4 D.L.R. (Pat.) 24; *Jainarain* v. *G. G. of India*, A.I.R. 1951 Cal. 462, 4 D.L.R. (Cal.) 225. *G. G. in Council* v. *Ahmed*, 1951 N.L.J. 254, A.I.R. 1952 Nag. 77; *Dominion of India* v. *Ahmad*, A.I.R. 1954 Nag. 115, I.L.R. 1954 Nag. 46; *Chhote Lal* v. *Union of India*, A.I.R. 1952 V. P. 83; *Mutsaddilal* v. *Governor General*, 1952 A.L.J. 451, A.I.R. 1952 All. 897 (F.B.). But when a suit is filed more than one year after dates of letters from railway authorities asking for full description about goods or saying that the goods will be rebooked as soon as they are received the suit is barred under this Article—*P. C. Varma & Sons* v. *G. G. in Council*, A.I.R. 1950 E.P. 160. In a suit falling under this Article, where no portion of the consignment has been delivered, it is sometimes necessary to take evidence on the question as to when the consignment ought to have been delivered, which must in any case be regarded as a question of fact; but where a great part of a consignment has been delivered on a certain day, there is ordinarily no necessity to enter into evidence on the question as to when the balance of the consignment ought to have been delivered, because the time when the consignment as a whole ought to have been delivered is manifestly the time when the greater part of the consignment arrived at its destination—*Gopi Ram* v. *G. I. P. Ry. Co.*, 8 P.L.T. 767, 103 I.C. 383, A.I.R. 1927 Pat. 335, The date on which a substantial portion of the consignment was delivered would be the date when the remaining portion ought to be delivered. A suit filed more than one year after such date would therefore be barred by limitation—*Darjeeling Himalayan Railway Co. Ltd.* v. *Jetmull Bhojraj*, 60 C.W.N. 683, A.I R. 1956 Cal. 390. *Shamburam* v. *Union of India*, A.I.R. 1958 Pat. 118. Where the consignee, to whom 4 packages had been consigned, found on inspecting the consignment that although three of the packages were a portion of the consignment as consigned, the fourth was not a portion of the consignment, and he refused to take ordinary delivery and demanded open delivery, whereupon the Railway Company permitted him open delivery on a subsequent date, but on opening the consignment he found that the goods therein contained were not the goods which had been consigned to him, and instituted a suit against the Railway Company for damages, *held* that time began to run when the Company permitted open delivery of the packing in question, and not from the date when he had taken delivery of the other three packages—*Bala Prosad* v. *B. & N. W. Ry.* 3 Luck. 102, 106 I C. 311, A.I.R. 1927 Oudh 478 (480).

Misdelivery:—See Note 310 in Article 30 under heading "Loss."

Part V.—Two years.

32.—Against one who, having a right to use property for specific purposes, perverts it to other purposes.	Two years.	When the perversion first becomes known to the person injured thereby.

313. Suits under this Article:—This Article should not be restricted to a suit for *compensation*. The present Article is independent of the nature of the remedy, and applies equally to all classes of suits brought upon the cause of action referred to in this Article—*Soman Gope* v. *Raghubir*, 24 Cal. 160 (162). Thus, from the undernoted cases it will be evident that this Article applies to suits for *injunction, ejectment, etc.*

A suit by a Zemindar for removal of certain structures erected by the mortgagees of an occupancy-holding, upon the holding, without the Zemindar's consent, is governed by this Article, as the defendants are persons who have a right to use the land of the plaintiff for certain specified purposes, and they have perverted it to other purposes—*Lach Ram* v. *Jangi Rai*, 8 A.L.J. 914, 12 I.C. 108. A suit by a Zemindar against certain occupancy tenants who have converted arable land into a grove or wood by planting trees thereon, for an injunction directing them to remove the trees is governed by this Article—*Gangadhar* v. *Zahurriya*, 8 All. 466; *Jaikishen* v. *Ram Lall*, 20 All. 519. But where trees were planted upon the waste lands of the village by certain *trespassers*, a suit for removal of the trees would be governed by Article 120 and not by this Article, because the trespassers were not "persons having a right to use property for specific purposes" within the meaning of this Article—*Mushaiaf Ali* v. *Iftkhar Hussain*, 10 All. 634 (635). If the suit against the trespasser is one for removal of the trees and for *possession*, Art. 144 applies—*Muhammad Shafi* v. *Bindeswari*, 46 All. 52, 75 I.C. 266, A.I.R. 1924 All. 443. Article 32 deals with the case of a person having legal right to use certain property. It has no application to cases where in substance the plaintiff seeks a greater relief—*Lachman* v. *Lal Ratnakar*, I.L.R. (1937) All. 623, 1937 A.L.J. 515, A.I.R. 1937 All. 472. A suit by a landlord against tenants for possession of land by removal of trees grown on it by the tenants—they having no legal right to use the land, is governed by Art. 142, and not Art. 32—*Gurcharam* v. *Jai Narain*, A.I.R. 1935 All. 964, 159 I.C. 521. Where a tenant without landlord's consent builds upon the *abadi* land which is no part of his tenancy lands, he, by such act takes exclusive possession of such land to the ouster of the landlord, and a suit by the landlord for the demolition of the building is not a suit falling under this Article—*Lachman* v. *Lal Ratna Kar*, supra.

A suit instituted under sec. 155 of the Bengal Tenancy Act to eject a tenant who had allowed a portion of his holding to be encroached upon by a stranger and had exchanged another plot of land of the tenancy in contravention of the terms of the *kabuliyat*, is governed by this Article and not by Article 143—*Taher* v. *Tarafdi*, 20 C.W.N. 661, 33 I.C. 923. Where the defendant, who had by virtue of a right of easement formerly placed a number of beams on the plaintiff's wall and constructed a thatched roof on them, subsequently placed on the wall heavier and more numerous beams and built a masonry roof on them, a suit by the plaintiff for removal of the beams does not fall under this Article. There is no *perversion* of use in this case; the use remains the same, namely, placing beams on the wall; but the defendants have carried out the purpose in a different way by placing heavier and more numerous beams. Article 32 does not apply, but probably Art. 120—*Mohan* v.

Bishambhar, 46 All. 68, 78 I.C. 193, A.I.R. 1924 All. 450 reversing *Bishambar* v. *Janki*, A.I.R. 1922 All. 320, 69 I.C. 819.

This Article applies to a suit brought under secs. 25 (*a*) and 155 of the Bengal Tenancy Act for the ejectment of a tenant and for removal of trees planted by him on land leased out for agricultural purposes. Article 120 does not apply to such a case —*Soman* v. *Raghubir*, 24 Cal. 160. This Article applies to a suit by a landlord for ejectment of an occupancy tenant on the ground that he has diverted his holding to non-agricultural purpose—*Gulab Singh* v. *Devendra*, I.L.R. (1947) Nag. 286, 229 I.C. 528, 1947 N.L.J. 25, A.I.R. 1948 Nag. 20, or, to an unauthorised purpose thereby rendering it unfit for the purpose for which it is held—*Rabul* v. *Ghulam*, 26 L.L.T. 31. A suit against a tenant for mandatory injunction to fill up a tank excavated by him on a land leased out for agricultural purposes, and in the alternative for ejectment, falls under this Article, and not under Art. 120—*Sharoop* v. *Jogessur*, 26 Cal. 564 (F.B.) practically over-ruling *Kedarnath* v. *Khetterpaul*, 6 Cal. 34 and disapproving *Gonesh* v. *Gondour*, 9 Cal. 147. So also, a suit for ejectment as well as for compensation against a tenant who has broken the conditions of the lease by making excavation on agricultural land, is governed by this Article—*Krishna Das* v. *Mohendra*, 25 C.W.N. 930, 62 I C. 779, A.I.R. 1921 Cal. 62.

Where the Mahomedan community of a certain village had been allowed by the Hindu proprietor to use a portion of his land as a public grave yard, and the defendants who were some of the Mahomedan residents of the village, appropriated it to their own use by planting trees thereon, and the proprietor of the land sued for removal of the trees, *held* that the suit was governed by Article 32. It was contended that Art. 32 could not apply until and unless some *particular person* (and not the public generally) was in possession of the property and that property had been given to him for a specific purpose. This contention was overruled—*Ismail* v. *Thakur Lal*, 13 O.L.J. 428, A.I.R. 1926 Oudh 341, 93 I.C. 89.

Appropriation of common property:—Where a property (*e.g.*, a village pond) was reserved for the common use of all the owners of the village, but the defendant took possession of the property and appropriated it to his own use, it has been held in some cases that a suit for an injunction restraining the defendant from cultivating the land is governed by this Article, in as much as the defendant has perverted the property to purposes other than those for which it was intended; this Article is not restricted to the case of a defendant who was, before the encroachment, in actual and *exclusive* possession of the property for a specific purpose and subsequently perverts it to other purposes—*Ghulam Muhammad* v. *Abdul Sattar*, 89 I.C. 405, A.I.R. 1925 Lah. 653; *Bhagwana* v. *Bhagawana*, 31 P.L.R. 14, A.I.R. 1930 Lah. 283 (284), 121 I.C. 186. A person, who *in common with other persons*, has a right to use a public property (*e.g.*, a public pathway) may be said to be a person having a right to use property for specific purposes; and if he builds on the land, a suit for removal of the building is governed by this Article—*Dewa Singh* v. *Qarum*, 30 P.L.R. 399, A.I.R. 1929 Lah. 535, 118 I.C. 447; *Bhagwan* v. *Ramanand*, 115 I.C. 73. But in several other cases of the same High Court it has been held that the word "property" in this Article means the property of a particular person or persons and does not include a public property (*e.g.*, a public road), and that a person who has a right to use a public property (*e.g.*, a public thoroughfare) *in common* with the general public cannot be said to be a "person having a right to use property for *specific* purposes." That expression applies to persons who have a specific right of some kind peculiar to themselves (*i.e.*, an exclusive right). If persons having only a right to use a public road in common with others appropriate the road to themselves by erecting huts, etc., on it, a suit for removal of the obstruction falls under Article 120, and not under

Article 32—*Main Pirthi* v. *Hans Raj*, A.I.R. 1928 Lah. 794 (795), 112 I.C. 381; *Gurdit Singh* v. *Hari Singh*, 29 P.L.R. 308, A.I.R. 1928 Lah. 792, 110 I.C. 517; *Achar Singh* v. *Badhawa*, 2 P.L.R. 1913, 124 P.R. 1912, 15 I.C. 285 (286). See also *Ganda Singh* v. *Nathu Ram*, 151 P.L.R. 1912, 13 I.C. 660; *Lal Singh* v. *Hari Singh*, 3 Lah.L.J. 128, 60 I.C. 20, A.I.R. 1921 Lah. 242; *Chandu* v. *Gajju*, 26 P.L.R. 283, 88 I.C. 176, A.I.R. 1925 Lah. 455. But where before the perversion the defendants had a real right in the land itself, parts of which any of them could time to time temporarily appropriate and use (*e.g.*, to cremate a dead body), a suit against the defendants for building on the ground is governed by this Article—*Nand Ram* v. *Jaichand*, A.I.R. 1929 Lah. 186 (187), 112 I.C. 844 (following 13 O.L.J. 428, *supra*, and distinguishing A.I.R. 1928 Lah. 792 and 794, *supra*).

In a later Full Bench case, the Lahore High Court has reviewed all the cases cited above, and expressed the opinion that the suit does not fall under Art. 32. The language of the present Article shows that it is applicable to those cases in which the plaintiff seeks the assistance of the Court merely to get rid of the perversion But where the defendant's act, though amounting to a perversion of the user from the original purpose, really amounts to an ouster of the plaintiff from the property and the object of the suit is not to get rid of the perversion *simpliciter*, but to have the dispute as to the title settled, Art. 32 can have no application, but Art. 144 or 120, according as the relief claimed is one for possession or injunction—*Mastan Singh* v. *Sant Singh*, 14 Lah. 267, 34 P.L.R. 618, 145 I.C. 553, A.I.R. 1933 Lah. 705 (708, 709) (F.B.).

As a result of this decision, the cases of *Ghulam Muhammad* v. *Abdul Sattar*, *Bhagwana* v. *Bhagawana*, *Dewa Singh* v. *Qarum*, and *Bhagwan* v. *Ramanand*, cited above, must be deemed to be overruled.

A landlord has no right to settle *Jaimazrua-am* lands and if he purports to do so, the person with whom he purports to settle them acquires no tenancy right by virtue of the settlement. If such a person brings the land under cultivation, his act amounts to an ouster of the public, and the period of limitation for a suit to recover possession is twelve years from the ouster. This Article has no application to such a suit—*Lachman* v. *Shankar*, 21 Pat.L.T. 109, A.I.R. 1940 Pat. 106, 184 I.C. 493.

313A. Starting point of limitation:—It should be noted that time for limitation does not run *until the plaintiff has knowledge of the perversion.* The time of perversion *is not* the time from which limitation runs—*Probhati* v. *Taraknath*, 46 C.W.N. 786; *Ram Narain* v. *Shirpal*, A.I.R. 1938 All. 20, 173 I.C. 40. When a suit is brought two years after the date of knowledge of perversion, the suit is barred—*Shib* v. *Panchanan*, 64 C.L.J. 71.

33.—Under the Legal Representatives' Suits Act, 1855 (XII of 1855), against an executor.	Two years.	When the wrong complained of is done.
34.—Under the same Act against an administrator.	Two years.	When the wrong complained of is done.
35.—Under the same Act against any other representative.	Two years.	When the wrong complained of is done.

314. The Legal Representatives' Suits Act permits the exerutors, administrators of the deceased, etc., to be sued for any wrong committed by him in his lifetime for which he would have been subject to an action, provided such wrong was committed within a year before his death.

Articles 33—35 provide for suits *against* executors, etc., whereas Article 20 provides for suits *by* executors, etc.

[Arts. 33-35 of the present Act correspond to Art. 33 of Act XV of 1877. Arts. 34 and 35 of the old Act have been omitted for reasons stated in the notes below; and to preserve the numbering of the old Act, Art. 33 has been split up into three Articles.]

Arts. 34 and 35 of Act XV of 1877 ran thus :—

34. For the recovery of a wife.	Two years.	When possession is demanded and refused.
35. For the restitution of conjugal rights.	Two years.	When restitution is demanded and is refused by the husband or wife, being of full age, and sound mind.

315. Under the Act of 1877, there was a conflict of opinion as to the applicability of these Articles and as to the application of sec. 23 to the suits contemplated by these Articles.

Thus, where a suit for recovery of wife was brought by the husband against a person who detained the wife, it was held in one case that the cause of action arose when the husband demanded possession of his wife and was refused, and section 23 did not apply. The suit was barred unless brought within 2 years after demand—*Ghizni* v. *Mehram*, 60 P.R. 1879. In another case it was held, however, that a third person who harbours a run-away wife does a continuing wrong, and in a suit by the husband against such person for the recovery of his wife a fresh period of limitation runs at every moment of the time during which the wrong continues, under sec. 23—*Khairuddin* v. *Budhi*, 80 P.R. 1892.

So also, in respect of suits under Article 35, it was held in some cases that the refusal of a wife to return to her husband and to allow him the exercise of conjugal rights was a continuing wrong giving rise to constantly recurring causes of action, so that the suit though governed by Article 35 was not excluded from the operation of section 23. The suit was therefore practically exempt from limitation—*Bai Sari* v. *Sankla*, 16 Bom. 714; *Hem Chand* v. *Shiv*, 16 Bom. 715 (Note); *Ghizni* v. *Mehram*, 60 P.R. 1879. In an Allahabad case it was held that since the personal law of Hindus and Mahomedans did not require an antecedent demand in a suit for restitution of conjugal rights, Article 35 was inapplicable to such a suit; but Article 120 would apply as read with section 23, and the suit was practically never barred—*Binda* v. *Kaunsilia*, 13 All. 126. In several other cases it was laid down that if a demand and refusal were in fact made, the suit would be governed by Article 35 and would be barred if brought more than two years after demand, notwithstanding the provisions of section 23—*Dhanjibhoy* v. *Hirabai*, 25 Bom. 644 (F.B.); *Saravanai* v. *Poovayi*, 28 Mad. 436; *Asirunnessa* v. *Buzloo Meah*, 34 Cal. 79, 11 C.W.N. 437. In *Fakirgauda* v. *Gangi*, 23 Bom. 307, the Judges were in doubt as to whether section 23 would apply.

To avoid this conflict of decisions, the Legislature has omitted those Articles from the present Act, so that the suits contemplated by those Articles are now altogether exempt from the bar of limitation.

But when a right to restitution has already been barred under the Act of 1877,

it cannot be revived by reason of the fact that it is saved from the bar of limitation by the present Act—*Muhammad* v. *Sakina*, 37 Bom. 393, 14 Bom.L.R. 908, 17 I.C. 629 (632). The Allahabad High Court holds on the contrary that in the absence of a provision in the present Act to the effect that "nothing herein contained shall be deemed to revive any right to sue barred under the old Act" the plaintiff's remedy though barred under the old Act subsists under the new Act of 1908—*Ayesha* v. *Faiyaz*, 34 All. 412. This view, it is submitted, is incorrect. The provision 'Nothing herein.....Act" has not been reproduced in the present Act for the obvious reason that a similar provision exists in sec. 6 of the General Clauses Act of 1897.

36.—For compensation for any malfeasance, misfeasance or non-feasance independent of contract and not herein specially provided for	Two years.	When the malfeasance, misfeasance or non-feasance takes place.

316. Application of Article:—Art. 36 is a general Article. It refers to action which may be taken on account of the commission of some act which is in itself unlawful, or being the improper performance of some lawful act, or the omission of some act which a person is by law bound to do. It is a general Article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere—*Kripa Ram* v. *Kunwar Bahadur*, 54 All. 467, 136 I.C. 809, A.I.R. 1932 All. 256 (258), 1932 A L.J. 241.

Malfeasance, misfeasance and non-feasance:—These words are equivalent to, and have the same significance as, the word 'tort'. They have the widest import and embrace all possible acts or omissions commonly known as 'torts' by English lawyers—*Esso* v. *Steam Ship "Savitri,"* 11 Bom. 133 (135). These terms are generally applied to some wrongful acts committed by persons standing in a fiduciary or quasi-fiduciary character, such as executors, trustees and directors of companies—*per* Maclean, C.J. in *Magnum* v. *Dolhin*, 25 Cal. 692 (699).

317. Suits not under this Article:—Article 36 is a general or residuary Article governing suits for compensation for torts to whom no special Article applies—*Esso* v. *Steam Ship "Savitri,"* 11 Bom. 133; *Magnum* v. *Dolhin*, 25 Cal. 692; *Jadu Nath* v *Hari Kar*, 36 Cal. 141; *Surat* v. *Umar*, 22 Cal. 877; *Ram Narain* v. *Umrao*, 29 All. 615; *Veeramma* v. *Subba Rao*, 35 I.C. 98 (102), 31 M.L.J. 257; *Panna Lal* v. *Adjai Coal Co. Ltd.*, 31 C.W.N. 92 (95); *Ghulam* v. *Iqbal*, A.I.R. 1939 Lah. 118, 184 I.C. 130. Thus, a suit for compensation for wrongful attachment of moveable property before judgment is a suit for compensation for "wrongful seizure under legal process" under the specific Art. 29, rather than a suit under Art. 36—*Ram Narain* v. *Umrao Singh*, 29 All. 615 (617); *Pannaji* v. *Senaji*, 53 Mad. 621, 126 I.C. 721, A.I.R. 1930 Mad. 635 (637). A suit for compensation for the wrongful seizure of a ship under an order of Court is governed by the more specific Art. 29, rather than by this Article—*Madras Steam Navigation Co. Ltd.*, v. *Shalimar Works Ltd.*, 42 Cal. 85 (108). The judgment-creditors' act of attaching the property of their judgment-debtor and asking the Court to distribute the sale proceeds among them, or their act of withdrawal of this money under the orders of the Court, cannot be regarded as "misfeasance" or "malfeasance" within the meaning of the section—*Ram Narain* v. *Brij Banke*, 39 All. 322 (330).

Where the malfeasance, etc., amounts to a trespass upon land, this article would not apply, but Article 39 which is more specific—*Narasimmacharya* v. *Raghupathia*, 6 Mad. 176. Plaintiff mortgaged his house to defendants who sold the same by a power contained in the deed, and possession was given to the purchaser. Some timber (which was not mortgaged) was stored in the house, and was not returned or accounted for to the plaintiff, for which he brought the present suit, alleging that the defendants had converted it to their use. *Held* that the plaintiff could recover the timber or its value, and the suit for such reocvery was governed by the more specific Art. 49 than by this Article, as the suit was for recovery of the specific moveable property or for compensation for wrongfully taking the same—*Passanha* v. *Madras Deposit and Benefit Society*, 11 Mad. 333. Where the compensation-money awarded by Government for land acquired by them had been withdrawn by a tenant representing himself to be the owner, and a suit was subsequently brought by the landlord against the tenant for the recovery of his share of the compensation money, *held* that the suit came more properly under Article 62 or 120 than under this Article—*Khetter Kristo* v. *Dinendra*, 3 C.W.N. 202.

A suit for damages against the defendant for making a false accusation against the plaintiff to the police, when no prosecution was instituted, in a suit for libel or slander, and the limitation applicable to such a suit is that prescribed by Art. 24 or Art. 25 and is not governed by this Article—*Harman* v. *Doola*, A.I.R. 1937 Lah. 709, 39' P.L.R. 686, 169 I.C. 640.

This article applies to *tortious* acts independent of *contract*. If a suit arises out of tort, and if it arises both from tort and contract and there is no waiver of tort, it has to be brought within the period prescribed by this Article—*Court of Words, Muzzafurnagar* v. *Ajodha*, I.L.R. (1938) All. 454, 1938 A.L.J. 328, A.I.R. 1938. All 305; *C. Rai* v. *Union of India*, A.I.R. 1955 J. & K. 36. If the suit for damages for malfeasance or misfeasance or negligence is based upon a liability *ex contractu* (whether the contract be express or implied), the proper Article applicable is Art. 115 (but not Art. 120)—*Jagannath* v. *Kalidas*, 8 Pat. 766, A.I.R. 1929 Pat. 245 (247), 10 P.L.T. 191. If the case really arises out of a contract (*e.g.*, pledge of jewels), though technically the defendant's act amounts to a conversion, Art. 36 cannot apply—*Ramaswamy* v. *Palaniappa*, 30 L.W. 898, A.I.R. 1930 Mad. 364 (371), 122 I.C. 37. Where the defendant borrowed from the plaintiff his car for private use, and while it was in his use it met with an accident which resulted in considerable damage to the car, a suit, by the plaintiff to recover the repairing charges and damages was governed by Art. 115 as it was a case of contract of bailment, and not by Art. 36—*Holloway* v. *Holland*, 10 O.W.N. 1105, 145 I.C. 1001, A I.R. 1933 Oudh 518 (519). A suit by an auction-purchaser against the decree-holder for compensation on account of a misdescription of the boundaries of the land in the proclamation of sale is not governed by this Article, is as much as the liability of the decree-holder, if any, is based on the contract of sale—*Mahomed* v. *Navroji*, 10 Bom. 214 (218). But *quaere* whether a Court-sale can be called a *contract*.

Where the defendant agreed to sell to the plaintiff certain goods of another person on the representation that he (defendant) had authority to sell those goods when in fact he had none, and afterwards failed to sell those goods, a suit by the plaintiff for compensation is not one arising in tort but one connected with a contract and arising out of the incidents of a contract. The suit is governed by Article 115 and not by this Article—*Vairavan* v. *Avicha*, 38 Mad. 275 (277). Where some of the joint tenants of certain lands took the use and occupation of part of the joint lands to the exclusion of the other joint tenants, a suit by the latter for compensation for such use and occupation by the former was governed by Article 120; Article 36 could not apply, for when the defendants, being tenants in common with the plaintiffs,

exclusively occupied a portion of *ijmali* lands, they could not be regarded as doing any act of misfeasance, malfeasance or non-feasance within the meaning of this Article —*Robert Watson & Co.* v *Ram Chand*, 23 Cal. 799 (804).

An *application* under sec. 214 of the old Indian Companies Act, 1882 (sec. 235 of the Companies Act, 1913) by an official liquidator praying that the directors of the company in liquidation be ordered to pay over to him a sum of money which had been improperly distributed among the shareholders, was not a *suit*, and therefore this or any other Article in the first division of this Schedule could not apply to it—*Ramasami* v. *Sreeramulu*, 19 Mad. 149. In another case it was held that a proceeding under sec. 214 of the Companies Act (1882) was not subject to the limitation provided by Article 36, as such proceeding was not a suit—*Connell* v. *Himalaya Bank*, 18 All. 12 (15). But sec. 235 (3) of the Indian Companies Act of 1913 expressly lays down that an application under sec. 235 of that Act is to be treated as a suit for the purposes of the Limitation Act. The question is as to which Article of the Limitaiton Act is applicable. The Lahore High Court holds that this application is governed by Article 36—*Bank of Multan Ld.* v. *Hukum Chand*, 71 I.C. 890, A.I.R. 1923 Lah. 58; *Daulat Ram* v. *Bharat National Bank*, 5 Lah. 27 (30), A I.R. 1924 Lah. 435, 79 I.C. 740; *Bhim Singh* v. *Basheshar*, 8 Lah. 167, 100 I.C. 907, A I.R. 1927 Lah. 443. But the Allahabad High Court is of opinion that Article 36 cannot apply, because the liability of the directors is not a matter *independent of contract;* the directors are not men in the street or trespassers, but they are bound by the Articles of Association, which contain the contract between the company and the directors. Moreover, if Article 36 were to apply, a fraudulent director has only to keep the shareholders and others in ignorance of his mischievous acts for two years and he would then be immune. Article 120 applies to the case—*In re Union Bank*, 47 All. 669, 23 A.L.J. 473, 88 I.C. 785, A.I.R. 1925 All. 579. The Bombay High Court is also of opinion that the relation between a bank and its directors are in part governed by numerous clauses in the Articles of Association which constitute part, though not the whole, of the contract between the bank and its directors. A claim against the directors for breach of trust is clearly not independent of contract. Article 120 governs the suit—*Govind* v. *Rangnath*, 54 Bom. 226, A.I.R. 1930 Bom. 572 (582), 32 Bom.L.R. 232. The Madras High Court is of opinion that a suit (application), under sec. 235, Companies Act, for compelling the directors to pay certain amounts by way of compensation in respect of their acts of misfeasance may fall under Article 36 or 120—*Narasimha* v. *Official Assignee*, 54 Mad. 153, 128 I.C. 477, A.I.R. 1931 Mad. 58 (60). The Sind Court holds that misfeasance dealt with in proceedings under sec. 235 of the Companies Act is not independent of contract, and Art. 36 is not applicable (but Art. 115)—*Karachi Bank* v. *Shewaram*, 143 I.C. 713, A.I.R. 1933 Sind 103 (107, 108). As to applicability of this Article to suits for damages for loss sustained on account of misleading prospectus by the directors see Note No. 318 "Suits under this Article."

This Article does not include wrongs committed by trustees in respect of trusts. Article 120 and not this Article is the proper Article applicable to a suit filed against a trustee or ex-trustee by a co-trustee or a succeeding trustee of a trust, to make good the loss sustained by the trust by reason of the defendant's omission to collect monies due to the trust—*Subbiah* v. *Samiappa*, I.L.R. (1938) Mad. 586, (1938) 1 M.L.J. 334, A.I.R. 1938 Mad. 353 (F.B.). See also *O. Rm. O. M. Sp. Firm* v. *Nagappa*, 67 I.A. 448, I.L.R. (1941) Mad. 175, 45 C.W.N. 385, 73 C.L.J. 166, 43 Bom. L.R, 440, A.I.R. 1941 P.C. 1, (1941) 1 M.L.J. 393 (P.C.); *India Sugars* v. *Estate of Ramalingam*, I.L.R. 1953 Mad. 1097, (1953) 1 M.L.J. 577, A.I.R. 1953 Mad. 694.

318. Suits under this Article:—A suit by the plaintiff to recover damages for the loss of his ship caused by collision with the defendant's steamer is an action on

tort founded upon the negligence of the defendant or his servants in the management of his steamer, and must be brought within two years under this Article—*Essoo* v. *Steam Ship "Savitri"*, 11 Bom. 133 (138). During the tenure of office of the Chairman of a Municipal Council the manager embezzled sums of money. The Council sued the Chairman to recover the amount, on the ground that the Chairman, as the agent appointed by the Municipality was bound to collect the dues and see that proper accounts were kept, and that he was liable to pay the loss which had occurred by the said embezzlement; it was held that the relation of principal and agent did not exist, that Arts. 89 and 90 did not therefore apply; and that the case was governed by Art. 36 —*Srinivasa* v. *Municipal Council of Karur*, 22 Mad. 342. A suit claiming compensations for damage said to have been caused by the failure of a local body to maintain its water system in proper order, is governed by this Article—*Mahomed Saadat* v. *Administrator, Corporation of City of Lahore*, I.L.R. (1945) Lah. 523, 47 P.L.R. 302, A.I.R. 1945 Lah. 324 (F.B.). A suit brought by the son of a deceased *shebait* of a *debutter* estate, for the recovery of money advanced by the deceased on account of the debuttor estate at a time when he had been wrongfully kept out of office by the defendant, who had claimed the office as against the deceased and realised money out of the estate, was held to be governed by this Article, if the suit was brought against the defendant *personally;* but if it was against the defendant as representing the debuttor estate, it would be governed by Art. 120—*Peary Mohan* v. *Narendra* 5 C.W.N. 273. A suit for damages on the ground that the defendant had maliciously and without reasonable and probable cause presented a petition in insolvency, as a result of which the plaintiff was adjudicated insolvent is governed by this Article—*Nagappa* v. *Trojan & Co.*, A.I.R. 1948 Mad. 446, (1948) 1 M.L.J. 173. A suit for damages for wrongful seizure of goods by the Official Receiver acting at the instance of a creditor and not under the orders of the Insolvency Court is governed by this Article—*Jhamdumal* v. *Janki*, 1942 A.L.W. 599. A suit for damages for wrongful attachment of moveable property before judgment falls under Article 29, but if the attachment is not wrongful, the suit may fall under Article 36—*Manavikraman* v. *Avisilan*, 19 Mad. 80 (82). See this case cited in Note 306 under Art. 29. A suit for compensation for injury done to plaintiff's stock-in-trade caused by persons who made the attachment before judgment treading on it, falls under this Article—*Sokkalinga* v. *Krishnaswami*, 38 M.L.J. 324, 55 I.C. 786 (790). Where the Collector of Customs detained the plaintiff's goods on representations made by the defendant company maliciously and without reasonable and probable cause, a suit for damages for such detention against the defendant is governed by Article 36. Article 49 cannot apply because the defendant company never had possession of or control over the goods and the Collector cannot be looked upon as the defendant company's agent—*Albert Bonnan* v. *Imperial Tobacco Co.*, 30 C.W.N. 465, A.I.R. 1926 Cal. 757, 94 I.C. 444; *Imperial Tobacco Co.* v. *A. Bonnan*, 46 C.L.J. 455, A.I.R. 1928 Cal. 1, 106 I.C. 277. A suit by a temple servant who has been suspended from service for compensation for the loss of perquisites during the period of suspension, is governed by this Article—*Bharadwaj* v. *Arunchela*, 41 Mad. 528. A suit for damages for wrongful deposit of silt on the plaintiff's land by the defendant falls under this Article—*Monumal* v. *Gobindram*, 27 S.L.R. 41, 144 I.C. 452, A.I.R. 1933 Sind 176 (178). Where the claim is for damages in respect of removal of clay it is not a mere claim for compensation founded on trespass so as to attract Art. 39 of the Act but it is a claim in respect of a tortious act which comes within the scope of this Article—*Hirdey* v. *Babu Ram*, 1940 O.W.N. 1318. A.I.R. 1941 Oudh 172, 191 I.C. 885. See *Union of India* v. *Muralidhar*, A.I.R. 1952 Assam 141. Where a suit for damages is brought against an objector who persists in retaining attached cattle even after the dismissal of his objection and the declaration of the right of the judgment-debtor to them, it is governed by this Article as the retention of

the cattle by the objector amounted to misfeasance—*Ghamandi* v. *Murli*, 1943 A.L.W. 38.

A suit for damages in respect of ex-communication from caste is governed by Art. 36—*Devchand* v. *Ghanashyam*, *A.I.R.* 1935 Bom.. 361, 37 Bom. L.R. 417, 153 I.C. 414. Where a person dissuades other persons from taking a certain building on rent by making false statements as to habitability and safety of the building, the person so representing is liable in tort, the tort being analogous to slander of title and falling within the broader description of injurious falsehood. The action is one for misfeasance independent of contract and this Article applies to such action—*Hargobind* v. *Kikabhai*, I.L.R. (1938) Nag. 348, A.I.R. 1938 Nag. 84, 176 I.C. 257.

Where the contract between the plaintiff and the defendant was that the defendant was to take water from the plaintiff's tank only for the purpose of raising a second crop on his land, but the defendant took water not for the second crop but for the purpose of watering the field to facilitate the ploughing for the next season; and wasted the water of the tank thereby causing loss and diminution of water supply to the second crop already planted by other ryots of the village, and the plaintiff brought a suit to recover damages for the unauthorised use of the tank water, it was held that the suit was barred as having been brought three years after the alleged act of unauthorised user. The action was one in tort because the wrongful act complained of was the illegal use of water. Article 36 and not Art. 115 would apply to such a case—*Manga Reddi* v. *P. Venkata Raghava*, A.I.R. 1936 Mad. 250, 40 M.L.J. 255, 161 I.C. 538.

This Article applies to an action against the directors of a company for compensation for loss suffered as the result of misleading prospectus. In such a case the tort is independent of the contract. The liability of the directors is confined to something which preceded the contract—*Dwarkadass* v. *Menavedan*, I.L.R. (1945) Mad. 325, (1945) 2 M.L.J. 286, A.I.R. 1945 Mad. 5; *Raja of Nilambur* v. *Amirchand*, 57 L.W. 312, A.I.R. 1944 Mad. 431.

319. Attachment and removal of crops:—A suit for damages for wrongful attachment, cutting and carying away of plaintiff's crops is governed by either Article 48 or 49, and not by Art. 36 which is a general Article in respect of suits on torts. *Jadu Nath* v. *Hari Kar*, 17 C.W.N., 308 (311), reversing *Jadunath* v. *Hari Kar*, 36 Cal. 141 (=*Sripati* v. *Hari Kar*, 12 C.W.N. 1090). A suit for damages for wrongful distraint of standing crops is governed by Article 36, and not by Art. 29, because standing crops are not moveable property within the meaning of the latter Article —*Hari Charan* v. *Hari Kar*, 32 Cal. 459 (462); *Mohesh Chandra* v. *Hari Kar*, 9 C.W.N. 376. But the Madras High Court is of opinion that a suit for damages for wrongful distraint of plaintiff's standing crops is really a suit for compensation for trespass upon the plaintiff's land, and falls under the specific Article 39, and the general Article 36 does not apply—*Venkataramanujan* v. *Basavayya*, 25 M.L.J. 447, 21 I.C. 213 (215, 216).

320. Wrongful removal of crops without attachment:—A suit for cutting and carrying away crops *without any process* of attachment falls under the specific Article 48 and not under Article 36, which is a general Article for torts—*Surat Lal* v. *Umar*, 22 Cal. 788 (882). In the Calcutta Full Bench case of *Mangun* v. *Dolhin*, 25 Cal. 692 (699, 700) also, the majority were in favour of the application of Article 48 or 49, and decided against the application of Article 36. This decision practically overrules *Pandah* v. *Jennuddi*, 4 Cal. 665.

321. Cutting away trees:—Where land with trees planted thereon was hypothecated, and afterwards the mortgagors sold the trees to the defendants, who

cut and carried away the trees, a suit instituted by the mortgagees against the defendants for compensation for cutting and carrying away the trees and thereby impairing the value of the security is governed by Art. 36 or 49—*Muniappa* v. *Seshayya*, 3 L.W. 341, 32 I.C. 901. A suit by the mortgagor against the mortgagee (usufructuary) for damages in respect of certain trees wrongfully cut by the mortgagee during the time he was in possession of the mortgaged property, is governed by this Article—*Sivachidambara* v. *Kamatchi*, 33 Mad. 71. According to the Bombay High Court a suit for compensation for the loss occasioned to the mortgagor by the wrongful act of the mortgagee in possession is a suit which would not be governed by Article 36 but would be governed by Article 120, and the cause of action would arise on the day the mortgagor would demand redemption and is refused—*Genuji* v. *Murlidhar*, A.I.R. 1954 Bom. 417. The Calcutta High Court holds that a suit by a landlord for compensation for the removal of trees cut down by a tenant is not governed by Art. 36 but by Art. 48 or 49—*Mahomed Hamidar* v. *Ali Fakir*, 10 C.L.J. 25, 2 I.C. 955. For a case in which a suit for entering on the plaintiff's land and cutting away trees was held to be a suit for compensation for trespass upon immoveable property, see 20 N.L.R. 80 cited under Art. 39.

322. Starting point of limitation:—The time from which limitation begins to run is the date of the alleged misfeasance or malfeasance, and not the date when the plaintiff comes to know of the misfeasance. The knowledge of the plaintiff has nothing to do with the question—*Sivachidambura* v. *Kamatchi*, 33 Mad. 71 (74).

In a suit for compensation governed by Art. 36, section 23 would be applicable if there is a continuance of the injury caused by the defendant. Limitation will run when the injury ceases—*Suhajmal* v. *Maneksha*, 6 Bom.L.R. 704. In this case the misfeasance complained of was the issue of a prohibitory order which was allowed to continue in force for five years. See also *Manga* v. *Changa Mal*, 22 A.L.J. 977, A.I.R. 1925 All. 131. If the suit for compensation for malfeasance arises out of some specific injury, sec. 24 will apply, and limitation will run from the date when the injury results—*Jagannath* v. *Kalidas*, 8 Pat. 776, 10 P.L.T. 191, A.I.R. 1929 Pat. 245 (246).

But where the acts of the defendant do not constitute a continuing cause of action, *e.g.*, where the defendant has been depositing silt on the plaintiff's land for the last 15 years, and each act of depositing silt affords a separate cause of action, the plaintiff can claim compensation for damage sustained by him in consequence of silt deposited during two years prior to suit—*Morumal* v. *Gobindram*, 27 S.L.R. 41, 144 I.C. 452, A.I.R. 1933 Sind, 176. Under Art. 36 time begins to run from the date when the non-feasance takes place—*Tavoy Municipality* v. *Khoo Zun*, A.I.R. 1936 Rang. 312.

The starting point of limitation in a suit for damage for malicious insolvency proceedings resulting the adjudication of the plaintiff is the date of the order of annulment—*Nagappa* v. *Trojan & Co.*, A.I.R. 1948 Mad. 446, (1948) 1 M.L.J. 173.

Part VI.—Three years.

37.—For compensation for obstructing a way or a water-course.	Three years.	The date of the obstruction.

323. An obstruction to a watercourse being a continuous act of wrong, as to which the cause of action is renewed *de die in diem*, so long as the obstructions

continue, section 23 applies; and a suit brought after three years from the date of the obstruction would not be barred—*Rajrup* v. *Abdul*, 6 Cal. 394 (P.C.). Compensation for obstructions and diversions can be recovered at any time within three years from any date at which there has been an obstruction, provided that compensation cannot be recovered for a period exceeding three years before the filing of the suit. (See Starling, 191). Where the obstruction caused by closing the main sluice of a tank continued and the plaintiff was prevented from removing the same by threat of violence, it was a continuing wrong under this Article read with sec. 23, and the suit was in time if brought within three years of the last day to which the wrong continued —*Sona Patil* v. *Laxman*, 82 I.C. 482, A.I.R. 1925 Nag. 189.

38.—For compensation for diverting a water-course.	Three years.	The date of the diversion.
39.—For compensation for trespass upon immoveable property.	Three years.	The date of the trespass.

324. This Article has reference only to suits for damages on account of trespass, and not to suits to recover immoveable property from a trespasser, for which the period of limitation is 12 years under Article 142—*Joharlal* v. *Municipality of Ahmednagar*, 6 Bom. 580 (582).

'Trespass' includes the mischief which the trespasser commits after entering on the land. Therefore a suit for damages for unlawfully setting fire to and destroying pepper vines on the plaintiff's land is governed by this Article—*Moideen* v. *Koman Nair*, 23 M.L.J. 618,, 17 I.C. 605. Where the defendants trespassed upon the land of the plaintiff and in the course of the trespass cut plaintiff's valuable lac-producing trees on the land, and removed the same, and thus caused damage to him, and the plaintiff brought a suit for damages sustained for wrongfully cutting the lac-producing trees *and for removing* the trees, *held* that the suit was one for compensation for trespass upon immoveable property within the meaning of this Article, and not a suit under Article 36. The suit is one for damages sustained on account of the lac crops of which the plaintiff was deprived by reason of the defendants' illegal act of trespass in cutting down the trees and in removing them. If the trees had not been cut but only the lac crop had been enjoyed by the defendant, plaintiff's claim would have been governed by Article 109. If the claim had been purely for compensation for removal of trees cut, the case would have fallen under Article 48 or 49. What the plaintiff complains of is not merely the removal of the trees, but also the cutting itself as having involved the infringement of his right, and he claims compensation with reference to such infringement; as this infringement has been made by a trespasser, Art. 39 applies to the suit as a whole—*Narbada Prasad* v. *Akbar Khan*, 20 N.L.R. 80, 80 I.C. 769, A.I.R. 1924 Nag. 125. The plaintiff and defendants were lessees of contiguous coal lands. The plaintiff sued the defendants for damages (including the value of coal) alleging that the latter had trespassed into the plaintiff's underground land, and extracted large quantity of coal therefrom. The High Court held that the suit fell under this Article or Article 49, and time ran from the last act of trespass; the claim was very much like a claim for damages for crops cut and carried away from the plaintiff's land, and to such a claim Art. 39 or 49 was applicable—*Panna Lal* v. *Adjai Coal Co. Ltd.*, 31 C.W.N. 82 (95), 101 I.C. 62, A.I.R. 1927 Cal. 117. But the Privy Council reversed this decision and held that Art. 48 was more appropriate—*Adjai Coal Co. Ld.*

v. *Panna Lal*, 57 Cal. 1341 (P.C.), 34 C.W.N. 483 (487), A.I.R. 1930 P.C. 113, 123 I.C. 726. The Patna High Court held that if the suit was only for compensation for under-ground trespass upon the plaintiff's colliery, it was governed by Art. 39 only; if the suit was only to recover the price of coal extracted and removed by the defendant from the plaintiff's colliery, and converted to his use, the suit fell under Art. 48—*Lodna Colliery Co. Ld.* v. *Bepin Behari*, 1 P.L.T. 84, 55 I.C. 113 (133, 134). This decision has been approved of by the Privy Council in *Pugh* v. *Asutosh*, 8 Pat. 516. Where the defendant enters on the plaintiff's land and receives the profits, a suit by the plaintiff for such profits received by the defendant is governed by Article 109; but if the defendant does not actually receive any profits and the land remains waste, a suit by the plaintiff for mesne profits (*i.e.*, the profits which he might have received from the land) is a suit for damages for trespass, and falls under this Article (not under Article 109)—*Ramasami* v. *Authi Lakshmi Ammal*, 34 Mad. 502 (dissenting from *Abbas* v. *Fasuhuddin*, 24 Cal. 413). Where the claim is for damages in respect of removal of clay it is not a mere claim for compensation founded on trespass so as to attract this Article—*Hirdey* v. *Baburam*, 1940 O.W.N. 1318, A.I.R. 1941 Oudh 172, 191 I.C. 885. See also *Union of India* v. *Muralidhar*, A.I.R. 1952 Assam 141. This Article has no application to a suit for damages for use and occupation after notice to quit. The reason is that the suit is not for compensation for trespass upon immoveable property. The defendant's remaining in possession of the property after the notice to quit does not constitute a trespass upon the property in the required sense—*Sukhdei* v. *Lachmi*, 1946 A.L.J. 305, A.I.R. 1947 All. 31, 231 I.C. 58.

A trespass is a continuing wrong, continuing from its inception until the possession of the trespasser comes to an end; therefore a suit may be brought within 3 years from the date on which the defendant's possession ceased, and compensation may be claimed for damages suffered within three years preceding the suit—*Narasimmachaya* v. *Raghupathiacharya*, 6 Mad. 176.

Removal of crops:—A suit for damages for cutting and carrying away crops may fall under this Article, because the act of cutting and carrying away the crops is coupled with the act of trespass on plaintiff's land, and clearly he is entitled to recover damages for trespass. But the case would fall more properly under Article 48 or 49—*Mangun* v. *Dolhin*, 25 Cal. 692 (699, 700); *Surat Lall* v. *Umar*, 22 Cal. 877 (885); *Jadu Nath* v. *Hari Kar*, 36 Cal. 141 (145, 147) (per Doss J.).

Wrongful attachment of crops:—The Madras High Court and the Nagpur Court are of opinion that standing crops being immoveable property for the purpose of the Limitation Act, a suit for illegal attachment of standing crops is a suit for trespass upon immoveable property, and is governed by Article 39 which specifically provides for suits for compensation for such trespass, and not by the general Article 36 which provides for suits for compensation for torts not provided for elsewhere—*Venkata-ramanujan* v. *Basavayya*, 25 M.L.J. 447, 21 I.C. 213, (216); *Nagoba* v. *Madholala*, 4 N.L.R. 49; *Suraj Mal* v. *Prolhad*, 18 N.L.R. 96, A.I.R. 1922 Nag. 212 (213). But the Calcutta High Court holds that such a suit is governed by Article 36—*Hari Charan* v. *Hari Kar*, 32 Cal. 459 (462); *Mohesh Chandra* v. *Hari Kar*, 9 C.W.N. 376.

40.—For compensation for infringing copy-right or any other exclusive privilege.	Three years.	The date of the infringement.

325. This Article applies to a suit for an *account* of profits obtained by the infringement of an exclusive privilege—*Kinmond* v. *Jackson*, 3 Cal. 17. The right to a trade-name or trade-mark is an exclusive privilege and a suit for damages for infringing the privilege is governed by this Article—*Vercados* v. *Macleod*, 45 P.R. 1919, 51 I.C. 434.

41.—To restrain waste.	Three years.	When the waste begins.

326. A suit by the reversioner not only to restrain the waste of moveable property by the widow but also praying that the property be handed over to a receiver appointed for such purpose and that the donees from the widow be directed to replace any part of the property which can be traced in their hands falls under Article 120—*Venkanna* v. *Narasimham*, 44 Mad. 984. The words "when the waste *begins*" in the third column indicate that a new cause of action does not arise from successive acts of waste of the same kind, and that sec. 23 will not govern a case after the waste has once begun. 'If, however, a new form of waste should begin to be committed, a new period of limitation would naturally commence.' (See Starling. 192).

42.—For compensation for injury caused by an injunction wrongfully obtained.	Three years.	When the injunction ceases.

327. In *Mohini Mohan* v. *Surendra*, 42 Cal. 550 (at p. 556) Fletcher J. expressed doubt as to whether a suit contemplated by this section was at all maintainable, and disapproved of the ruling in *Nand Coomar* v. *Gour Sankar*, 13 W.R. 305, in which such suit was held to be maintainable. See also *Narendra* v. *Bhushan Chandra*, 31 C.L.J. 495, 57 I.C. 375. In a Calcutta case also, it has been held that the existence of Article 42 of the Limitation Act is in itself no argument that a suit is maintainable for damages for an injury caused by an injunction wrongfully obtained, because an Act cannot create a cause of action if it does not already exist independently—*Albert Bonnan* v. *Imperial Tobacco Co.*, 30 C.W.N. 465, 94 I.C. 444, A.I.R. 1926 Cal. 757 (761). In *Bhutnath* v. *Chandra Binode*, 16 C.L.J. 34, 16 I.C. 443 (445), a suit for damages for an injunction was held to be maintainable. See sec. 95 of the C. P. Code 1908 which provides for an *application* to recover compensation for injunction.

The defendant judgment-creditor attached certain property of his judgment-debtor; the plaintiff intervened and claimed the property as his own. The defendant applied for and obtained an injunction directing that the property should not be made over to the plaintiff. The claim-proceedings terminated in plaintiff's favour, and thereupon the plaintiff sued for loss of a part of the property while it was under the defendant's attachment. It was held that the suit was governed by this Article, and not by Art. 29—*Idu* v. *Rahmat*, 24 All. 146; *Haji Pir Muhammad* v. *Thakur Das*, 40 P.R. 1881 An attachment by a prohibitory order under O. 21, r. 46, C. P. Code does not amount to an injunction—*Veeramma* v. *Subba Rao*, 31 M.L.J. 257, 35 I.C. 98 (101).

Time begins to run as soon as the injunction is at an end. When an injunction is granted in a suit but the suit is dismissed by the Court of appeal on the 3rd July 1905, and the order of dismissal is affirmed on appeal to the High Court on the 22nd December, 1905, the injunction is said to terminate on the 3rd July 1905—*Bhutnath*

v. *Chandra*, 16 C.L.J. 34, 16 I.C. 443. Where a temporary injunction was at first granted in a suit, and the Court afterwards passed a decree granting a perpetual injunction, the period of limitation in respect of a suit for damages for the temporary injunction began to run from the date when the Court passed the decree for perpetual injunction, that being the date when the temporary injunction ceased and was replaced by the perpetual injunction—*Mohini Mohan* v. *Surendra*, 42 Cal. 550, 18 C.W.N. 1189.

43.—Under the Indian Succession Act, 1925, (XXXIX of 1925) section 360 or section 361, to compel a refund by a person to whom an executor or administrator has paid a legacy or distributed assets.	Three years.	The date of the payment or distribution.

The words "Indian.....361" have been substituted for "Indian Succession Act, 1865, section 320 or section 321, or under the Probate and Administration Act, 1881, section 139 or section 140," by the Repealing and Amending Act VIII of 1930. This is consequential to the re-enactment in the Indian Succession Act 1925 of the corresponding provisions of the Old Acts.

44.—By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years.	When the ward attains majority.

328. Change:—This Article corresponds to Art. 44 of Act XV of 1877, the words "transfer of property" being substituted for the word "sale" occurring in the old Act.

It was suggested by Dr. Whitley Stokes in his Anglo-Indian Codes, Vol. II, page 950 that this Article should be extended to mortgages and leases. As a result of this suggestion the word 'sale' has now been changed into "transfer of property" in the present Act.

329. Scope of Article:—Article 44 is an embodiment of the result of the general principles of sections 6 and 8 as applied to a suit to set aside a transfer made by a guardian of property belonging to the minor, brought by him after attaining majority. Ordinarily, in such a suit the statute begins to run from the date of the alienation; but section 6 says that where a person is a minor at the time when period is to be reckoned, he may institute the suit within the same period after the disability has ceased as would otherwise have been allowed; and section 8 limits the period of extension to three years. These two sections, as applied to the above case (suit by minor to set aside a transfer made by a guardian) would yield the rule in the exact form embodied in Art. 44—*Ramaiah* v. *Brahmiah*, 59 M.L.J. 196, A.I.R. 1930 Mad. 821 (823), 127 I.C. 801; *Doraisami* v. *Nondisami*, 38 Mad. 118 (121).

The use of the term "ward" in this Article is peculiar, and there seems no reason why the word "minor" should not have been used. But the use of the term 'ward'

does not mean that this Article is restricted to transfers made by guardians appointed or declared under the Guardians and Wards Act; it applies to transfers made by *natural guardians* as well—*Fakirappa* v. *Lumanna*, 44 Bom. 742 (761, 763), 22 Bom L.R. 680, 58 I.C. 257. The definition of the word "guardian" in section 4 (2), Guardians and Wards Act indicates that the word is of general import, and includes natural and testamentary guardians as well as guardians appointed by the Court—*Dip Chand* v. *Munni*, 1929 A.L.J. 1248, A.I.R. 1929 All. 879 (880); *Ramaswami* v. *Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (316), 118 I.C. 481. The word 'guardian' must be interpreted as meaning only a lawful or *'dejure'* guardian and not as including a *'defacto'* manager or guardian of the property of a minor—*Palaniappa* v. *Nallappa*, (1951) 1 M.L.J. 265, A.I.R. 1951 Mad. 817. The mother of a Christian minor is his natural guardian, after the death of the father, and a suit to set aside an alienation made by the mother is governed by this Article—*Bangarammal* v. *Lydia Kent*, 57 Mad. 1062, 152 I.C. 546, A.I.R. 1934 Mad. 605 (607), 67 M.L.J. 322.

This Article is not confined to an assignment of absolute ownership only but also refers to an assignment of the ward's interest, whatever that interest might be. It therefore applies to a suit by the ward to set aside an assignment by his guardian of his right as mortgagee—*Madugula Latchiah* v. *Pally Mukkalinga*, 30 Mad. 393 (395).

One condition precedent to the application of this Article is that the property alienated should be the *property of the ward*. Where it is found that the property on the date of the sale was held by a Hindu daughter for her life-time, and her minor son *had no right*, title or interest in the property at that time, a suit brought by the son after his mother's death to set aside the sale is not governed by this Article —*Iqbal* v. *Bankey*, 7 O.W.N. 150, 128 I.C. 72, A.I.R. 1930 Oudh 82 (83). Article 141 would apply.

Where a sale was effected by the minor's father not in his capacity as *guardian* but in his capacity as *executor* under a will (under which the minor was a legatee), *held* that this Article did not apply to a suit to recover the property sold—*Ganapathi* v. *Sivamalai*, 36 Mad. 575. This Article has no application where the alienation was made by a person not as guardian of the plaintiff but in his capacity as manager of a joint Hindu family—*Sheo Raj* v. *Ajudhiya*, 4 Luck. 503, A.I.R 1929 Oudh 284, 116 I.C. 196. If the Karnavan alienates the immoveable property of a tarwad, some of whom are minors, and the alienation is made by the Karnavan not only as the guardian of the minors but also in his capacity as Karnavan, this Article does not apply, and a suit for possession by the minor after attaining majority is governed by Article 144 —*Kanna Pannikkar* v. *Nanchan*, 46 M.L.J. 340, A.I.R. 1924 Mad. 607, 78 I.C. 564.

The expression "transfer of property" means actual transfer followed by delivery of the property to the transferee. It implies that the property has changed hands. But if the erstwhile minor has been in possession in spite of a deed of transfer having been executed by his guardian during his minority, there was no transfer of property, and this Article has no application. The ex-minor can bring a suit for a declaration that the sale-deed is void and ineffective, more than three years after he attains majority —*Mahomed Raza* v. *Zahoor Ahmed*, 52 All. 979, 1930 A.L.J. 1416, 132 I.C. 21, A.I.R. 1930 All. 858 (859). A surrender by a guardian of a minor widow under the Hindu Law does not operate as a transfer of property from the widow to the surrenderee and therefore this Article has no application—*Ethilavulu* v. *Pethakkal*, (1950) 1 M.L.J. 76, 1950 M.W.N. 69, A.I.R. 1950 Mad. 390. So also an agreement to sell along with the possession does not amount to a transfer within the meaning of this Article—*Amroo* v. *Babaras*, I.L.R. (1950) Nag. 25, 1950 N.L.J. 30, A.I.R. 1951 Nag. 403.

If the ward dies after attaining majority, a suit by his legal representative for

recovering the property alienated by the guardian will fall under this Article—*Ramaswami* v. *Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (321), 118 I.C. 481. If the minor had *died before attaining majority* the provisions of sub-section (3) of section 6 would come into play and must be read with this Article; that is, the period of limitation (three years) prescribed by this Article must be counted not from the time of the ward's attaining majority (which does not happen here) but from the date of the minor's death; therefore a suit by the minor's heir to set aside an alienation made by the minor's guardian must be brought within three years of the death of the minor—*Ramaliah* v. *Brahmiah*, 59 M.L.J. 196, 127 I.C. 801, A.I.R. 1930 Mad. 821 (823). The remark made in *Ramaswami* v. *Govindammal*, supra, that if the minor died before attaining majority a suit by his legal representative for recovering the property alienated by the guardian would not fall under Art. 44, was only by way of *obiter* and does not seem to be correct.

This Article does not apply to a suit, brought by the sons to set aside alienation by the father, who has executed the sale deed for himself and as guardian of his minor sons. Article 126 applies to such a suit—*Basave* v. *Basave*, A.I.R. 1952 Mysore.

This Article has no application to a suit for possession of properties sold in execution of a decree passed on the basis of an award on a reference made by the court without the court giving permission to the guardian of the minor, a party to the suit, to enter into the agreement to refer the case to arbitration. The reason being that though the decree is voidable and can be set aside yet the right to possession can not be established without asking for the setting aside of the execution sale—*Nahar* v. *Tex Chand*, 1951 All.L.J. 751, A.I.R. 1952 All. 184.

If the minor fails to bring a suit within three years after attaining majority, such omission will also bar a suit filed by a person who claims under him—*Fakirappa* v. *Lumanna*, 44 Bom. 742 (764). See also *Sundrammal* v. *Rangasami*, 18 Mad. 193 (200).

It is open to the minor as *defendant* to challenge the transfer of property made by guardian and this Article will be no bar to such a defence. This Article only bars the remedy of the plaintiff to get the transfer set aside but is not fatal to his title—*Jagarnath* v. *Chunni*, I.L.R. (1940) All. 580, 1940 A.L.J. 511, A.I.R. 1940 All. 416, 191 I.C. 647.

330. Void transfers:—Where a minor's property is sold by another person, even though he be his guardian, claiming it to be his own, the minor's interest is not affected by such transfer, which is void. Art. 44 has no application to a suit to set aside such transfer—*Bhagwandas* v. *Kashiprasad*, A.I.R. 1935 All. 417, 157 I.C. 118. Where the alienation made by the guardian is an absolute nullity, it is unnecessary for the minor to get it set aside under this Article; he can sue to recover possession within the longer period allowed by Art. 144. Thus, an alienation by a *de facto* guardian, *i.e.*, a person who is not a lawful guardian and who has no authority to act as guardian (*e.g.*, a mother or a step-mother or brother under the Mahomedan law, or a step-mother, or paternal aunt, under the Hindu law) is void (and not merely voidable) and need not be set aside; this Article does not apply to such a case. The plaintiff can bring a suit to recover possession under Art. 144—*Matadin* v. *Ahmed* Ali, 34 All. 213 (222, 223) (P.C.), 9 A.L.J. 215; *Balappa* v. *Chandasappa*, 17 Bom. L.R. 1134, 33 I.C. 444; *Anandappa* v. *Totappa*, 33 I.C. 441, 17 Bom. L.R. 1137 (Foot note); *Laloo Karikar* v. *Jagat Chandra*, 25 C.W.N. 258; *Thyammal* v. *Ruppanna*, 38 Mad. 1125; *Purushottama* v. *Brundavana*, 33 L.W. 664, A.I.R. 1931 Mad. 597 (alienation by natural father of an adopted minor); *Sundara* v. *Annammal*, 60 M.L.J. 695, A.I.R. 1931 Mad. 529 (alliention by *de fcto* guardian of a Christian minor); *Krishnadhan* v. *Brojendra*. 34 C.W.N. 642 (645); *Sheikh Rajah* v. *Sheikh Wazir*, 1 P.I.R. 188, 34

I.C. 85; *Satrohan* v. *Inder Bikram*, 10 O.C. 367; *Sadulla* v. *Sulaiman*, 6 Lah.L.J. 516, 84 IC. 923; *Ghandu Lal* v. *Anant Ram*, 135 P.R. 1892; *Sardar Shah* v. *Haji*, 182 P.L.R. 1908, 1 I.C. 545, 28 P.R. 1909; *Tajjad* v. *Mohammad Zulfikar*, 83 P.R. 1916, 33 I.C. 943; *Uttam Singh* v. *Gurmukh Singh*, 15 P.R. 1913, 19 I.C. 235; *Husen* v. *Rajaram*, 10 N.L.R. 133, 26 I.C. 813; *Ethilavulu* v. *Pethakkal*, (1950) 1 M.L.J. 76, 1950 M.W.N. 69, A.I.R. 1950 Mad. 390; *Vitu* v. *Debidas*, 15 N.L.R. 55, 51 I.C. 943; *Panjab Rao* v. *Atmaram*, A.I.R. 1926 Nag. 124; *Janardan* v. *Nilkantha*, A.I.R. 1952 Orissa 31. To a suit by a ward on attaining majority, for possession of property transferred by his guardian, a pardanashin lady, under a transfer void *ab initio*, this Article has no application. To such a suit it is Art. 142 that applies—*Hirdey* v. *Baburam*, 1940 O.W.N. 1318, A.I.R. 1941 Oudh 172, 191 I.C. 885. ".....this Court has been consistently holding that in case of improper or unauthorized alienations by *de facto* guardians, the minors when they come of age, need not get the alienations set aside, and that Art. 44, Limitation Act, would not apply"—*Ponnammal* v. *Gomathi*, A.I.R. 1936 Mad. 884, 71 M.L.J. 366, 165 I.C. 287. Though under the Hindu law, it is well-settled that an alienation by a *defacto* guardian, if for necessity, is binding on the minor, it does not follow that an alienation by a *defacto* guardian not supported by necessity, is voidable in the sense that it is binding on the minor until set aside, so as to attract the application of this Article—*Kailash* v. *Rajani*, 24 Pat. 273, 1945 P.W.N. 323, 27 P.L.T. 93, A.I.R. 1945 Pat. 298. So also, where a *defacto* guardian of a minor executes a sale deed in his own capacity and not as the guardian of the minor along with the minor, it is not necessary for the minor to get the sale deed set aside as the sale deed is ineffective and the vendee does not acquire any interest in the property. This Article has no application in such a case—*Amateppa* v. *Sanganbasappa*, 41 Bom. L.R. 867, A.I.R. 1939 Bom. 427, 186 I.C. 235.

Where a sale-deed executed by a guardian in respect of properties in one district was registered in another district by fraudulent inclusion in the deed of a small item of property situated in the latter district which neither the vendor intended to sell nor the purchaser to buy, *held* that the sale-deed was not duly registered; and the sale being therefore totally inoperative, this Article did not apply but Art. 144 —*Narasimha Rao* v. *Papunna*, 43 Mad. 436, 38 M L.J. 227, 56 I.C. 519.

In a joint Hindu Mitakshara family, there can be no "guardian of property" of a minor, since the interest of a member of such family is no individual property at all. Consequently an ilienation made by a person calling himself such a guardian is not binding on the minor, and no suit is required to be brought by him under this Article to set aside the sale. He can bring a suit for possession under Art. 144—*Kalyan Singh* v. *Pitambar*, 13 AL.J. 94, 27 I.C. 687; *Asaram* v. *Ratan Singh*, 12 N.L.R. 12, 33 I.C. 242; *Veerasami* v. *Sivagurunath*, 21 L.W. 111, A.I.R. 1925 Mad. 793; *Appanna Prosada* v. *Apana Mahapatra*, 5 L.W. 374, 40 I.C. 145; *Kala* v. *Faquir Chand*, A.I.R. 1934 Lah. 601, 35 P.L.R. 722, 152 I.C. 633; *Hanmantappa* v. *Dundappa*, A.I.R. 1934 Bom. 234, 36 Bom. L.R. 474, 151 I.C. 1043; *Chhaju* v. *Muttan*, A. I. R. 1936 Lah. 996 (the relief for cancellation of the deed of alienation by the manager is a relief ancillary to claim for possession). And so, where several brothers constitute a joint Hindu family, the elder brother is undoubtedly the manager of the family, but he is not the guardian of his minor brothers, because there can be no guardianship in such a case. Even assuming that he was a *de facto guardian*, still this Article cannot apply, as it does not contemplate a *de facto* guardian—*Dnyanu* v. *Vishnu*, 27 Bom.L.R. 495, 87 I C. 721, A.I.R. 1925 Bom. 372. A sale-deed executed by the manager of a joint Hindu family for other than necessary purposes is void from its inception, and a suit to set it aside is not governed by Art. 44—*Sheo Raj* v. *Ajudhiya*, 4 Luck. 503, A.I.R. 1929 Oudh 284, 116 I.C. 195. Where the property of a minor is transferred by a wholly unauthorised

person, the transaction is void *ab initio*, and it is not necessary for the minor in order to recover possession, to have the transfer set aside. In such cases Art. 144, and not Art. 44, applies—*Dipchand* v. *Munni Lal.* 1929 A.L.J. 1248, A.I.R. 1929 All. 879 (881); *Banku* v. *Banku*, 47 C.W.N. 288, A.I.R. 1943 Cal. 203, 206 I.C. 599; *Abdul* v. *Anwari*, 53 C.W.N. 258. A lease which amounts to a clog on the equity of redemption is void; such a lease, executed by a guardian, need not be set aside by a suit within three years under Art. 44—*Parashram* v. *Lakshmibai*, 53 Bom. 360, A.I.R. 1929 Bom. 186 (188), 115 I.C. 405.

331. Voidable transfers:—Where the alienation is not void but voidable only and would bind the minor until it is set aside, he cannot ignore the transaction but must sue to set it aside within the period prescribed by this Article. Even though the suit is framed as a suit for *possession* still it will be treated as a suit to set aside the sale, under this Article, because he cannot establish his right to possession without first setting aside the alienation. It is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining which Article is applicable to the suit—*Ramaswami* v. *Govindammal*, 56 M.L.J. 332, 118 I.C. 481, A.I.R. 1929, Mad. 313 (317); *Labha Mal* v. *Malak Ram*, 6 Lah. 447, 89 I.C. 602, A.I.R. 1925 Lah. 619. Thus, an alienation by a natural or lawful guardian who goes beyond the scope of his authority or alienates without legal necessity is *voidable* at the option of the minor and not *void* altogether, and a suit to set aside such alienation and to obtain possession is governed by this Article and not by the twelve years' rule—*Laxmana* v. *Rachappa*, 42 Bom. 626; *Fakirappa* v. *Lumanna*, 44 Bom. 742 (764); *Brojendra* v. *Prasanna*, 24 C.W.N. 1016, 59 I.C. 589; *Madugula Latchia* v. *Pally Mukkulinga*, 30 Mad. 393; *Satyalakshmi* v. *Jagannatham*, 34 M.L.J. 229, 42 I.C. 939; *Ranga Reddi* v. *Narayana Reddi*, 28 Mad. 423; *Labha Mal* v. *Malak Ram*, 6 Lah. 447, A.I.R. 1925 Lah. 619, 89 I.C. 602, 26 P.L.R. 531; *Khushia* v. *Faiz Md.*, 9 Lah. 33, 103 I.C. 365, A.I.R. 1928 Lah. 115; *Tara Chand* v. *Murlidhar*, 3 Lah.L.J. 280, 61 I.C. 384; *Arumugam* v. *Pandian*, A.I.R. 1921 Mad. 425, 62 I.C. 630, 40 M L.J. 475; *Bangarammal* v. *Lydia Kent*, 57 Mad. 1062, A.I.R. 1934 Mad. 605 (607); *Sham Chandra* v. *Godadhar*, 9 I.C. 377, 13 C.L.J. 277; *Kolhu* v. *Belsingh*, A.I.R. 1922 Nag. 201, 17 N.L.R. 183; *Ram Bharahey* v. *Ram Bahadur*, 1947 O.W.N. 558, A.I.R. 1948 Oudh 125; *Lok Nath* v. *Rohlu*, A.I.R. 1951 J.&. K. 25. Where a person (a manager of a joint Hindu family) executed a *mukhtarnama* providing for the management of the family estate, both during his life-time and after his death until his eldest minor son attained majority, and the *mukhtear* was given the power to manage the estate as he thought fit including the power of sale, *held* that a sale by the *mukhtear* was binding on the minor sons and could not be treated as a nullity, and a suit to challenge the sale was governed by this Article—*Mahableshyar* v. *Ramchandra*, 38 Bom. 94, 21 I.C. 350. An alienation by a guardian appointed under the Guardians and Wards Act, without the sanction of the Court is *voidable* and not void (see section 30 of the Guardians and Wards Act); consequently a suit by the minor to set aside the alienation after attaining majority falls under this Article—*Sivanmalai* v. *Arunachala*, (1938) 2 M.L.J. 428, A.I.R. 1938 Mad. 822, 182 I.C. 862; *Mir Ghulam* v. *Ayesra*, I.L.R. (1941) Mad. 775, (1941) 1 M.L.J. 800, A.I.R. 1941 Mad. 481 (F.B.). So also, a permission obtained by a certificated guardian by means of fraudulent mis-representation is a nullity, but a transfer ostensibly made in pursuance thereof is only voidable. Consequently, a suit by the minor to set aside the transfer falls under this Article and not Art. 144—*Ram Charitter* v. *Suraj*, 53 All. 738, 1931 A.L.J. 997, 136 I.C. 71, A.I.R. 1932 All. 108 (109).

In an Allahabad case it was held that a suit to set aside an alienation of the plaintiff's property made during his minority by his mother as guardian, brought

after his mother's death, was governed by Article 141—*Bachchan* v. *Kamta Prasad*, 32 All. 382 (396) 7 A L.J. 337, 5 I.C. 585. This view, it is submitted, is not correct; although the suit was brought after his mother's death, still the plaintiff did not sue as a reversionary heir, consequently Art. 141 could not apply. The proper Article was Art. 44. This ruling has been disapproved of in *Brojendra* v. *Prasanna*, 24 C.W.N. 1016, *Tara Chand* v. *Murlidhar*, 3 Lah.L.J. 280; and in the later Allahabad case, *Dip Chand* v. *Munni*, 1929 A.L.J. 1248, A.I.R. 1929 All. 879 (881).

Where a property had been mortgaged by the minor's father, and after his death the natural *guardian* (*e.g.*, mother) of the minor sold the equity of redemption to the mortgagee, without any legal necessity, a suit by the minor after attaining majority to redeem the mortgage is governed by Article 44, because the plaintiff cannot redeem without suing to set aside the sale of the equity of redemption—*Fakirappa* v. Lumanna, 44 Bom. 742 (overruling *Bhagvant* v. *Kondi*, 14 Bom. 279). But if the equity of redemption was sold by a person acting as guardian but without any authority to act as such (*e.g.*, a step-mother who is not a guardian under the Hindu law, the sale is void and need not be set aside, and a suit by the minor after attaining majority to redeem the mortgage is not governed by this Article—*Balappa* v. *Chanbasappa*, 17 Bom. L.R. 1134, 33 I.C. 444.

A deed executed by a guardian of a minor mortgagee releasing from operation of mortgage the sub-soil rights of the mortgage land in favour of lessee of the mortgagor in consideration of certain sum is a transfer of the equity of redemption and is a voidable transaction and requires to be avoided or set aside within the period of limitation prescribed by this Article—*Jagadamba* v. *Anadi*, 17 Pat. 460, 19 Pat. L.T. 594, A.I.R. 1938 Pat. 337, 176 I.C. 273.

When the senior member of a coparcenary dies leaving only minor co-parceners, the mother of the minors is their *de jure* guardian. And a suit brought by the minors to set aside alienations made by the *de jure* guardian during their minority is governed by Art. 44, and not by Art. 144, and consequently a suit brought within 12 years of the alienations but more than 3 years after the plaintiff had attained majority is barred by limitation under Art. 44. Art. 144 applies to cases where the possession of the purchaser is adverse to the plaintiff and a purchaser from the guardian of a minor does not hold the land under a title adverse to the minor, but on the contrary he derives his title from the minor and has a good title until it is shown that in selling the land to him the guardian exceeded his powers. A transfer by a guardian, however improper it may have been, is not a void transaction but only a voidable one. and when property cannot be recovered without avoiding the transfer it is settled that Art. 44 applies—*Koya Ankamma* v. *Kanaganchi Kameshwaramma*, A.I.R. 1936 Mad. 346, 59 Mad. 549, 70 M.L.J. 352, 161 I.C. 797; *Palaniappa* v. *Nallappa*, (1951) 1 M.L.J. 265, A.I.R. 1951 Mad. 817.

But Art. 44 does not apply to suits to set aside alienations made by *de facto* guardian of minors—*Palaniappa* v. *Nallappa*, supra.

A suit under this Article must be brought within three years after the minor attains majority; and the burden lies on the minor to prove that his suit is in time, if the date of attaining majority is disputed—*Prolhad Chandra* v. *Ramsaran*, 38 C.L.J. 213, A.I.R. 1924 Cal. 420, 81 I. C. 680.

Suit against alienee from purchaser :—When the purchaser from the guardian has alienated the whole or portion of the property purchased by him, the ward if he wants to dispossess the second alienee, must bring the suit against him within the period prescribed by this Article. The reason is that the second alienee cannot be bound by the adjulication in the suit by the ward against the original

purchaser and the question of the validity of the alienation must be re-tried—*Kasim Ali* v. *Ratna*, 1938 M.W.N. 403, A.I.R. 1938 Mad. 677, 181 I.C. 697.

Suit by minor's transferee:—Where a minor's property was sold by the minor's guardian, and the minor after attaining majority transferred the same property to another, and then the transferee as principal plaintiff (plaintiff No. 1) and the transferor as the second plaintiff sued to set aside the sale within three years of the minor attaining majority, *held* that so far as plaintiff no. 2 was concerned, the suit was clearly within time because he brought the suit within three years of his attaining majority, under Article 44. And the suit was in time as regards plantiff no. 1 also, *although Article 44 could not apply to his case.* No doubt this suit is substantially by plaintiff no 1, and plaintiff no. 2 is joined only to save limitation; but the fact that plaintiff no. 2 has conveyed his interest in the property to plaintiff no. 1 does not mean that he has no interest in maintaining the suit to set aside the alienation. In order to make his transfer to plaintiff no. 1 effective and to save the right of the transferee from being barred by limitation, plaintiff no. 2 was entitled to sue to set aside the sale, in spite of the transfer in favour of plaintiff no. 1, and to join in the present suit brought by the latter. As the suit by plaintiff No. 2 is maintainable and not time-barred, the suit by plaintiff no. 1 is also saved from limitation, although a suit, brought by plaintiff no. 1 alone would have been barred by limitation, as more than 12 years have elapsed after the date of the sale by the guardian of plaintiff no. 2—*Hanmant* v. *Ramappa*, 49 Bom. 309, 27 Bom. L.R. 211. 86 I. C. 879, A.I.R. 1925 Bom. 292. This decision, which lays down that Art. 44 does not apply to the transferee of an ex-minor, leads to the anomaly that a suit by the transferee would be barred though his vendor is not barred. Such interpretation of Art. 44 would lead to another anomaly under the following circumstances: Suppose the guardian makes the alienation shortly before the ward attains majority, and the ward does not sue within 3 years of his attaining majority, but transfers the property before the end of three years. Now, after the lapse of three years, the minor's right to the property will be extinguished, by the operation of sec. 28, but the transferee will be entitled to institute a suit for possession within 12 years from the date of possession taken by the guardian's alienee; and if he brings a suit within that time he will not be barred although his vendor is barred. See *Ramaswami* v. *Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (319). Such an anomaly could not have been contemplated by the Legislature, and so it has been held in several cases that a suit by the transferee of the ex-minor is governed by the same rule of limitation as a suit by the ex-minor himself (*viz.*, 3 years' rule under Art. 44)—*Ramaswami* v. *Govindammal*, supra (dissenting from 40 Bom. 309); *Chandra* v. *Maruti*, 5 N.L.R. 50, 2 I.C. 229. If the suit is brought by the minor's transferee alone, and it is found that at the time when this suit is brought, a suit brought by the ex-minor to set aside the sale made by the guardian would have been barred by Art. 44, the ex-minor's right to the property is extinguished, and consequently his transferee has no right and his suit is likewise barred—*Laxmana* v. *Rachappa*, 42 Bom. 626, 46 I.C. 22. 20 Bom.L.R. 408, explained in *Jhaverbhai* v. *Kabhai*, 34 Bom.L.R. 1512, A.I.R. 1933 Bom. 43 (44), 141 I.C. 806; *Natha* v. *Thakur*, 1939 O.W.N. 241, A.I.R. 1939 Oudh. 122, 180 I.C. 329. If after a suit has been brought by the ex-minor and his transferee jointly, the former withdraws from the suit, the effect is that he elects not to set aside the sale and the sale becomes binding on him; consequently, the transferee has then no right to continue the suit—*Jhaverbhai* v. *Kabhai*, supra. In this case it has been observed (by way of *obiter*) that Article 44 applies only to a suit brought by the minor after attaining majority and not to the suit by the minor's transferee.

Effect of bar of limitation:—A suit under this Article is virtually a suit

for possession of property. And therefore if the minor fails to bring a suit to set aside the sale within 3 years after attaining majority, his right to the property will be extinguished by operation of section 28—*Kandasami* v. *Irusappa*, 41 Mad. 102 (105); *Gnanasambanda* v. *Velu Pandaram*, 23 Mad. 271 (279) (P.C.); *Dip Chand* v. *Munni*, 1929 A.L.J. 1248, A.I.R. 1929 All. 879 (881); *Palaniappa* v. *Nallappa*, (1951) 1 M.L.J. 265, A.I.R. 1951 Mad. 817. The Calcutta High Court has taken a contrary view in *Lalit* v. *Nogendra*, A.I.R. 1940 Cal. 589, where it has been held that this Article has nothing whatever to do with suits for possession. The only thing which becomes barred at the expiry of the period prescribed by this Article is the ward's right to set aside a transfer. The failure to sue within the time prescribed does not extinguish the right to the property under sec. 28 of the Act. The fact that in a previous suit by the alienee against the ward, to recover some properties which had not passed to his possession under the transfer, the alienation was found invalid, will not relieve the ward from the consequences of his failure to have the transfer set aside within the period allowed by law with regard to properties which had passed to the possession of the alienee. When at the time such previous suit was brought, the ward's right to such property had been extinguished under section 28, the decision will not have the effect of reviving the extinguished right—*Madugulu Latchia* v. *Pally Mukkalinga*, 30 Mad. 393 (397).

But if the minor had been all along *in possession* of the property inspite of the execution of a sale-deed by his guardian during his minority, a suit by the ex-minor to have the sale set aside is not a suit for possession and sec. 28 does not apply. Consequently, if the minor fails to bring such suit within the period limited by this Article his remedy by way of cancellation of the sale-deed is lost, but his right to the property is not extinguished under sec. 28, and he can bring a suit for partition of the property with his co-sharers—*Mahomed Raza* v. *Zahoor Ahmad*, 52 All. 970, A.I.R. 1930 All. 858 (860), 132 I.C. 21, 1930 A.L.J. 1416.

332. Section 7:—This Article should be read subject to the provision of section 7. Thus, two brothers brought a suit to set aside a sale effected by their mother as guardian during their minority. The suit was brought within three years of the younger brother attaining majority but more than three years after the elder brother came of full age. *Held* that the claim being a joint claim and the suit having been brought more than 3 years after attainment of majority of the elder brother, who as manager of the family was competent to give a valid discharge under section 7 as soon as he became a major, the claim was barred by limitation even in respect of the share of the younger brother—*Doraisami* v. *Nondisami*, 38 Mad. 118 (F.B.); *Mahableshwar* v. *Ramchandra*, 38 Bom. 94, 21 I.C. 350; *Kuppuswami* v. *Kamalammal*, 43 Mad. 842; *Babu Tatya* v. *Bala Raoji*, 45 Bom. 446. But if the elder brother does not act as the manager (*e.g.*, in a case where the father is still living) he cannot give a valid discharge on behalf of his minor brothers; and so in such a case, a suit brought by the younger brothers within three years of their attaining majority, to set aside an alienation made by their father is not barred, although their eldest brother had long before three years reached majority—*Jawahir* v. *Udai Perkash*, 48 All. 152 (P.C.), A.I.R. 1926 P.C. 16, 30 C.W.N. 698, 93 I.C. 216; followed in *Narayana* v. *Venkataswami*, 51 M.L.J. 845, A.I.R. 1926 Mad. 1190, 98 I.C. 31. See also *Nahar Singh* v. *Tek Chand*, (1951) A.L.J. 751, A.I.R. 1952 All. 184.

45.—To contest an award under any of the following Regulations of the Bengal Code:— The Bengal Land-revenue Settle-	Three years.	The date of the final award or order in the case,

ment Regulation, 1822 (VII of 1822).
The Bengal Land-revenue Settlement Regulation, 1825 (IX of 1825).
The Bengal Land-revenue (Settlement and Deputy Collectors) Regulation, 1833 (IX of 1833).

333. Scope of Article:—This Article would apply even though the plaintiffs were not parties to, and did not appear in, the Settlement proceedings—*Tulsiram* v. *Mohamed*, 10 W.R. 48. Under this Article, *any* person who wishes to contest an award, whether bound by it or not, must bring his suit within three years. But Article 46 applies only to those persons who are bound by the award, and relates to suits for recovery of property.

This Article does not apply unless the award is a valid one and made in accordance with the provisions of law. Where the Assistant Collector not being able to come to any decision as to the possession and rights of the parties in an estate, refers the whole matter to the Collector, and he without hearing the parties and after only reading the evidence taken by the Assistant Collector, passes an order, such an order has no element of a judicial character and has not the authority of an *award;* it need not be contested within 3 years, but the party may bring a suit for possession within 12 years—*Bhaoni* v. *Maharaj Sing*, 3 All. 738. Regulation VII of 1822 does not empower the Collector to decide disputes as to *title* between raiyats, but only to decide disputes in regard to the *nature* of any tenancy. A decision by the Collector as to the title between two raiyats is not an 'award' under the Regulation or within the meaning of this Article—*Rajani Kant* v. *Ram Dulal*, 17 C.W.N. 55, 17 I.C. 881. A suit not to set aside an award but to obtain possession of land from which the plaintiff has been dispossessed by virtue of an order under sec. 145, Criminal Procedure Code which was to the effect that the defendants were in occupation of the disputed land on the strength of a settlement made in their favour, does not fall under this Article —*Midnapore Zemindary Co.* v. *Naresh Narayan*, 49 Cal. 37, 33 C.L.J. 497, A.I.R. 1922 Cal. 345. The "award" contemplated by this Article presupposes a contest between the parties and a decision after proper investigation into the points at issue. Where there is nothing to indicate that there was any contest or a decision on any investigation, but the only object of the suit is that the plaintiffs may be confirmed in their possession of the lands if they succeed in it, and the settlement by the Revenue authorities, in so far as it determined the amount of the revenue payable in respect of the disputed property, would in no way be affected, the only result being that the plaintiffs would in that case obtain the benefit of a settlement which a third party obtained from the Government, Article 45 does not apply—*Latifa Khatun* v. *Tofer Ali*, 55 Cal. 201, 104 I.C. 655, A.I.R. 1927 Cal. 902.

334. Limitation:—In a suit to contest an award of a Survey Deputy Collector, the period of limitation begins to run, where there has been an unsuccessful *appeal* to the Commissioner and then to the Board of Revenue, from the date of the order of the latter—*Kishen Chunder* v. *Mahomed Afzal*, 10 W.R. 51. Where A and B were similarly affected by a survey award, and A appealed but B did not, the period of limitation in respect of B's suit to set aside the award would run from the date of the award, and not from the date of the order on A's appeal in which B did not join—*Tulsiram* v. *Mohamed*, 10 W.R. 48. A settlement award under Regulation

VII of 1822 in favour of a mortgagee in possession becomes binding upon the mortgagor if he allows it to remain unchallenged for three years; and the mortgagor is thereafter debarred from bringing a suit for redemption—*Sreechund* v. *Mullick*, 9 W.R. 564.

46.—By a party bound by such award to recover any property comprised therein.	Three years.	The date of the final award or order in the case.

335. Scope of Article:—The 'award' referred to in this Article is an award under the Regulations mentioned in Art. 45. An award passed in a civil suit it not one coming under this Article—*Lachman* v. *Atma*, 25 P.R. 1883. This article applies only to parties 'bound by the award.' A person who was not a party to an award or order, is not bound by it, and is not therefore debarred from bringing a suit for possession under the twelve years' rule of limitation—*Pureeag* v. *Shib*, 3 W.R. 165; *Kanto* v. *Asaa*, 5 C.L.R. 452. A suit for the reversal of a survey award and for recovery of possession, alleging dispossession on a date *subsequent* to the date of the award, is not governed by Article 45 or 46 but by the 12 years' rule of limitation (Art. 142)—*Mozaffur* v. *Girish*, 10 W.R. 71.

This Article will not enable a person to come in within 3 years from the date of the award and recover possession of lands in respect of which his suit is barred by other provisions of the law of limitation—*Beer Chand* v. *Ramgutty*, 8 W.R. 209; *Maula Baksh* v. *Keshoram*, 10 W.R. 249.

In a thakbust map, a land was demarcated as belonging to A. B claimed that it belonged to him jointly with A. On 18th November 1858 the map was rectified by demarcating the land to A and B jointly. On 11th December 1865, A brought a suit against B for a declaration of his sole right and confirmation of possession, and alleged that he had been in possession ever since. It was held that a suit by a person in possession to have his *title confirmed* was not a suit to *recover property* within this Article and was not barred by reason of its not being brought within three years from the date of the award—*Mohima* v. *Rajkumar*, 10 W.R. 22.

47.—By any person bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898, (V of 1898), or the Mamlatdars' Courts Act, 1906 (Bom. II of 1906), or by any one claiming under such person, to recover the property comprised in such order.	Three years.	The date of the final order in the case.

336. Change:—The word "'immoveable" has been added in 1908. Under the Act of 1877 Article 47 referred to immoveable as well as moveable property—

Kangali v. *Zomurrudonnissa*, 6 Cal. 709. But the Act of 1908 confines this Article to *immoveable* property alone.

337. Application of Article:—This Article is not confined in its operation to orders passed under Ch. XII of the Cr. P. Code. An order restoring possession under sec. 522, Cr. P.Code is an order respecting the possession of property within the meaning of this Article, and must be brought within 3 years of the order—*Pakki Adinarayana* v. *Surmma*, 48 M.L.J. 372, A.I.R. 1925 Mad. 799, 86 I.C. 744.

Where the plaintiff had no legal right to possession *at the time* the order under sec. 145, Cr. P. Code was made against him, but *subsequently* acquired that right, this Article would not apply to a suit for possession brought by him after he acquired such right; Art. 144 would apply to the case—*Bolai Chand* v. *Samiruddin*, 19 Cal. 646; *Subbalakshmi* v. *Narasimmiah*, 52 M.L.J. 482, 102 I.C. 360, A.I.R. 1927 Mad. 586.

This Article does not apply to a person claiming against both of the parties between whom the order is made.

Art. 47 applies only to those cases in which the magistrate has declared one of the parties to be entitled to possession until evicted therefrom in due course of law or has restored possession to a party found to have been forcibly and wrongfully dispossessed within two months of his initial order—*Partab Bahadur Singh* v. *Jagatjit Singh*, A.I.R. 1936 Oudh 387, 1936 O.W.N. 714, 164 I.C. 118.

This Article has no application where the order of the Magistrate was passed *without jurisdiction*. Thus, in a case under sec. 145, Cr. P. Code, the Magistrate has to decide as to which party is in possession; but if the Magistrate goes beyond this, and decides the mode of possession or how that possession is to be exercised, or makes an order for joint possession, his decision is without jurisdiction, and Article 47 does not apply to a suit by one of the parties to establish his rights. Moreover, this Article has no application where the Magistrate's order does not dispossess the plaintiff or maintain the defendant's possession to the exclusion of the plaintiff—*Rohini Nandan* v. *Jadunandan*, 30 C.W.N. 873, 97 I.C. 73, A.I.R. 1926 Cal. 1022. But every defective or erroneous order of the Magistrate should not be considered as passed 'without jurisdiction.' Thus, in a proceeding regularly initiated under sec. 145, Cr. P. Code, the Magistrate passed an order as to possession, but the provisions of subsection (4) of that section were not complied with. It was held that the order of the Magistrate might be defective or irregular, but it was not passed without jurisdiction, and a suit to recover the property comprised by the order fell under Art. 47. Before want of jurisdiction can be pleaded, a vice must be clearly established which infects the whole proceeding. When an inquiry has been duly entered upon under section 145, Cr. P. Code, it is not every error that makes the result invalid—*Ear Mahamed* v. *Heyat Mahamed*, 22 C.W.N. 342 (345, 346), 42 I.C. 768; *Rani Abadi Begam* v. *Ahmad Mirza*, 11 O.L.J. 757, A.I.R. 1925 Oudh 190. So also, the mere fact that the Magistrate acting under sec. 145, Cr. P. Code did not make the proper inquiries which he ought to have made before he passed the order, or did not serve any notice on the plaintiff in accordance with law, does not make the order illegal or without jurisdiction, especially when the plaintiff had notice of the proceedings and put in a written statement before the Magistrate. A suit to recover possession of property comprised in such order falls under this Article—*Parasuramayya* v. *Ramachandradu*, 38 Mad. 432, 21 I.C. 564. See also *Gangaram* v. *Sankarappa*, 9 M.L.J. 91.

This Article does not apply where there was no order by the Magistrate as to possession of property under sec. 145 Cr. P. Code, but the proceedings under that section have been consigned to records by the agreement of the parties—*Jagatjit* v.

Partab, 44 Bom.L.R. 868, 47 C.W.N. 38, A.I.R. 1942 P.C. 47, (1942) 2 M.L.J. 384 (P.C.). Thus, an order by a Magistrate attaching the property under sec. 146, Cr. P. Code is not an order 'respecting the possession of property' because such an order is passed when he is *unable to determine* who was in actual possession of the property. Therefore, where a Magistrate attaches certain lands under sec. 146, Cr. P. Code, and places them in charge of a Sub-Magistrate, a suit to recover the property does not fall under this Article—*Akilandammal* v. *Periasami*, 1 Mad. 309; *Raja of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (413); *Goswami* v. *Girdhariji*, 20 All. 120; see also *Deo Narain* v. *Webb*, 28 Cal. 86 (88). Where a person was a party to a litigation in a Civil Court, and an order is made by the Magistrate with regard to possession of immoveable property as the result of the adjudication in the Civil Court, such a person cannot be properly described as a person bound by the order of the Magistrate, but as a person bound by the order of the Civil Court, because the Magistrate is merely carrying out the order of the Civil Court. The Magistrate's order is not one promulgated under the Cr. P. Code and Art. 47 cannot apply—*Alagarswami* v. *Ramabadra*, A.I.R. 1929 Mad. 38 (40), 111 I.C. 152.

This Article applies although the order was passed summarily without investigation. Thus, where a suit was dismissed by the Mamlatdar for the non-appearance of the plaintiff, he must bring his suit for possession in the Civil Court within three years under this Article—*Ramachandra* v. *Bhikibai*, 6 Bom. 477; so too, if the suit was dismissed by the Mamlatdar for non-appearance of both parties—*Purushottam* v. *Chatagir*, 25 Bom. 82. An order of the Mamlatdar dismissing the plaintiff's claim for possession on account of lack of proof is tantamount to an order confirming the defendant's possession, and is therefore an order 'respecting the possession of property' under this Article—*Chinto* v. *Ganenh*, 1883 P.J. 131.

Where a plaintiff against whom an order was passed by the Mamlatdar in 1885, *continued in possession* inspite of the adverse order, up to 1887, when he was dispossessed in execution of a decree in another proceeding, a suit brought by him to recover possession in 1890 was not barred by this Article, because there was no necessity for the plaintiff to bring a suit to recover possession under this Article within 3 years from the order of 1885 if he continued in possession in spite of that order—*Krishnacharya* v. *Lingama*, 20 Bom. 270.

This Article has no application to a suit for possession by a successful party in a proceeding under sec. 145 Cr. P. Code. So where in a proceeding under sec. 145, Cr. P. Code, possession of both co-sharers is confirmed, this Article has no application. Its applicability is restricted to cases where a party is held to be out of possession—*Ranga* v. *Raju*, A.I.R. 1950 Orissa 64. Thus where a co-sharer brings a suit for possession of his separate share or for partition of joint properties in respect of portion of which an order under sec. 145, Cr. P. Code, was passed in his favour, this Article has no application—*Ranga* v. *Raju*, supra.

This Article does not apply where the plaintiff brings the suit in a different capacity from that in which he sued before the Mamlatdar. Thus, where a suit instituted by the plaintiff in his private capacity as the heir of the deceased manager of a *Math* was dismissed by the Mamlatdar for non-production of certificate of heirship, a subsequent suit brought by the plaintiff in his representative capacity, describing himself as the manager of the *Math*, is not governed by Art. 47—*Babajirao* v. *Laxmandas*, 28 Bom. 215. Where after the order of the Mamlatdar in a possessory suit, the parties entered into a contract for sale in respect of the property in dispute, such a contract dissolves the order of the Mamlatdar; it is unnecessary to bring a suit to set aside the order; and a suit based on the contract of sale is not barred by reason of

not having been brought within three years from the date of the order of the Mamlatdar —*Sagaji* v. *Namdev*, 23 Bom. 525 (527).

"Person bound by the order":—A person will not be bound by an order made in a proceeding under sec. 145 Cr. P. Code, to which he is not a party—*Shankhta* v. *Sm. Govindi*, A.I.R. 1950 All. 693; *Main Sharif* v. *Said Gal*, 196 I.C. 444, A I.R. 1941 Pesh. 65. Where the *manager* of a joint Hindu family in his capacity as such is a party to proceedings under sec. 145, Cr. P. Code, the joint family as a whole is a party, and the proceedings will bind any member of the joint family in his capacity as such. Consequently, a suit by *a member* of a joint family to recover possession of properties from the defendant whose possession had been confirmed by an order under sec. 145, Cr. P. Code to which the manager of the joint family was a party and not the other members of the family, is governed by this Article. All persons who, though not parties to an order under sec. 145, Cr. P. Code, had actual notice of the order are "bound" by that order within the meaning of this Article—*Venkatasomaraju* v. *Varakalaraju*, 52 Mad. 787, 57 M.L.J. 228, A.I.R. 1930 Mad. 48 (49, 51), 122 I.C. 171. Compare 45 All. 306, cited in the next note.

338. "Any one claiming under such person":—This Article applies to all persons who are bound by or parties to an order under sec. 145, Cr. P. Code, as well as to any other person who may claim the property through any such person under a title *derived subsequent* to the order—*Jogendra* v. *Brojendra*, 23 Cal. 731 (F.B.). The words "claiming under such person" mentioned in the article refer to those persons who claim from the person bound by the order under a title created subsequent to the order and not those who claim under a title created prior to the order—*Munga Lal* v. *Sagarmal*, A.I.R. 1936 Pat. 629, 15 Pat. 481, 17 P.L.T. 726. If a party defeated in the proceedings before the Mamlatdar's Court fails to bring a suit to set aside the Mamlatdar's order within three years, as provided by this Article, a suit brought by the *assignee* of such party will be barred. The assignee cannot be in a better position than the original party—*Bapu* v. *Mohadaji*, 18 Bom. 348. If an order is passed in respect of a property under sec. 145, Cr. P. Code against the managing member of a joint Hindu family, it is binding on the whole family, and a suit brought by the surviving members of the family, after the death of the managing member, to recover the property, will be governed by this Article—*Ram Sahai* v. *Benode Behari*, 45 All. 306 (308), 21 A.L.J. 102, 71 I.C. 402. Cf. 52 Mad. 787, *supra*.

339. Suit to recover property:—This Article does not apply to a suit for possession based on *title*. Thus, the Mamlatdars' Courts Act gives the Mamlatdar no power to decide upon the *rights* of the parties, and his order rejecting a suit or dis-allowing a claim involves no decision as to the *title* of the plaintiff. Consequently, he is not bound to sue within three years under this Article for recovery of possession *based on title*. This Article has been prescribed for suits to set aside orders respecting *possession* only—*Tukaram* v. *Hari*, 28 Bom. 601 (F.B.). Where a Mamlatdar has made an order respecting the possession of a joint property, and the plaintiff who has been dispossessed by the order brings a suit to establish his right to and to recover a fourth share of the property, *held* that this Article does not apply for the suit is in substance a suit for partition though nominally it is one for recovery of the property comprised in the Mamlatdar's order—*Bhaguji* v. *Aniaba*, 5 Bom. 25; *Shivram* v. *Narayan*, 5 Bom. 27; *Parashram* v. *Rakhma*, 15 Bom. 209 (305). But the Calcutta High Court dissents from this view, being of opinion that a suit for partition is another name for a suit for recovery of possession, and must be held to be barred if not brought within the period of three years prescribed by this Article

—*Atab Sunarhi* v. *Talik Husain*, 51 C.L.J. 461, 128 I.C. 106, A.I.R. 1930 Cal. 612 (614).

Where a suit is not one to recover any property but for a declaration of the plaintiff's right to put up dams in a river and to irrigate their lands by means of such dams. Art. 47 does not apply—*Eshan Chunder* v. *Nilmoni*, 35 Cal. 851. On the other hand if the suit is really one to recover a property in respect of which an order has been passed under sec. 145 of the Criminal Procedure Code, the plaintiff can not evade the provisions of this Article and claim an enlarged period by describing his suit as one for declaration of the title—*Ram Sahai* v. *Benode Behari*, 45 All. 306 (308), 21 A.L.J. 102, A.I.R. 1923 All. 151.

If a Mogistrate attaches a property under sec. 146, Cr. P. Code and appoints a receiver thereof, the property is, in the eye of the law, in *custodia legis*. It is held in the custody of the Court for the benefit of the person who may eventually and finally succeed in establishing his title to the property. In such a case no party is under any obligation to bring a suit to *recover the property*, but can only sue to *establish his right* to the property. To 'recover' means to recover property from the possession of another party to whom possession has been given—*Alagarswami* v. Ramabadra, A.I.R. 1929 Mad 39 (41), 111 I.C. 152. A suit for a *declaration of a right of way* over the land of the defendant need not be instituted within three years of the date of the Magistrate's order passed in favour of the defendant under sec. 145, Cr. P. Code, in as much as this Article contemplates a suit respecting the possession of the soil and involving no question of right of way—*Kalachand* v. *Jatindranath* 57 I.C. 852 (Cal.).

340. Starting point of limitation:—It was held that the period of limitation ran from the date of the Magistrate's order, and not from that of a confirmation order by the Sessions Judge—*Kangali* v. *Zomurrudonnissa*, 6 Cal. 709. It was also held that time ran from the date of the Magistrate's order and not from the date on which a rule issued by the High Court under sec. 15 of the Charter Act against the Magistrate's order was disposed of; because an order of the Magistrate under sec. 145 of the Cr. P. Code was a 'final order' within the meaning of this Article since it was not subject to appeal, review or revision, and the Charter Art was not contemplated by the Legislature when they drew up the provisions of Art. 47—*Jagannath* v. *Ondal Coal Co., Ltd.*, 12 C.W.N. 840. But these two rulings are no longer good law, because under the Criminal Procedure Code as amended in 1923, orders under sec. 145 passed by a Magistrate are not final, but are open to revision under the Code itself. According to the Patna High Court an order passed by the High Court in the exercise of its power of revision under sec. 439 of Cr. P. Code, is the 'final order' within the meaning of this Article. Whether the High Court ultimately interferes in revision or not, its order is none the less a 'final order'—*Rampal* v. *Mansukh*, 20 Pat. 735, 22 Pat.L.T. 202, A.I.R. 1941 Pat. 372, 193 I.C. 501. The Madras High Court has, however, held that if the High Court interferes in revision, then the order passed by the High Court in revision is the 'final order'. But if the High Court does not interfere in revision, the order of the Magistrate is the 'final order'—*Nagabhushanayya* v. *Kotayya*, I.L.R. (1947) Mad. 179, (1946) 1 M.L.J. 398, A.I.R. 1946 Mad. 444. Where after the Magistrate passes his order in the proceedings under sec. 145, Cr. P. Code against the plaintiff the latter makes an application to the Sessions Judge in revision for making a reference to the High Court but the application is dismissed by the Sessions Judge and the High Court is not moved in revision, the order of the Magistrate and not of the Sessions Judge is the "final order" within the meaning of this Article—*Pitambar* v. *Achoki* 29 Pat. 311, A.I.R. 1951 Pat. 325.

When once limitation has begun to run by reason of an order being passed as

to possession of the property, the plaintiff will not be entitled to a fresh starting point from the date of a subsequent atachment of the property under sec. 146, Cr. P. Code —*Jurawan* v. *Ram Sarekh*, 12 Pat. 261, 14 P.L.T. 113, A.I.R. 1933 Pat. 224 (228); *Deo Narain* v. *Webb*, 28 Cal. 86.

Effect of bar of limitation:—It has been held in a Bombay case that if the defendant against whom an order has been passed by the Malatdar fails to bring a suit under this Article for the recovery of the property within three years, his title to the property is not extinguished. Consequently, if he gets into possession again, such possession should be referred to his then subsisting title, and any one, who after his re-entry disputes his title, will have to prove his own as against the title of the defendant, independently of any question of limitation arising under this Article—*Parashram* v. *Rakhma*, 15 Bom. 299 (304). It can not be said that mere failure to sue within the period of three years from the date of an adverse order under sec. 145, Cr. P. Code, bars the owner from suing unless it be shown by the person in whose favour the order under sec. 145, Cr. P. Code was passed that he had in fact set up a hostile title in those proceedings. The latter fact has to be clearly proved. The order of restoration implies nothing except that the person was in possession. It does not imply that he was in adverse possession. The limited right would not ripen into full ownership—*Anjadi* v. *Syed Hasan*, 19 *Luck.* 531, 1944 O.W.N. 217. A.I.R. 1944 Oudh 250. But the Calcutta High Court dissents from this view and is of opinion that if a person against whom an order has been passed under sec. 145. Cr. P. Code fails to bring a suit within the period prescribed by this Article, his right to the property is extinguished by operation of sec. 28—*Atab Sunarri* v. *Talib Hussain*, 51 C L.J. 461, 128 I.C. 106, A.I.R. 1930 Cal. 612 (614), (dissenting from *Parashram* v. *Rakhma*, 15 Bom. 299); *Khaleque* v. *Labibuddin*, I.L.R. (1942) 2 Cal. 332, 76 C.L.J. 342, 46 C.W.N. 817, A.I.R. 1943 Cal. 67. The Nagpur J. C, Court holds the same view as the Calcutta High Court—*Jagatram* v. *Pitai*, 26 N.L.R. 160, 122 I.C. 270. A.I.R. 1930 Nag. 142 (143).

After the expiry of the period of limitation the law declares not simply that the remedy is barred but that the title is extinct in favour of the possessor.

Section 28 provides in clear terms that after the expiry of the period prescribed for institution of a suit for possession of any property, the person who should have instituted any such suit but has failed to do so shall cease to have any right to the property—*Nando Kahar* v. *Sri Bhup Narain*, A.I.R. 1935 Pat. 164, 16 P.L.T. 183

48.—For specific moveable property lost or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same.	Three years.	When the person having the right to the possession of the property first learns in whose possession it is.

341. Scope of Article:—This Article is a special one, whereas Article 49 is a general provision, and the well established rule is that where the special provision applies, the general provision does not apply. Article 48 deals only with specific moveable property which falls under one of two classes, *viz.*, (1) such property as has been lost, or (2) as has been acquired by (a) theft, (b) dishonest misappropria-

tion, or (c) conversion. No other kind of moveable property is affected by this Article. If the case is not covered by this Article, then Article 49 will apply—*Lodna Colliery* v. *Bepin Behary*, 1 P.L.T. 84, 55 I.C. 113 (133), approved of in *Pugh* v. *Ashutosh*, 8 Pat. 516 (P.C.), 33 C.W.N. 323 (327). This Article contemplates suits by plaintiffs who have right to possession, that is, where they are entitled to immediate possession. Article 49 applies to a case where the plaintiff has no right to immediate possession at the time when the cause of action pleaded by him arose and on which he succeeds—*Pattakumari* v. *Nirmal*, 51 C.W.N. 544, 82 C.L.J. 173, A.I.R. 1948 Cal. 97, 229 I.C. 373.

See also, *Kripa Ram* v. *Kunwar Bahadur*, 54 All. 467, 1932 A.L.J. 241, 136 I.C. 809, A.I.R. 1932 All. 256 (258); *Manakchand* v. *Samsingh*, A.I.R. 1950 Raj. 4 where the distinction between Arts, 48 and 49 has been pointed out.

This Article has no application in case of a suit by a trustee against the beneficiaries to recover certain moveable property belonging to the trust for the trust. The reason is that the defendants are co-beneficiaries under the trust and the nature of their possession is the same as that of the plaintiff—*Jagodev* v. *Sibkanto*, A.I.R. 1949 Assam. 10. An action of the nature contemplated by sec. 38, Companies Act does not fall within the purview of this Article. It is governed by Art. 120—*Jawahar Mills* v. *Sha Mulchand & Co.*, (1949) 2 M.L.J. 88, 1949 M.W.N. 424, 62 M.L.W. 635, A.I.R. 1951 Mad. 572, and on appeal, *Sha Mulchand & Co.* v. *Jawahar Mills*, 1953 S.C.R. 351, 1953 S.C.J. 68, A.I.R. 1953 S.C. 98.

Article 48 provides a period of limitation, both for the recovery of the property itself, and for compensation for its wrongful taking or detention.

Specific moveable property:—'Specific moveable poperty' means property of which you may demand the delivery in *specie*—*Surat* v. *Umar*, 22 Cal. 877 (882); *Essoo* v. *Steam Ship "Savitri,"* 11 Bom. 133 (137). It means property which can be specified by the delivery of the identical subject, and *does not cover money*—*Agandh Mahto*, v. *Khajah Alijullah*, 11 C.W.N. 862 (dissenting from *Rameswar* v. *Mata Bhik*, 5 All. 341); *Lala Gobind* v. *Chairman*, 6 C.L.J. 535; *Sankunni* v. *Gobinda*, 37 Mad. 381; *Jagjivan* v. *Gulam Jilani*, 8 Bom. 17 (19). In some cases, however, money has been held to be included in 'specific moveable property'. See *Ram Lal* v. *Ghulam Husain*, 29 All. 579; *Tula* v. *Mohri*, 7 I.C. 5; *Rameswar* v. *Mata Bhik*, 5 All. 341; *British India Steam Navigation Co. Ltd.*, v. *Sandara*, (1944) 2 M.L.J. 340, A.I.R. 1945 Mad. 60. According to the Assam High Court, the words "specific moveable property" in this Article have not the same meaning as identifiable moveable property—*Union of India* v. *Muralidhar*, A.I.R. 1952 Assam 141.

G. P. Notes and title-deeds are specific moveable property—*Gopal* v. *Surendra*, 12 C.W.N. 1010; *Subbakka* v. *Moruppakkala*, 15 Mad. 157. *Crops* when standing on the land are immoveable property; but when severed from the land, they become moveable property—*Surat Lall* v. *Umar*, 22 Cal. 877 (883); *Mangun* v. *Dolhin*, 25 Cal. 692 (699) (F.B.).

Conversion:—"An act of conversion may be committed—(1) when property is wrongfully taken, (2) when it is wrongfully parted with, (3) when it is wrongfully sold in market overt, although not delivered, (4) when it is wrongfully retained, and (5) when it is wrongfully destroyed or changed in nature. Anyone who without authority takes possession of another man's goods with the intention of asserting some right or dominion over them is *prima facie* guilty of conversion"—Clark and Lindsell on Torts, 6th Edition, p. 252. And so where the defendant committed an underground trespass into the plaintiff's colliery and extracted and carried away a certain quantity

of coal, a suit by the plaintiff for the value of coal so removed is governed by this Article, as the defendant has taken possession of the coal belonging to the plaintiff with the intention of asserting some right or dominion on it; and his act therefore amounts to conversion—*Lodna Colliery Co. Ld.* v. *Bepin Behary*, 1 P.L.T. 84, 55, I.C. 113 (133, 134); approved of by the Privy Council in *Pugh* v. *Ashutosh*, 56 I.A. 93, 8 Pat. 516, A.I.R. 1929 P.C. 69, 114 I.C. 604, 33 C.W.N. 323 (328); *Adjai Coal Co. Ld.* v. *Panna Lal*, 57 Cal. 1341 (P.C) 34 C.W.N. 483 (487), A.I.R. 1930 P.C. 113, 123 I.C. 726, overruling *Panna Lal* v. *Adjai Coal Co. Ld.* 31 C.W.N. 82, A.I.R. 1927 Cal. 117, 101 I.C 62 (where Article 49 was applied and Art. 48 was held to be inappropriate). The word "dishonest" does not qualify the word "conversion." The word "dishonest misappropriation or conversion" should be read as "dishonest misappropriation or by conversion." Otherwise there is no provision in the Article for simple conversion. Moreover, there is ground for splitting up conversion into two classes, one dishonest, and the other not dishonest. This Article would apply even though the defendant converted the thing to his own use under an honest belief—*Pugh* v. *Ashutosh*, supra. Article 48 applies to all conversions, whether dishonest or not, and whether the trespass is due to mere inadvertence or to inadvertence without reasonable care—*Adjai Coal Co. Ld.* v. *Panna Lal*, supra (overruling 31 C.W.N. 82). A failure to deliver up goods on demand is not a cenversion if at the time of the demand they are no longer in the power or possession of the defendant. as for instance, when they are already destroyed or consumed or have already got into the possession of some other person. No one can convert a chattel by refusing to give it up when he no longer has it. He may be liable in trover and to pay compensation, but it is difficult to see how an action for recovery of specific property can lie against him—*Kaikhusroo Manekshah* v. *Gangadas*, A.I.R. 1936 Bom. 322, 38 Bom L.R. 712, 165 I.C. 184.

342. Limitation:—Limitation runs from the time when the plaintiff first learns in whose possession the property is. The onus is on the plaintiff to prove that he first learnt within three years of the suit that the property which he is seeking to recover was in the possession of the defendant. In other words, he has to prove that he obtained the knowledge of the defendant's possession of the property within three year's of the suit, and that is all. If he proves this, then to succeed in the plea ot limitation the defendant has to prove that the fact that the property was in his possession became known to the plaintiff more than three years prior to the suit—*Kaikhusroo Manekshah* v. *Gangadas*, A.I.R. 1936 Bom. 322, 38 Bom. L.R. 712, 165 I.C. 184; *Kalyani* v. *Borrea Coal Co.*, 49 *C.W.N.*, 810,, A.I.R. 1946 Cal. 123; *Lodna Colliery* v. *Bholanath*, 58 C.W.N. 227, A.I.R. 1954 Cal. 233; *Kanji & Co.* v. *Jatashankar*, A.I.R. 1956 Pat. 526. Where plaintiff entrusted a certain jewel to a person for sale, and the latter pledged it for his own use, a suit by the plaintiff to recover the jewel or its value from the pawnee is governed by this Article, and would be in time if brought within three years from the date on which the plaintiff knew that the jewel was in the possession of the pawnee—*Seshappier* v. *Subramania*, 38 Mad. 783, affirmed on appeal in 40 Mad. 678. Where a person claiming to be the true owner of certain moveable property which was taken possession of by the Official Assignee on the ground that it belonged to an insolvent, does not take steps to establish the claim for 3 years from the date of knowledge of the possession by the Official Assignee, his claim to the property is, even if true, barred by limitation—*Balammal* v. *Official Assignee of Madras*, (1949) 1 M.L.J. 72, A.I.R. 1949 Mad. 437. It is for the plaintiff to prove the facts which would bring the claim within time; it is for him to show that he had first had the necessary knowledge within three years prior to the suit—*Bank of Bombay* v. *Fazalbhoy*, 24 Bom.L.R. 513 (per Shah, J.), 68 I.C. 761. The principle is clear that when there have been successive conversions of the same property by different persons, each of these conversions is an in-

dependent cause of action, and the barring of one of them by the statute of limitation has no effect on the others. After all, the effect of the law of limitation in respect of injuries to moveable property is merely to destroy the plaintiff's right of action but not to divest his ownership of property. Therefore, if A converts goods belonging to B, it is no defence that formerly and more than three years before suit was brought they were converted by C also—*Kaikhusroo Manekshah* v. *Gangadas Dwarkadas*, A.I.R. 1936 Bom. 322, 38 Bom.L.R. 712, 165 I C. 184. The knowledge referred to in Art. 48 is the knowledge of the taking away of the property. A mistaken belief by the plaintiff that the property removed was not his, will not affect the running of the period of limitation unless, of course, the knowledge of the fact was kept back from him by the fraudulent conduct of the defendant—*Sirischandra Nandy* v. *Ramji Bechar Das*, A.I.R. 1936 Pat. 179, 161 I.C. 855.

343. Cases:—The brother of the defendant had appropriated to his use certain goods of the plaintiffs and after his death the defendant sold the goods and held the sale proceeds as agent for his deceased brother's widow. The plaintiffs brought a suit to recover the money. *Held* that the case did not come under Article 48, because there was no *dishonest* misappropriation or conversion by the defendant; the defendant sold the goods on account of his brother; he held the proceeds on account of his brother's widow. There was no dishonest conduct on the part of the defendent, although the plaintiffs had a right, finding the money in his hands, to make him responsible for it. The suit fell under Article 120—*Gurudas* v. *Ram Narain*, 10 Cal 860 (864) (P.C.). A 5 per cent. G. P. Note for Rs. 3,800 was deposited in Court, and was lost by the Court. Many years afterwards, it was traced and it was found that it stood in the name of one who had converted it into a 3½ per cent. G. P. Note for Rs. 4,100. Thereupon the plaintiff instituted a suit against him. The defendent pleaded that he purchased the Note in good faith from one since deceased. *Held* that the suit did not fall under this Article as there was no proof of theft or dishonest conversion—*Chandra Kali* v. *Chapman*, 32 Cal. 799 (814). This Article applies where the plaintiff is entitled to possession of the property for the recovery of which he is bringing the suit. But if a decree-holder brings a suit alleging that a claimant in the execution proceedings has misappropriated the property of the judgment-debtor which was attached by the decree-holder, the suit does not fall under this Article, because the plaintiff is a mere attaching creditor and has no right to the possession of the property, his only remedy being to put it up to sale in execution of his decree. For the same reason Art. 49 cannot apply. The suit falls under the general Article 36—*Kripa Ram* v. *Kunwar Bahadur*, 54 All. 467, 1932 A.L.J. 241, 136 I.C. 809. A.I.R. 1932 All. 256 (258).

A suit for damages for misappropriation of crops grown on plaintiff's land on the allegation that the defendants had wrongfully and forcibly cut and carried away the crops, falls under Article 48 or 49, and not under Art. 36, which is a general Article for action on torts—*Surat Lall* v. *Umar*, 22 Cal. 877 (882, 883); *Mangun* v. *Dolhin*, 25 Cal. 692 (699) (F.B.); *Jadu Nath* v. *Hari Kar*, 17 C.W.N. 308.

A suit to recover the price of materials of a house removed and misappropriated by the defendants must be brought within the period prescribed by this Article—*Tafazul* v. *Mahomed*, 52 I.C. 360 (Pat.). A suit against an innocent person to recover stolen property or its value as damages falls under this Article, and time runs from the date the plaintiff knew that the property had came into the defendent's possession —*Sohan Singh* v. *Mull Singh*, 229 *P.L.R.* 1911, 11 I.C. 446. A suit for return of a machine in the condition in which it was attached before judgment and entrusted to sureties or for damages, it being found that certain parts of the machine have been removed while in possession of the sureties, falls under this Article or Article 49—*Venugopal* v. *Gopala*, (1946) 1 M.L.J. 241, A.I.R. 1946 Mad. 453, 226 I.C. 464. Where

in pursuance of the directions of a will, the executors deposited a number of G. P. Notes in a Bank to accumulate until the minor legatee attained majority, but some time before that event, they got the G. P. Notes sold by the Bank and drew out the amounts, *held* that a suit by the legatee against the Bank for the amounts thus drawn out must be treated as one for conversion, to which Art. 48 would apply. If it is to be treated as a suit for money received by the defendant as sale-proceeds and properly payable to the plaintiff, Article 62 would apply—*Bank of Bombay* v. *Fazalbhoy*, 24 Bom. L.R. 513, 67 I.C. 761, A.I.R. 1923 Bom. 155.

48A.—To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Three years.	When the sale becomes known to the plaintiff.

This Article and the next have been added by the Indian Limitation Amendment Act I of 1929. Article 48A is the same as Article 133 (*now omitted*), which ran as follows:—

133.	To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration.	Twelve years.	The date of the purchase.

Thus, the first column of Article 48A is the same as that of Art. 133; the period of limitation is reduced from 12 years to three years and time runs *when the sale becomes known to the plaintiff*, instead of from "the date of the purchase." The reason of the amendment has been thus stated:—"We consider that the date when the plaintiff obtains knowledge of the transfer he seeks to attack is the most suitable date from which limitation should run. If limitation runs from the date of the transfer itself, it is a simple matter for a dishonest trustee and a colluding transferee to conceal the fact of the transfer until the period of limitation has expired... If this point is ceded, then there is no reason to maintain such a long period as 12 years in the case of the sale of moveable property under Article 133 (48A). We consider that in these cases a period of 3 years is quite sufficient"—*Report of the Select Committee* (Gazette of India, 1927, Part V, p. 258).

344. Article 133 (now 48A) is an abridgment in favour of the purchaser for valuable consideration of the period provided in Art. 145 in cases of deposit and pledge, and an enactment of a special period of 12 years (now 3 years), in the case of a purchaser from a trustee, when under sec. 10 there would be no limitation at all in a suit against the trustee himself—*Gangineni Kondiah* v. *Gothipati Pedda*, 33 Mad. 56 (58). This Article uses the words "bought" and "purchase" and does not therefore apply to a mortgage—*Bank of Bombay* v. *Fazalbhoy*, 24 Bom.L.R. 513, A.I.R. 1923 Bom. 155.

48B.—To set aside sale of moveable property com-	Three years.	When the sale becomes known to the plaintiff.

prised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.		

This Article has been added by the Indian Limitation Amendment Act I of 1929. The suits contemplated by this Article were not previously provided for in any Article. There are suits by persons interested in the endowment to set aside alienations of the endowed property made by the manager. In these cases the plaintiff is not entitled to possession, and cannot therefore claim to recover the property; but he may sue to have the transfer set aside and for any consequential relief which may be adapted to the circumstances of the case. For this class of cases the Legislature has provided Article 48B in respect of moveable property, and Art. 134A in respect of immoveable property—*Report of the Select Committee* (Gazette of India, 1927, Part V, p. 258).

49.—For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same.	Three years.	When the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.

345. Scope:—This Article applies to a case where the plaintiff has no right to immediate possession at the time when the cause of action pleaded by him arose and on which he succeeds. This Article would therefore apply to a suit against a defendant who has wrongly detained moveable property to which the plaintiff has reversionary right and which the defendant, in spite of a prior suit, has on a false pretext, refused to produce and hand over to a receiver when asked to do so—*Pattakumari* v. *Nirmal*, 51 C.W.N. 544, 82 C.L.J. 173, A.I.R. 1948 Cal. 97. This Article has no application to a suit under sec. 38 Companies Act. Such a suit falls under Art. 120—*Jawahar Mills* v. *Sha Mulchand & Co.*, 1949 M.W.N. 424, (1949) 2 M.L.J. 88, 62 M.L.W. 635, A.I.R. 1951 Mad. 572, and an appeal, *Sha Mulchand & Co.*, v. *Jawahar Mills*, 1953 S.C.R. 351, 1953 S.C.J. 68, A.I.R. 1953 S.C. 98.

345A. Specific moveable property:—See Notes under Art. 48. Art. 49 must be read along with Art. 48. The word "other" in Art. 49 is a significant word. Reading the two articles together, it is clear that Art. 49 would apply to a suit for recovery of specific moveable property which is other than the specific moveable property described in Art. 48; and if the property in suit falls within the description under Art. 48, it is clear it would be excluded from the operation of Art. 49, which seems to be a residuary article. In other words, specific moveable property in Art. 49 must be the property which is not lost to the owner as a result of theft, or dishonest misappropriation, or conversion—*Kaikhusroo Manekshah* v. *Gangadas Dwarkadas*, A.I.R. 1936 Bom. 322, 38 Bom.L.R. 712, 165 I.C. 184; *Harnam* v. *N. W. F. Province*, 202 I.C. 218, A.I.R. 1942 Peh. 57. Specific moveable property means property of which one can demand the delivery in specie. If a half-share in a certain moveable property is sought to be recovered on declaration of title, it is not a suit for specific moveable pro-

perty. Art. 120 governs the suit—*Swarnamoyee* v. *Probodh*, 36 C.W.N. 758 (763), 143 I.C. 402, A.I.R. 1933 Cal. 253.

Legacy:—A suit to recover specific moveable property from one who is in unlawful possession thereof, is governed by this Article, even though the property is the *subject of a legacy*. Art. 123 does not apply to such a suit—*Issur* v. *Juggut*, 9 Cal. 79.

Idols:—A suit for recovery of the Thakurs of a temple from the possession of the defendants is not governed by this Article, in as much as the Thakurs (idols) are not specific moveable property but are considered as juridical persons, specially in a suit like the present where the Thakurs are themselves made plaintiffs—*Bali Panda* v. *Jadumani* 38 Cal. 284.

Accounts books and mortgage-deeds are specific moveable properties—*Durga Devi* v. *Ram Nath*, 85 P.R. 1919, 52 I.C. 580.

346. Wrongful taking:—The word "wrongfully" appearing in this Article has not been defined in the Act and in its plain meaning, it would be synonymous with "not rightful". The element of dishonest misappropriation or conversion need not exist—*Manakchand* v. *Samsingh*, A.I.R. 1950 Raj. 4. Article 49 applies not only where the property is wrongfully taken, but also where the original possession of the defendant is lawful but it becomes unlawful by reason of certain facts, *e.g.*, where the plaintiff demands the moveable property from the defendant and the latter refuses to deliver it up—*Bhupendra* v. *Goonendra*, 32 C.W.N. 133 (138), 106 I.C. 885; *Bulakidas* v. *Radhakishan*, I.L.R. (1939) Nag. 498, 1939 N.L.J. 190, A.I.R. 1939 Nag. 177, 183 I.C. 386. Where, under the erroneous order of the Magistrate, the defendant took possession of the property, he was guilty of wrongful taking which gives the true owner a cause of action. In such a case, time runs under Art. 49 from the date when the property is wrongfully taken—*Ramasamy* v. *Muthusamy*, 30 Mad. 12. But *Quaere* whether the receipt was *wrongful*. Compare 3 C.L.J. 182, cited in Note 463 under Article 109. Where trees are wrongfully cut down and subsequently the wood so lying on the ground is wrongfully taken, the suit for compensation will be in time under this Article, if brought within three years of the wrongful taking—*Aiyappa Reddi* v. *Kuppusami*, 28 Mad. 208. The plaintiff was the owner of a house which was mortgaged to defendant. In August 1885 defendant took the key of the house from the plaintiff and sold it under a power of sale contained in the mortgage-deed. In the house there had been stored a certain quantity of timber not mortgaged, which was not returned to the plaintiff after the sale. The plaintiff brought a suit in September 1887 to recover the value of the timber, alleging that the defendant had taken it and converted it to his own use. *Held* that the suit was one for compensation for wrongfully taking specific moveable property, under this Article, and not governed by Article 36—*Passanha* v. *Madras Deposit and Benefit Society*, 11 Mad. 333.

347. Injury:—This Article applies only to suits in respect of plaintiff's property in the hands of some other person, and not to suits in respect of property in the plaintiff's own possession; and the injury to property mentioned in this Article is limited to cases of injury to property while in the custody of some person other than owner. Therefore a suit for compensation for damage done to a ship of the plaintiff (while it was in his possession) by collision with the defendant's ship on the high seas does not fall under this Article but under Article 36—*Essoo* v. *Steam Ship 'Savitri'*, 11 Bom. 133 (137).

348. "When the detainer's possession becomes unlawful":—The defendant's possession of the plaintiff's property does not become unlawful until the property is *demanded* by the latter and *refused* by the former. Mere detention is not

unlawful—*Maganlal* v. *Thakurdas*, 7 I.C. 447; *Kalicharan* v. *Ganeshi* A.I.R. 1928 Oudh 47. Where the plaintiff had made over a certain quantity of gold to the defendant to be made into ornaments, but no time was fixed, and the latter put him off from time to time until being pressed by the plaintiff he promised to make and deliver the ornaments on the 8th April, but failed to do so, *held* that a suit for recovery of the gold deposited was governed by Article 49 or 115 or 145. Under Article 49, the detainer's possession became unlawful when he wrongfully refused to apply the gold to make ornaments as he had originally agreed to do, *viz.*, from 8th April—*Gangahari* v. *Chandra*, 20 C.W.N. 232 (233), 34 I.C. 959.

Mere silence on the part of the defendant on demand of the moveable property being made does not constitute refusal to deliver up the property. Time runs when there is a definite refusal to do so—*Gopalasami* v. *Subramania*, 35 Mad. 636 (639); *Hemendra* v *Indo-Swiss Trading Co.*, A.I.R. 1955 Pat. 375. Where moveables are entrusted to any person on the condition that they will be returned on the expiry of a specified period, the mere fact that they are detained beyond that period does not render the detainer's possession unlawful. It is only when a demand is made and there is a refusal to comply with the demand that the defendant's possession becomes unlawful, and limitation runs from the date of such refusal —*Laddo Begum* v. *Jamaluddin*, 42 All. 45, 17 A.L.J. 907, 52 I.C. 382. Where the possession of a jewel by the defendant was originally permissive, the character of that possession would not be changed by the fact that he subsequently set up a claim to the jewel as his own property. His bare assertion that the jewel is his own property does not make his possession unlawful. His possession becomes unlawful only when there is a formal demand for return of the jewel and a refusal to comply with it. Under this Article, time would begin to run from the date of his formal refusal to comply with the demand—*Ma Mary* v. *Ma Hla*, 2 Rang. 555 (557), A.I.R. 1925 Rang. 146, 85 I.C. 10. The proper way of applying this Article to a suit for recovery of jewels from the daughter-in-law on her remarriage owing to disappearance of her husband for more than seven years is only to hold that it has not been shown that the retention of the jewels was unlawful at any time prior to three years before the institution of the suit—*Venkunaidu* v. *Appanna*, (1951) 1 M.L.J. 167, 1951 M.W.N. 484, A.I.R. 1951 Mad. 704. The mere non-payment of the rent of a machine taken on hire-purchase system does not amount to a wrongful taking or detaining of it; there must be some overt act of demand by the plaintiff and refusal by the purchaser; and the cause of action arises only when the machine is *demanded* back and *refused*—*Singer Manufacturing Co.* v. *Felyun*, 13 A.L.J. 81, 27 I.C. 637 (638, 639). A testator bequeathed certain specific moveable property to A, which A sold to C. B obtained a certificate under Act XXVII of 1860 and took possession of the property. The certificate was cancelled and B was ordered to hand over the property to A or his vendee C on the 19th August 1873. C instituted his suit on the 22nd March 1878. It was held that the suit fell under this Article and time began to run from 19th August 1873, the date of the Court's order, from which time B's possession became unlawful —*Issur* v. *Juggut*, 9 Cal. 79. B sold moveable and immovable properties to A, but instead of putting him in possession, sold the properties to C and put him in possession. A brought a suit for specific performance against B and C in which he obtained a decree; but as C still continued in possession of the moveable property, B brought a suit against him to recover it. *Held* that C's detainer became unlawful from the date of the decree for specific performance—*Dhondiba* v. *Rama Chandra*, 5 Bom. 554. After the redemption of a mortgage, the title deeds of the mortgaged premises remained with the mortgagee, who on demand for their return refused to give them up. A suit for recovery of the deeds was held to be governed by this

Article and time began to run from the date of demand for the deeds, after which their retention became unlawful—*Subbakka* v. *Maruppakkala*, 15 Mad. 157.

A suit for return of property which has been wrongfully attached and subsequently released from the attachment is governed by Art. 49. Such a suit is not governed by Art. 29 as it is not one for compensation for wrongful seizure. Time for such suits begins to run from the time when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful, *i.e.*, after the property was released from attachment—*Parshadilal* v. *Chandan*, A.I.R. 1935 All. 915, 1935 A.L.J. 1010, 158 I.C. 1014; *Muthuswami* v. *Dhanushkodi*, (1950) 1 M.L.J. 799, A.I.R. 1950 Mad. 734. This Article also applies where portion of attached property is removed during attachment—*Venugopal* v. *Gopalla* (1946) 1 M.L.J. 241, A.I.R. 1946 Mad. 453, 226 I.C. 464; *Krishna* v. *Sudalal*, I.L.R. (1945) Mad. 784, (1945) 1 M.L.J. 265, A.I.R. 1946 Mad. 33; *Ojha Bros.* v. *Volkart Bros.*, A.I.R. 1951 Pat. 602.

349. Deposit:—Where the transaction amounts to a deposit, the more specific Article 145 (and not the general Article 48 or 49) applies. Thus, a suit to recover moveable property deposited with the defendant for safe custody, or in the alternative for its value, is governed by Article 145 which is more specific than Article 48 or 49. Even the fact that there has been a demand for the return of the deposit and a refusal to return by the depositary, which makes the defendant's possession wrongful, does not attract the provisions of sec. 49 so as to make the suit as one "for specific moveable property or for compensation for wrongfully detaining the same"—*Narmadabai* v. *Bhavanishankar*, 26 Bom. 430 (432), 4 Bom.L.R. 72; *Gangineni Kondiah* v. *Gottipati Pedda*, 33 Mad. 56. But in an exactly similar case, where the plaintiff handed over some jewellery to the defendant for safe custody, the Allahabad High Court held that a suit for recovery of the jewellery or its value was governed by Article 49—*Laddo Begam* v. *Jamaluddin*, 42 All. 45, 17 A.L.J. 907. No reference was made in this case to Article 145 or to the Bombay and Madras cases cited above. The matter has been settled by their Lordships of the Judicial Committee in *Habibul* v. *Haq Tikam*, A.I.R. 1938 P.C. 110, 173 I.C. 612, 1938 M.W.N. 390 where it has been held that where certain promissory notes remain with defendant, having been left by the plaintiff as security or at any rate for safe custody, then on either view, not this Article but Article 145 is the relevant article applicable to a suit in respect of such notes.

Where the defendant who was entrusted with a jewel to pledge it and raise loan on it on behalf of the plaintiff, did so, but after the plaintiff repaid the loan, the defendant got back the jewel from the pledgee but did not return it to the plaintiff though demand was made for its return, it was held that as there was no agreement that the jewel should remain in deposit with the defendant after the repayment of the loan, Article 145 would not apply to a suit to recover the jewel, but Art. 49—*Gopalasami* v. *Subramania*, 35 Mad. 636 (638).

See *Administrator-General* v. *Kristo Kamini*, 31 Cal 519 cited in Note 628 under Art. 145. See also Note 630 under Art. 145 where the distinction between Arts. 145 and 49 has been pointed out.

349A. Starting point of limitation:—The starting point of limitation under Art. 49 is, when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful. The cause of action in the case is conversion. The detention of property amounts to conversion only when it is adverse to the owner or other person entitled to possession, that is to say, the defendant must have shown an intention to keep the property in fraud of the plaintiff. The usual method of proving that the detention is adverse within the meaning of this rule is to show that the

palintiff demanded the delivery of the property and that the defendant refused or neglected to comply with the demand and if a suit is brought within three years from the date of refusal it is not barred even though it is beyond three years from the date of demand—*Kuppuswami* v. *Pannalal*, (1942) 1 M.L.J. 187, A.I.R. 1942 Mad. 306, 205 I.C. 307.

350. Where Article does not apply:—This Article does not apply if the suit is covered by a more specific Article. *See Pannaji* v. *Senaji*, 53 Mad. 621, A.I.R. 1930 Mad. 635 (637). Thus, a suit for compensation for wrongful seizure of a ship under an order of Court is governed by the more specific Article 29 rather than Article 36 or 49—*Madras Steam Navigation Co. Ld.* v. *Shaliman Works Ld.*, 42 Cal. 85 (108).

This Article is inapplicable where the plaintiff has not strictly speaking a personal claim to the property, as for instance, where he claims it in a representative capacity as the shebait of a temple—*Gossami Sri Gridhariji* v. *Ramanlalji*, 17 Cal. 3 (P.C.); *Jagodeb* v. *Sibkanta*, A.I.R. 1949 Assam 10. A suit by an heir of a Mahomedan to recover a fourth share of certain specified moveable properties left by the deceased is really a suit for partition of those properties, and falls under Article 120, not under this Article—*Bashirunnisa* v. *Abdur Rahaman*, 44 All. 244 A.I.R. 1922 All. 525, 64 I.C. 974. A suit by a Mahomedan widow against the brother of her deceased husband, for a declaration of her life-interest in the estate of her husband according to local custom, is not governed by Article 49, as this Article is not applicable to a suit to establish a right to inherit the property of a deceased person; nor is it a suit for distributive share of property under Art. 123. The suit falls under Art. 120—*Mahomed Riasat* v. *Hasin Banu*, 21 Cal. 157, (163) (P.C.). A suit against a Navigation Company for compensation for non-delivery of a timber which is not in the possession of the company, is governed by Article 31, and not by this Article since the property is not in the detainer's possession—*Venkatasubba* v. *Asiatic Steam Navigation Company*, 39 Mad. 1 (F.B.). Even if Article 49 were applicable, its operation would be excluded by the provisions of Article 31, which is more specific —*Ibid*. Where in consequence of a quarrel arising between the plaintiff (a fruit seller) and the ijaradr of the market about the payment of tolls, the latter informed the police and the result was that the boat of oranges brought by the plaintiff was detained at the thana for some days, and while so detained the oranges deteriorated, and then the plaintiff brought a suit against the ijardar for compensation, *held* that Article 49 did not apply because the plaintiff did not bring this suit to recover any specific moveable property, and it was the police and not the defendants who took the oranges to the thana and detained them there. The suit falls under Article 36—*Ananda Charan* v. *Barada Kanta*, 42 C.L.J. 203, 90 I.C. 509, A.I.R. 1926 Cal. 177. Where the plaintiff handed over certain ornaments to the defendant to be used by the latter in a religious procession (Ram Lila procession) but the ornaments were stolen from the defendant, a suit to recover the ornaments does not fall under this Article, because the property was not wrongfully taken by the defendant from the plaintiff, nor was it injured; nor was it detained by the defendant, because it was stolen from his possession before he had opportunity of returning it to the plaintiff. The suit falls under Art. 115—*Chaturgun* v. *Shahzady*, 7 O.W.N. 769, 126 I.C. 682, A.I.R. 1930 Oudh 395 (396).

A suit for compensation for *wrongful attachment before judgment* falls under Article 29 and not under Article 49. The latter Article applies to a case in which moveable property is wrongfully taken or detained by the defendant (*i.e.*, by a *private person*), and not by the *Court* in execution of a legal process—*Ram Narain* v. *Umrao*

Singh, 29 All. 615 (617); see also *Narasingha* v. *Gangaraju*, 31 Mad. 431 (438). In *Manavikraman* v. *Avisilan*, 19 Mad. 80 (82) such a suit was held to fall under Article 49; the Judges remarked that since the attachment was made at the instance of the defendant, the attachment might be said to have been made by the defendant, and it was immaterial that it was effected through a process of the Court. It was further held in this case that Article 36 might also apply.

Removal of crops:—As to whether this Article governs a suit for wrongfully cutting and carrying away crops, see Notes 319 and 320 under Article 36.

50.—For the hire of animals, vehicles, boats, or household furniture.	Three years.	When the hire becomes payable.
51.—For the balance of money advanced in payment of goods to be delivered.	Three years.	When the goods ought to be delivered.

351. If there be no date specifically fixed for the delivery of the goods, evidence must be taken as to the time when the goods ought to be delivered—*Baiddonath* v. *Lalunnissa*, 7 W.R. 164.

52.—For the price of goods sold and delivered, where no fixed period of credit is agreed upon.	Three years.	The date of the delivery of the goods.

352. A suit for payment of a bill of goods supplied in retail by an ordinary trader is governed by this Article—*Shama Churn* v. *Collector*, 1 W.R. 308. A suit for price on account of goods supplied to defendant is governed by this Article when there is no allegation in the plaint of any writing signed by the defendant—*Shambhoo* v. *Firm Dindayal Deokaran*, I.L.R. (1950) Nag. 464, 1950 N.L.J. 150, A.I.R. 1950 Nag. 228. A suit to recover price of goods supplied by a tradesman on credit, for which payments were to be made on presentation of the bill, is governed by this Article, and not by Art. 85, and the period of limitation is three years from the date of delivery—*Dansford* v. *Shaw & Co.*, 88 I.C. 747, A.I.R. 1925 Pat. 806; *Sukhdeo* v. *Michæl*, I.L.R. (1939) Nag. 137, 1938 N.L.J. 157, A.I.R. 1938 Nag. 266, 178 I.C. 50. Where the plaintiff supplied goods to the defendant on various occasions, and the defendant made part payments, but these payments never showed a balance in favour of the defendant, a suit to recover the balance of the price did not fall under Article 85 but was governed by the present Article—*Lalji* v. *Ghazi Ram*, 7 O.W.N. 420, 128 I.C. 276, A.I.R. 1930 Oudh 287 (288); *Kahan* v. *Hadayat*, 42 P.L.R. 272, A.I.R. 1939 Lah. 307. The limitation will start from the date of the delivery of goods on each occasion and not from the date of the last supply—*Lakshmanan* v. *Nalla*, (1942) 2 M.L.J. 337, A.I.R. 1943 Mad. 13, 207 I.C. 133. There is, in such a case, one single cause of action for the whole amount due for the goods sold and delivered and the starting point of limitation is the date of delivery and deliveries made more than three years before the filing of the suit are barred by limitation—*Atmaram* v. *Lalji*, I.L.R. (1940) Bom. 127, 42 Bom.L.R. 227, A.I.R., 1940 Bom. 158; *Narayana* v.

Narayanan, A.I.R. 1957 Kerala 93. Where a tradesman supplied goods from time to time on credit to a customer who made payments from time to time on account, no fixed period of credit being agreed upon, the cause of action in respect of each supply must be taken to arise under this Article on the date when each item of goods was supplied. But if there be an implied contract that all the goods supplied within a certain period are to be paid for after the expiration of that period, then limitation would run from the expiry of the period of credit (Art. 53)—*Satcowree* v. *Kristo*, 11 W.R. 529. The starting point of limitation under this Article is "the date of the delivery of goods." Where there are several deliveries, each delivery gives an independant cause of action—*Gulabrai* v. *Ilahi*, I.L.R. (1945) All. 200, A.I.R. 1945 All. 185.

Where a suit is brought against the son for the price of goods sold and delivered to the deceased Hindu father, this Article would apply; but if a decree was obtained against the father, a suit against the son on the cause of action arising from the decree against the deceased father—the decree being a debt which the son is, according to Mitakshara Law, under an obligation to discharge—is governed by Article 120—*Periasami* v. *Seetharama*, 27 Mad. 243 (F.B.) A suit for recovery of the price of fruits standing in a garden and sold to the defendant is governed by this Article, the word 'goods' being wide enough to include fruits even before they have been gathered—*Wasu Ram* v. *Rahim Baksh*, 66 I.C. 120 (Lah.). Articles in tins which do not require immediate consumption are "goods" even though they are held by the proprietor of a store who has a restaurant department—*Pershad* v. *The Firm of Unica*, 1939 Rang.L R. 626, A.I.R. 1940 Rang. 17, 186 I.C. 582. Electric energy is 'moveable property' and therefore 'goods' within the meaning of this Article. So a claim for electric charge for more than three years is barred under this Article even though on account of mistake of metre reader wrong bills were issued—*Nainital Hotel Co.* v. *Municipal Board, Nainital*, I.L.R. (1946) All. 476, 1946 A.L.J. 195, A.I.R. 1946 All. 502; *Attar* v. *Municipal Committee, Amritsar*, 40 P.L.R. 143, A.I.R. 1938 Lah. 338, 180 I.C. 510. Where grain is advanced on a contract that it should be repaid in kind, it is not a case of goods being "sold" within the meaning of this Article. The word 'sold' in this Article refers to a case in which the contract is to pay for the price in *money*. A suit for the recovery of the value of the grain in kind falls under Art. 65 or 115—*Md. Din* v. *Sohan Singh*, 65 I.C. 691, A.I.R. 1922 Lah. 271. This Article does not apply to a suit based on contract by which the plaintiff firm agreed to act as commission agent for the defendant. Such a suit is not for goods sold and delivered—*Mamraj* v. *Muhammad Hasim*, A.I.R. 1941 Cal. 245, 194 I. C. 827. A suit to recover arrears of subscription of a newspaper is governed by this Article—*Hormasji* v. *Kharsetji*, 7 Bom.L.R. 190. A suit by a medical practitioner for recovery of price of medicines supplied to his patient falls under this Article—*Baroda Kant* v. *Court of Wards*, 1931 A.L.J. 949, A.I.R. 1931 All. 752 (753), 133 I.C. 537.

A suit to recover the balance of the price of a motor-car sold and delivered to the defendant falls under this Article—*Bhima Lal* v. *Rahmatullah*, 130 I.C. 574, A.I.R. 1931 Lah. 309. A suit for the price of work done and goods supplied under some contract entered into by the plaintiff with the defendants for the supply of labour and material for repairing and constructing certain buildings is governed by Article 52 so far as the price of goods is concerned, and by Article 56 in respect of the price of work done. If the plaintiff has a lien on the buildings for the money due, a suit for the enforcement of that lien is governed by Article 132—*Daulat Ram* v. *Woollen Mills*, 95 P.R. 1908. But where the claim for the price of work done and for the price of goods supplied is *inseparable* and *indivisible*, the suit is neither governed by Article 52 nor by Article 56 but is governed by the comprehensive Article

115. Thus, the defendant employed the plaintiff as a contractor to do the work of flooring in a building; the plaintiff was to supply marble and other stones required for the flooring and was also to do all the work necessary for constructing the floor, and was to be paid a certain sum of money for every square foot of the flooring done by him, which rate included both the price of materials supplied and the work done by the plaintiff. The plaintiff sued for a sum of money due to him on the basis of this contract, and the plaint made no mention of the price of the materials as distinct from the price of the work. *Held* that the claim as laid in the plaint was an indivisible one; it could not be split up into two portions; consequently it fell neither under Article 52 nor under Article 56, but was governed by Article 115, which is a general provision applying to all actions *ex contractu* not specially provided for otherwise—*Md. Ghasita* v. *Serajuddin*, 2 Lah. 376 (381, 382), 66 I.C. 490, A.I.R. 1922 Lah. 198 (F.B.). In an earlier case, viz., *Radha Kishen* v. *Basant Lal*, 103 P.R. 1913, 22 I.C. 576, it was held that a suit for the recovery of a sum of money alleged to be due for the price of work done and goods supplied was governed by Article 120, because no single Article (52 or 56) covered the entire claim; Article 56 did not cover the price of goods supplied and Article 52 did not cover the price of work done. This decision is impliedly overruled by the Full Bench case cited above.

Where the goods sold remain in the custody of the vendor as security for the unpaid price of the goods, and the vendor sues the vendee for a personal decree against him and not for enforcement of any charge on the security, the suit is governed by this Article, and not by Art. 120—*Mukat Lal* v. *Gulab Singh*, 1931 A.L.J. 363, 132 I.C. 422, A.I.R. 1931 All. 229 (231).

53.—For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit.	Three years.	When the period of credit expires.

353. Where the contract was that the plaintiff would supply wood to the defendants and further that he would indemnify the defendants for loss arising by failure on his part to supply wood, it was held that the intention of the parties having been that the price of wood was not claimable as of right on the date of its being supplied but rather when the contract was completed by the whole wood being supplied or when the contract came to an end, a suit for the price of the wood was not governed by Art. 52 but by this Article—*Pragi* v. *Maxwell*, 7 All. 284. A vendor sent to his vendee a bill for some piece-goods purchased, and at the top of the bill appeared the words "debit interest at ¾ per cent. per month after 60 days thavanai." In a suit for money due the question arose whether it was a credit sale or a cash transaction. *Held* that the word *thavanai* meant credit period, and the suit was governed by Art. 53—*K. M. P. R. N. M. Firm* v. *Somasundaram*, 48 Mad. 275, 47 M.L.J. 844, A.I.R. 1925 Mad. 161, 85 I.C. 299.

Under Art. 52 limitation runs from the *date of the delivery of the goods* whereas under Art. 53 limitation runs from the expiry of the *period of credit* even though the goods may not have been then delivered.

54.—For the price of goods sold and delivered to be paid for by a bill of ex-	Three years.	When the period of the proposed bill elapses.

change, no such bill being given.		
55.—For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon.	Three years.	The date of the sale.
56.—For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment.	Three years.	When the work is done.

354. "For Art. 54 to apply, it must be alleged that the hundis were not executed as promised"—*Northern Forest Co.* v. *Ram Singh Kabuli & Co.*, A.I.R. 1936 Lah. 328, 162 I.C. 302. A suit by a goldsmith to recover the price of his labour in making ornaments falls under Article 56—*Vishnu* v. *Gopal*, 1885 P.J. 252; *Laximinarayan* v. *Shri Ram*, I.L.R. (1938) Nag. 592, A.I.R. 1938 Nag. 286, 177 I.C. 345; so also, a suit by a printer to recover costs of printing—*Ambica* v. *Nitya Nand*, 30 Cal. 687. A suit by a Zemindar to recover sums expended by him at the defendants' request for the repair of a tank for the irrigation of lands held by them in common with him, is a suit for work done at the defendants' request, and governed by this Article —*Sunddram* v. *Sankara*, 9 Mad. 334. As regards a suit by a contractor for recovery of price of work done for constructing and repairing certain buildings *as well as for price of materials*, see Notes under Article 52. Where the plaintiff, a contractor, was engaged by the defendant to do some work for the defendant's principal who was a Ruling Prince, and the plaintiff was refused permission by Government to sue the Prince, a suit against the agent (defendant) was maintainable, and it fell under this Article—*Abdul Ali* v. *Von Goldstein*, 43 P.R. 1910, 14 P.L.R. 1909, 4 I.C. 902. A suit by a medical practitioner to recover his fees from a patient cannot be said to be a suit for price of work done, within the meaning of this Article but falls under Art. 115; and a suit to recover the price of medicines supplied to the patient falls under Article 52 —*Baroda Kant* v. *Court of Wards*, 1931 A.L.J. 949, A.I.R. 1931 All. 752 (753), 133 I.C. 537. A suit by an Advocate for his fees when there is no contract, is governed by this Article—*Sachindra* v. *B. N. Ry. Co. Ltd.*, 75 C.L.J. 7, A.I.R. 1942 Cal. 444, 201 I.C. 650.

In an action for work done, the cause of action arises when the work is completed; and the rule applies even though the work is done for a public body, and no steps have been taken to raise funds for payment—*Emery* v. *Day*, (1834) 1 Cr. M. & R. 245.

57.—For money payable for money lent.	Three years.	When the loan is made.

355. Scope:—Art. 57 is applicable to loans payable at once or what is technically called payable *on demand;* it applies to cases where *no time is fixed* for

repayment of the loans. If there is an agreement fixing a certain date for repayment, and the agreement is in *writing*, Art. 66 or 115 applies. But if the agreement is *verbal*, the case falls under Article 115. Thus, a suit to recover money lent with interest upon a verbal agreement that the loan should be repaid within one year is not governed by this Article but by Art. 115—*Rameshwar* v. *Ram Chand*, 10 Cal. 1033; *Ramasami* v. *Muthusami*, 15 Mad. 380 (381).

This Article governs a suit in which the lender transfers to the borrower a cheque which had been drawn by another person and endorsed in his favour by the payee—*Manmathan* v. *Baldeo*, 65 I.A. 132, I.L.R. (1938) All. 326, 42 C.W.N. 514, 19 Pat.L.T. 222, 67 C.L.J. 176, 40 Bom.L.R. 752, (1938) 1 M.L.J. 785, A.I.R. 1938 P.C. 66.

Where a person took a loan and a surety guaranteed payment by a letter of the same date, a suit for recovery of the money brought against the principal and surety fell under this Article; the loan became payable at once on the date of the loan, and the liability of the surety also began to run from that date—*Diyalu* v. *Nandu*, 132 I.C. 590, A.I.R. 1931 Lah. 691. A suit for recovery of money on a *bahi* account, in which the dealings between the parties were simple money transactions as between creditor and debtor, in the sense that the defendant borrowed money from the plaintiff from time to time, made payments to him occasionally and struck balance in his favour, the account not being mutual, is governed by Art. 57 and not by Art. 85—*Ram Dhan* v. *Malik Mahomed Dost*, 12 Lah. 420, 134 I.C. 513, A.I.R. 1931 Lah. 241 (243); *Milkhi Ram* v. *Rup Chand*, 32 P.L.R. 65, 131, I.C. 292, A.I.R. 1931 Lah. 233 (235). See *Abdul Aziz* v. *Niaz Ullah*, A.I.R. 1934 All. 126, 147 I.C. 295.

Where the transaction between the parties starts as a deposit, and subsequently there are several items of deposits and withdrawals in the handwriting of the depositor, the transaction is not a loan under Article 57, but one between banker and customer within the meaning of Art. 60—*Gulab Rai* v. *Sandhi*, 15 Lah. 242, 151 I.C. 712, A.I.R. 1934 Lah. 42 (43).

Where a customer of a bank draws cheques on it knowing that the funds to his credit are not sufficient to meet them but expecting the bank nevertheless to honour them, he impliedly applies to the bank for an overdraft or loan. A suit for recovery of the amounts due by the customer in such a case is governed by this Article and must be instituted within 3 years from the date on which the earliest of the various sums paid to the customer or to his orders in respect of the cheques so drawn—*Uma Shankar* v. *Bank of Behar Ltd.*, 1941 P.W.N. 638, A.I.R. 1942 Pat. 201, 197 I.C. 449; each payment made by the customer over his signature goes to extend limitation in regard to the particular overdraft which it goes to repay and which would be the earliest item outstanding on the debit side. The payment would therefore be of no avail to save limitation in respect of general balance of account. The fact that part of the floating balance is secured would not make any difference—*Basanta* v. *Choto Nagpur Banking Corporation*, 26 Pat. 231, A.I.R. 1948 Pat. 18.

356. Pledge:—A suit for money lent under Article 57 would not be less so, where the money lent is secured by a pledge; the period of limitation for such a suit would be three years from the date of the loan. Thus, in a suit by a pawnee to recover the balance due on his debt after accounting for the proceeds of the sale of the articles pledged, it was contended by the plaintiff that the time ran under this Article from the date of the sale, because it was only then ascertained that any balance was due on the original loan, but the Court held that time ran from the date of the loan. The suit was one to recover the unpaid balance of a loan, and the fact that moveable property had been pledged did not change the nature of the suit—

Sayid Ali v. *Debi Prosad*, 24 All. 251; *Yellappa* v. *Parasharamappa*, 30 Bom. 218. Where the suit on a pledge of certain moveable property is to recover the amount due by sale of the property pledged as also for a personal remedy against the defendant for recovering any balance which may remain due after such sale, the suit will be governed by Art. 57 so far as the personal remedy is concerned, and by Art. 120 so far as the remedy by sale of the pledged property is concerned—*Nim Chand* v. *Jagabandhu*, 22 Cal. 21; *Madan Mohan* v. *Kanhai Lal*, 17 All. 284; *Mahalinga* v. *Ganapathi*, 27 Mad. 528 (F.B.); *Sailendra* v. *Keshab*, 41 C.W.N. 783, A.I.R. 1937 Cal. 347. If the personal remedy is barred, a right to enforce the charge against the property will still exist—*Nim Chand* v. *Jagabandhu*, 22 Cal. 21 (dissenting from *Vitla Kamti* v. *Kalekar*, 11 Mad. 153).

A suit for recovery of money secured by pledge is really a suit for money lent and advanced, and a suit to recover the balance due after the sale of the pledged property is none the less a suit for money lent and is governed by Art. 57—*Percy Fischer* v. *Ardeshir*, A.I.R. 1935 Bom. 213, 37 Bom.L.R. 165, 156 I.C. 531.

"When the loan is made"—'the *terminus a quo* is the date on which the loan is made'—*Babu Manmohan* v. *Baldeo*, A.I.R. 1938 P.C. 66.

Thavanai accounts:—A suit for money lent on a *thavanai* account is governed by Art. 60 and not by this Article. See Note 362 under Art. 60.

58.—Like suit when the lender has given a cheque for the money.	Three years.	When the cheque is paid.

357. This Article follows the English Law. When the advance is made by cheque, it is deemed to be made when the cheque is presented at the lender's bank and *cashed*, and not when it is given; and the reason for the law is that if the loan was considered as made when the cheque was given, the lender might sue for it at once before the cheque was presented, and on presentation the cheque might be dishonoured—*Garden* v. *Bruce*, (1868) L.R. 3 C.P. 300; *Babu Manmohan* v. *Baldeo*, A.I.R. 1938 P.C. 66.

59.—For money lent under an agreement that it shall be payable on demand.	Three years.	When the loan is made.

See Notes under Art. 60.

358. Loan:—Where one person acts as managing agent of two companies, and uses money belonging to one principal for the benefit of the other principal, without the knowledge of either of them, there is no advancing of *loan* by one principal to the other, and a suit by one company to recover the money from the other does not fall under this Article. For a loan to come into existence, there must be a borrower and a lender; but here the lender and the borrower being the same person, no loan came into existence—*Jaunpur Sugar Factory* v. *Upper India Rice Mills*, A.I.R. 1927 All. 173, 98 I.C. 1010. The words "on demand" have been used in this Article in the legal sense of the term, *i.e., forthwith* and without demand—*M. Chetty* v. *Palaniappa*, 13 Bur.L.T. 21, 57 I.C. 908. According to the Law of England, when money is payable "on demand" and nothing further is said, it is payable at once and

without demand, and time under the statute of limitations begins to run at once—*Jackson* v. *Ogg*, (1859) Johns, 397. The most common instances of the application of this principle are of money lent repayable on demand or at request, and promissory-notes payable on demand. This principle has been applied under Arts. 59 and 73 to cases of money lent and bills of exchange and promissory-notes payable on demand—*Secretary of State* v. *Radhika Prosad Bapuli*, 46 Mad. 259 (288), 44 M.L.J. 685, 74 I.C. 785, A.I.R. 1923 Mad. 667.

A promise that the loan shall be payable "at any time within six years on demand" is not equivalent to "payable on demand" and this Article cannot apply—*Sanjivi* v. *Rama*, 6 Mad. 290.

60.—For money deposited under an agreement that it shall be payable on demand, including money of a customer in the hands of his banker so payable.	Three years.	When the demand is made.

The words "including money of a customer in the hands of his banker so payable" did not exist in the Act of 1877. For reason of this addition, see Note 361 below.

359. "Money":—This Article deals with deposit of *money*, which does not include a deposit of things to be returned *in specie*, because no one ever entertains the idea of the return of the identical coins (or currency notes) deposited. The word "payable" excludes such an idea. The case of deposit of goods to be returned in specie is provided for by Art. 145—*Ishur Chunder* v. *Jibun*, 16 Cal. 25 (29); *Chandiprasad* v. *Jugal*, I.L.R. (1948) Nag. 340, 1948 N.L.J. 513, A.I.R. 1948 Nag. 377. In an Allahabad case, however, Walsh J. was inclined to the view that specific coins, *e g.*, gold mohurs, entrusted to a bailee for a given purpose to be returned in specie might be treated as "money" within the meaning of this Article—*Kalyan Mal* v. *Kishen Chand*, 41 All. 643 (645), 17 A.L.J. 888, 55 I.C. 45.

360. Deposit and loan:—There is a good deal of difficulty in ascertaining whether a suit comes under Article 59 or Article 60. It is not clear what the Legislature meant by the word 'deposited' in Article 60, but there must be some difference between 'money lent' and 'money deposited'; and a plaintiff relying upon Article 60 must prove that something took place between the parties at the time the money passed which would constitute the handing over of the money 'a deposit' and not 'a loan.' It has been suggested that the difference between 'a loan' and 'a deposit' is that the borrower who takes money on deposit stands in a fiduciary relationship to the lender. That might either arise from a direct agreement, or might be implied from the circumstances in which the money came to the hands of the borrower. Ordinarily, when A hands over money to B on the understanding that it is not a gift, but has to be repaid when demanded, that would be considered in law 'a loan,' and when the plaintiff seeks to prove that the money so handed over was 'a deposit,' the onus would lie upon him to prove that there were additional circumstances which turned the 'loan' into 'a deposit.' There is no distinction in this Act between a money lent and money deposited as regards the agreement to repay; so that it is not the agreement that the money should be payable on demand that distinguishes a deposit from a loan. There must be something further proved, and it is not possible to define exactly what

that something further must be—*Chintaman* v. *Kuchubhai*, 25 Bom.L.R. 503, 73 I.C. 978, A.I.R. 1924 Bom. 28. Whether the transaction is a deposit or a loan is clearly a question of fact to be decided according to the evidence in each case—*Perundevi* v. *Nammalvar*, 18 Mad. 390 (394). It is true that the mere use of the term "deposit" cannot alter the substance of the transaction, but as the dividing line between a loan and a deposit is so fine and as the difference must to a large extent depend upon the intention of the parties, the fact that the parties agree to regard their act as a deposit is of importance—*Kashinath* v. *N. A. C. G. & Co.*, I.L.R. (1950) Nag. 562, A.I.R. 1951 Nag. 255. If there is any doubt as to whether a transaction is a deposit or a loan, the presumption is that it is a deposit and not a loan—*Murugiah* v. *Pakkiria*, A.I.R. 1928 Mad. 499, 107 I.C. 290. The distinction between a loan and a deposit is that in the case of a loan it is ordinarily the duty of the debtor to seek out the creditor and to repay the money according to the agreement. In the case of a deposit it is the duty of the depositor to go for the money to the banker or the depositee and to make a demand for it. Article 60 applies to a transaction of deposit on the stipulation that it shall carry interest at a specified rate and shall be payable to the depositors on demand and with a further stipulation that a demand shall not be made within three years. The agreement spoken of in Article 60 need not be expressed; it may be implied—*Gurcharan Das* v. *Ram Rakna Mall*, A.I.R. 1937 Lah. 81. The test to determine whether a particular transaction is one of loan or one of deposit is to ascertain whether the money paid or deposited was in the nature of an advance of loan so as to create the relationship of creditor or debtor between the parties or was merely a deposit without bringing into existence such relationship—*Gulzarilal* v. *Manzoor*, A.I.R. 1939 All. 378, 184 I.C. 559. The most obvious distinction is that a deposit not for a fixed period, does not impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor will therefore be a normal condition of the obligation of the depositeee to pay—*Chandrabhagabai* v. *Tiku*, I.L.R. (1944) Nag. 462, 1944 N.L.J. 83, A.I.R. 1944 Nag. 101. The Privy Council has recently held that in order to determine whether a bailment of a certain sum of money is a deposit for safe custody or a loan, the test to be applied is whether the bailee is to keep the monies till the bailor asks for it or whether there is an obligation on his part to seek out the bailor and repay him—*Suleman* v. *Haji Abdulla*, I.L.R. (1940) Kar. (P.C.) 277, 44 C.W.N. 1041, 72 C.L.J. 435, 1940 A.L.J. 612, 42 Bom.L.R. 971, 1940 M.W.N. 1000, 1940 P.W.N. 715, A.I.R. 1940 P.C. 132, 189 I.C. 444 (P.C.). See also *Jagannath* v. *Ram Dularey* I.L.R. (1956) 1 All. 156, A.I.R. 1956 All. 63; *Nawaneetdas* v. *Gordhandas*, A.I.R. 1955 M.B. 113.

In *Balabux* v. *Inder Kumar*, A.I.R. 1936 Pat. 541, 15 Pat. 709, 165 I.C. 593 Rowland, J., in delivering the judgment of the Court remarked: "In the absence of a legal definition I think we may say, following the Calcutta and Madras High Courts, that regard will be had to the popular meaning attached to the expression "deposited" rather than to the technical meaning which the word "deposit" has for certain legal purposes; that is to say, we ought to see whether what happened between the parties was of the nature of that sort of current account which a customer keeps with his banker."

A deposit is a loan and something more, *i.e.*, the depositee stands in a fiduciary relation to the depositor; therefore where the plaintiff claimed to recover from the defendant, who was his grand-father, a certain sum which was the amount standing to his credit in the defendant's books, and it was found that these sums were presents which had been made to him on his birthday and from time to time paid over to the defendant by the plaintiff's mother (defendant's daughter) and that these sums were

carried over from year to year in the defendant's books, the interest being added each year; it was held that the defendant stood in a fiduciary position to the plaintiff, and therefore, there was a *deposit* within the meaning of this Article and not a loan, and limitation did not commence to run until demand—*Dorabji* v. *Mancherji*, 19 Bom. 352, affirmed on appeal in *Mancherji* v. *Dorabji*, 19 Bom. 775. Following those two cases it has been held in *Kanhayalal* v. *Hiralal*, 48 Bom.L.R. 795, A.I.R. 1947 Bom. 205 that where money is deposited in confidence the transaction is a deposit made in trust and the depositee stands in a fiduciary relation to the depositor and is liable to render an account to the depositor. But a mere deposit of money does not necessarily create fiduciary relation. That is to be determined from the circumstances of each case. Similarly, where the grand-father of one P intended to make a gift to her of Rs. 1,000 and in fact made the gift and asked the defendant who was a relation of his to hold the money for her and to give it to her when she attained her majority, or when she might demand it, with interest at a certain rate, it was held that the transaction was clearly in the nature of a deposit of money in the hands of the defendant, and this Article applied—*Narayanan* v. *Vellayappa*, 1916 M.W.N. 206, 34 I.C. 347. Where one M entrusted his nephew S, a rich money-lender, with some money for investment, and the latter accordingly first deposited the amount with a third party, but subsequently withdrew it and invested it in his own firm, there being no evidence as to the exact terms on which the money was handed over, *held* that the presumption was that the money was deposited on terms that it should be payable on demand and the suit for its recovery fell under this Article—*Ramanathan* v. *Subramanya*, 28 M.L.J. 372, 28 I C. 688. The plaintiff from time to time kept money with the defendants for safe custody. The defendants were at liberty to employ the money in their own business and in case they did so they were to pay a certain interest on the money so employed. *Held* that the relation between the parties was not that of lender and borrower, as the defendants did not take the money for their own benefit and did not agree to pay interest for it themselves. The transaction was in the nature of a deposit under Article 60—*Jogendra* v. *Dinkoo Ram*, 25 C.W.N. 981, A I.R. 1921 Cal. 644, 66 I.C. 752. Where the plaintiff bailed 400 gold mohurs with the defendant for specific purposes, and on demand being made, the delivery was refused, it was held that the suit for the return of those mohurs or for their value was a suit for 'money deposited under an agreement that it should be payable on demand' and that this Article governed the case—*Kalyan Mal* v. *Kishen Chand*, 41 All. 643, 17 A.L.J. 888, 55 I.C. 46.

Money belonging to one can be said to be in deposit only with another person or authority. It can never be a "deposit" in the hands of the very person to whom the money belongs—*Joseph* v. *Official Assignee*, A.I.R. 1956 Mad. 283 (F.B.))

Deposit does not imply trust:—The word 'deposit' cannot have been used to mean *'trust,'* i.e., the word cannot point to cases in which money is lodged with another under an express trust or under circumstances from which a trust may be implied; because, in the first place, it would be giving a wholly new meaning to the word for which there is no sanction in popular usage or in the ordinary terminology of the law, and in the second place, to apply Art. 60 to express trusts might lead to great confusion and might curtail very seriously the beneficial effects of section 10—*Ishur Chunder* v. *Jibun*, 16 Cal. 25 (31), dissenting from the dictum of White, J. in *Ram Sukh* v. *Brohmomoyi*, 6 C.L R. 470. Deposit does not necessarily involve the creation of trust—*Chandrabhagabai* v. *Tiku*, I.L.R. (1944) Nag. 462, 1944 N.L.J. 83, A.I R. 1944 Nag. 101. Where *stridhana* moneys belonging to a Natukottai Chetti woman were converted into a hundi for that amount and invested with a firm of Natukottai Chettis in the name of her husband, *held* that the transaction amounted to

a deposit under this Article and not to a trust under section 10—*Subbiah* v. *Visalakshi*, 63 M.L.J. 232, 139 I.C. 164, A.I.R. 1932 Mad. 685 (686).

361. Banker and customer:—There was a conflict of opinion as to whether the relationship between a banker and a customer was that of depositee and depositor under Article 60 or of borrower and lender under Article 59. In *Ishur Chunder* v. *Jibun*, 16 Cal. 25 (29) and *Perundevitayar* v. *Nammalvar*, 18 Mad. 390, it was held that the transaction was in the nature of a deposit; but in *Ichha* v. *Natha*, 13 Bom. 338, *Dharam* v. *Ganga*, 29 All. 773 and *Chandu* v. *Chanda*, 95 P.R. 1885 the relationship was held to be that of borrower and lender. This conflict has been set at rest by the addition of the words "including ....payable" in Article 60; so that a banker is now regarded as a depositee—*Juggi Lal* v. *Kishen Lal*, 37 All. 292.

The word 'banker' in this Article does not necessarily mean a *professional banker*. It is not necessary to prove that the defendants were carrying on business only as bankers. A man might become a banker or place himself in the position of a banker with regard to a particular customer—*Chandiprasad* v. *Jugal*, I.L.R. (1948) Nag. 340, 1948 N.L.J. 513, A.I.R. 1948 Nag. 377; and if the dealings between the lender and the borrower are such that the Court is satisfied that it could be said that the borrower is in the position of a banker to the lender, then the money so lent could be considered as a deposit. Where the evidence shows that the plaintiff was lending money to the defendants at a low rate of interest, and the defendants were lending out that money and other money deposited in a similar fashion at a higher rate, *held* that it was exactly in the nature of a banker's business—*Bhimanna* v. *Venichand*, 28 Bom.L.R. 73, 93 I.C. 215, A.I.R. 1926 Bom. 168; *Motigavri* v. *Naranji*, 29 Bom L.R. 423, 102 I.C. 408, A.I.R. 1927 Bom. 362.

Money left in the hands of a trader who is not a banker, under circumstances such as would make it the money of a customer if the depositee were a banker, will be considered as a deposit and a suit to recover money so deposited will fall under this Article—*Subramanian* v. *Kadiresan*, 39 Mad. 1081 (1084), 30 M.L.J. 245, 32 I.C. 965. Really there is no distinction between a deposit and a loan, because they are both moneys lent by the customer to the banker, but it is necessary, for the purpose of considering whether Article 60 applies, to see whether the relationship of customer and banker arose between the parties. Where the books of the firm began in plaintiff's favour with a balance, and the account was made up every year and interest added to it, and the balance carried forward to the next year, and it also appeared that payments were from time to time made and withdrawn and interest allowed on the said amounts and there was no period fixed for repayment of the moneys, *held* that the transaction was not a loan but a deposit, being moneys of a customer in the hands of a banker payable on demand—*Hirabhai* v. *Dhanjibhai*, 29 Bom.L.R. 427, A.I.R. 1927 Bom. 433, 102 I.C. 145.

The word 'deposit' in this Article covers all payments of the customer's moneys made to the banker which make up the credit balance in favour of a customer in the banker's hands—*Motigavri* v. *Naranji*, 29 Bom.L.R. 423, A.I.R. 1927 Bom. 362, 102 I.C. 408; *Kantichandra, Official Receiver* v. *Badri Das*, A.I.R. 1936 Lar. 718, 17 Lah. 481, 165 I.C. 699.

An overdraft in the hands of a banker is a loan and not money deposited with the banker, and Article 59 would apply to such overdraft and not Art. 60—*Motigavri* v. *Naranji*, supra. So also, Article 60 would not apply to a banker suing his customer on an overdraft—*Bengal National Bank* v. *Jatindra*, 56 Cal. 556, 33 C.W.N. 412 (417).

Where money is deposited by a customer with a banker, the death of the banker

does not change the character of the sum. It cannot be said that the liability of the heirs of the banker is in any way different from that which existed between the original debtor and the depositor. The money does not become a loan in the hands of the banker's heirs, so as to make Article 59 applicable—*Nripendra* v. *Arun*, A.I.R. 1940 Pat. 129, 185 I.C. 339.

Where on the annulment of adjudication of a banker with whom money was deposited by a creditor, the property is handed over to the banker, the property so far as regards the creditor's claim is his deposit and that deposit cannot lose its character as such—*Daw Hrit* v. *Anamalai*, 1938 Rang.L.R. 468, A.I.R. 1938 Rang. 335, 179 I.C. 428.

The character of a deposit with a banker is not altered by the fact that the person in whose name the money is deposited agrees in writing with another person that a part of it should belong to that other from the date of the agreement. The money still remains as a deposit, and suit to recover it by the respective parties is governed by this Article—*Ramaswami* v. *Maikkam*, (1938) 1 M.L.J. 56, A.I.R. 1938 Mad. 236, 1937 M.W.N. 1249, 176 I.C. 236.

In banking transactions the following rules are now settled: (1) the obligation of a bank to pay the cheques of a customer rests primarily on the branch at which he keeps his account and the bank can rightly refuse to cash a cheque at any other branch; (2) a customer must make a demand for payment at the branch where his account is kept before he has a cause of action against the bank. The rule is the same whether the account is a current account or whether it is a case of deposit—*Delhi Cloth & General Mills Co.* v. *Harnam Singh*, (1955) I.S.C.R. 402, (1955) S.C.J. 645, A.I.R. 1955 S.C. 590.

362. Thavanai account:—The caustom of *thavanai* transaction among Natukottai Chetties is that the deposit is made for a fixed and certain period of two months at the rate of interest which is fixed weekly by members of the Chetty community, the depositor cannot demand repayment before the end of two months for which he has deposited the money. If the depositor does not demand it at the end of the term, and the depositee does not elect to repay it then, the deposit, is taken to be extended for another period of two months, the rate of interest to be fixed by the weekly meeting of the community, and so on until the money is repaid.

A suit for money due under a *thavanai* transaction is governed by Art. 60 or 115 (and not Art. 57). It is not clear whether the money deposited on a *thavanai* account is repayable at once upon demand, or is repayable only after the expiration of the current *thavanai* period when the demand is made. In the former case, Art. 60 would apply, and time would begin to run from the date of demand; and in the latter, time runs under Art. 115 from the expiry of the current *thavanai* period when the demand is made—*Muthia* v. *Ramanathan*, 1918 M.W.N. 242, 43 I.C. 972; *Vellayappa* v. *Unnamalai*, 1917 M.W.N. 858, 42 I.C. 573; *Annamalai* v. *Annamalai*, 10 L.W. 67, 52 I.C. 456. In a Burma case, it has been held that money deposited on a *thavanai* account is not repayable until the end of the period of deposit when the demand is made, and a suit to recover money deposited on a *thavanai* account is governed by Article 60, and must be brought within three years from the time when the demand is made—*M. Chetty* v. *Palaniappa*, 13 Bur. L.T. 21, 57 I.C. 908. In *Chellappa* v. *Subramanian*, 1918 M.W.N. 564, 47 I C. 948, it has been held that the suit is governed by Article 60 and no other, because the money deposited on the understanding that it is to be paid on demand after the expiry of a fixed period does not cease to be a deposit payable on demand within the meaning of Art. 60.

It is clear that Art. 57 cannot apply, because under that Article time runs from the date of the loan, whereas in *thavanai* accounts time runs, *ex hypothesi*, from the expiry of the *thavanai* period; besides the transaction is more in the nature of a deposit than a loan, and the Notukottai Chetties are 'bankers' within the meaning of Art. 60—*Vellapappa* v. *Unnamalai*, 1917 M.W.N. 858, 42 I.C. 573.

In case of deposit on *thavanai* where the agreement is that interest is not to be paid until demand but should be added to the principal, the whole amount being treated as a fresh deposit at the end of each *thavanai*, *held* that the proper Article applicable to a suit for recovery of the principal and interest is Art. 60 and not that the claim for interest is governed by Art. 63—*Narayanan* v. *Subbiah*, 43 Mad. 629, 58 I.C.639.

363. "Payable on demand":—It is not sufficient for the application of this Article that there should be a deposit; but it is also necessary to show that the deposit was under an agreement—*Ammalu* v. *Narayanan*, 51 Mad. 549. A.I.R. 1928 Mad. 509 (511), 111 I.C. 210. Advance money deposited by the vendee with the vendor under a contract of sale is not money payable on demand, but is repayable to the vendee in the event of the vendor failing to perform his part of the contract. To a suit to recover the money Article 60 does not apply but Article 97—*Galstaun* v. *Sahebzadi Mamoodi*, 56 Cal. 455, 33 C.W.N. 115 (116), A.I.R. 1929 Cal. 216, 117 I.C. 700. In Article 59, the term 'on demand' is used in its legal sense, *i.e.*, forthwith and without demand; but Article 60 applies to cases of deposit of money repayable 'on demand' in the popular sense of the term, *i.e.*, after actual demand is made—*M. Chetty* v. *Palaniappa Chetty*, 13 Bur.L.T. 21, 57 I.C. 908; *Jagannath* v. *Ram Dularey*, I.L.R. (1956) 1 All. 156, A.I.R. 1956 All. 63. The demand must be a legal demand. It must be made by a person capable of giving a valid discharge in the event of payment being made. If the deposit is payable to more persons than one it equally follows that the demand must be made by them all or at least by one of them duly authorised by others and in a position to give a valid discharge on behalf of himself and the others. The demand must be made directly on the party with whom the deposit lies in his capacity as depositee—*Gopal* v. *Metharam*, I.L.R. (1939) Kar. 602, A.I.R. 1939 Sind. 173, 182 I.C. 718. Therefore a claim to deposit not addressed to the depositee but put forward in a written statement in a suit in which both the claimant and the depositee are co-defendants is not a demand of the nature contemplated in this Article—*Gopaldas* v. *Lakamal*, supra. So also, proof of debt and claim made in insolvency is not a demand within the meaning of this Article—*Daw Hnit* v. *Anamalai*, 1938 Rang. L.R. 468, A.I.R. 1938 Rang. 335, 179 I.C. 428. The demand must be for repayment of the whole amount of the deposit due, and not a demand for partial payment— *Gopaldas* v. *Lokamal*, supra; *Daw Hnit* v. *Anamalai*, supra; *Subbiah* v. *Visalakshi*, 63 *M.L.J.* 232, 139 I.C. 164, A.I.R. 1932 Mad. 685; *Ramaswami* v. *Jeevarathnammal*, A.I.R. 1957 Mad. 106; (1956) 2 M.L.J. 508. The necessity for a demand may, however, be got rid of by special contract or waiver. The repudiation by the depositee of the depositor's right to be paid any particular sum will be a waiver of any demand in respect of such sum—*Nripendra* v. *Arun*. A.I.R. 1940 Pat. 129, 185 I.C. 339.

Whether a transaction is a transaction of loan or deposit does not depend merely on the terms of the document but has got to be judged from the intention of the parties and all the circumstances of the case.

Even though the transaction is a transaction of deposit the deposit can be coupled with an agreement that it will be payable on demand. Such an agreement can be express or implied and if an express agreement in that behalf is recorded in the

document the transaction of deposit cannot be thereby converted into a transaction of loan and the words "we shall pay the said sum" cannot convert the document into a promissory note. The promise to pay will be involved in a promissory note as well as in a deposit within the meaning of Article 60 and the court will have regard to the intention of the parties and the circumstances of the case in order to arrive at the conclusion whether the document is a promissory note—*Annamalai* v. *Veerappa*, A.I.R. 1956 S.C. 12.

Money payable under a *fixed deposit* in a Bank is not money payable on *demand*; it is money payable by the Bank at a specified time namely, upon the expiry of the fixed period of deposit—*Bank of Upper India* v. *Arif Husain*, 1930 A.L.J. 1157, 128 I.C. 772, A I.R. 1931 All 59 (62); and consequently not governed by this Article—*Kashinath* v. *N. A. C. G. & P. Co.*, I.L.R. (1950) Nag. 562, A.I.R. 1951 Nag. 255.

Article 60 not only applies to deposits made by a customer with a banker where the money is payable on demand from the beginning, but also applies where the money is payable on demand after the termination of a fixed period—*Murugappa Chetty* v. *Ramanathan Chetty*, A.I.R. 1935 Mad. 734, 157 I.C. 274. 1935 M.W.N. 559, 41 L.W. 536; *Nokhlal* v. *Mojiban*, 20 Pat. L.T. 84, 1939 P.W.N. 344, A.I.R 1939 Pat. 261, 182 I.C. 831.

It is not necessary that the agreement to pay the amount due on demand must be express; this Article will apply even if the agreement is to be implied from the course of dealings between the parties or other circumstances of the case—*Gulab Rai* v. *Sandhi*, 15 Lah. 242, 151 I.C. 712, A.I.R. 1914 Lah. 42 (43); *Kantichandra, Official Receiver v. Badri Das*, A.I.R. 1936 Lah. 718, 17 Lah. 481, 165 I.C. 699; *Ram Rakha Mal* v. *Harnarain*, A.I.R. 1936 Lah. 587, 28 P.L.R. 506, 164 I.C. 50; *Ramanna* v. *Abdul*, A.I.R. 1939 Rang. 42, 180 I.C. 300.

The starting point of limitation is the date when the demand is made. Such a demand must be an unqualified demand for the whole sum due. Where the person demanding stated that he was in need of money and asked for the payment of the whole if it suited the convenience of the depositees, but in any case he asked them to send such money as they might be able to collect, it was held that a qualified demand like this would not cause time to run for the whole amount due—*Subbiah* v. *Visalakshi*, 63 M.L.J. 232, 139 I.C. 164, A.I.R. 1932 Mad. 685 (687). *See* also *Shamrao* v. *Saraswatibai*, A.I.R. 1954 Nag. 38 and *Daw* v. *Annamalai*, A I.R. 1938 Rang. 335.

"*So payable*":—The words "so payable" mean payable on demand—*I. S. Seema* v. *R. Banerjee*, A.I.R. 1936 Rang. 338.

61.—For money payable to the plaintiff for money paid for the defendant.	Three years.	When the money is paid.

The suits contemplated by this section are suits covered by sec. 69, Contract Act.

364. Contribution suits:—A contribution suit brought against the co-parceners by the managing member of a family who was compelled to pay the whole family-debt is governed by this Article—*Tirupatiraju* v. *Rajagopala*, 8 M.L.J. 271. Where a loan is raised by one of the joint owners of an under-tenure to pay off certain decrees for rent and revenue in arrears to save the estate from sale, a suit by him for contribution against the other owners falls within this Article—*Sukhamoni* v. *Ishan*, 25 Cal. 844 (851) (P.C.). This Article applies where the plaintiff pays money which is payable by both the plaintiff and the defendant in satisfaction of a liability

which arose before the payment (e.g., liability to pay rent, etc., but where the plaintiff filled up a tank and settled tenants on the filled-up ground, and the defendant derived benefit by way of receiving rents from the tenants, whereupon the plaintiff sued for contribution, it was held the plaintiff's act of filling up the tank was not done in satisfaction of any previous liability, but the plaintiff's right to contribution arose by reason of the defendant deriving benefit from the plaintiffs act, (sec. 70, Contract Act), and the suit did not fall under this Article but under Art. 120—*Upendra Krishna* v. *Naba Kishore*, 25 C.W.N. 813 (815); *Radheyshiam* v. *Md. Nasir*, A.I.R. 1937 Oudh 394; distinguishing *Sukhamoni* v. *Ishan*, 25 Cal. 844 (P.C.). A suit by the plaintiff to recover the money which he has paid in excess of his own moiety, for the expenses of certain temple held jointly by him and the defendant, which excess the defendant ought to have paid, is governed by this Article; and the fact that it may be necessary to examine certain accounts, cannot by itself render the suit one for account—*Raman Lalji* v. *Gopal Lalji*, 19 All. 244. Under an award, the plaintiff was to clear a canal common to himself and the defendant, and to recover a certain share of the costs from the defendant. Plaintiff cleared the canal and brought the present suit to recover from the defendant his share of the sums expended in such clearing. *Held* that the suit fell under this Article—*Tulsidas* v. *Wardero*, 60 I.C. 971, 14 S.L.R. 219. A suit for contribution by a partner of a firm who has paid the whole or more than his share of the amount due from all the partners falls under this Article—*Walaiti Ram* v. *Ram Kishen* 5 Lah.L.J. 210, 72 I.C. 385, A.I.R. 1924 Lah. 112, *Kunju Naina* v. *Eapen Chacko*, A.I R. 1954 T.C. 499. A suit by a quondam receiver to recover the amount spent by him in instituting a suit on behalf of the estate is governed by Art. 61 and not by Art. 83 or 120, Limitation Act. The expenses incurred by the receiver of an estate in instituting a suit to recover money due to the estate are incurred by him on behalf of and for the person who owns the estate and they are money payable to the plaintiff for money paid for the defendant within the meaning of Art. 61—*Cheerath Veetil* v. *Narayan Ayyar*, A.I.R. 1953 Mad. 594, 69 M. L.J. 539, 42 L. W. 680, 1935 M.W.N. 598, 157 I.C. 746-

The plaintiff and the defendant, who jointly owned a well, entered into a registered agreement to the effect that the necessary repairs were to be made by both the owners. In 1911, the plaintiff alone repaired the well at his own cost, and in 1916 brought a suit for contribution. *Held* that the suit was barred under this Article; it was not covered by Article 116, because although the original indebtedness arose out of the *registered* contract, yet the claim upon which the action is based rests not upon the registered contract but upon the promise which the law implies on the part of the co-owners to share equally the expenses of the repairs—*Suraj Prasad* v *Karamali*, 44 Bom. 591 (594), 57 I.C. 532.

A suit for contribution in respect of half share of the amount spent for stamps for a sale certificate issued in respect of properties jointly purchased is not governed by this Article but by Art. 130—*Meyappa* v. *Ramaswami*, (1940) 2 M.L.J. 494, 1940 M.W.N. 982.

This Article applies only to a "suit" for recovery of money payable, but an application by a past receiver for payment of such sums as have been allowed to him on passing of accounts is not a suit and is therefore not hit by this special limitation —*Ali Ismail* v. *Momin Bibi*, 92 C.L.J. 287, A.I.R. 1954 Cal. 386.

Charge:—As to whether the plaintiff gets a charge on the property of the defendant for the payment made on his behalf, compare the cases cited in Note 443 under Art. 99. In a Madras case it has been held that the plaintiff who satisfies a money decree which was hanging over the head of the defendant, does not thereby

acquire any charge on the defendant's estate, even though the money decree might be realised in execution by sale of the immoveable properties of the defendant —*Muthuswami* v. *Ponnayya*, 51 Mad. 815, A.I.R. 1928 Mad. 820 (822), 55 M.L.J. 436, 110 I.C. 613.

365. Other suits:—Where the contract of agency is contained in a *registered* deed, but the contract does not contain any promise on the part of the principal to indemnify the agent for advances made by him on account of his principal, a suit by the agent for recovery of money paid by him for the principal in meeting the expenses of the principal's litigation is not governed by Article 116, because the principal's obligation to indemnify the agent cannot be treated as part of the contract in writing registered. The right of suit is conferred by section 70 of the Contract Act, and the suit is governed by Art. 61. This Article is not confined to cases where the defendant is under a legal liability to make a payment, but cases falling under sec 70, Contract Act are covered by the language of this Article—*Kandasami* v. *Avayambal*, 34 Mad. 167 (170, 172). A suit to recover revenue paid by the plaintiff while he was in possession of immoveable property under an order of Court but of which he was subsequently dispossessed by reason of the order being reversed, falls under this Article and not under Article 97, and time runs from the date of the last payment —*Alayar* v. *Bibi Kunwar*, 42 All. 61, 17 A.L.J. 1025, 52 I.C. 632.

Where the mortgagor leaves a specified portion of the consideration money with the mortgagee to pay off certain creditors, and the mortgagee fails to make such payments, in consequence of which the mortgagor, to save his property, makes the payment himself, a suit by him to recover the money so paid from the mortgagee falls under this Article and time runs from the date of actual payment and not from the date of the mortgage—*Sarju Misra* v. *Ghulam Hussain*, 63 I.C. 87 (89) (All.). Art. 116 may also apply. See 19 A.L.J. 81 cited in Note 485 under Art. 116. Where a prior mortgagee sues upon his mortgage impleading the puisne mortgagee and obtains a decree for sale, and the puisne mortgagee pays off and discharges the decree, he thereby acquires on the principle of section 74 (now 92) of the Transfer of Property Act a *charge* upon the property which he can enforce within 12 years (Art. 132). But he is also entitled under the provisions of sec. 69 of the Contract Act to be reimbursed the money by the mortgagor, and can sue to recover it from the mortgagor *personally*, and such a suit must be brought within three years of the date of his payment, under this Article—*Shib Lal* v. *Munni Lal*, 44 All. 67, A.I.R. 1922 All. 153. The right of a person who becomes subrogated to the rights of a mortgagee by redeeming the mortgage is the same as that of the mortgagee. When the said right is considered as merely a right to re-imbursement of the money, this Article applies, and a suit must be brought within three years from the date when the money is paid—*Perumal* v. *Suppiah*, (1945) 1 M.L.J. 341, A.I.R. 1945 Mad. 500, 1945 M.W.N. 319. Where a property was mortgaged to two persons, and upon a suit being brought and a decree obtained by the first mortgagee, the 2nd mortgagee paid off the decree, *held* that the second mortgagee's claim to recover the amount, when viewed as a claim for re-imbursement, falls under this Article—*Kotappa* v. *Raghavayya*, 50 Mad. 626, 102 I.C. 316, A.I.R. 1927 Mad. 631 (following *Sibanand* v. *Jagamohan*, 1 Pat. 780, at p. 788, A.I.R. 1922 Pat. 409, 68 I.C. 707); *Shafiqullah* v. *Samiullah*, 52 All. 139, 1930 A.L.J. 57, A.I.R. 1929 All. 934 (947).

This Article has no application to a suit by a partner against the sub-partner for contribution of the loss sustained by the plaintiff, as a partner paying his share of the firm's loss could not be deemed to be paying it for or on behalf of his sub-partner but should be taken to have made the payment on his own behalf. The fact

that he could recover a proportion of what he had paid from the sub-partner is no reason for holding that he had paid it on the latter's behalf—*Seenayya* v. *Ramalingayya*, 57 Mad. 347, 148 I.C. 204, 65 I.C. 789, A.I.R. 1934 Mad. 12.

A suit for re-imbursement by a purchaser, whose purchase has been set aside as a sham transaction, of the sum of money which he had paid for the redemption of an undisclosed mortgage on the property, is governed by this Article—*Raghunath* v. *Lahanu*, 32 Bom.L R. 1376, 128 I.C. 907, A.I.R. 1931 Bom. 39.

A suit to recover money paid twice over owing to another's action falls under this Article—*Jiwan* v. *Radha*, 18 Lah. 623, 40 P.L.R. 300, A.I.R. 1938 Lah. 99. Thus where a person borrows from two persons jointly and makes payment to one of them and a suit is brought against him by the creditors jointly and a decree is passed, a suit to recover the amount paid twice on account of the action of one of the creditors is governed by this Article—*Jiwan* v. *Radha*, supra.

366. Involuntary payment:—It is immaterial whether the party seeking contribution made the payment *voluntarily* or *involuntarily*, *i.e.*, whether he made the payment of his own accord and averted any coercive process, or whether the amount was realised by seizure and sale of his property under legal process—*per* Bhashyam Aiyanger, J. in *Rajah of Vizianagram* v. *Raja Setrucherla*, 26 Mad. 686 (693) (F.B.). The word 'paid' in Articles 61 and 99, includes payments made or derived out of the sale-proceeds or income of the property of the person seeking contribution, just as under sec. 20 the receipt by a mortgagee of the produce of land mortgaged to him is a payment made to him by the debtor for the purposes of that section—*Ibid* (at p. 694). This is also the view of the Calcutta High Court in *Gotinath* v. *Chandra Nath*, 26 C W.N. 340, A.I.R. 1921 Cal. 814. But in an earlier Calcutta case it was held that where money was realised by coercive process, *i.e.*, by sale of the plaintiff's property, a suit for contribution fell under Art. 120—*Kumar Nath* v. *Nobo Kumar*, 26 Cal. 241 (244).

367. Starting point of limitation:—The cause of action for a suit under this Article arises when the money is *actually paid*, *i.e.*, when the plaintiff is actually out of pocket—*Torab Ali* v. *Nilrutton*, 13 Cal. 155. See *Jiwan Singh* v. *Radha Kishan*, A.I.R. 1936 Lah. 747. The expression "when the money is paid" means actual payment and not merely notional payment which a renewal implies—*Achutanand* v. *Chandrabhai*, I.L R. (1945) All. 871, 1945 A.L.J. 488, A.I.R. 1946 All. 142. Any suit for contribution implies a detriment to the plaintiff and a benefit to the defendant. The Legislature in deciding arbitrarily the chosen point from which limitation should begin to run in such suits, chose the most easily determined point, namely, the date upon which the plaintiff suffered detriment by making the payment. If in the circumstances of the case there is interval of time between the date on which the plaintiff makes the payment and the date on which the defendant receives the benefit, the wording of the statute makes it clear that it is the former date which is the governing factor for purposes of limitation and not the latter—*Meghavarnam* v. *Md. Mohideen*, A.I.R. 1936 Mad. 78. Thus, where money which was deposited with the plaintiff by T in the name of and to the credit of one A was withdrawn by T in May 1873, and the plaintiff was subsequently sued by A and had to pay the decretal money into Court in January 1883, *held* that the period of limitation for a suit by the plaintiff against T and A to recover the sum so paid into Court, began to run from the date of such payment, *i.e.*, January 1883, and not when the money was withdrawn from him by the depositor (May 1873)—*Ibid*. Where two persons being under a joint liability to pay a sum of money to a third, both made payments, but one of them paid more than what was legally due for his share, and brought a suit for contribution, the suit

was governed by this Article, and limitation ran from the date of the last payment made by the plaintiff, and any later payment made by the defendant towards the joint liability would not enure for the benefit of the plaintiff or save limitation—*Marudai* v. *Chinnakannu*, 1919 M.W.N. 429, 52 I.C. 243. If the payment is made by a Hindu widow who is in possession of the estate otherwise than as heiress to the last male holder, the period of limitation begins to run from the time when she has made the payment or at least when the rightful person claims the estate, and her act in keeping possession of the estate will not enlarge the period—*Muthuswami* v. *Ponnayya*, 51 Mad. 815, 55 M.L.J. 436, A.I.R. 1928 Mad. 820 (823), 110 I.C. 613. In a suit by an agent to recover from his principal the moneys spent by him on account of the expenses of his principal's litigation, time runs from the date when the agent makes the payments, and not from the date of the termination of the agency. The fact that the agent has a right of retainer, out of all sums received by him on account of the principal in the business of the agency, of all moneys due to himself in respect of expenses properly incurred does not entitle him to wait till the termination of the agency, nor is it a ground for holding that the statute does not run till the agency ceases—*Kandaswamy* v. *Avayambal*, 34 Mad. 167 (171, 172).

When the payment is involuntary, *e.g.*, where the plaintiff's property is attached and sold and the sale-proceeds paid over to the decree-holder, time will begin to run from the date when the sale-proceeds were drawn by the decree-holder from Court, and not from the date of the sale of the property of the plaintiff—*Patabhiramayya* v. *Ramayya*, 20 Mad. 23 (following *Fuckorudden* v. *Mahima Chunder*, 4 Cal. 529).

A suit by a *de facto* guardian against his ward to recover the expenses incurred by him on behalf of the ward is governed by Art. 61, and the suit must be brought within three years of the advance made by him. There is no valid reason for holding that limitation must commence from the date of the ward's attaining majority—*Piarelal* v. *Lajjia Ram*, A.I.R. 1935 Lah. 437, 37 P.L.R. 246, 159 I.C. 203. Where a guardian of minor's person and property appointed by Court advances monies to estate for expenditure without obtaining the sanction of the Court as regards some items and thereafter hands over the possession of the property to the minor on his attaining majority by the order of the Court before recouping himself with the entire amount spent, a suit by him to recover the amounts due from the estate is governed by this Article and must be brought within three years of his handing over possession of the property. The cause of action does not arise from the date of each advance, but from the date when he hands over possession of the property under orders of the Court —*Radhi* v. *Namdeo*, 41 Bom.L.R. 585, A.I.R. 1939 Bom. 394, 184 I.C. 611.

62. For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use.	Three years.	When the money is received.	

368. Article 62 applies to suits falling under the category well known in English law as "suits for money had and received." Such suits arise where money paid into the hands of the defendant is payable forthwith to the plaintiff—*U Sein* v. *U Phyu*, 7 Rang. 540 The language of this Article is borrowed from the form of count formerly in vogue in England under the Common Law Procedure Act, 1852. This count was applicable where a defendant had received money which in justice and equity belonged

to the plaintiff under circumstances which in law rendered the receipt of it a receipt by the defe.dant to the use of the plaintiff. It was a form of suit which was adopted when the plaintiff's money had been wrongfully obtained by the defendant, as for example when money was exacted by extortion or oppression or by abuse of legal process or when overcharges were paid to a carrier to induce him to carry goods, or when money was paid by the plaintiff in discharge of a demand illegally made under colour of an office. It was a form of claim which was applicable when the plaintiff's money had been wrongfully obtained by the defendant, and the plaintiff in adopting it waived the wrong and claimed the money as money for his use—*Rajputana Malwa Railway Stores* v. *Ajmere Municipal Board*, 32 All. 491 (496). See *Moses* v. *Macfarlane*, 2 Burr. 1005 (1010); *Morgan* v. *Palmer*, (1824) 2 B. & C. 129: 26 R.R. 537; *Neate* v. *Harding*, (1851) 6 Ex. 349: 86 R R. 328; *Biman* v. *Promotha*, 49 Cal. 886 (889), 36 C.L.J. 295, A.I.R. 1922 Cal. 157. This Article is not confined to an action for money had and received in the strictest sense of the term as understood in the English Common Law Courts and cannot be held to be inapplicable when the action is based not only on an implied contract but on the principle of *ex acquo et bono* this Article is intended to apply to all actions for money had and received to the use of the plaintiff whether they be actions which may be deemed strictly to be based on implied contracts or whether they be merely to enforce an equitable claim to the return of money had and received—*India Sugars and Refineries Ltd.* v. *Municipal Council, Hospet*, I.L.R. (1942) Mad. 521, (1942) 2 M L.J. 663, A.I.R. 1943 Mad. 191.

In an action for money had and received there must be privity of a legally recognizable nature between the plaintiff and the defendant—*Rama ami* v. *Muthusami*, 41 Mad. 923. This Article applies if there exists such privity between the plaintiff and the defendant, so that the defendant may be said to have held the money in trust for the plaintiff—*Nihal Singh* v. *Secretary, Gurudwara*, 92 I.C. 731, A.I.R. 1926 Lah. 228. This Article applies when the defendant has received money as distinct from profits into his hand. So, a suit for recovery of profits of property entrusted to the defendant by the plaintiff for safe custody and management is not governed by this Article but by Article 120—*Shi Mahadeoji* v. *Baldeo*, I.L.R. (1942) Nag. 92, 1941 N.L.J. 184, A.I.R. 1941 Nag. 181.

A suit by a purchaser for refund of purchase money deposited by him in Court when a third person obtains a decree setting aside the sale, is governed by Art. 62 of the Limitation Act and not by Art. 120 as the suit is in substance one for money had and received—*Sivaramaraju* v. *Secy. of State*, A I.R. 1935 Mad. 354, 68 M.L.J. 630, 1935 M.W.N. 338, 41 L.W. 305, 159 I.C. 750. Where the purchaser files a suit against the decree-holder to recover the purchase money the Article applicable is 96 and not this Article as the fundamental basis of the claim was the existence of a mistake as to the true state of affairs regarding the property and its title—*Rudrayya* v. *Subba*, 1941 M.W.N. 484, A.I.R. 1941 Mad. 742. A suit by the purchaser for refund from creditors who were paid by the sale proceeds on a decree passed in a suit by a third party claiming that property sold was not judgment-debtor's property, is governed by Article 120 and not by this Article—*Shamchand* v. *President, Anjuman Imdad Qurza of Panj Gurain*, 228 I.C. 489.

Where the understanding between the plaintiff and the defendant was that the defendant be allowed to retain a certain sum of money as a stake-holder till it was judicially decided as to whether the plaintiff was entitled to it, a suit to recover the money instituted within three years from the date of the decision is within time—*Kailash Nath* v. *Chandra Bhan*, 156 I.C. 970.

369. Scope:—This Article would apply where the money was received by

the defendant for the *plaintiff himself*: if the receipt had been for somebody else, whose shoes the plaintiff had stepped into, this Article would not apply—*Chana* v. *Angan*, 13 All. 468.

A suit to enforce an equitable claim against a trustee liable to account, in which the relief sought is to have an account taken of the trust property and to recover what is ascertained to be due is not governed by Art. 62 or 89 but by Art 120—*Guru Das* v. *Ram Narain*, 10 Cal. 860 (P.C.); *Annamalai* v. *Muthukaruppan*, 8 Rang. 645 (P.C.), 130 I.C. 609, 35 C.W.N. 145 (151), A.I.R. 1931 P.C. 9; *Habibulla* v. *Sabdar Hussain*, 7 All. 25 (28). So also, a suit to enforce an equitable claim to recover money withdrawn by the defendant contrary to agreement is not governed by this Article but by Article 120—*Fakir* v. *Shamrao*, 1941 N.L.J. 665. See *India Sugars and Refineries Ltd.* v. *Municipal Council, Hospet*, cited in Note 368 where a contrary view has been taken. Plaintiff entrusted certain goods to the defendant's brother, who however appropriated the goods to his own use, and after his death the defendant also sold the goods, and held the proceeds as agent of the widow of the deceased. Plaintiff thereupon sued to recover the money from the defendant. *Held* that this Article did not apply, for when the defendant sold the goods, he received the money not for the use of the *plaintiff*, but for the use of the widow of his deceased brother. The suit fell under Article 120—*Gurudas* v. *Ram Narain*, 10 Cal. 860 (864) (P.C.).

It was held in an Allahabad case that this Article would only apply where the amount was received for the plaintiff's use by the *defendant himself*; if the amount had been received by the predecessor of the defendant, this Article would not apply. Therefore a suit by the client against the pleader's legal representative, for money which had been received by the deceased pleader from Court on behalf of the plaintiff was held to be governed by Art. 120, and not by this Article—*Bindraban* v. *Jamuna*, 25 All. 55. But in this case the learned Judges have taken no account of the definition of 'defendant' given in sec. 2, which includes the defendant's legal representatives. In a later Calcutta case it has been rightly held that a suit by the plaintiff against the pleader's son and legal representative for recovery of a sum of money received by the pleader out of Court for the use of the plaintiff is governed by this Article and not by Article 120—*Ramhari* v. *Rohini Kanta*, 35 C.L.J. 330, A.I.R. 1922 Cal. 499. The same view has been taken by the Patna High Court in *Rameshwar* v. *Narendra*, 5 P.L.T. 355, 71 I.C. 916, A.I.R. 1923 Pat. 259 (following 35 C.L.J. 330. A suit brought against the legal representative of an agent for recovery of a definite sum only is governed by this Article—*Ashutosh* v. *Arun*, A.I.R. 1950 Dacca, 13. But where the suit against the legal representative involves taking of accounts and is not a suit for a specific sum of money, Article 62 cannot apply. See *Rao Giraj Singh* v. *Raghubir*, 31 All. 429; *Fatima* v. *Imtiazi*, 1 P.R. 1912, 12 I.C. 930. But where in a suit for recovery of certain sums from the sons of a deceased *karpardaz* or agent, it is found that the *karpardaz* was under no liability to pay over sums received by him to the principal directly on receipt and there was a running account the proper Article applicable to the suit is not this Article. Article 89 or 120 will apply—*Sadhu* v. *Krishnamani*, 23 Pat.L.T. 457, A.I.R. 1942 Pat. 181.

370. Where a suit was brought by one co-sharer of a *jaghir* to recover his share of the net income from another co-sharer who was also appointed as the manager of the *jaghir*, *held* that the suit was not governed by Article 62. This Article only applies to cases where a *definite* sum of money has been received by the defendant and which the law says he must hold for the use of the plaintiff; it does not govern cases where the suit is really one for *account* and it is sought to recover from the defendant not only the money which he actually received, but also moneys which he ought to have

received but failed to receive for his default—*Subba Rao* v. *Rama Rao*, 40 *Mad.* 291 (293); *Vidya* v. *Shahdev*, A.I.R. 1938 Lah. 139, 182 I.C. 426. Such a suit is governed by Article 120. Where one daughter files a suit for rendition of accounts against another daughter who under the terms of her father's will is appointed manager, this Article does not apply for the money or profits received by the managing daughter was not money received by her for the use of the plaintiff and it is only Article 89 that can apply—*Asrarafi* v. *Ram*, I.L.R. (1939) All. 594, 1939 A.L.J. 428, A.I.R. 1939 All. 442, 183 I.C. 584. This Article applies where the defendant is bound to pay over the specific sum of money to the plaintiff as soon as it is received by him and not where it is payable after a particular period—*Ahmed* v. *Yehiga*, A.I.R. 1950 Hyderabad. 52. Thus a suit to recover the surrender value of a life insurance policy which grows from year to year and does not even begin to accrue until a certain number of premia has been paid, is not governed by this Article—*Annapuranabai* v. *Hindusthan Co-operative Insurance Co. Ltd.*, I.L.R. (1943) Nag. 253, 1942 N.L.J. 380, A.I.R. 1943 Nag. 9, So also a suit for rent against an assignee of a lease in respect of period subsequent to assignment is not governed by this Article as at the date of assignment these amounts were not due at all and consequently it could not be said that the money was received by the assignee from the assignor for the plaintiff landlord's use—*Dwijendra* v. *Promode*, 54 C.W.N. 673, A.I.R. 1951 Cal. 251.

This Article applies where *whole* of the money received by the defendant belongs to the plaintiff. Where however, one of two co-mortgagees realises the mortgage-money from the mortgagor, a suit by the other co-mortgagee against the first-named co-mortgagee to realise his share of the mortgage-money is in the nature of a suit for account, and falls under Article 120 and not under the present Article—*Mahomed Ibrahim* v. *Rahim*, 5 Lah. L.J. 111, 79 I.C. 294, A.I.R. 1921 Lah. 196 (197).

It is not necessary to prove that the defendant *intended* to receive the money for the use of the *plaintiff*; whether he intended to receive the money on behalf of the plaintiff or he intended to appropriate it to his own use, this Article applies all the same if the money actually belongs to the plaintiff— *Durga Devi* v. *Ram Nath*, 85 P.R. 1919, 52 I.C. 580; *Lachmi* v. *Dhanukdhari*, 17 I.C. 351 (352); *Harihar* v. *Syed Mohamed*, 1 P.L.J. 374 (375), 20 C.W.N. 983, 37 I.C. 30. But where the receipt by the defendant is on his own account and is not or cannot be regarded as one on behalf of the plaintiff, this Article can have no application—*Peria Negamam* v. *Varalakshmi*, (1942) 1 M.L.J. 274, 1942 M.W.N. 129, A.I.R. 1942 Mad. 386.

This Article would apply to a suit brought by the plaintiff to recover from the defendant the money received by the latter to the plaintiff's use, even though at the time when the defndant realised the money a suit by the plaintiff to recover the money from the person originally liable would have been barred by limitation—*Mohabir Prasad* v. *Parsandi*, 45 All. 410, 21 A.L.J. 345, 74 I.C. 939, A.I.R. 1923 All. 532.

371. Surplus sale proceeds:—A suit for recovery of the surplus proceeds of a sale held for arrears of revenue wrongfully taken away by the defendant comes under this Article—*Harihar* v. *Syed Mohamed*, 1 P.L.J. 374 (376); *Bhagwan* v. *Karam Hussain*, 33 All. 708 (726) (F.B.). Similarly, this Article governs a suit to recover the surplus proceeds of a sale of a patni tenure held for arrears of rent, which were wrongfully withdrawn from Court by the defendant—*Niranka* v. *Atul Krishna*, 28 C.W.N. 1009, A.I.R. 1925 Cal. 67. Just after the purchase of the mortgaged property, by the mortgagee, the property was sold for arrears of Government revenue; after payment of the arrears a surplus was left with the Collector, who paid it to the defendant, the previous owner; a suit by the mortgagee to recover the surplus sale-proceeds from the defendant was governed by this Article—*Lachmi* v. *Dhanukdhari*, 17 I.C. 351 (Cal.).

But the surplus proceeds of a revenue-sale remaining in the hands of the Collector under the statutory provisions of sec. 31 of Act XI of 1859, are not money had and received for the use of the proprietor of the estate; and a suit to recover the proceeds from the Collector is governed by Article 120 and not by this Article—*Secretary of State* v. *Guru Prosad*, 20 Cal. 51 (F.B.) (overruling *Secretary of State* v. *Fazal Ali*, 18 Cal. 234).

372. Suit to recover share of family property:—If the members of the family are *separate*, a suit by one member to recover his share of money received by another member is governd by Article 62, even though some of the property is left joint. If, however, the *family is joint*, Article 62 cannot apply. Thus, at the *separation* of the members of a joint family, the unrealised debts as well as other properties of the family left undivided. The debts and the rents of the properties were subsequently realised by one or some members of the separated family. In a suit brought by the other members for their shares in the moneys so realised. it was held that this Article applied and time ran from the date of the realisation of the moneys. Article 127 cannot apply because the family is not joint—*Banco Tewari* v. *Doona Tewari*, 24 Cal. 309 (315); *Ramalagu* v. *Solai*, 41 M.L.J. 274, A I.R. 1921 Mad. 283, 69 I.C. 274; *Arunachala* v. *Ramasamya*, 6 Mad. 402 (403); *Vaidyanatha* v. *Aiyasamy*, 32 Mad. 191 (196); *Thakur* v. *Partab*, 6 All. 442; *Gajraj* v. *Sadho*, 15 O.C. 397, 16 I C. 882 (883). But if the family is joint, Article 62 is inapplicable, for *until separation* one tenant in-common cannot maintain an action for money had and received against his co-tenant, for recovery of the money received by the latter in excess of his share. but can only bring a suit for account, and the only Article applicable would be Art. 120, unless an agency can be presumed in which case Article 89 will apply—*Yerukola* v. *Yerukola*, 45 Mad. 648 (F.B.), 42 M.L.J. 507, A.I.R. 1922 Mad. 150 (following *Thomas* v. *Thomas*, (1850), 5 Ex 28 and *Subba Rao* v. *Rama Rao*, 40 Mad. 291); *Suraj Narain* v. *Narbada*, 4 Luck 265, 115 I.C. 99, A.I.R. 1929 Oudh 83 (85), 5 O.W.N. 1122; *Sitaram* v. *Narayan*, 45 Bom.L.R. 424, AII.R. 1943 Bom. 216, 208 I.C. 340. Until there has been a separation, one co-sharer cannot claim a share in each individual collection, nor can he claim any *particular* sum at the time of collection, from the defendant. All that he is entitled to is an account technically so called. The Article governing the suit is not therefore Art. 62—*Subha Rao* v. *Ram Rao*, 40 Mad. 291 (295), 32 I C. 899. A suit for accounts between one co-owner and another is governed by Article 120 and not by this Article—*Abu* v. *Abdul*, I.L.R. (1940) 1 Cal. 110, A.I.R. 1940 Cal. 363, 189 I.C. 642. Where the family is separate, but the whole family property is managed by one member of the family, who occupies the position of manager, the family is nevertheless a separate family, and a suit by one of the members to recover his share of the money received by the manager (defendant) is governed by Art. 62. If however the suit is framed as a suit for recovery of the money as well as for partition of the whole moveable and immoveable property of the family managed by the defendant, Art. 120 applies—*Parsotam* v. *Radha Bai* 37 All 318 (323). So also, where after partition one brother recovers joint family property and mesne profits from a third party, a suit by the other brother for recovery of half share and an account of the amounts received is governed not by this Article but by Article 120—*Naganna* v. *Venkatarayulu*, (1950) 2 M L.J. 459, A.I.R. 1951 Mad. 234.

If on partition of the joint family property a portion of the family property is left joint in the hands of one or some members by a *family arrangement*, the member or members in whose possession it is left will be *agents* of the other members. A suit by the other members for an account of such property (moveable) and for recovery of their shares is governed by Aticle 89 and not by Article 62 or 120. Limitation begins

to run from the date when an account is demanded and refused, or if no demand is made, when the agency is terminated—*Gabu Naroba* v. *Zipur Ramsingh*, 45 Bom. 313; *Yerukola* v. *Yerukola*, 45 Mad. 648 (663), 42 M.L.J. 507, 71 I C. 177; *Kishen Devi* v. *Banwari*, 10 Lah. L.J. 355, A.I.R. 1928 Lah. 688 (689), 111 I.C. 635. Even though there was no family arrangement, still if after partition one brother was realising the outstandings originally due to the joint family, as he had been doing before partition, there must be an *implied* contract of agency between him and the other brothers, and a suit by a brother to recover his share of the collections would be governed by Art. 89, and not by Art. 62 or 120—*Bur Chand* v. *Ganpat*, 30 P.L.R. 275, A.I.R. 1929 Lah. 407 (408), 116 I.C. 327. In *Pt. Narsingh* v. *Mathura Nath*, A.I.R. 1935 Pat. 159, 156 I.C. 887 the action was against defendant 3 who was for sometime the Karta when the family of which the plaintiff was a member was joint and who received payment with respect to a mortgage bond. This was in 1922 and then in 1929 a partition took place and the present plaintiff had assigned to him this very mortgage bond which had been repaid. He brought the action on the mortgage and an alternative claim against defendant 3 who had been the Karta of the family, that if the Karta had received the money, then there would be a money decree against him. It is a case of conversion by the defendant, or a case where having held the money for many years from the date of the partition he must be said to hold it in trust for the plaintiff in which event Art. 120 will apply. "Art. 62 cannot be held to be the Article applicable... ... ...or, if Art 62 applies, the money can be said to have been received to the plaintiff's use only in 1929." Where two persons jointly purchase a property in the name of one of them, and the person in whose name the property is purchased sells the property and keeps the sale proceeds with himself, he is a trustee for the share of the proceeds belonging to the other. So a suit by the beneficiary for the recovery of his share of the proceeds is not governed by this Article but by Art. 120—*Venkataseshayya* v. *Subrahmanyam*, (1950) 2 M.L.J. 611, A.I.R. 1951 Mad. 547.

Where a debt due to two brothers jointly was realised before partition by one brother, who afterwards fradulently represented to the other brother's representative at the time of partition that the debt was still outstanding, a suit by the latter to recover his share of the money was governed by this Article and limitation would run according to section 18 from the time when the plaintiff was aware of the fraud—*Lakshminarasamma* v. *Lakshmamma*, 25 M.L.J. 531, 21 I.C. 394.

373. Suit for money received by agent or ex-agent:—A suit by the plaintiff against his ex-agent for money realised by the latter after the termination of the agency falls under this Article—*Hansraj* v. *Ratni*,, 13 A.L.J. 494, 29 I C. 986. The plaintiffs were the proprietors of a brick-making business at Muttra, where the defendant was employed as their agent. The defendant, however, in course of time started a brick-making business of his own at Brindaban, close to Muttra, and all order for bricks arriving at the plaintiffs' firm at Muttra were forwarded to and executed by the defendant's own firm at Brindaban. Thereupon the plaintiffs dismissed the defendant, and more than three years after, brought a suit against him to recover the profits made by the defendant from his brick business. It was held that the profits which the defendant made in his own firm out of the plaintiffs' firm in the manner mentioned above, and which he was bound in his capacity as agent to pay over to his employers, must be regarded as money had and received for the use of the principal; the suit was therefore barred under Art. 62. As this cause of action arises out of mixed consideration the suit may come within Art. 90; but even applying that Article, the suit is also barred, as the plaintiffs had knowledge of the defendant's misconduct more than three years before suit—*Puran Mal* v. *Ford*, 41 All. 635, 17 A.L.J. 805, 52 I.C. 373. This Article applies to a suit by a deshmukh of a village against *ajahat gumashtas*

appointed by Government for realisation of collections made by them for the deshmukh—*Malojirao* v. *Keshai*, I.L.R. (1939) Bom. 154, 41 Bom.L.R. 215, A.I.R. 1939 Bom. 126.

374. Suit for refund of consideration money:—Where the consideration *ailed ab initio*, the transaction being in its inception *void*, the suit is governed by this Article and not by Article 97; the latter Article applies to suits for refund of money paid upon an "*existing* consideration which *afterwards fails*" (*i.e.*, where the transaction is not in its inception void, but afterwards turns out to be invalid)—*Ratanbai* v. *Ghasiram*, 55 Bom. 565, 134 I.C. 1157, A.I.R. 1932 Bom. 36 (37); *Buta Ram* v. *Gurdas*, 44 P.R. 1918, 46 I.C. 26; *Ardeshir* v. *Vajesingh*, 25 Bom. 593; *Basivi Reddi* v. *Tallapragada*, 35 Mad. 39; *Madhavdas* v. *Jan Mahomed*, I.L.R (1941) Kar. 495, A.I.R. 1942 Sind 37, 199 I.C. 438; *Panchoo* v. *Ram Sunder*, I.L.R. (1943) All. 604, 1943 A.L.J. 250, A.I.R. 1943 All. 294. If there *never was any consideration* for the sale, then the price paid by the purchaser was money had and received to his use, and Art. 62 would apply—*Hanuman* v. *Hanuman*, 19 Cal. 123 (126) (P.C.). A suit for the return of money paid in advance under a contract of sale is governed by this Article and not by Article 97 as it is difficult to regard such money as money paid upon the existing consideration—*Labh Singh* v. *Court of Wards*, 47 P.L.R. 174, A.I.R. 1945 Lah. 210. An amount paid by the plaintiff under a void agreement is recoverable as money had and received A suit to recover the money is governed by Art. 62, and time runs from the date on which the agreement is discovered to be void—*Hans Raj* v. *Official Liquidators*, 54 All. 1067 (P.C.), 37 C.W.N. 379 (388), 142 I.C. 7, A.I.R. 1933 P.C. 63. A contract of sale negotiated by a minor (the minor having settled the terms, paid consideration and received the sale-deed) is void *ab initio*. A suit for refund of the consideration money is governed by Art. 62 and not by Art. 97—*Munni Lal* v. *Madan Gopal*, 13 A.L.J. 185, 27 I.C. 733. Where there is a total failure of consideration with regard to a lease, a suit for refund of the consideration money is governed by this Article and not by Art. 97—*Biswanath* v. *Surendra*, 19 C.W.N. 102, 29 I.C. 429. When the mortgage being void, the consideration failed *ab initio*, a suit by the mortgagee to claim repayment of money advanced to the mortgagor is a suit for money had and received, and is governed not by Art. 97 but by this Article—*Bai Diwali* v. *Umedbhai*, 40 Bom. 614, 36 I.C. 564. 18 Bom.L.R. 773; *Javerbhai* v. *Gordhan*, 39 Bom. 358, 28 I.C. 442. Similarly, a suit by a lessee for a refund of part of the premium paid for a lease, proportional to the portion of the land of which possession could not be obtained by him, it having been previously leased out by the lessor to another, is governed by this Article, and not by Article 97 because the consideration failed *ab initio* in regard to that portion of the land—*Mahomed Ayub* v. *Elahi Baksh*, 49 I.C. 258 (Cal.).

But where the sale was valid at its date and the purchaser took possession but subsequently a judgment creditor of the vendor sought to execute his decree against the lands and ultimately ejected the purchaser, a suit by the purchaser to recover the purchase-money is governed by Article 97 and not by this Article, because the sale being valid at its date the consideration did not fail *ab initio*, but it *subsequently* failed by reason of dispossession—*Venkatanarasimhulu* v. *Peramma*, 18 Mad. 173. Where a sale by a member of a joint Hindu family governed by the Mithila law went off objection being taken by the other co-sharers when the purchaser attempted to take possession, the sale was voidable and not void, and a suit by the purchaser for recovery of money paid by him is governed by Article 97 (not by Art. 62) because there was an "existing consideration which subsequently failed" by reason of the purchaser not getting possession—*Hanuman* v. *Hanuman*, 19 Cal. 123 (126) (P.C.). Where the plaintiff who had entered into a contract with the defendant for the sale of certain property and paid earnest money, sued the defendant for specific performance of the contract, but the suit was dismissed, whereupon he again sued the defendant for the return of the

earnest money, *held* that the present suit was governed by Art. 97 and not by Art. 62, because the consideration had not failed *ab initio*, but had failed *subsequently* by reason of the dismissal of the previous suit for specific performance—*Munni* v. *Kunwar Kamta*, 45 All. 378 (379), 21 A.L.J. 265, A.I.R. 1923 All. 321. Where one of the joint tenants under a registered lease containing a covenant to refund nazarana in case of dispossession enters into possession knowing the defective title of the lessor and is subsequently dispossessed, a suit for refund of nazarana is governed by Article 116 and not by this Article—*Ashan* v. *Suraj*, 17 Luck. 289, 1941 O.W.N. 1182, A.I.R. 1942 Oudh 82, 196 I.C. 888. In *Saraswatibai* v *Madhukar*, I.L.R. (1950) Nag. 467, 1950 N.L.J. 145, A.I.R. 1950 Nag. 229 it has been held that this Article has no application to a suit for refund of consideration money for a contract void *ab initio* as the same is not a suit for "money had and received." Where the contract, found void *ab initio* is embodied in a registered document Article 116 is applicable, otherwise Article 97 applies. The same view has been taken in *Punjab Government* v. *Baijnath*, 47 P.L.R. 122, A.I.R. 1945 Lah. 164. A suit by the purchaser to recover a portion of the purchase-money on account of the vendor's failure to give possession of a portion of the lands sold, by reason of the vendor's not having any title to that portion, is governed by Article 97 and not by this Article, the sale being voidable only and not void—*Tulsiram* v. *Murlidhar*, 26 Bom. 750. Where the vendor sold the property in good faith believing it to be his own, and the vendee obtained possession but was subsequently ousted by the true owner, it was held that although the sale was void *ab initio*, still as there was good faith on the part of the vendor there was consideration so long as the vendee remained in possession. A suit for refund of the purchase-money is governed by Art. 97 and not by this Article—*Narsing* v. *Pachu*, 37 Bom. 538, 20 I.C. 254. A suit for return of the consideration by the vendee of the mortgagee rights against his vendor on the dismissal of a suit on mortgage on the ground of want of consideration is governed by Article 97 and not this Article—*Bajeet* v. *Shudarsan*, 1942 A.L.W. 50. So also this Article does not apply to a suit for recovery of part purchase price paid on sale which afterwards goes off by reason of the failure of the buyer to complete payment. The test for the applicability of this Article is whether when the money was paid it was recovered immediately—*Madhavdas* v. *Jan Mahomed*, I.L.R. (1941) Kar. 495, A.I.R. 1942 Sind 37, 199 I.C. 438.

In *Babu Ram* v. *Amba Prasad*, I.L.R. (1946) All 72, 1945 A.L.J. 473, 1945 O.W.N. (H.C.) 295, A.I.R. 1946 All. 159 the Allahabad High Court has held that the provisions of this Article might have been applied before the enactment of section 55 of the Transfer of Property Act to cases where there was no covenant and the suit was merely on the allegation that the vendor had purported to transfer some property to which he had no title. Now, that sec. 55 of the Transfer of Property Act has imported into all transfers, unless the parties agree to the contrary, a covenant warranting the title of the vendor, it would seem that a suit to recover the consideration would be on the basis of that specific covenant and the time would begin to run from the date of the deed after it had been established that there never had been any title. But in the case where there is an express covenant, it must be construed according to the intention of the parties and no general rule can be laid down about the date when the cause of action arises. Such suits would be on the basis of a covenant and the provisions of Article 97 would apply if there was no registered deed and the provisions of Article 116 if there was a registered deed.

According to the trend of recent decisions, however, all these suits fall under Art. 116 and not under Art. 97. See Note 436 under Art. 97.

Where the sale is void *ad initio* and the purchaser does not obtain possession under the deed, the starting point of limitation for a suit for refund of consideration (Art. 62)

is the date of the sale-deed—*Ardeshir* v. *Vajesingh*, 25 Bom. 593. If the sale was not void *ab initio* but voidable, but the vendee did not obtain possession, the period of limitation for a suit for refund of consideration (Art. 97) ran from the date when the vendee endeavoured to obtain possession but, being opposed, found himself unable to obtain possession—*Hanuman* v. *Hanuman*, 19 Cal. 123 (P.C.) See Note under Art. 97. But if the vendee has been put in possession, the cause of action does not arise until the vendee is dispossessed—*Ratanbai* v. *Ghasiram*, 55 Bom. 565, 134 I.C. 1157, A.I.R. 1932 Bom. 36 (37).

Where a *patni taluq* was sold for arrears of rent, but the sale was reversed on 24th August 1905 by reason of the Zemindar's (who brought the taluq to sale) not having the right to make the sale, and the decree reversing the sale was affirmed on appeal on 3rd August 1906, a suit brought by the purchaser in September 1908 against the Zemindar to recover so much of the purchase-money as the latter had received, is really a suit for money had and received by the defendant to the plaintiff's use, within the meaning of Art. 62 and not a suit under Article 97, because the Zemindar not having the right to bring the taluk to sale, the sale was void *ad initio*, and there was no "existing consideration" for it. The suit was time-barred, as time ran from the date of the sale. Even assuming (but not holding it to be correct) that the suit was one under Article 97, time ran from August, 1905, and the suit was like-wise barred —*Juscurn Boid* v. *Prithi Chand*, 46 Cal. 670 (P.C), 23 C.W.N. 721, 50 I.C. 444.

375. Suit by one heir for money received by another:—The plaintiff claimed as an heir to N, deceased, a moiety of monies which at the time of N's death were deposited with a banker, and which the defendant, the other heir of N, had wholly received from such banker; the suit was governed by this Article—*Kundun* v. *Bansi*, 3 All. 170. A suit by persons entitled to a portion of the money left by the deceased against the holder of a succession certificate who has received the whole amount is governed by this Article—*Najmunnissa* v. *Amina*, 38 All. 188; *Amina* v. *Nujmunnissa*, 37 All. 233, 13 A.L.J. 255, 27 I.C. 712. Where one of two brothers obtained a succession certificate in respect of certain debt due to their deceased uncle, and realised some money on the strength of the certificate, a suit brought by the widow of the other brother, who died after the certificate was obtained, for an account of all sums received by the defendant as holder of the certificate and for recovery of her husband's share, would fall under this Article—*Abdul Ghaffar* v. *Nurjahan Begum*, 37 All. 434; *Ahidannissa* v. *Isuf Ali*, 50 Cal. 610, 27 C.W.N. 941, 74 I.C. 1010.

A suit to recover share of sale proceeds by one heir against another with whom the sale proceeds of a certain property are handed over with instructions to distribute the same amongst the heirs according to their shares, is governed by this Article—*Hussain* v. *Baquir*, (1945) 2 M.L.J. 422, 1945 M.W.N. 671, A.I.R. 1946 Mad. 116

376. Assignment of debt:—Where the plaintiff assigned a mortgage-debt to the defendant, and the latter under clour of the assignment received money from the mortgagor, but the assignment was subsequently declared void, a suit by the plaintiff to recover from the defendant the amount received by the latter from the mortgagor fell under this Article—*Shanmuga* v. *Govindasami*, 30 Mad. 459. Where a mortgagee assigned the mortgage for consideration, and afterwards received the mortgage-money from the mortgagor, a suit, by the assignee to recover the money from the assignor (mortgagee) fell under this Article—*Sriramulu* v. *Chenna*, 25 Mad. 396. See this case cited under Art. 97. Certain G. P. Notes standing in the name of A was assigned to B, and were afterwards attached in execution of a decree obtained by A's creditors against A. B after vainly objecting to the attachment brought a suit against A and the decree-holders, to establish his right to the Notes; and was successful in

that suit. While it was pending, A realised interest on the Notes. In a suit by B to recover the interest so realised, *held* that this Article applied—*Chand Mal* v. *Sansar*, 36 P.R. 1913, 17 I.C. 311.

376A. Assignment of decree:—Where a decree is assigned by a person before adjudication as an insolvent and the assignment is annulled at the instance of the Official Receiver after adjudication, a suit by the Official Receiver against the assignee to recover the money collected under the decree both before the annulment of the assignment and after the annulment is governed by this Article—*Shanmugan* v *Official Receiver*, (1938) 1 M.L.J. 682, A.I.R. 1938 Mad. 532, 1938 M.W.N. 290, 178 I.C. 448. One of the holders of a decree for money assigns his share to a third party and the other decree-holders bring a suit against the assignor and the assignee for specific performance of contract of sale in their favour and obtain a decree declaring them to be entitled to the whole amount of the decree and they realise the entire amount in execution. Subsequently the decree in the specific performance suit is reversed on appeal. In a suit by the assignee against the decree-holders for recovery of his share in the decretal amount already realised by them, this Article is applicable and not Article 120—*Murlidhar* v. *Ram Saran*, I.L.R. (1946) All. 633, 1947 A.L.J. 170, A.I.R. 1947 All. 256, 228 I.C. 493.

377. Compensation money:—A suit against the tenant by the landlord to recover his share of compensation money awarded by Government and withdrawn by the tenant who falsely represented himself to be the real owner, falls under Art. 62 or Art. 120—*Khetter* v. *Dinendra*, 3 C.W.N. 202. But where at the time when the defendant (lessee) drew out the compensation money, the plaintiff had not yet established his title to the property acquired by Government but did it subsequently, the money when taken out by the defendant could not be said to have been received for the *plaintiff's* use, and consequently a suit by the plaintiff to recover the money from the defendant after he established his title to it does not fall under this Article but under Article 120—*Nund Lal* v. *Meer Aboo*, 5 Cal. 597; *Krishnan* v. *Perachan*, 15 Mad. 382.

378. Other suits:—Where there is a mortgage decree, a payment made out of Court after the preliminary decree and before the final decree should be brought into account when the final decree is passed (*Sital* v. *Baijnath*, 44 All. 668). But if this is not done, that money becomes money in the hands of the mortgagee to the use of the mortgagor—*Mahbub Ali* v. *Md. Hussain*, 50 All. 111, 25 A.L.J. 823, A.I.R. 1927 All. 710 (711), 104 I.C. 419. A suit by the plaintiff for recovery of money received by the defendant, his co-mortgagee, in satisfaction of a mortgage in which both were interested, though the deed stood in the name of the defendant alone, is a suit governed by this Article—*Mahomed Wahib* v. *Mahomed Ameer*, 32 Cal. 527.

Before the present amendment of sec. 10, a shebait of an idol was not treated as a trustee under that section; whatever sum he received for and on behalf of the idol was treated only as sums received to the use of the idol, and a suit to recover the money so received was held to be governed by this Article—*Jaisth Madhu Acharyaji* v. *Thakur Sri Gat Ashram*, 50 All. 265, 25 A.L.J. 1047, A.I.R. 1928 All. 134; *Rangacharya* v. *Guru Revti Ramanacharya*, 1929 A.L.J. 229, 114 I.C. 734, A.I.R. 1928 All. 689 (695). But this is no longer good law in view of the amendment of sec. 10.

A suit for money received by the pleader of the plaintiffs out of Court for their use is governed by this Article—*Ramhari* v. *Rohini*, 35 C.L.J. 330, A.I.R. 1922 Cal. 499. A suit to recover money paid by the plaintiff to the defendant by mistake in

excess of the amount legally due is governed by Article 96 which specially provides for the case, rather than Article 62—*Tofa Lal* v. *Moinuddin*, 4 Pat. 448, 93 I.C. 129, A.I.R. 1925 Pat. 765 (767). *Pannalal* v. *Union of India*, A.I.R. 1956 V.P. 26.

A suit for recovery of rent received by a joint lessor falls under this Article—*Gopal Rao* v. *Ambabai*, 16 N.L.R. 183, 59 I.C. 455. See also *Venkatarama* v. *Kuppuswami*, A.I.R. 1955 Mad. 643. A suit by the real claimant against a benamidar in whose name a bond stood and who had realised the money due upon it, is governed by this Article—*Sundar* v. *Fakir*, 25 All. 62; *Subbanna* v. *Kunhanna*, 30 Mad. 298; *Narayanna* v. *Rangasami*, 1915 M.W.N. 215, 28 I.C. 495. The Madras High Court has however, held in *Devarajulu* v. *Jayalakshmi*, (1941) 2 M.L.J. 222, 1941 M.W.N. 727, A.I.R. 1941 Mad. 727 and in *Karanamurthi* v. *Ramanatha*, I.L.R. (1946) Mad. 306, (1946) 1 M.L.J. 140, A.I.R. 1946 Mad. 248 that the relationship between a *benamidar* and the real owner is in the nature of a trust and the claim against a *benamidar* is an equitable one and the proper Article to govern such a suit is Article 120 and not this Article.

An attaching creditor is not entitled to the sale proceeds as against the holder of a decree charging the lands attached, on the ground of the priority of his attachment, if the charge had been created prior to the attachment. Where in such a case the Court had wrongly ordered the holder of the decree charging the lands to refund to the attaching creditor the sale proceeds paid to him, and he brought a suit to recover the money by the establishment of his prior right to the same and to cancel the order of the Court compelling him to refund the money,, as it was made without jurisdiction, *held* (by the majority of the Full Bench) that the suit fell under this Article, (but the other two Judges were of opinion that Art. 120 applied)—*Ram Kishen* v. *Bhavani*, 1 All. 333 (F.B.). "It is very doubtful whether the decision of the majority of the Full Bench in this case is correct, as the money in this case was paid under an order of a Court which was still in existence at the time of the suit"—Starling, 5th Edn., p. 255.

One B. & Co. were the managing agents of two companies J. & Co. and U. & Co. which did business other than money-lending or banking business. The money of J. & Co. was employed by B. & Co. to continue the business of U. & Co. of which the directors of either company were ignorant. *Held* that U. & Co. is liable for the money so employed, either for having received the money through their agents rightfully and applied to their purpose, or for having received it wrongfully by secret and deceitful misapplication by their agents. In the latter case, the money is recoverable as money had and received to the use of the true owner, and time begins to run from the date of actual payment—*Upper India Rice Mills* v. *Jaunpur Sugar Factory*, 49 All. 520 (F.B.), 101 I.C. 224, A.I.R. 1927 All. 161, overruling *Jaunpur Sugar Factory* v. *U. I. Rice Mills*, A.I.R. 1927 All. 173, 98 I.C. 1010. A suit by a company for the recovery of money due to it, but which had been realised by a decree holder against the company during the pendency of an application for the winding up of the company is governed by Article 120 and not by this Article; *Gorakpur Electric Supply Co. Ltd.* v. *Nariman & Co.*, I.L.R. (1947) All. 203, 1947 A.L.J. 319, A.I.R. 1948 All. 75.

Money paid under a void authority or under a void judgment to a person not entitled to receive it can be recovered from him by the rightful owner in an action for money had and received—*Ram Narain* v. *Brij Banke*, 39 All. 322 (331). Where in execution of a decree a certain debt is attached and the amount of the debt is paid by the debtor into Court and received by the decree-holder, a suit by the claimant of the debt against the decree-holder is governed by Art. 62 or 120—*Yellammal* v. *Ayyappa*, 38 Mad. 978. In execution of a decree against A, certain money due to A was attached. Before that date, A had transferred his property to B and the

money was legally due to B. The debtor of A paid the money to the bailiff, who deposited it into Court, and it was paid to A's decree-holder. Subsequently B brought a suit for the recovery of the money within three years of the date when it was paid. *Held* that this Article governed the suit and not Art. 29, since the suit was one for money had and received for the plaintiff's use—*Naidar* v. *Ganga*, 38 All. 675. A decree held by the plaintiff was sold in execution of a decree against him. The auction-purchaser realised the amount of the decree he purchased; but subsequently the sale was set aside. The plaintiff sued the auction purchaser for the recovery of the money realised by him under the decree; *held* that the suit was not one for damages, but was one for money payable by the defendant for money received by the defendant to the plaintiff's use, and fell under this Article—*Bhawani* v. *Rikhi Ram*, 2 All.. 354. Where a mortgaged property was sold for arrears of revenue and the surplus sale-proceeds were withdrawn by the mortgagor from the Collectorate, a suit by the mortgagee to recover his mortgage-money out of the sale-proceeds is governed by either Article 132 or 120, but not by Article 62 or 97—*Kamala Kanta* v. *Abdul Barkat*, 27 Cal. 180. A suit for the recovery of money wrongfully withdrawn by the defendant from Court by setting up an adverse title to the claim of the plaintiff is governed by Article 120 and not by this Article—*Kanji* v. *Kalidas*, 69 C.L.J. 108, A.I.R. 1939 Cal. 413, 182 I.C. 860.

A suit by the plaintiff to recover his share of a Government allowance received by the defendant is subject to the limitation of three years under this Article—*Chamanlal* v. *Bapubai*, 22 Bom. 669; *Raoji* v. *Bala*, 15 Bom. 135. Where a Municipal Board has assessed taxes on plaintiff's goods at a higher rate than that sanctioned by the Government, a suit for refund of the amount realised over and above the sanctioned rate would fall under this Article—*Rajputana Malwa Railway Stores* v. *Ajmere Municipal Board*, 32 All. 491; or on the ground that tax was illegally levied by the Municipality —*City Municipality, Bhusawal* v. *Nusserwanji*, 42 Bom.L.R. 491, A.I.R. 1940 Bom. 252; 189 I.C. 678. So also, a suit to recover license fees and profession tax alleged to have been wrongfully levied by the Municipality is governed by this Article—*India Sugars and Refinaries Ltd.* v. *Municipal Council, Hospet*, I.L.R. (1942) Mad. 521, (1942) 2 M.L.J. 663, A.I.R. 1943 Mad. 191. But a suit by the Municipality for recovery of house tax and sanitary charge imposed in the form of rate on lands or building is not governed by this Article but by Article 132—*Shidrao* v. *Municipality of Athni*, 44 Bom.L.R. 849, A.I.R. 1943 Bom. 21. Where the price of a consignment of goods was paid by the plaintiff in advance on 15th November, but when the goods were delivered on 22nd November, certain of the goods were found missing, and then the plaintiff sued for recovery of the sum overpaid, *held* that limitation ran from the failure of consideration, *i.e.*, 22nd November, the date when the short delivery took place, and not from 15th November, the date when defendant received the money—*Atul Kristo* v. *Lyon*, 14 Cal. 457 (460). But it is curious that in this case the Judges held that Art. 62 was applicable while they computed the period of limitation from the date of "failure of consideration" using the language of Article 97.

A suit to recover money under section 73 (2) C. P. Code, on the ground that the plaintiff and not the defendant was entitled to receive the same in proceedings in execution of a decree for rateable distribution, is governed by Art. 62, and not by Art. 120, the cause of action arising on the date of the wrongful payment to the defendant—*Baijnath* v. *Ramadoss*, 39 Mad. 62; *Vishnu* v. *Achut*, 15 Bom. 438.

Where a person has lost money by theft he can sue the thief for the recovery of the money, quite apart from the crime, but if he does, the suit must be framed as one for money had and received, and the suit then falls under this Article—*Gaffar* v. *Syed*

Noor, I.L.R. (1941) Mad. 414, (1941) 1 M.L.J. 27, 1941 M.W.N. 24, A.I.R. 1941 Mad. 391

A suit for recovery of money realised by a *defacto* guardian as such is governed by this Article even though in the receipt granted by him the amount is shown as *amanat* to him—*Shaikh Golam* v. *Najafunnessa*, 4 D L.R. (Cal.) 141.

Disputes having arisen between the heirs of one G deceased, the defendant was appointed to sell his stock-in-trade and pay up the creditors pending certain arbitration proceedings. The defendant sold certain property and paid up certain debts. The arbitration proceedings fell through. In a suit brought by G's sister for recovery of her share, *held* that this Article applied—*Masihuddin* v. *Imtiazunissa*, 37 All. 40. On a dispute between owners of contiguous properties, some lands were attached under section 146 of the Criminal Procedure Code and the income was deposited in the collectorate. Thereupon several suits were instituted by the defendant (one of the owners) for the establishment of his right and the dispute was then compromised. In the meantime, the defendant withdrew a portion of the money alleging that it represented his share of the profits, whereupon the other owner sued him for the recovery of that money on the ground that the lands attached belonged to him *Held* that the suit was not governed by Article 62. The defendant when he withdrew the money from the collectorate took the money as owner, and had good reason for believing at the time that the money was really his; it could not therefore be said by any process of reasoning that the defendant received the money for the use of the plaintiff. The suit fell under Article 120—*Anantram* v. *Hem Chandra*, 50 Cal. 475, 72 I.C. 1041, A.I.R. 1923 Cal. 379; *Lingangouda* v. *Lingangouda*, I.L.R 1953 Bom. 214, 54 Bom.L.R. 829, A.I.R. 1953 Bom. 79 See contra—*T.S.H.W. Co-operative Society Ltd.* v. *Sundaram*, A I.R. 1957 T.C.. 61. Where an association not having been registered, the members brought a suit against the promoter for repayment of their subscriptions by converting the property of the association into cash, *held* that the suit was not governed by Art. 62, because the money (subscription) when it was received by the promoter was not received by him for the plaintiff's use, but was received for other specific purposes (*viz.*, to start a business), and became payable to the plaintiffs to the extent to which it is payable (after paying off all debts), by reason of happening of subsequent events, *viz.*, failure to register the partnership as a company The suit is, though not in form, in substance a suit for an account, governed by the residuary Article 120—*U. Sein* v. *U. Phyu*, 7 Rang. 540, A.I.R. 1930 Rang. 21 (25, 27), 120 I.C. 902. The starting point for computing limitation would be the date on which the money was paid and there would be no recurring cause of action—*Kumaraswami* v. *Chinnethambi*, (1950) 2 M.L.J. 453, 1050 M.W.N. 655, A.I.R. 1950 Mad. 291. A debt due to K. from B was attached before judgment in a suit by V. K. was thereafter adjudged an insolvent. The attached debt was paid into Court and the Official Receiver of K's estate claimed the money and applied to the Court for the payment of the money to him and not to V, by virtue of sec. 34 of the Prov. Ins. Act (1907). The application was dismissed and the amount was paid to V. The Official Receiver then filed a suit to recover the money from V. *Held* that this Article applied and not Article 11—*Official Receiver* v. *Veeraraghavan*, 45 Mad. 70 (see this case cited under Article 11).

63. For money payable for interest upon money due from the defendant to the plaintiff.	Three years.	When the interest becomes due.	

379. A suit by the depositor against a banker for the difference between the higher rate of interest claimed by him and the lower rate paid by the banker is governed by this Article—*Makundi* v. *Balakishen*, 3 All. 328. This Article applies where the interest is actually payable. If in a *thavanai* transaction money is deposited with the understanding that at the end of each thavanai period the interest for the period is *not to be paid* but is to be added to the principal, and both are to be treated as a fresh deposit, a suit to recover principal and interest is governed by Article 60. The claim as to interest will not be treated as falling under Article 63—*Narayanan* v. *Suppai Chetty*, 43 Mad. 629, 28 M.L.J. 417.

Where a mortgagee, not being entitled to claim *post diem* interest as such under the mortgage, claims such interest by way of damages for the non-payment of the mortgage-money, such a claim is governed by Article 116 of the Limitation Act—*Mathura* v. *Narindar*, 19 All. 39 (P.C.) See also *Gudri* v. *Bhubaneswari*, 19 Cal. 19, and *Mati* v. *Kumhari*, 24 Cal. 699 (F.B.) cited under Art. 116.

A suit for recovery of interest is barred when a suit for recovery of the principal is barred when there is no independent contract to pay interest and the interest is a mere accessory to the principal. But where there is a special contract to pay interest at a specified rate this principle does not apply—*Hazi Nathu* v. *Nikki*, 204 I.C. 509, A.I.R. 1942 Pesh. 85.

64. For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them.	Three years.	When the accounts are stated in writing signed by the defendant or his agent duly authorised in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.

380. Account stated:—An account is said to be stated only when there have been *reciprocal* demands between the parties and the balance struck then becomes the consideration for the discharge on either side. Such an account stated amounts to a new contract and is substantive cause of action—*Ishar Das* v. *Harkishan*, 1916 P.W.R. 148, 35 I.C. 577. A *mere statement of the balance* which is due on a particular date cannot be called an account stated within this Article. An account stated is a transaction in which several cross items are set off one against the other and the balance is struck in favour of one of the parties. In such a case, the law implies a new promise by the other party to pay the balance in consideration not merely of past debts, but also of the extinguishment of the old debts on each side, and hence it is not necessary that the balance should be struck within the period of limitation applicable to any of the items in the account—*Suraj* v. *Bourke*, 5 P.L.J. 371 (372), following *Hargopal* v. *Abdul*, 9 B.H.C.R. 429. In other words, an account stated, signed by the defendant, will be the basis of a suit, even though at the date of the statement some of the items adjusted are barred by the ordinary rule of limitation.

The bare striking of a balance consisting largely of barred debts in the defendant's account book in the plaintiff's handwriting which is not signed by the defendant

and which does not contain words acknowledging liability by the defendant or stating account on his behalf, is neither an acknowledgment under sec. 19, nor an account stated under Art. 64, nor a promise to pay under sec. 25 (3) of the Contract Act—*Gulzari Mal* v. *Kishan Chand*, 132 P.R. 1907.

In an account stated it is necessary that there should have been *reciprocal* demands between the parties. Therefore when a sum of money was deposited with the defendant's firm, and long after a suit for the money was barred by limitation, a balance was struck calculating the amount of interest and principal, and was signed by the defendant, acknowledging the same to be "due for balance of old account," it was held that the transaction did not amount to an account stated as there was no *reciprocal* demand, but was only an acknowledgment, which, as the suit had then long been barred by limitation, was of no avail—*Nathanibai* v. *Nathu*, 7 Bom. 414. Where there are no cross demands to be set off against each other, but the account consists merely of debts on one side of the account and payments made by the debtor on the other side, the account is not mutual. Hence a mere acknowledgment signed by the debtor showing a balance standing against him on such an account is not an account stated. So, a *khata* consisting of one item on one side only and bearing the mark of the debtor, is merely an acknowledgment and not an account stated—*Tribhovan* v. *Amina*, 9 Bom. 516. Where the defendant after having examined the accounts acknowledged the balance due by him and signed the entry of the same in the defendant's account-book, it was held that the acknowledgment being a mere acknowledgment of a balance struck, and the account not mutual, there was neither an account stated to which Art. 64 applied, nor an evidence of a new contract which could be the basis of a suit—*Ganga* v. *Ram Dayal*, 23 All. 502; *Shankar* v. *Mukta*, 22 Bom. 513. *Chithas* having no reciprocal debts and credits but consisting of only one-sided debts all of which were taken by the defendants from the plaintiff cannot be said to be accounts stated Each of the items is a separate debt in itself and each of them will be barred in different dates—*Deoraj* v. *Indrasan*, 8 Pat. 706, A.I.R. 1929 Pat. 258 (260). The striking of a balance in an account, the items of which are all on one side, does not amount to an account stated—*Jamun* v. *Nand Lal*, 15 All. 1.

In other words, where the account is not mutual, an acknowledgment by the debtor in the account book of his creditor, is not an account stated within the meaning of this Article. If it were, then the provisions of sec. 19 (which requires the acknowledgment to be made before the expiry of the period of limitation of the suit) may be evaded, for it would be unnecessary to inquire whether the acknowledgment was made before the expiry of the period. Therefore in cases where the account is not mutual, Article 64 must be read with sec. 19, and this Article would be inapplicable except where at the time of stating the account all the several items of the account were unaffected by limitation. See U. N. Mitra, 5th Edn. p. 953; Rustomji, 3rd Ed., p. 343. This is the gist of the rulings cited above. But the Calcutta High Court has in a Full Bench case assumed that Art. 64 applied to accounts stated, even if there were *no reciprocal* or cross demand—*Dukhi* v. *Mahomed*, 10 Cal. 284 (F.B.). The same opinion was expressed in a Madras case—*Manjunatha* v. *Devamma*, 26 Mad. 186. So also according to the Lahore High Court, in a case of accounts stated, it is unnecessary to decide whether there are reciprocal demands between the parties. Such a question arises under Art. 85 and not under Art. 64. If the accounts have been adjusted and the balance struck, and the statement of account has been examined and accepted by the defendant, and signed by him, the requirements of Art. 64 are complied with. The acceptance of the account amounts to an acknowledgment of liability, and according to the Privy Council ruling in *Manikram* v. *Seth Rupchand*

(33 Cal. 1047) an unconditional acknowledgment always implies a promise to pay and can form the basis of a suit—*Kahan Chand* v. *Dayaram*, 10 Lah. 745, 115 I.C. 764, A.I.R. 1929 Lah. 263 (264); see also *Fateh Mahomed* v. *Ganga*, 10 Lah. 748, A.I.R. 1929 Lah. 264, 115 I.C. 863; *Dalip Singh* v. *Jawahir*, A.I.R. 1921 Lah. 421 (422), 116 I.C. 464. In these three cases it has been said that the contrary view taken in *Shankar* v. *Mukta*, 22 Bom. 513 and *Pala Mal* v. *Tulla Ram*, 119 P.R. 1908 (where it was laid down that a striking of balance by the defendant merely amounted to an acknowledgment of liability and not a promise to pay so as to constitute the basis of a suit) must be deemed as overruled by the above Privy Council case (33 Cal. 1047). See also *Chunilal* v. *Laxman*, 46 Bom. 24 (28), A I.R. 1922 Bom. 183 where 22 Bom. 513 is held to be no longer good law.

Where money is placed in deposit with another person, who after some time submits accounts showing a credit balance in hand, the transaction is really a deposit (Art. 69) and the statement of account will not alter its nature and bring the case under the present Article—*Lazarus* v. *Krishna Chunder*, 28 Cal. 393. (Distinguished in *Lachminarayan* v. *Murlidhar*, A.I.R. 1937 Cal. 538). The parties who were partners in certain business had gone into the accounts of the partnership and as a result of the scrutiny an entry was made in the plaintiff's *bahi* signed by the defendant, which ran as follows:—"After the scrutiny of the accounts of this firm I have struck a debit balance against me of Rs. 4017 on account of losses and advances of every kind." The plaintiff sued the defendant for recovery of the sum on the basis of the entry. *Held* that the entry being an account stated between the parties, the suit was governed by Article 64 and not by Art. 106—*Nand Lal* v. *Partab Singh*, 3 Lah. 326, A.I.R. 1922 Lah. 425, 69 I C. 502; *Jai Ram Singh* v. *Sardari Mal*, 29 P.L.R. 219, 108 I.C. 600, A.I.R. 1928 Lah. 459 (460). In a suit by a commission agent, if it is found that the accounts were stated and balance struck, the proper Article applicable is Art. 64 and not Art. 85—*Karam Chand* v. *Dayanand*, A.I.R. 1928 Lah. 51 (52), 100 I.C. 874.

Where accounts have been taken from the agent and adjusted and a specific sum has been found due from the agent to the principal, the latter becomes entitled to sue forthwith for recovery of that money. A suit to recover the money is governed by Article 64 or 115, and not by Article 89 because that Article refers to a suit in which accounts *have to be taken* and not a suit where an account *has been rendered*—*Kesho Proshad* v. *Sarwan Mal*, 25 C.L.J. 335, 40 I.C. 359.

A suit for accounts and profits of dissolved partnership is not governed by this Article but by Art. 106—*Meera Pillai* v. *Yegnanarayana*, A.I.R. 1952 Tra-Co. 177.

Starting point of limitation:—The period of limitation runs when the accounts are stated and balance struck. But if the balance becomes an item in a new account, that is, if after an account stated the balance appearing due on it to either of the parties is not paid but is afterwards thrown into a new account between the same parties, it passes out of the operation of the statute of limitation—*Farrington* v. *Lee*, (1677) 1 Mad. 270.

380A. "Accounts stated"—Meaning of—Bishun Chand v. Girdharilal, 56 All. 376 (P.C.)—Present law:—Under sec. 19 an acknowledgment gives a fresh starting point only if it is made before the expiry of the period of limitation: after the expiry of the period nothing short of a fresh contract to pay the barred debt will revive the debt. Under sec. 25, Indian Contract Act, a mere acknowledgment of the debt is not sufficient, there must be a promise to pay the barred debt. Unlike sec. 25, however, Art. 64, Limitation Act does not require that there shall be any promise to pay. And even if some of the items are statute barred, a settlement of

account including these items is none the less binding. The account stated may be reopened only on any ground which would justify setting aside any other agreement.

In common parlance any adjustment and acknowledgment of the amount due in respect of debt is treated as an 'account stated'. But such a mere acknowledgment of a debt cannot be treated as a 'real account stated' within the meaning of this Article. An account stated in the true sense "which is a very usual form as between merchants in business in which the account stated may be described in the words of Lord Atkin as an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been set off and paid in the way described." (*Per*, Lord Atkin in *Siqueria* v. *Noronha*, A.I.R. 1934 P.C. 144).

"In *Laycock* v. *Pickles*, (1863) 33 L.J.Q.B. 43 the plaintiff was indebted to the defendants in the sum of £111. He had claim against them for labour and materials for £67, and it was agreed that in return for the transfer of certain property he should be credited with £70. A balance was then struck, and his final liability was agreed at £22, which sum the plaintiff was held entitled to recover as upon an account stated.* Blackburn, J. observed: "There is a real account stated when several items of claim are brought into account on either side, and being set against one another, a balance is struck, and the consideration for the peyment of the balance is the discharge on either side; each party resigns his own rights on the sums he can claim in consideration of a similar abandonment on the other side, and of an agreement to pay and to receive in discharge the balance found due." "It is not necessary in order to make out a real account stated, that the debts should be debts in *praesnti*, or that they should be legal debts." Particular reliance has been placed by the Courts in India on the language, as quoted above, of Backburn. J. But as to the true import of this decision the Indian Courts do not agree. On the one hand, it has been held in several cases (*e.g.*, *Kanhaivalal* v. *Stowell*, 3 All. 581; *Nahanibai* v. *Nathu Bhan*, 7 Bom. 414; *Jamun* v. *Nandlal*, 15 All. 1; *Rajnarain* v. *Ramsarup*, 52 All. 480; *Suraj Prosad* v. *W. Boucke*, 5 P.L.J. 371), that in a purely loan transaction, even though there may be payment by the debtor from time to time, in as much as there can be no adjustment of reciprocal claims or demands. the final balance struck, even though with mutual, consent, can never amount to an account stated.

On the other hand, it has been held in some cases that it is not necessary that there should be mutual demands of claims but if there are debit and credit enitres in an account, though indicating only the advances made by one side and payments made by the other, the final settlement of accounts between the parties may amount to an account stated within the meaning of Art. 64. (Observations in *Dukhu Sahu* v. *Md. Bikhu* 10 Cal. 284; *Manjunatha* v. *Devamma*, 26 Mad. 186; *Sarifun* v. *Feradoal*, A.I.R. 1923 Cal. (578).

The weight of authority is however in favour of the former view. This conflict

* It was with reference to these facts that Blackburn, J., spoke of items of claim, but he also uses the phrase "This the same as if each item was paid and a discharge given for each, and in consideration of that discharge the balance was agreed to be due." Lord Cave uses the expression "items of debit and credit" and does not emphasise any distinction between 'mere items of debit and credit' and 'items of claim.' Moreover, in a sense partial payments by a debtor to his creditor might be brought within Blackburn, J.'s words as "items of claim," because in any action for the moneys due they might be relied on by way of a counter-claim or set off.

of opinion has been set at rest by the recent decision of their Lordships of the Privy Council in *Bishunchand* v. *Girdharilal*, 61 I.A. 273, 38 C.W.N. 691, A.I R. 1934 P.C. 147, 56 All. 376, 59 C.L.J. 535, 67 M.L.J. 110, 1934 A.L.J. 623, 36 Bom L.R. 723, 150 I.C. 6, by its pronouncement in favour of the latter view. This decision was given in May, 1934. But prior to this in February, 1934, the same point came up for decision before their Lornships in *Siqueira* v. *Noronha*, 38 C.W N. 813, 59 C L.J. 494, 151 I.C. 90, A.I.R. 1934 P.C. 144. "That was on an appeal from the Court of Appeal from East Africa varying a judgment of the Supreme Court of Kenaya. The Limitation Act. 1877, which so far as is material is the same as the Act of 1908. had been applied to Kenaya by the Order in Council and the principal question discussed in the judgment of the Board delivered by Lord Atkin on 15th Feb., 1934, was whether there was an account stated within Art 64 of the Act. The plaintiff had for many years, from 1913 until 1928, been employed by the defendant. In the books of the business there were accounts of the plaintiff's drawing from time to time; there was no account on the other side in respect of his salary, because the salary had never been fixed, In 1928 an account was drawn up and signed by the defendant's manager showing credits for salary and debits for drawings, and ending, 'by balance in your favour, 42,458-84'. The account had started with a balance of 26,000 shillings in 1921. and appears throughout to have been in the plaintiff's favour. Lord Atkin held that it was an account stated involving a promise to pay the balance shown in the account for good consideration. He distinguished and put on one side that form of account stated which constituted a mere acknowledgment of a debt. Then he thus stated what would properly be described as a real account stated:—"But, on the other hand, there is another form of account stated which is a very usual form as between merchants in business, in which the account stated is an account which contains entries on both sides, and in which the parties who have stated the account between them have agreed that the items on one side should be set against the items upon the other side and the balance only should be paid; the items on the smaller side are set off and deemed to be paid by the items on the larger side, and there is a promise for good consideration to pay the balance arising from the fact that the items have been so set off and paid in the way described."

This decision was considered in *Bishunchand* v. *Girdharilal*, 61 I.A. 273, 38 C.W.N. 961, 56 All 376, 150 I.C. 6, A.I.R. 1934 P.C. 147. There the plaintiff-appellants before their Lordships of the Privy Council, who carried on business as money-lenders for 25 years had been lending money to the defenant-respondents, the rate of interest being 10 annas per cent. per mensem. The loans were in the appellants' books with charges for interest at intervals, and so also were the payments on account made by the respondents from time to time, the ledger set out the various items of debit and credit, and the suit was brought as on an account stated evidenced by entries as below described in the appellants' ledger. At the foot of the page of the ledger on the debit side there was written by or on behalf of the appellants: "Balance due to be received after adopting the account up to Kunwar sudi 9 Sambat 1982 (*i.e.*, 26th September 1925), Rs. 16,043-8-9." Below this entry written in the writing of one of the respondents: "Balance due to be paid after adjusting the account up to Kunwar Sudi 9. Rs. 16,043-8-6." The latter entry was signed by the respondents who were literate. The last loan granted to the respondent was Rs. 1,000 on 9th August, 1921, and the last acknowledgment of the accounts by the respondent previous to that sued upon was on 10th December 1921. Considerable payments either on account of principal or on account of interest or of both. were made between 1921 and 1925. The respondents pleaded that they merely signed in reliance on the word of the appellants and did not go into the accounts with them and that the case was barred by limitation,

The trial Court found that there was in fact a settlement of account between the parties on 26th September, 1925, so that the balance then struck became itself a debt which was to carry future interest at 10 annas per cent. per mensem, and gave judgment for the appellants, halding that there was an account stated within the meaning of Art. 64, Sch. I. This judgment was reversed in appeal by the High Court of Allahabad. The learned Judges held that in law the words "account stated" cannot properly be applied to a money lending transaction where one party lent to the other and the other merely made repayments of the money lent, so that the borrower was always the debtor of the lender: such transactions, they held, were entirely unilateral and there could be no settlement of a mutual account, so as to satisfy the words in Art. 64, "account stated between them."

The plaintiffs appealed to the Privy Council from the decision of the High Court. Their Lordships of the Privy Council elaborately examined the relevant decisions, both of the English and Indian Courts, and allowed the appeal with costs and restored the decree of the trial Court. In delivering the judgment of the Board, Lord Wright points out that there can be account stated within the meaning of Art. 64, Limitation Act, where there are no cross demands between the plaintiff and the defendant in the strictest sense of the term. He says that where the relationship between the parties is that of a creditor and debtor and a loan is advanced by the creditor to the debtor either in one lump or on different occasions and if there is payment from time to time by the debtor and after certain intervals, the credit side and the debit side are squared up and the amount found due is calculated by addition and subtraction and the final result is stated and the debtor signs it, it would come within the meaning of Art. 64, Limitation Act. The Noble Lord observes: "Indeed, the essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree to the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side *protanto*, go on to agree that the balance only is payable." Then there is this passage which is very important: 'Such a transaction is in truth bilateral, and create a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be at least, in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be a complete satisfaction on the payment of the agreed balance. Hence there is mutual consideration to support the promise on either side and to constitute the new cause of action. The account stated is accordingly binding, save that it can be reopened on any ground—for instance, fraud or mistake—which would justify setting aside any other agreement." The Noble Lord proceeds to point out that: "This rule does not depend on the character or origin of the debts or credits on either side..... Nor can it be material.....in determining whether there can be an account stated, whether the balance of indebtedness is throughout, as it must be at the end, in favour of one side. Equally it seems irrelevant whether the debt in favour of the final creditor was created at the outset by one large payment or consisted of several sums of principal and several sums of interest; nor can it matter, in this connection, whether the only payments made on the other side were simply payments in reduction of such indebtedness or were payments made in respect of other dealing. In any event, items must in the same way be ascertained and agreed on each side before the balance can be struck and settled."

Relying on these two Privy Council decisions it has been held in *Prasanna Kumari* v. *Tripura Charan*, A.I.R. 1936 Cal. 470, that where on settlement of an account in respect

of a debt on a promissory note a certain amount is found due on a particular date on calculation of interest at a reduced rate, and an endorsement to that effect made on the back of the promissory note is signed by the debtor, such an endorsement amounts to an account stated between the parties and a suit for recovery of the amount alleged to be due is governed by Art. 64. So also, where the amount mentioned in a hatchita is the balance due after setting off the payments against the amounts borrowed from time to time as shown in the account books and the parties agreed to this setting off, and accepted the balance as correct, and the account books and hatchitta are parts of the same transaction and the hatchitta is signed by the defendant, a suit for the amount mentioned in the hatchitta is for money found to be due on accounts stated within the meaning of this Article—*Nabendra* v. *Shasabindoo*, A.I R. 1941 Cal. 595, 197 I.C. 321.

The same view was adopted in *Sohanlal* v. *Arya Megh Udhar Sabha, Sialkot*, A.I.R. 1935 Lah. 877, 37 P.L.R. 126, 159 I.C. 447. There the defendant had leased certain land from the plaintiff and a house thereon had been sold to him. An account was kept by the plaintiff in the defendant's name in which the rent due from him was debited and the amounts received from him were credited from time to time. Balances showing the amounts due from the defendant were also struck and admitted at intervals the first balance having been struck in March, 1927, and the last in February, 1930. The suit was based on the last balance. It was held *inter alia* that Art. 64 governed the case, and the suit was not barred by limitation. (A.I.R. 1934 P.C. 147 followed).

On the other hand, in *Shamlal & Others* v. *Gulabchand*, A.I.R. 1935 Nag. 221, 159 I.C. 47, it was held that a document containing an entry signed by a creditor that on making account on a particular day in respect of the old *sarkat* and after deducting repayments, a certain amount is found due including interest, and also an entry signed by the debtor admitting the amount to be due cannot be regard as "accounts stated" within the meaning of Art. 64. Before a document can be used as an account stated, it must be shown that there were items on both sides of the account—*Ramprasad* v. *Anandi*, I.L.R. (1940) Nag. 441, A.I.R. 1938 Nag. 180. But in *Seth Bulakhidas* v. *Ganpatrao*,, I.L.R. (1946) Nag. 21, A.I.R. 1946 Nag. 112 it has been held that an entry in an account book showing the balance due signed by the debtor, amounts to an "account stated," though the account is not of mutual claims and there are only debit and credit entries showing calculation of interest and payments made.

According to the Allahabad High Court a mere statement of the balance which is due on a particular date can not be called an account stated. In order to bring a case under this Article, there must be something in the nature of a fresh contract—*Gopinath* v. *Chameli*, I.L.R. (1938) All. 741, 1938 A.L.J. 773, A.I.R. 1938 All. 504.

Where a document contains items showing realisations yearly made as credit against payments as debit and a balance is struck showing a certain amount in debit side and below this the defendant makes an endorsement "I admit and accept as correct," it is not a case of 'account stated' as there is neither agreement nor adjustment but merely a statement of account with an acknowledgment by the defendant; nor a fresh promise to pay is made by the endorsement—*Satish v. Rampad*, A.I.R. 1938 Cal. 861, 182 I.C. 368.

N.B.—In view of the Privy Council decision in 56 All. 376 the decisions of the Indian High Courts in A.I R. 1930 All. 467, 7 Bom. 414, 15 All. 1, A.I.R. 1920 Pat. 161, 3 All. 581, 23 All. 502, in so far as they hold that the words "account stated" cannot be applied to a money lending transaction where one party lent to the other and the other merely made repayments of the money lent, so that the borrower was always the debtor to the lenders, are no longer good law.

It should be noted that where an account has been stated it is immaterial that

some items were statute barred, but if the whole account is time-barred, then the ban imposed by sec. 25 (3) of the Contract Act would apply—*Ganesh* v. *Rambar*, I.L.R. (1942) Nag. 369, 1942 N.L.J. 248, A.I.R. 1942 Nag. 92.

381. "Signed":—This Article does not apply unless the account stated is in writing and signed by the defendant—*Dukhi* v. *Mahomed*, 10 Cal. 284 (F.B.) (overruling *Shaikh Akbar* v. *Shaikh Khan*, 7 Cal. 256); *Murugappa* v. *Vyapuri*, 32 M.L.J. 536, 38 I.C. 227; *Thakurya* v. *Sheo Singh*, 2 All. 872; *Zulfikar Hussein* v. *Munna Lal*, 3 All. 148 (F.B.). An account stated which is signed by one of several partners is binding on all—*Manjunatha* v. *Devamma*, 26 Mad. 186. See sec. 20, Partnership Act. If the account is not signed as required by this Article, the plaintiff can only succeed in respect of such items as are within the ordinary period of limitation—*Thakurya* v. *Sheo Singh*, 2 All. 872. Where the actual page of the account with the name of the defendant at the heading and the account is totalled up and the balance struck in pencil is also in the hand-writing of the defendant, it is not a statement of account signed by the defendant sufficient for this Article—*Kanthasami* v. *Pethusami*, (1940) 2 M.L.J. 334, 1940 M.W.N. 882, A.I.R. 1940 Mad. 887. Where there is no allegation in the plaint of any writing signed by defendant this Article does not apply—*Shambhoo* v. *Firm Dindayal*, I.L.R. (1950) Nag. 464, 1950 N.L.J. 150, A.I.R. 1950 Nag. 228. But where a person goes through the account and signs an acknowledgment of his liability for a particular sum in the creditor's account book and affixes an anna stamp to that entry, the account is account stated within the meaning of this Article—*Ramcharan* v *Nanhey*, 14 Luck. 478, 1939 O.W.N. 176, A.I.R. 1939 Oudh 120. As between principal and agent an account, to be a settled account, need not be signed provided that it is submitted to the party sought to be made liable on it, and he has by words or by conduct, acquiesced in it—*Sadik* v. *Bibhuti*, 21 Pat. L.T. 41, A.I.R. 1940 Pat. 71.

65. For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency.	Three years.	When the time specified arrives or the contingency happens.

382. Cases:—A verbally became surety upon a bond executed by B for repayment in May 1872, to the plaintiff, of certain advances, promising, "if B does not pay eventually (*shesh porjunto*) I will." Default was made, and in April 1878 the plaintiff filed a suit against both B and A, which was clearly barred against B. It was held that the words *"shesh porjunto"* could not be taken as limited to the time specified in the bond, and that the lower Court, in order to determine whether the suit was barred against A, must find upon the evidence when a demand was made upon him for payment, and then apply this Article—*Bishumber* v *Hungsheshur*, 4 C.L.R. 34. In case of a promissory note payable on demand, the cause of action against the surety arises on the same date on which it arises against the principal debtor, *viz.*, the date of the pro-note. The surety is not entitled to any further notice—*Brojendra Kishore* v. *Hindusthan Co-operative Insurance Society*, 44 Cal. 978, 21 C.W.N. 482; *Raja Sreenath* v. *Raja Peary Mohan*, 21 C.W.N. 479, 39 I C. 205. Where a deed of further charge provided that without payment of money due under it the mortgagor will not be entitled to redeem the property mortgaged, and the mortgagor paid off the mortgage amount without paying the further charge, *held* that a suit for recovery of

the further charge fell under Art. 65, and time ran from the date of redemption of the principal mortgage—*Brahmajit* v. *Dwaraka*, 3 O.W.N. 976, A.I.R. 1927 Oudh 53. Where a bond executed by the defendants contained a covenant that money would be paid either on a certain date, or in the event of default, on the date when a certain mortgage (executed by the defendants in favour of the plaintiff) would be redeemed, it was held that the cause of action for a suit to recover money due under the bond arose when the mortgage was redeemed without satisfying the bond—*Mahabir* v. *Durbijai*, 8 A.L.J. 233, 9 I.C. 482. Where there was an agreement by the vendor to refund purchase-money in case of land providing deficient, and the land actually proved deficient, a suit for refund of the purchase-money was a suit governed by this Article; if the sale-deed was registered, by Art. 116—*Kishen* v. *Kinlock*, 3 All. 712. The defendants sold by registered sale deed their shares in certain land to the plaintiff and had agreed that if the land sold should not fall to their share in the partition proceedings which were then pending, they would pay compensation. The vendors were allotted at partition a less area than the area sold to the plaintiff, and compensation was claimed accordingly. *Held* that the suit fell under this Article read with Article 116, and time ran from the date of the order of the Revenue Officer passed in the partition proceedings—*Rukhan Din* v. *Hassan Din*, 72 I.C. 897, A.I.R. 1923 Lah. 24 A suit by the mortgagor against the mortgagee to recover the balance of the consideration payable by the latter to the former together with damages for non-payment of the amount in time is a suit governed by Article 65 read with Article 116 (the mortgage being registered)—*Naubat* v. *Indar*, 13 All. 200, (204). When grain is advanced to the defendant on a contract that it should be repaid in kind, a suit against the defendant for compensation for not having fulfilled the promise falls under Article 65 or 115, but not under Art. 52 or 120. Article 52 refers only to those cases in which the contract is to pay for the price of the goods in money and not in kind—*Md. Din* v. *Sohan Singh*, 4 Lah.L.J. 268. 65 I C. 691, A.I.R. 1922 Lah. 271; *Mengha Ram* v. *Hassu*, 41 P.R. 1918, 49 I.C. 231; *Labh Singh* v. *Rur Chand*, 4 Lah.L.J. 64, A.I.R. 1922 Lah. 122. Where the promisor before the arrival of the specified time intimates his intention of not performing his promise, still limitation will not commence to run until the specified time arrives—*Mansuk Das* v. *Rangayya*, 1 M.H.C.R. 162.

66. On a single bond, where a day is specified for payment.	Three years.	The day so specified.

383. Single bond:—"A bond merely for the payment of a certain sum of money without any condition in or annexed to it is called a simple or single bond. The term 'single bond' is sometimes used to signify a bond given by one obligor as distinguished from one given by two or more"—Halsbury's Laws of England, Vol. III, p. 80. In *Nihal Chand* v. *Khuda Baksh*, 76 I C. 150, A.I.R. 1924 Lah. 534, a bond executed by two persons (*viz.*, principal debtor and surety) was held to be a single bond under this Article. The expression 'single bond' means a bill or written engagement for the payment of money, without an alternative condition or a penalty attached—*Lachman* v. *Kesri*, 4 All. 3; *Gurditta Mal* v. *Singh*, 26 P.R. 1892; *Horilal* v. *Thamman*, 26 O.C. 121, 70 I.C. 85, A.I.R. 1923 Oudh 19. A bond providing for repayment of principal and interest after a specified period with option to sue on failure to pay interest is a single bond, notwithstanding the default clause—*Raghunandan* v. *Sheoroji*, 16 Luck. 464, 1941 O.W.N. 361, A.I.R. 1941 Oudh 210. Where a bond stipulates that on payment of certain amount by a specified date, the balance will be remitted by the creditor and on failure of payment the debtor will be liable to pay the entire

amount with compound interest, it is not a single bond—*Yeshwant* v. *Laxman*, I.L.R. (1938) Nag. 399, A.I.R. 1938 Nag. 13, 173 I.C. 463.

Where in a debt-bond the debtor stipulated that if the principal and interest be not paid up at the specified period, the creditor would be at liberty to recover the amount by instituting a suit, "from my moveable and immoveable property, my own milk," it was held that the language was too vague to warrant the inference of the creation of a mortgage, and that the instrument was no more than a simple bond to which Art. 66 applied; if such instrument was *registered*, Art. 116 would apply—*Collector of Etawah* v. *Beti Maharani*, 14 All. 162 (164). The liability of the surety being co-extensive with the liability of the principal, a suit on a bond executed by the principal debtor and surety, against both of them, falls under this Article, and limitation runs as regards both from the date fixed for payment—*Nihal Chand* v. *Khuda Baksh*, supra.

It has been observed by the Privy Council that where a mortgagee sues on a *personnal convenant* contained in the mortgage making the mortgagor responsible for any deficiency in the realisation of the mortgage-debt out of the mortgaged properties, the claim is governed by the three years' rule of Art. 66, and not by the 12 years' rule under Article 132—*Ganesh Lal* v. *Khetramohan*, 5 Pat. 585 (P.C.), 31 C.W.N. 25 (31), A.I.R. 1926 P.C. 56, 95 I.C. 839. But it has been pointed out by the Madras High Court (as well as by other High Courts) that it is not clear whether the mortgage in this Privy Council case was properly and validly registered, and it was not necessary for their Lordships to decide whether the three years' rule (Art. 66) or six years' rule (Art. 116) applied, as the suit was barred in either case, having been brought 10 years after the date of the mortgage. If the mortgage is validly registered the suit on personal covenant would be governed by the six years' rule of Art. 116—*Chengalamma* v. *Veeraraghava*, 55 M.L.J. 506, A.I.R. 1928 Mad. 1124 (1126), 114 I.C. 340; *Ratnasabapathi* v. *Daivasigamoni*, 52 Mad. 105 (F.B.); *Umapada* v. *Haripada*, 35 C.W.N. 1030 (1031), 53 C.L.J. 520. See Note 483 under Art. 116, where a large number of cases on this subject has been cited.

384. Specified date:—Where the bond stipulated for payment *within two years* or on certain contingencies the case was not one under this Article as no particular day was specified for payment—*Gauri* v. *Surju*, 3 All. 276. But in *Narain* v. *Gouri Persad*, 5 Cal 21, where a bond provided that the principal should become due within a certain specified time, *e.g.*, within 6 months from the date of execution, it was held to be regarded as the "day specified" under this Article, and a suit brought within 3 years from that day was not barred. The same view has been taken in *Gaya Prosad* v *Sher Ali*, 15 A.L.J. 313, 39 I.C. 574; *Sham Lal* v. *Tehariya*, 18 A.L.J. 476, 58 I.C. 278; *Ramia* v. *Sankaranarayana*, A.I.R. 1958 Kar. 246. But where the creditor can demand the whole of the money due under a bond whenever default is made in payment of the interest for any two years consecutively, it is impossible to predicate of the bond that there is any certain day 'specified' for payment within this Article. The bond falls under Art. 80—*Hori Lal* v. *Thamman Lal*, 9 O.L.J. 416, A.I.R. 1923 Oudh 19.

It is settled law that where a deposit is for a fixed period, the money is payable at the specified time, namely at the expiry of that fixed period, and the Article applicable is not Art 60 but either Art. 66 or Art. 115—*I. S. Seema* v. *R. Banerjee*, A.I.R. 1936 Rang. 338, 164 I.C. 412. Where in a simple bond it is provided, that, if the monthly interest is not paid or if the principal money lent is not paid at the end of a specified period, the creditor may sue, even though there is a breach of the condition for payment of the interest still that is a matter over which the creditor has a right of waiver and limitation will only begin to run from the period stipulated in the bond for payment. In such a case if no default in payment of interest is made then Art. 66

applies for limitation. If on the other hand, default is made in payment of interest then Art. 68 applies. Thus, limitation runs either from the date specified for payment of the bond or from the date when the condition as regards payment of interest is broken. The two Arts. 66 and 68 read together are tantamount to Art. 132 and the expression "when the money sued for becomes due" would apply to either Art. 66 or Art. 68—*L. Naraindas* v. *Mannoolal*, A.I.R. 1935 All. 405, 1935 A.L.J. 341, 157 I.C. 409; *Raghunandan* v. *Sheoraji*, 16 Luck. 464, 1941 O.W.N. 361, A.I.R. 1941 Oudh 210.

(The reasoning in the Privy Council case of *Lassa Din* v. *Gulab Kunwar*, A.I.R. 1938 (P.C.) 207; 7 Luck. 442 applied).

The same view was adopted in *Umrao* v. *Mangla*, A.I.R. 1935 All. 443, 1935 A.L.J. 381. 154 I.C. 521.

Art. 66 provides for the case of a single bond where a day is specified for payment . It has no application to a case where the bond provides payment of interest month by month, and entitles the creditor to recover his money in case of default of payment of interest for every month—*Shiva Narain* v. *Badal*, A.I.R. 1936 Oudh 279, 162 I.C. 459.

Applicability:—To attract the application of the article all that is necessary to show is that the suit is based on a single bond where a date is specified for payment. Whoever may be the person against whom the bond is sought to be enforced, Art 66 would apply if the suit is based on a single bond which specified a date for payment—*Deosaran* v. *Loknath*, A.I.R. 1937 All. 559.

67. On a single bond, where no such day is specified.	Three years.	The date of executing the bond.

385. Where a deed provided that if the obligee desired to recover his money, he should be at liberty to realise it whenever he wished, it was held that for the purpose of limitation, money became due immediately upon the execution of the bond —*Gajraj* v. *Raghubar*, 18 O.C 86, 27 I.C. 540. If a house is mortgaged, while under attachment, the mortgage is void altogether, under sec. 64, C.P. Code, and a suit to enforce the personal security is governed by Article 67. Article 97 does not apply to the case as the consideration failed *ab initio*—*Ghulam Murtaza* v. *Fazal Hahi*, 27 P.L.R. 801, A.I.R. 1927 Lah. 101 (102).

68. On a bond subject to a condition.	Three years.	When the condition is broken.

386. This Article applies to bonds of the nature of security bonds—*Raghunandan* v. *Sheoraji*, 16 Luck. 464, 1941 O.W.N. 361, A.I.R. 1941 Oudh 210. An administration bond executed under sec. 78 of the Probate and Administration Act, 1881 (sec. 291 of the Indian Succession Act, 1925) is a bond 'subject to a condition' and a suit against the administrator and his sureties on such a bond is governed by this Article—*Maung San* v. *Maung Kyaw*, 1 Rang. 463, A.I.R. 1924 Rang. 68 (69), 76 I.C. 802; *Ramanathan* v. *Rangammal*, 17 M.L.T. 61, 27 I.C. 849; *Ahmed* v. *Fatima*, 8 Bur.L.T. 69, 29 I.C. 505. But in *Kanti Chandra* v. *Ali Nabi*, 33 All 414 (420), 8 A.L.J. 199, 9 I.C. 935, and *Ko Pu* v. *Ma Thein*, 12 Bur.L.T. 225, 56 I.C. 968, the Judges are of opinion that a suit on an administration bond is governed by Article 120—*Manubhai Chunilal* v. *G. A. F. Corp. Ltd.*, A.I.R. 1936 Bom. 363. A suit by an assignee of an administration bond under the provisions of sec. 292, Succession Act for its enforcement is a suit upon a bond subject to a condition to which this Article applies—*General Acci-*

dent Fire and Life Assurance Corporation Ltd. v. *Janmahomed*, 67 I.A. 416, I.L.R. (1941) Bom. 202, 72 C.L.J. 497, 45 C.W.N. 429, 43 P.L.R. 138, (1941) 1 M.L.J. 88, 1941 P.W.N. 271, A.I.R. 1941 P.C. 6.

A bond executed by a guardian under sec. 34, Guardians and Wards Act, is a bond 'subject to a condition' under this Article, the condition of the bond being that the guardian shall render accounts and shall pay the balance found due by him from time to time—*Krishna Chettiar* v. *Venkatachalapathi*, 42 Mad. 302 (309). A suit to recover penalty imposed under section 165 of the Madras Local Boards Act (V of 1884) is governed by this Article—*Kundapur Taluq Board* v. *Lakshmi Narayana*, 17 M.L.J. 537.

Where a bond stipulates that on payment of certain amount by a date mentioned therein the creditor will remit the balance and in case of failure to pay the amount within the specified date the debtor will be liable to pay the entire amount with compound interest, the bond is one subject to a condition—*Yeshwant* v. *Laxman*, I.L.R. (1938) Nag. 399, A.I.R. 1939 Nag. 13, 173 I.C. 463.

387. Starting point of limitation:—When the administrator dies, the condition must be deemed to have been broken at the latest on that date and time would begin to run from that date. Section 292 of the Succession Act has not the effect of conferring a new cause of action on the assignee and hence cannot provide a fresh starting point for the purposes of limitation—*General Accident Fire and Life Assurance Corporation Ltd.* v. *Janmahomed*, supra. So also, where a surety dies, the condition of the bond executed by him is broken at the latest on his death, and the cause of action against his heirs therefore arises on the date of death under this Article—*Mani Devi* v. *Anpurna*, 22 Pat. 114, A.I.R. 1943 Pat. 218, 206 I.C. 126.

Where a debtor makes a part payment of the amount due on bond and makes an endorsement that the balance would be paid by a certain date, limitation will run on the expiry of the period mentioned in the endorsement—*Harbans* v. *Sobha*, 41 P.L.R. 352, A.I.R. 1939 Lah. 236.

Limitation for a suit against an administrator and his surety runs not from the time when the alleged misappropriation took place, but from the date when the Court confirmed the Commissioner's accounts and the shortage was ascertained—*Hamadanee* v. *Ma Shwe*, 4 Rang. 358, A.I.R. 1927 Rang. 28 (29), 98 I.C. 459. Limitation does not necessarily run from the date of the first breach of a condition of the bond. Where the bond contains several conditions, and a suit is brought for breach of one of the conditions, it must be filed within three years of that breach. The breach of each condition gives rise to a separate cause of action, and time begins to run from the date of the particular breach giving rise to the suit—*Maung San* v. *Maung Kyaw*, 1 Rang. 463, 76 I.C. 802, A.I.R. 1924 Rang. 68 (at p. 69). Ordinarily, the administrator's work may be said to be completed when he files his final accounts, showing how he has dealt with the estate, and these accounts have been accepted by the Court; limitation will then begin to run. But it very often happens that there is litigation pending against the administrator, and in such a case the administrator (and consequently his sureties) cannot be absolved until the close of the litigation. If a decree is passed against him in that litigation, he is bound as administrator to pay money or deliver property as the case may be, and failure in this respect is a breach of the bond. Limitation runs from the date of this breach—*Ibid* (at p. 70). In cases where the administration bond contains successive covenants, each breach gives a separate cause of action; but the date of the last breach is the starting point of limitation in a suit on the bond when the bond is conditioned on the performance of several acts, and the obligation to pay is enforceable till the last of the conditions has been fulfilled—*Ramanthan* v. *Rangammal*, supra.

69. On a bill of exchange or promissory note payable at a fixed time after date.	Three years.	When the bill or note falls due.
70. On a bill of exchange payable at sight, or after sight, but not at a fixed time.	Three years.	When the bill is presented.
71. On a bill of exchange accepted payable at a particular place.	Three years.	When the bill is presented at that place.
72. On a bill of exchange or promissory note payable at a fixed time after sight or after demand.	Three years.	When the fixed time expires.
73. On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue.	Three years.	The date of the bill or note.

388. The words "on demand" have been used in this Article in the sense in which they have been interpreted in English Common Law, *i.e.*, at once and without demand—*Secretary of State* v. *Radhika Prasad Bapuli*, 46 Mad. 259 (288, 289). The words "on demand" do not constitute a condition precedent, but merely import that the debt is due and payable immediately, and it is for this reason that the period of limitation runs from the date of the instrument and not from the date of demand—*Meghraj* v. *Johnsan*, 11 N.L.R. 189, 31 I.C. 880 (882). A promissory note payable 'at sight' is a promissory note payable 'on demand' and is governed by this Article —*Durga Prasad* v. *Kalicharan*, 40 C.L.J. 84, A.I.R. 1924 Cal. 1065, 84 I.C. 475. A promissory note payable at any time within six years on demand is not governed by this Article but by Art. 120—*Sanjivi* v. *Kama Erappa*, 6 Mad. 290. But, it is submitted, the case would fall under Art. 80, which is the residuary Article in respect of *promissory notes*.

The liability of an endroser of a promissory note arises only on the date of the endorsement; and a suit within three years of the endorsement, though beyond three years of the execution of the promissory note, is not barred by limitation—*Moossan* v. *Kattyali*, (1939) 2 M.L.J. 760, A.I.R. 1940 Mad. 85, 50 L.W. 49.

389. Postponing right to sue:—Where a promissory note was accompanied with a letter in which the debtor stated that he would pay the principal

and interest within one year, *held* that the letter amounted to a writing postponing the right to sue within one year, and the limitation would not run till at the expiration of the period mentioned in the writing, and the suit was governed by Art. 80, and not by this Article—*Jwala Prasad* v. *Shama Charan*, 42 All. 55. Where on the very date of execution of a promissory note payable on demand the defendant executes an agreement which recites that if he does not discharge the debt relating to the promissory note before discharging the debt due under a usufructuary mortgage executed in favour of the plaintiff previously, the defendant shall pay the entire amount due under the promissory note along with the debt due under the mortgage and then take delivery of possession of the mortgaged lands, the agreement has the effect of extending the time for payment of the promissory note and the plaintiff can file the suit under Article 80 within three years after the date of the discharge of the mortgage—*Subbamma* v. *Venkanna*, (1950) 1 M.L.J. 161, 1950 M.W.N. 118, A.I.R. 1950 Mad. 749. Where the defendant executed a promissory note to the plaintiff payable on demand, and on the same date gave a writing to the effect that "ten months' *thavanai* (time for payment) from the date of the pro-note has been fixed for this note," it was held that the pro-note was accompanied with a writing postponing the period of payment; consequently Article 73 did not apply but Article 80, and time began to run from the expiry of the period mentioned in the writing—*Annamalai* v. *Velayuda*, 39 Mad. 129 (F.B.) overruling *Simon* v. *Hakim Mahomed*, 19 Mad. 368 and *Somasundaram* v. *Narasimha*, 29 Mad. 212. A promissory note payable after six months whenever the plaintiff shall demand the same, is a promissory note payable on demand with the right to sue restrained for six months, and limitation consequently begins to run on the expiry of the six months from its date—*Jeaunnissa* v. *Manekji*, 7 B.H.C.R. 26.

74. On a promissory note or bond payable by instalments.	Three years.	The expiration of the first term of payment as to the part then payable; and for the other parts, the expiration of the respective terms of payment.

389A. Where a bond stipulates that the principal amount thereunder would be paid back within a fixed period (*e.g.*, 18 years) and the entire principal amount is divided into instalments payable annually and provision is also made for payment of interest, the bond is one payable by instalments, and as the bond contains no stipulation that if default be made in payment of one instalment, the whole sum shall be due, the case is governed by Art. 74, and not by Art. 75; the cause of action in respect of each instalment in default would arise on the date of the default. Consequently the plaintiff can recover only those instalments which fell due within three years before suit—*Gaura v. Ram Charan*, 4 Luck. 480, 4 O.W.N. 207, 100 I.C. 655, A.I.R. 1927 Oudh 539; *Sohanlal* v. *Lakshmichand*, 42 C.W.N. 545.

There is a well-defined distinction between this Article and Article 75. This Article applies to an instalment bond which does not contain any default clause, and in such a case, therefore, the plaintiff is entitled by the very terms of the bond to sue only for such instalments as remain unpaid. No question of waiver of default can arise in such a case. But where the document provides that in the case of default the obligee has the right to sue for the whole of the sum then remaining due, Article 75 applies—*Gokhul* v. *Sheo Prasad*, 18 Pat. 459, 20 Pat. L.T. 443, A.I.R. 1939 Pat. 433 (F.B.); *Gaya Prasad* v. *Ahmad*, 1941 O.W.N. 861, 194 I.C. 744, A.I.R. 1941 Oudh 485.

75. On a promissory note or bond payable by instalments, which provides that, if default be made in payment of one or more instalments, the whole shall be due.	Three years.	When the default is made, unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.

390. Scope:—This article is applicable only to *suit* on bonds and promissory notes payable by instalments, and not to *applications* for execution of a decree payable by instalments—*Ugra Nath v. Lagonmani*, 4 All. 83. Those applications are governed by Art. 182 (7).

This Article does not apply to a suit brought on a *verbal contract*—*Koylash Chunder* v. *Baykoonta*, 3 Cal. 619.

391. Bond payable by instalments:—A covenant for payment of *interest* by instalments does not bring a bond under this Article. Thus, where by a bond the principal lent, was payable within a fixed time, but the interest was made payable half-yearly, *held* that this was not a bond payable by instalments—*Ball* v. *Stowell*, 2 All. 322; *Shib Dayal* v. *Meherban*, 45 All. 27 (41), A.I.R. 1923 All. 1, 69 I.C. 981; *Narain* v. *Gouri Persad*, 5 Cal. 21. Even if the bond provides that on default of payment of any instalment of interest the whole amount of principal would be payable at once, the case would not fall under this Article but under Article 66. Thus, where money lent on a bond was made payable on a certain date *viz.*, 28th May, 1874, subject to the payment of interest every month and it was provided that if any monthly payment of interest should remain unpaid it should be lawful for the creditor immediately to call in and demand payment of the principal and interest, it was held that the cause of action accrued on the due date of the bond, *i.e.*, 28th May, 1874, and not on the date when the first unpaid instalment of interest became due—*Narain* v. *Gouri Pershad*, 5 Cal. 21. But where a bond provided that the obligee should be put in possession of land, and out of the produce thereof pay himself certain sums annually, and the balance to the obligor, and that if the obligee's receipts of produce should in any way be interfered with, the obligor should pay certain sums annually, it was held that this was a bond payable by instalments—*Ramchandra* v. *Gokalgiri*, 1877 P.J. 309.

392. Option to sue for the whole amount—Election or waiver of option:—Where the bond provides that on default of payment of one instalment the entire amount shall become due, the creditor is at liberty either to sue for the whole amount as soon as a default is made, or to waive the provision and bring a suit for recovery of each instalment as it falls due (*i.e.*, for recovery of those subsequent instalments as are not barred at the date of the suit). This is borne out by the third column of this Article. If the creditor elects to sue for the whole amount, the period of limitation runs from the date of the first default; but if he chooses to sue for the instalments that are not barred at the date of the suit, the period is to be counted from the date on which each of those instalments falls due—*Ajudhia* v. *Kunjal*, 30 All. 123 (124); *Amolak* v. *Baijnath*, 35 All. 455 (458); *Mohan Lal* v. *Tika Ram*, 41 All. 104 (107), 47 I.C. 926, 16 A.L.J. 929; *Rajaram* v. *Narain*, 22 N.L.R. 126, A.I.R. 1927 Nag. 28. But if the creditor sues to recover the whole amount, and the claim is found to be barred by reason of the suit not having been brought within three years

of the date of the default, the plaintiff cannot be allowed to fall back upon the claim to recover the instalments that fell due within three years before suit—*Sarat Lakshi* v. *Narendra*, 33 C.W.N. 250 (252), A.I.R. 1929 Cal. 292; *Gaya Prosad* v. *Ahmad*, 1941 O.W.N. 861, A.I.R. 1941 Oudh 485; *Shahaji* v. *Tukaram*, I.L.R. (1945) Nag. 955, 1945 N.L.J. 473, A.I.R. 1946 Nag. 117.

In a recent case it has been decided that if the creditor chooses to wait for the full period of the bond, (instead of suing when the first default is made) time runs from the expiry of the term of the bond. Thus, where a bond provided that the debt was to be paid in four years, and interest was to be paid on the amount every six months, and the bond further provided that in case of default in payment of interest on any six-monthly period or the amount of principal in any year, the creditor had power to realise the entire amount in any way he liked, and default was made in the payment of interest from the very outset, it was held that the creditor could sue for the amount due before the expiry of the stipulated period, when the default was made, or he could waive the option and wait for the full period of 4 years before putting the bond in suit—*Lalta Prasad* v. *Gajadhar*, 55 All. 283, A.I.R. 1933 All. 235 (241), following the principle of *Lasa Din* v. *Gulab*, 7 Luck. 442 (P.C.)

The advantage of waiver described in Art. 75 can be taken by the creditor against the principal debtor only and not against a person standing surety for payment of the debt.—*Gopi Chand* v. *Md. Umar Khan*, A.I.R. 1935 Pesh. 179. Where a creditor waives his right to take advantage of the forfeiture clause with regard to first three instalments and brings his suit for recovery of the whole of the balance within three years from the date when the fourth instalment falls due his suit is within time—*Gopi Chand* v. *Md. Umar Khan*, A.I.R. 1935 Pesh. 179.

In an instalment bond it was recited that the amount borrowed by the *debtor* would be repaid by him in monthly instalments, and that if the debtor executant did not pay three instalments the creditor would be able to realise the amount of three instalments and interest thereon or to realise the entire balance by means of a suit. It was held that under the terms of this bond the creditor was competent to sue at any time for all those instalments which had become payable within three years of the institution of the suit—*Fazu Ilahi* v. *Guddar Shah*, A.I.R. 1937 Lah. 1.

The rule of law prevailing in England is contained in *Hemp* v. *Garland*, (1843) 4 Q.B. 419; 62 R.R. 423 (426). In this case the terms of the instrument expressly provided that the creditor should be *at liberty* to enter up judgment for so much of the debt as should be unpaid at the time of the first default as if all the periods of payment had expired; and Lord Denman C. J. observed:—"If the plaintiff chose to wait until all the instalments became due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant who might well consider the action as accruing from the time that the plaintiff had the right to maintain it." This case was followed by the English Court of Appeal in *Reeves* v. *Butcher*, (1891) 2 Q.B. 509. In this case money was lent for a fixed period of five years subject to the payment of interest quarterly but it was provided that if any quarterly payment of interest should remain unpaid for 21 days after the same would become payable, it should be lawful for the plaintiff immedately upon the expiry of such 21 days to call in and demand payment of the principal and interest then due. It was held that the cause of action arose on the first default in payment of interest, and that time began to run from the earliest time at which plaintiff could have brought his acton. See *Halsbury's Laws of England*, Vol. XIX, p. 44.

In some Allahabad cases it has been said that the question whether the creditor has the right to waive the penalty clause upon default and to sue for those subsequent

instalments which are not barred at the date of suit, has to be decided upon a construction of the terms of the bond. Thus, where a bond payable by instalments contained a provision that upon default of payment of any one instalment it would be in the power of the creditor to sue for the whole amount due under the bond without waiting for the period provided for the payment of other instalments, it was held that this provision did not mean that the creditor would be *bound* to sue for the whole on default of payment of one instalment; the creditor was at liberty to waive the provision and to sue for those instalments which fell due within three years of the suit—*Ajudhia* v. *Kunjal*, 30 All. 123 (125); *Mohan Lal* v. *Tika Ram*, 41 All. 104 (106), 16 A.L.J. 929, 47 I.C. 926. On the other hand, a bond might be so worded as to *compel* a creditor to sue for the whole amount immediately if any default occurred. Thus, under an instalment bond the creditor was to recover from the debtor a sum of Rs. 11 every year for eight years, and there was a stipulation in the bond by which the obligor agreed that in case of any default in the payment of any instalment, he would pay the entire amount due on the bond irrespective of the instalments. None of the instalments were paid. The plaintiff stated in his plaint that his claim in respect of two instalments was barred by time, and that he did not want to sue for the entire sum due, and thus leaving out those two instalments, he sued for three instalments which fell due within three years before the institution of the suit. Held that the terms of the bond did not give him an *option* to waive the penalty clause, but compelled him to sue for the whole amount upon default and that limitation ran from the date of the first default and that the suit was barred—*Kanhai* v. *Amrit*, 47 All. 552, 23 A.L.J. 424, 87 I.C. 162, A.I.R. 1925 All. 499 (500). A bond provided for payment of the sum in two instalments. The terms of the bond were that on the expiry of the term for payment of half the sum (first instalment) the creditor had a right to recover it (i.e., the amount of the first instalment) or to recover the entire amount after the expiry of the last term. *Held* that the bond nowhere said that in case of default of payment of the first instalment the plaintiff was entitled to recover the entire amount. The right to recover the whole amount did not accrue till after the expiry of the date fixed for the second instalment. And if he brings his suit within three years of the time fixed for the second payment, it is within time—*Shiam Lal* v. *Jotia*, 23 A.L.J. 896, 89 I.C. 383, A.I.R. 1926 All. 142. The Patna High Court has taken the same view. Thus where an instalment bond with a default clause provides that on default of payment of any instalment the agreement for payment by instalment shall be cancelled or invalidated, then on the happening of a default the whole unpaid balance becomes payable, and unless the obligor sues within three years of such default, his remedy gets barred, and he has no longer any option to waive the default and treat each subsequent default as providing a cause of action—*Nalinaksha* v. *Suleman*, 30 Pat. L. T. 11, A.I.R. 1949 Pat. 447. The Madras High Court has held in *Ayyathurai* v. *Ibramsa*, (1949) 1 M.L.J. 112, 1949 M.W.N. 325, A.I.R. 1949 Mad. 592 that reading Article 74 and this Article together, this Artcle is no bar to a suit on the instalment bond itself either after or before the expiry of the instalment period for the recovery of the instalments which the debtor has contracted to pay and which have not themselves time-barred under Article 74. The two remedies are co-existent and open to the creditor and he has his choice either to wait and sue for the instalments in default under Article 74 or to enforce, the default clause in a suit contemplated by Article 75. A suit falling under this Article may be dismissed on the debtor proving waiver by the creditor of the default which entitles the creditor to file such a suit, in which case the creditor can still fall back on his right to sue for the instalments within the time limit prescrbed by Article 74. He has also the other alternative of suing to enforce the default clause for a subsequent default which he had not waived within the period prescribed by this Article. The same view has been taken in *Har Kaur* v *Court of*

Wards, A.I.R. 1952 Pepsu. 18. But the Calcutta High Court recognises no such distinction, and lays down that if a bond provides that in case of default of payment of an instalment the creditor will be *at liberty* to realise the whole sum and that the debtor shall pay interest on the sum defaulted, such stipulation has the same effect as a stipulation that upon default the whole sum *shall* become due. The condition as to payment of interest should not be interpreted to mean that the creditor had the option either to claim at once or to wait on the chance of payment with interest. Even though the debtor pays any interest on the sum defaulted, the limitation runs from the date of the default—*Basanta* v. *Nabin*, 53 Cal. 277, 96 I.C. 594, A.I R. 1926 Cal. 789 (790); *Jadab* v. *Bhairab*, 31 Cal. 297 (299). There is no distinction between a bond in which it is provided that on non-payment of an instalment the whole amount *shall* become due, and a bond in which it is provided that on non-payment of an instalment the whole amount *may* be sued for. In both cases, limitation runs as soon as a default is made in the payment of an instalment—*Jadab Chandra* v. *Bhairab*, 31 Cal. 297 (300).

Bar of Or. II r. 2, C. P. Code:—In an instalment bond where on a default it is provided that the creditor has the right to claim the whole amount, there is an option either to bring a suit on the whole amount relying on the default clause or to waive the default clause and claim each instalment as it falls due. Where it is clear from the plaint in such a suit that the suit is not based on the default clause but on the agreement to pay each instalment on the due date, no question of any bar of Or. II r. 2 C. P. Code, arises—*Badri* v. *Bhartu*, I.L.R. (1945) All. 105, 1945 A.L.J. 107, A.I.R. 1945 All. 119.

393. Waiver:—The word 'waiver' is not defined in this Act. But in Wharton's Law Lexicon it is defined as follows: "The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost..... mere lying by is not waiver for this purpose; there must be some *positive* act, which act if done is a waiver in law." Waiver may be express or implied; thus, where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for, there is a waiver—Halsbury's Laws of England, Vol. 7, p. 423. Waiver may be affected in a variety of ways and may be inferred from various circumstances. It must however always depend on some definite act or forbearance on the part of the plaintiff—*Sarat Lakshi* v. *Narendra*, 33 C.W.N. 250 (252), A.I.R. (1929) Cal 292; *Abinash* v. *Bama*, 13 C.W N. 1010 (1013), 4 I.C. 17; *Gokhul* v. *Sheo Prasad*, 18 Pat. 459, 20 Pat. L.T. 443. A.I.R. 1939 Pat. 433 (F.B.); *Raghunath* v. *Warlu*, I.L R. (1947) Nag. 947, A.I.R. 1948 Nag. 225 (overt act on the part of the creditor communicated to the debtor). Where the waiver is not express, it might be *implied* from conduct which is inconsistent with the continuance of the right—*Kanhai* v. *Amrit*, 47 All. 552, 23 A.L.J. 424, A.I.R. 1925 All. 499, 87 I.C. 162. Delay is not waiver; inaction is not waiver though it may be evidence of waiver. Waiver is a *consent* to dispense with something to which a person is entitled—Selwyn v. *Grafit*, 38 Ch.D. 284.

Mere abstinence from bringing a suit as soon as a default is made is not sufficient to prove waiver of the condition that upon default of payment of an instalment the whole debt shall become due. The question of waiver does not depend upon the sweet will of the plaintiff—*Kanhai* v. *Amirt*, 47 All. 552, 87 I.C. 162, A.I.R. 1925 All. 499; *Abinash* v. *Bama*, 13 C.W.N. 1010 (1012); *Girindra* v. *Khir Narayan*, 36 Cal. 394; *Jadab Chandra* v. *Bhairab Chandra*, 31 Cal. 297 (299); *Sarat Lakshi* v. *Narendra*, 33 C.W.N. 250 (257); *Sethu* v. *Narayana*, 7 Mad. 577; *Seshan* v. *Veera Raghwan*, 32 Mad. 284; *Gopala* v. *Paramma*, 7 Mad. 583; *Babu Ram* v. *Jodha Singh*, 11 A L.J. 89, 18 I.C. 690; *Amolak* v. *Baij Nath*, 35 All. 455 (458); *Khairuddin* v. *Atu Mal*, 188

P.R. 1883 (F.B.); *Nobadip* v. *Ram Krishna*, 14 Cal. 397; *Kanku* v. *Rustomji*, 20 Bom. 109 (113); *Kimatrai* v. *Sher Mahamed*, 8 S.L.R. 63, 26 I.C. 938; *Gopal v. Dhondya*, 8 N.L.R. 44, 14 I.C. 685; *Sewakram* v. *Basod*, A.I.R. 1933 Nag. 70 (72); *Vishwanath* v. *Sadashiv*, 28 N.L.R. 44 (F.B.), A.I.R. 1932 Nag. 1 (2) (overruling *Rajaram* v. *Narayan*, 22 N.L.R. 126); *Gokhul* v. *Sheo Prosad*, 18 Pat. 459, 20 Pat.L.T. 443, A.I.R. 1939 Pat. 433 (F.B.); *Ram Kumar* v. *Baquidi*, 22 Luck. 33, A.I.R. 1947 Oudh 128, *Mangli* v. *Gayaprasad*, 22 Luck. 299, 1947 O.W.N. 162 A.I.R. 1947 Oudh. 235, *Raghunath* v. *Warlu*, supra. There must be either an agreement between the parties, or such conduct as will itself afford clear evidence of a legal waiver—*Kankuchand* v. *Rustomji*, 20 Bom. 109. But in the following cases it has been held that abstinence from suing as soon as the default was made amounted to a waiver of the provision—*Ajudhia* v *Kunjal*, 30 All. 123 (125); *Mohan Lal* v. *Tika Ram*, 41 All. 104 (106), 47 I.C. 926.

The mere demand of an instalment does not amount to a waiver of the right to demand the whole sum—*Kanku* v. *Rustomji*, 20 Bom. 109 (115). The acceptance of interest after default, in a case in which the bond provides that upon default the creditor shall be at liberty to recover the whole amount and the debtor shall pay interest on the sum defaulted, does not amount to waiver—*Basanta* v. *Nabin*, 53 Cal. 277, A.I.R. 1926 Cal. 789 (790), 96 I.C. 594; *Gokhul* v. *Sheo Prasad*, 18 Pat. 459, 20 Pat.L.T. 443, A.I.R. 1939 Pat. 433 (F.B.).

The mere acceptance of an overdue instalment cannot constitute a waiver—*Mohesh* v. *Prasanna*, 31 Cal. 83; *Srinivas* v. *Sheo Gobind*, 20 I.C. 156; *Balaji* v. *Sakharam*, 17 Bom. 555; *Mumford* v. *Peal*, 2 All. 857; *Ballabhdas* v. *Dalip Singh*, 7 N.L.R. 147, 12 I C. 741; *Sewakram* v. *Basod*, A.I.R. 1933 Nag. 70 (72). In some cases it has been held that the question whether the acceptance of an overdue instalment amounts to a waiver is a question of fact to be determined by the circumstances of the case. See *Satrucherla* v. *Seetarama*, 3 Mad. 61, and *Kashram* v. *Pandu*, 27 Bom. 1 (F.B.); *Yohannan* v. *Geervarghese*, A.I R. 1952 Tra-Co. 29. Thus, when an instalment is paid some days after it becomes due, and it is found that this payment is accepted as one made on account or in satisfaction of that instalment, and not as a mere part payment in reduction of the whole debt, and that the circumstances indicate an intention to waive the forfeiture though there is no express waiver, the acceptance of the amount of that instalment constitutes a waiver within the meaning of this Article—*Nagappa* v. *Ismail*, 12 Mad. 192. The Patna High Court has held that acceptance of an overdue instalment amounts to waiver of the default but acceptance of portion of overdue instalment or of the interest only on the overdue instalment does not amount to waiver of the default—*Gokhul* v. *Sheo Prasad*, 18 Pat. 459, 20 Pat. L.T. 443, A.I.R. 1939 Pat. 433 (F.B.). Payment and acceptance of amounts equivalent to overdue instalments are not sufficient to prove waiver, when such payments are not appropriated to any particular instalments—*Tukaram Appa* v. *Laxman Appa*, A.I.R. 1935 Nag. 43; 18 N.L.J. 104; 159 I.C. 96. But the payment by the debtor and acceptance by the creditor specifically made towards the satisfaction of a particular defaulted instalment amounts to a waiver of that default—*Raghunath* v. *Warlu*, I.L.R. (1947) Nag. 947, A.I.R. 1048 Nag. 225; even in the absence of the fresh consideration, a fresh agreement or some thing amounting to an estoppel—*Yohannan* v. *Geevarghese*, A.I.R. 1952 Tra-Co. 29. The question whether there is waiver or not depends on the attending circumstances of the act claimed as a waiver in each particular case. Where there is no evidence either that the debtors requested the creditors to excuse the default or that the payment of the overdue amount was accepted as a consequence of waiver, the suit filed more than 3 years from the date of the first default cannot be saved from the bar of limitation by a plea of waiver—*Sewakram* v. *Basod*, 144 I.C.

211, A.I.R. 1933 Nag. 70 (72), following *Vishwanath* v. *Sadashiv*, 28 N.L.R. 44 (F.B.), A.I.R. 1932 Nag. 1 (2). Contra—*Chenibash* v. *Kadum*, 5 Cal. 97; *Maharaja of Benares* v. *Nandram*, 29 All. 431; *Jadab Chandra* v. *Bhairab Chandra*, 31 Cal. 297 (299); *Ram Jawaya* v. *Ram Singh*, 2 Lah.L.J. 314. These latter decisions are in accord with the English law as laid down in *Norton* v. *Wood*, 1 R. & M. 178, where Lord Lyndhurst observes: "If the money be tendered after the period when it became due, and the person to whom it has been paid does not see fit to refuse it, it is a waiver of the obligation; it must be taken as a regular payment, if the person receives it the day after, without making any objection."

It the creditor pleads payment of an overdue instalment by the debtor, and the payment is found to be *false*, there is no waiver—*Abinash* v. *Bama*, 13 C.W.N. 1010 (1013), 4 I.C. 17. Similarly, if the creditor pleads payment of interest after default, and it is found that no interest has actually been paid by the debtor, there is no waiver. The fact of waiver would be absolutely inconsistent with the plea, when such plea of payment has been found to be false—*Sarat Lakshi* v. *Narendra*, 33 C.W.N. 250 (252) A.I.R. 1929 Cal. 292.

Where the plaintiff, who is entitled, in default of payment of a certain sum by the defendant, to receive a much larger sum, receives from the defendant on default being made by him a larger sum than that which was due at the prescribed time but one smaller than that which he was entitled to on default under the agreement, he cannot be said to have waived his right to the larger amount—*Nanjappa* v. *Nanjalla*, 12 Mad. 161. If the creditor accepted several irregular payments without objection, he must be taken to have waived his right to enforce the payment of the whole amount—*Sakhawat* v. *Gajadhar*, 28 All. 622. A consent not to sue for the bond on failure of payment of an instalment amounts to a waiver—*Ram Chander* v. *Rawatmull*, 19 C.W.N. 1172, 31 I.C. 672.

In the absence of waiver, if the creditor fails to sue to recover the whole amount due under the bond, upon the first default being made in the payment of an instalment, he will be debarred from bringing a suit for the later instalments which individually are not time-barred In other words, this Article contemplates that in the absence of a waiver, an instalment bond is to be treated as a bond not permitting instalments for the purposes of limitation—*Bankey Lal* v. *Ram Lal*, 12 O.L.J. 112, A.I.R. 1925 Oudh 373, 86 I.C. 918.

A creditor cannot be compelled to waive the right he has acquired on the debtor's default—*Raghu* v *Dipchand*, 4 Bom. 97; nor can a person in default take advantage of his own wrong; *Gulab* v. *Ganpat*, I.L.R. (1943) Nag. 630, 1942 N. L. J. 296, A.I.R. 1942 Nag. 138.

Pleading:—In a case falling under this Article the plaintiff trying to get over the bar of limitation by pleading waiver has to make his pleading specially on the point and support it by cogent evidence. Waiver can not be presumed—*Shahaji* v. *Tukaram*, I.L.R. (1945) Nag. 955, 1945 N.L.J. 473, A.I.R. 1946 Nag. 117; *Mangli* v. *Gayaprasad*, 22 Luck. 299, 1947 O.W.N. 162, A.I.R. 1947 Oudh 235; *Raghunath* v. *Warlu*, I.L.R. (1947) Nag. 947, A.I.R. 1948 Nag. 225. It is a mixed question of law and fact—*Mangli* v. *Gayaprasad*, supra; *Raghunath* v. *Warlu*, supra and cannot be taken for the first time in revision—*Shahaji* v. *Tukaram*, supra, or in appeal—*Mangli* v. *Gayaprasad*, *supra*.

394. Starting point of limitation:—The *terminus a quo* provided by this Article is the date of first default in the payment of an instalment, and not the date of the last payment of an instalment. Thus, where a bond was payable by instalments

with a proviso that the default in payment of one or more instalments shall render the whole debt due forthwith, and the plaint recited the payment of the first two instalments and a default of the third, *held* that the period of limtation ran not from the date of payment of the second instalment but from the date of non-payment of the third instalment in accordance with the stipulations in the contract. The plaintiff will be required to prove the fact of default of payment of the third instalment; and he will not be required to prove the fact of payment of the second instalment with reference to the provision of sec. 20—*Nand Lal* v. *Akki*, 6 Lah. 163, 26 P.L.R. 328, 89 I.C. 294, A I R. 1925 Lah. 394; *Probhat Chandra* v. *Mohesh Chandra*, 58 Cal. 615, 52 C.L.J. 591, 130 I.C. 571, A.I.R. 1931 Cal. 157 (158). (The ruling in *Jawand Lal* v. *Sharf Din*, 35 P R. 1913, 16 I.C. 961 was dissented from in both the above cases). Where this Article applies the starting point of limitation is the date of the first default, or in case of waiver of its benefit, the next default, no matter whether the creditor is given by a contract an option to wait or not to wait. The principle underlying seems to be that the commencement of the period of limitation depends really upon whether the creditor is entitled under the terms of the bond to sue for the whole money due under it and it is not affected by the fact that he has the option not to do so if he likes—*Munshi* v. *Sagar*, 1943 A.L.J. 24; such a contract must be deemed to be void under sec. 23 of the Contract Act and cannot therefore alter the stating point of limitation—*Bhagwati* v. *Chitrapal*, I.L..R (1946) All. 711, A.I.R. 1947 All. 38, 225 I.C. 122. Where the plaintiff was unwilling to receive the instalments which the defendant was willing and ready to pay, it cannot be said there was any default in payment of the instalments on the part of the defendant—*Sitharama* v. *Krishnasamy*, 38 Mad. 374 (383).

Demand:—Where a bond stipulates for payment of a debt by instalments, and in default of payment of any one instalment, for payment of the entire sum *on demand* by the creditor, the cause of action for recovery of the entire sum would arise when *demand is made* by the creditor in terms of the stipulation; in such a case the words 'on demand' have the same meaning as "when you require" and do not mean that payment is to be made forthwith or immediately upon default—*Karunakaram* v. *Krishna*, 36 Mad. 63; *Hanmantram* v. *Bowles*, 8 Bom. 561. The insertion of these words ("on demand") in the instalment bond would imply that the parties deliberately used the expression and intended to make it a condition precedent that a demand should be made if the whole debt is to be paid at once—*Seetharam* v. *Muniswami*, 37 M.L.J. 613, 50 I.C. 87. Except in transactions connected with law merchant's words "on demand" have meaning, and there should be a demand before the cause of action arises—*Ibid*.. But when all the instalments had ceased to run, there could be no question of demand. Thus, where an instalment bond stipulated as above, and a suit was brought within three years of the date of demand, but seven years after all the instalments had ceased to run, it was held that the suit was barred—*Kaliappa* v. *Grigori*, 1919 M.W N. 550, 50 I.C. 916. The expression *indul talab* used in such a bond means 'on demand' and does not confer an option on the creditor to demand the whole amount if there was default in payment of any instalment—*Bankey* v. *Puran*, I.L.R. (1944) All. 224. 1944 A.L.J. 251, A.I.R 1944 All. 198.

395. Instalment mortgage bond:—A mortgage bond containing a stipulation for payment by instalments falls under Art. 132—*Narna* v. *Amani*, 39 Mad. 981; *Lachakkammal* v. *Sokkaya*, 1918 M.W.N. 586, 48 I.C. 191. It has now been authoritatively decided by the Privy Council that in case of instalment mortgage-bonds the mortgagee is at liberty either to sue wthin 12 years from the date of the default, or to wait till the expiry of the term of the mortgage—*Lasa Din* v. *Gulab*, 7 Luck. 442 (P.C.). See Note 554A under Art. 132.

Where a mortgage deed provides for payment by instalments with a default clause that in default of payment of any instalment the whole of the balance becomes payable, the mortgagee does not forfeit his right to recover the balance after the expiry of the term of the mortgage, though he might not have taken advantage of the default clause. A suit to enforce the personal remedy under such a bond is governed by this Article read with Article 116 and would be within time if filed within six years from the date fixed for the payment of the last instalment—*Amrut* v. *Pahad*, 1941 N.L.J. 649.

Instalment decree:—See Note 719 under Art. 182.

76. On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen.	Three years.	The date of the delivery to the payee.

396. The third column of this Article is based on the English case of *Savage* v. *Aldren*, (1817) 2 Stark 232. In this case a promissory note was given to bankers to be be delivered to the payee upon his producing and cancelling another note; it was held that time did not run till the note was delivered by the bankers to the payee.

77. On a dishonoured foreign bill, where protest has been made and notice given.	Three years.	When the notice is given.
78. By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance.	Three years.	The date of the refusal to accept.

397. Where the suit is really one to recover money alleged to be due on accounts taken between the parties, the circumstance that a *hundi* and a cheque sent by the defendant to the plaintiff were dishonoured on presentation does not attract the application of this Article—*Padmalochan* v. *Giris Chandra*, 46 Cal. 168.

79. By the acceptor of an accommodation bill against the drawer.	Three years.	When the acceptor pays the amount of the bill.

397A. Time runs only when the acceptor actually pays the amount of the bill. The acceptor of an accommodation bill of exchange has an implied engagement from the drawer that he will take up the bill at maturity and indemnify the acceptor; and there is no cause of action till the acceptor is damnified by actual payment—*Reynolds* v. *Doyle*, (1840) 1 M. & G. 753; *Angrove* v. *Tippett*, (1865)) 11 L.T. 708.

80.	Suit on a bill of exchange, promissory note or bond not herein expressly provided for.	Three years.	When the bill, note or bond becomes payable.

398. Cases:—A suit on an unregistered bond, whereby certain moveable property in the debtor's possession was pledged as security, is governed by this Article—*Vitla* v. *Kalekara*, 11 Mad. 153. A bond which stipulates for payment of principal within three years and of interest every half year and provides that in default of such half yearly payments of interest it shall be optional on the part of the creditor to claim full payment of the debt, is not an instalment bond under Art. 75 because a stipulation to pay *interest* in instalments does not bring a bond within that Article; it belongs to the category of bonds mentioned in Art. 80—*Ball* v. *Stowell*, 2 All. 322; *Shib Dayal* v. *Meharban*, 45 All. 27 (42) (F.B.), A.I.R. 1923 All. 1. A document which recites "I shall pay you whenever you may demand after you attain the age of majority" is a promissory note; and a suit on the note is governed by Art. 80. Limitation begins to run from the time when there has been a demand after the creditor has attained majority—*Kattiassan* v. *Suppi*, 3 M.L.J. 199. Neither Article 78 nor Art. 69 applies to a suit based on a dishonoured hundi payable at a fixed time after date, but *which had never been presented for acceptance but only for payment*. Such suit is governed by the general Article 80, and the period is to be computed from the time when the bill becomes payable—*Ram Chand* v. *Shadi Ram*, 19 P.R. 1888. A bond provided that the money was to be repaid in five years, that interest was to be paid every six months, that in case of non-payment of interest for four six-monthly periods, the creditor would have power to realise the whole of the amount due to him in a lump sum within the fixed period, and that if after the time fixed the amount remained unpaid with the consent of the creditor or for some other reason, then the same condition and rate of interest would be applied and maintained after the time fixed and up to the satisfaction of the amount in full. In a suit to enforce the bond it was held that time ran from the expiry of the period (5 years) fixed for payment and not from the non-payment of two years' interest—*Sham Lal* v. *Theriya*, 18 A.L.J. 476, 58 I.C. 278.

Where a bond payable in two years contains a clause providing that the creditor can sue for the full amount either on the failure to pay the monthly interest or on failure to pay the principal amount and default in payment of interest is made, the clause gives an option exclusively in favour of the creditor, who is entitled to the benefit of the investment for the full term originally provided, and need not sue until that term expires even if there is a default in the payment of interest—*Mool Chand* v. *Chittar*, A.I.R. 1935 Lah. 948.

Where a bond provides that on payment of a certain amount by a fixed date, the creditor will give up the balance and in default of payment by that date the debtor will have to pay the entire amount with compound interest and the debtor fails to pay as stipulated, the starting point of limitation is the day following the date fixed for payment and this Article will apply—*Yeshwant* v. *Laxman*, I.L.R. (1938) Nag. 399, A.I.R. 1938 Nag. 13, 173 I.C. 463.

A suit on a war-bond is governed by this Article. Time runs when the bond becomes payable; and as by the terms of the bond it is provided that the holder of the bond must present his bond at the place appointed for payment, time does not begin to run until presentment at the specified place has been made—*Secretary of State* v. *Kunhi Krishna*, 64 M.L.J. 172, 142 I.C. 286, A.I.R. 1933 Mad. 376 (378).

Where a debt incurred on a bond was to be paid within seven years, but it was

stipulated that upon failure to pay interest consecutively for two years it was to become payable at once, and there was a default in payment of interest for two years consecutively, *held* that under the term of the bond, the creditor was entitled to adopt either of the two alternatives, *viz.*, either to recall the whole of the money due thereunder on the happening of default in payment of interest for two consecutive years, or to enforce the bond at the end of seven years; and if the creditor chose not to avail himself of the first remedy but only of the second, the bond became payable within the meaning of this Article, on the expiry of the period of seven years. The debtor has no right to compel the creditor to stick to the shorter term—*Hori Lal* v. *Thamman*, 26 O.C. 121, 70 I.C. 85, A.I.R. 1923 Oudh 19, following *Durga* v. *Tota Ram*, 16 O.C. 45, 19 I.C. 738. It should be noted that the learned Judge who gave the decision in 26 O.C. 121, gave it reluctantly, following 16 O.C. 45. He was really of opinion that the word 'payable' in Article 80 meant payable at the earliest time, and that the bond in suit became payable on default of payment of two years' interest. And this view has now been taken in a later case of the same Court. In this case a bond provided for repayment of the amount in six months but the interest was to be paid month by month, and in the event of failure to pay interest in one month the creditor was to have the right to file a suit at once for the whole amount, without waiting for the stipulated period of six months. Interest was never paid. *Held* that the bond became 'payable' on the occurrance of the default in the payment of first month's interest, and that a suit not brought within 3 years from the date of the first default was barred by limitation; the fact that the money was stated in the deed to be payable five months later did not entitle the creditor to ignore the earlier date as the starting point of limitation and select the later one because it suited his convenience better. He was not entitled to waive the right accruing on the first default, because the right of the creditor to waive such right is recognised only by Article 75 and not by any other Article—*Pherai* v. *Pudai*, 27 O.C. 318, 1 O.W.N. 647, A.I.R. 1925 Oudh 502 (dissenting from 26 O.C. 121 and 16 O.C. 45). This decision has been recently followed in *Shiva Narain* v. *Badal*, A.I.R. 1936 Oudh 279, 1936 O.W.N. 518, 162 I.C. 459, a remarkably similar case, where it has been pointed out that the starting point of limitation under Art. 80 is the date when the bond becomes payable. "It is clear from the terms of the bond that it became payable as soon as a default was made in the payment of interest. When once the amount becomes payable limitation must begin to run and it cannot be stopped because the bond provides an alternative starting point for limitation. The creditor cannot be allowed to ignore the earlier starting point of limitation because as soon as the money once becomes payable limitation must begin to run irrespective of the wishes and convenience of the creditor. The matter is one the determination of which rests on the terms of the statute and not on wishes or option of the creditor." (280). As regards the decision of their Lordships of the Privy Council in *Lasa Din* v. *Gulab Kunwar*, A.I.R. 1932 P.C. 207 it was remarked: "...No doubt the language of the third column of Art. 132 which prescribes the starting point of limitation, is somewhat similar to the language of the correponding clause of Art. 80, yet obviously the consideration which arise in the case of mortgage are quite different from those which are applicable to this case. The mortgagor and the mortgagee have reciprocal rights in the matter of redemption by the mortgagor and enforcement of the mortgage by the mortgagee. But in the case of a bond an obligee may be able to pay up the bond at any time even though the obligor may have no right to enforce payment except after the stipulated period." These cases have been overruled by the same Court in a subsequent Full Bench case where it has been held that such a bond is a single bond, notwithstanding the default clause. The period of limitation does not run from the date of the first default in payment of interest and the whole amount of the bond does not become payable on that date so as there and

then to induce the application of this Article—*Raghunandan* v. *Sheoraji*, 16 Luck. 464, 1941 O.W.N. 361, A.I.R. 1941 Oudh 210, 193 I.C. 481 (F.B.).

In case of a registered bond falling under this Article, the period of limitation would be six years from the date when the bond becomes payable. See *Shib Dayal* v. *Meherban*, 45 All. 27 (42) (F.B.).

If a promissory note is accompanied with a writing postponing the right to sue or postponing the date of payment, the suit is governed by Article 80, and not by Article 73. See 42 All. 55 and 39 Mad. 129 (F.B.) cited under Article 73. In a suit upon a promissory note executed by the defendant in favour of the plaintiff Bank, it appeared that it was customary for the Bank to fix a period for payment and that the defendant's application for the loan was in a printed form in which he added the words "for six months' *thavanai*" and on which the officer of the Bank concerned made an endorsement to the effect that the amount might be lent to the defendant "for six months' *thavanai*." *Held*, that the application form with the endorsement therein formed part of the same transaction as the suit-note, and was receivable in evidence for fixing the date of payment of the amount of the note, and that the suit on the note was governed by Article 69 or 80, the starting point of limitation being six months after the date of the note—*Ponnusami* v. *Vellore Commercial Bank*, 38 M.L.J. 70, 55 I.C. 384. Where on the very date of execution of a promissory note payable on demand the defendant executes an agreement which recites that if he does not discharge the debt relating to the promissory note before discharging the debt due under a usufructuary mortgage executed in favour of the plaintiff previously, the defendant shall pay the entire amount due under the promissory note along with the debt due under the mortgage and then take delivery of possession of the mortgaged lands, the agreement has the effect of extending the time for payment of the promissory note under this Article within three years after the date of the discharge of the mortgage—*Subbmma* v. *Venkanna*, (1950) 1 M.L.J. 161, 1950 M.W.N. 118, A.I.R. 1950 Mad. 749.

81. By a surety against the principal debtor.	Three years.	When the surety pays the creditor.

398A. A suit by the surety against the principal debtor for recovery of moneys paid by the former on behalf of the latter is governed by Article 81 and not by Art. 61—*Kunj Lal* v. *Gulab Ram*, 55 P.L.R. 1922, 68 I.C. 365, A.I.R. 1921 Lah. 335. A suit by a creditor against the surety being decreed in the Small Cause Court, the surety applied for review, and deposited the amount of the decree under sec. 17 of the Prov. S. C. C. Act. He made the deposit on the 5th September 1919. The application for review was dismissed and on the 21st of April 1920 the creditor withdrew the money. The surety then brought the present suit against the principal debtor on the 20th April 1923. *Held* that the suit was within time. Under this Article the date on which the creditor was paid was the date on which the creditor actually withdrew the money and not the date when the money had been deposited along with the application for review, because the creditor was not entitled to withdraw the money immediately it was deposited and before the application for review was dismissed—*Mahammad Naqi* v. *Harqu Lal*, 82 I.C. 1011, A.I.R. 1925 All. 164. A surety's right of action against the principal debtor is not barred on the ground that the creditor's action against the principal debtor is barred—*Considine* v. *Considine*, (1846) 9 Ir. L.R. 400.

82. By a surety against a co-surety.	Three years.	When the surety pays anything in excess of his own share.

399. The right of a surety against a co-surety for contribution can be asserted, notwithstanding that the creditor's right of action against him is barred—*Wolmershausen* v. *Gullick*, [1893] 2 Ch. 514. No action can lie by a surety against a co-surety until the latter has paid more than his share of the debt—*Davies* v. *Humphreys*, (1840) 6 M. & W. 153 (169).

83. Upon any other contract to indemnify.	Three years.	When the plaintiff is actually damnified.

400. Articles 81 and 83:—From a comparison of Articles 81 and 83 it would seem that Article 81 is confined to cases of *loans* of money, or where one person is liable for a definite sum which at the time constitutes, or which will at some future time constitute, *a debt*, and to suits by the surety against the principal debtor, where he (the surety) has himself paid the creditor—*Madar* v. *Ahmed*, 98 P.R. 1881. But where the security was given for the due performance of a contract (so that the promisee could only claim *damages* as distinguished from a *debt*) and the surety had been compelled to pay such damages, a suit by the surety against the principal debtor to be indemnified for the amount paid would fall under Article 83.

401. Contract to indemnify:—The word "contract" in this Article does not mean an express contract; it would include both express and implied contracts —*Ram Barat* v. *Sheodani*, 16 C.W.N. 1040, 16 I.C. 73; *Mst. Mehdatunnisa* v. *Mst. Halimathunnissa*, 17 Pat. 751, 1939 P.W.N. 361, A.I.R. 1939 Pat. 194; *Tilakram* v. *Surat*, I.L.R. (1938) All. 500, 1938 A.L.J. 455, A.I.R. 1938 All. 297 (F.B.). See also *Shanti Sarup* v. *Janak Singh*, A.I.R. 1958 All. 170 (F.B.).

It has been held by the Madras High Court that the *obligation* of a principal to indemnify an agent under section 222 of the Contract Act is not a "*contract* to indemnify" within the meaning of this Article—*Kandasami* v. *Avayammal*, 34 Mad. 167 (171). But the Lahore High Court holds that the right of an agent to be reimbursed by his principal in respect of losses sustained or expenses incurred by the agent in transactions entered into by the agent on behalf of the principal is a direct consequence of the contractual relationship of principal and agent, and a suit to enforce that right is governed by this Article and not by Art. 61—*Manghi Ram* v. *Ramsaran Das*, 23 P.R. 1915, 100 P.L.R. 1915, 26 I.C. 415 (dissenting from 34 Mad. 167); *Ganesh Das* v. *Narsingh*, 30 P.L.R. 35, 115 I.C. 767; *Bhagwan Das* v. *Mutsaddi*, 12 Lah. 190, 31 P.L.R. 666, 128 I.C. 306, A.I.R. 1931 Lah. 392 (393). The same view has been taken by the Calcutta High Court in *Upendra* v. *Bimalendu*, I.L.R. (1944) 2 Cal. 283, 48 C.W.N. 317, A.I.R. 1944 Cal. 302. A suit for the recovery of the money due on account of the value of goods supplied by the plaintiff as commission agent to the defendants is governed by Article 83—*Sarab Dial* v. *Devi Ditta*, 59 P.L.R. 1918, 46 I.C. 541 (542). Plaintiffs were commission agent. At the request of the defendants they purchased some goods for them and paid the price out of their own pocket. Subsequently they sold the goods at a loss and instituted the present suit for the recovery of the loss. *Held* that the suit was governed by this Article, and time ran when the plaintiffs purchased the goods and made payment on behalf of the principals, and not from the date when they sold the goods at a loss—*Kripa Ram* v. *Sawan Mal*, 29 P.L.R. 60, A.I.R. 1927 Lah. 826 (827), 106 I.C. 40; *Bhagat* v. *Harjas*, 112 I.C. 719, A.I.R. 1928 Lah. 424 (425); *Kadari Pershad* v. *Har Bhagwan*, 3 Lah L.J. 65, 66 I.C. 900, A.I.R. 1921 Lah. 167. A suit to recover the losses alleged by the plaintiffs to have been sustained by them in certain dealings in some articles of trade which they undertook as commission agents on behalf of the defendants, is not a suit for money payable on accounts stated between the parties under Art. 64, but a suit governed

by Article 83—*Munshi Ram* v. *Bhagwan*, 27 P.L.R. 32, 92 I.C. 595, A.I.R. 1926 Lah. 152. An undertaking by a second mortgagee to pay off a prior mortgage cannot be held to be a contract of indemnity in the absence of an express provision in the deed of mortgage to the second mortgagee to indemnify the mortgagor—*Keshwar* v. *Guni*, 17 Pat. 338, 19 Pat.L.T. 198, A.I.R. 1938 Pat. 275, 176 I.C. 269. Where, however, in such a case the prior mortgagee obtains a decree against the mortgagor and the mortgagor pays the amount of decree *after* the institution of his suit against the subsequent mortgagee for damages for breach of the covenant the mortgagor can not seek protection under this Article, he having suffered no actual loss on the date of the suit—*Gauri* v. *Nathi*, A.I.R. 1951 All. 589.

A man who is entrusted with a certain sum of money with instructions to pay it to another person to whom the person paying the money is liable, keeps the money at his peril. If he fails to pay it or delays payment beyond a reasonable time, he is liable for damages as for a breach of contract to the extent of the loss which the person depositing the money has suffered by reason of such failure or delay, and a suit to enforce the security or for damage resulting from the delay falls under Article 83, and must be filed within 3 years of the date of actual injury—*Kedar Nath* v. *Har Govind*, 24 A.L.J. 550, 95 I.C. 913, A.I.R. 1926 All. 605. Where a party by his contract undertook to pay money to a third person, and he not having paid, the person to whom the money should have been paid sued the original debtor and recovered the money, a suit brought by the last named (plaintiff) for loss or damage fell under this Article, and time ran not from the date of the breach of contract, (*i.e.*, not from the date when the money ought to have been paid by the defendant to the third person), because the plaintiff was not actually damnified at that time; but time ran when the creditor recovered the money from the plaintiff, *i.e.*, when the plaintiff suffered loss—*Ram Ratan* v. *Abdul Wahid*, 49 All. 603, 101 I.C. 691, A.I.R. 1927 All. 435; *Rajbunshi* v. *Bishundeo*, 10 Pat. 451, 132 I.C. 104, A.I.R. 1931 Pat. 271 (273). Where the plaintiff vendor has actually been damnified in consequence of a breach of agreement by the vendee to a sale deed the suit comes under Art. 83. Thus, where a vendee who was required to pay off the vendor's incumbrances out of the purchase money, failed to do so, and the vendor had to pay off the incumbrances out of his own pocket, a suit by the vendor for relief against the vendee is governed by Art 83 read with Art. 116 (the covenant to pay off the mortgage being contained in a registered sale-deed), and time ran from the date when the vendor himself had to pay the money, that being the date when he was actually damnified—*Gulzari* v. *Magho Mal*, 14 Lah. 380, 141 I.C. 435, A.I.R. 1933 Lah. 109 (111); *Abdul Kadir* v. *Bilas*, 14 Lah. 646, 144 I.C 362, A I.R. 1933 Lah. 793; *Kunwar Unkar* v. *Kashi Prasad*, 55 All. 490, 1933 A.L.J. 787, 143 I.C. 821, A.I.R. 1933 All. 386 (388); *Valiyakath* v. *Govinda*, A.I.R 1936 Mad. 655; *Mst. Mehdatunnissa* v. *Mst. Halimathunnissa*, 17 Pat. 751, 1939 P.W.N. 361, A.I.R. 1939 Pat. 194; *Tilakram* v. *Surat*, I.L.R. (1938) All. 500, 1938 A.L.J. 455, A.I.R. 1938 All. 297 (F.B.); *Kartar* v. *Sant*, A.I.R. 1940 Lah. 321.

The plaintiff executed a bond in favour of U and borrowed money of which the defendant had the whole benefit. A suit brought by U against the plaintiff for the money was compromised, and the plaintiff had to pay the money in terms of the compromise. A suit by the plaintiff against the defendant for the recovery of money paid by the plaintiff under the compromise was a suit on a contract to indemnify under this Article—*Girraj* v. *Mulchand*, 29 All. 627.

Where in a suit for declaration that the property attached in execution of a decree does not belong to the judgment-debtor an undertaking is given by the defendant (decree-holder) to indemnify the plaintiff after auction sale if it is found that the property belongs to the plaintiff, a suit by the plaintiff after his title has been found

for price of the property sold is governed by this Article as the cause of action for the suit is the undertaking to indemnify—*Haji* v. *Abdul*, 39 P.L.R. 948, A.I.R. 1938 Lah. 196, 175 I.C. 630.

Where the covenant to indemnify is contained in a *registered* instrument, the suit will be governed by Article 116 read with Article 83—*Tilak* v. *Surat*, supra; *Mst. Mehdatunnissa* v. *Mst. Halimathunnissa*, supra; *Kartar* v. *Sant*, A.I.R. 1940 Lah. 321. Thus, A and B exchanged lands under a registered deed which contained a clause to the effect that there was no dispute in respect of the said lands, and that if disputes should arise, the respective party should be answerable to the extent of his private property. A was deprived of some of the lands he got by the exchange, and he sued B on the aforesaid covenant, for the value of the lands of which he was dispossessed. It was held that the suit fell within Article 116 read with Art. 83 of the Limitation Act (and not under Article 113), and was in time if brought within six years from the date of the deprivation, although more than six years after the date to the exchange—*Srinivasa* v. *Rangasami*, 31 Mad. 452. Similarly, one S sold certain immoveable property under a registered sale-deed. The consideration money was Rs. 3,900, out of which Rs. 2,000 was to be paid by the vendees to a mortgagee, and in the event of the mortgage money being in excess of Rs. 2,000, S was to be liable for such excess. The vendees were forced to sue the mortgagee for redemption, and obtained a decree on 21st July 1911 on paymnt of Rs. 3,100. This payment was made on 5th December 1911, and on 20th July 1916 the vendees brought the present suit against S for recovery of Rs. 1,000 as well as the costs of the redemption suit. *Held* that suit fell under Article 116 read with Article 83, and time ran from the date when the plaintiffs were actually damnified, *i.e.*, on 5th December 1911, when the payment was actually made by the plaintiff, and that the suit was within time—*Abdul Aziz* v. *Md. Bakhsh*, 2 Lah. 316, A.I.R. 1921 Lah. 260, 64 I.C. 431. Where a major portion of the sale consideration is left with the vendee for payment to the various creditors of the vendor and the vendee commits default, a suit by the vendor against the vendee for loss occasioned by the default is in substance a suit for damages for breach of a contract of indemnity and is governed by this Article read with Article 116. Time runs from the date on which the vendor is actually damnified—*Kartar* v. *Sant*, A.I.R. 1940 Lah. 321. As regards vendee's implied contract to indemnify the vendor under a registered sale-deed, see 14 Lah. 380, 14 Lah. 646, and 55 All. 490, *supra*.

This Article applies only to *personal* contracts of indemnity. Where in addition to the contract of indemnity, a *charge* is created, the suit will be governed by Article 132, and not by this Article—*Rangasami* v. *Kuppusami*, 1921 M.W.N. 472, 66 I.C. 554, A.I.R. 1921 Mad. 514. Where a property subject to a charge is sold in execution, the purchaser impliedly undertakes to indemnify the owner against the incumbrances affecting the property, and if by the default of the purchaser any loss is caused to the owner by any proceedings taken by the incumbrancer, then the purchaser is bound to indemnify him. A suit to enforce this implied contract of indemnity is governed by Article 132 and not by this Article—*Rama Rayanimayar* v. *Venkatalingam*, 57 Mad. 218, 66 M.L.J. 4, 149 I.C. 379, A.I.R. 1934 Mad. 1 (7).

402. Commencement of limitation:—Under a contract of indemnity, the the cause of action arises when the damage which the indemnity is to cover is suffered —*Reynolds* v. *Doyale*, (1840) 1 M. & G. 753; *Shankar* v. *Laxman*, 42 Bom.L.R. 175, A.I.R. 1940 Bom. 161, 188 I.C. 663. Thus under an express contract to indemnify a party to litigation against costs, the cause of action arises upon the *actual payment* of costs by such party, and not when the costs were incurred or the solicitor's bill was delivered—*Collinge* v. *Heywood*, (1839) 9 A. & E. 633. Similarly, under an *implied*

promise to indemnify, time runs from actual loss—*Huntley* v. *Sanderson*, (1833) 1 Cr. & M. 467. The assignee of a lease is under an implied obligation, in the absence of an express covenant, to indemnify the assignor for breach of covenants, and in a suit by the assignor against the assignee to recover the damages paid by him (assignor) to the original lessor, limitation runs only from the time when the plaintiff was actually damnified, *i.e.*, when damages were actually recovered from him by the original lessor —*Pepin* v. *Chunder Seekur*, 5 Cal. 811. Where a portion of the mortgaged property was sold subject to the mortgage, but the buyer having failed to pay off the mortgage, the mortgagee sued on his mortgage and the whole of the mortgaged property was sold in execution of the mortgage decree, and the seller was dispossessed of the lands which had been retained by him, a suit by the seller for damages against the buyer was governed by this Article, and time ran from the date when the seller was actually damnified, *viz.*, the date of dispossession—*Ram Barat* v. *Sheodeni*, 16 C.W.N. 1040, 16 I.C. 73. See also 49 All. 603 and 14 Lah. 380 cited in Note 401. Where a mortgage, which is not validly registered contains a covenant for payment by the mortgagee to a prior mortgagee and no date is fixed for such payment, the default in payment by the mortgagee must be taken to have occurred on the very day on which the mortgage is executed; and the express covenant to pay is turned, after its breach, into an implied covenant to pay to the mortgagor himself and a breach of it gives rise to the cause of action to the mortgagor at once—*Gauri* v. *Nathu*, A.I R. 1951 All. 589.

A suit by the Municipal Committee upon a bond executed by the defendant to reimburse the Committee in case of loss caused to it by the conduct of certain bill-collector is governed by this Article and the time runs from the date when the Municipal Committee is actually damnified, that is, the date of enbezzlement by the collector—*Municipal Committee* v. *Vishnu*, I.L.R. (1948) Nag. 350, 1948 N.L.J. 594, A.I.R. 1949 Nag. 48.

A suit for money by A against B was compromised under which B and another agreed to pay a sum of money to A, but as they had no money to pay on that date and as A was not prepared to accept a promise from B, it was arranged that one C, on behalf of B, should execute a promissory note in favour of A, which was accordingly done. C paid off the amount to A, and sued B for the amount. The suit was brought more than 3 years from the date of the promissory note, but within 3 years from the date of payment by C to A under the hand-note. It was held that the suit was not governed by Art. 61 but by Art. 83, and was consequently not barred by limitation—*Rangappa* v. *Venkatasami*, A.I.R. 1936 Mad. 334, 70 M.L.J. 537, 163 I.C. 177.

Claim to indemnity by way of set-off:—When a suit is brought for the recovery of the price of goods supplied (the contract for supply of goods being evidenced by a deed containing a clause for indemnifying the defendants in case of default in supplying goods at the time fixed), and the defendants claim damages for irregular supply of goods, by way of set-off, limitation in respect of the set-off will run up to the date of the suit by the plaintiff, and not up to the date on which the set-off is claimed by the defendants—*Pragi* v. *Maxwell*, 7 All. 284.

84. By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid.	Three years.	The date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.

403. Scope:—This Article applies only to suits; it does not apply to an *application* by an attorney for enforcement of payment of costs by a summary order of the High Court, under the High Court Rules. Such an application is not governed by any other Article, so that it is exempt from the law of limitation; even Article 181 does not apply because it is not an application under the Civil Procedure Code —*Abba Haji Ishmail* v. *Abba Thara*, 1 Bom. 253; *Wadia* v. *Purshotam*, 32 Bom. 1; *Narendra Lal* v. *Tarubala*, 48 Cal. 817, 25 C.W.N. 800. 66 I.C. 209. But although such applications are not governed by any special rule of limitation, still a discretion should be exercised by the Court in allowing such applications, when a question of lapse of time is raised. Since the High Court Rule provides an alternative relief by suit, it is just and proper that the time limit of such applications should be the time allowed for such suit, *viz.*, the time allowed by this Article—*Lakhimani* v. *Dwijendra*, 46 Cal. 249 (253), 23 C.W.N. 473, 51 I.C. 941; *Attormani* v. *Ramesh Chunder*, 52 C.L.J. 147, 129 I.C. 787, A.I.R. 1930 Cal. 651 (652).

Though the word "suit" may include execution proceedings as well as an appeal also, this meaning cannot be imported into this Article where the word "suit" seems to be used in its ordinary and not technical sense in which a layman would understand it—*Venkatarama* v. *Zamindar of Sivagiri*, (1947) 1 M.L.J. 173, 1947 M.W.N. 151, A.I.R. 1948 Mad. 457.

An application under section 24 of Patents and Designs Act XV of 1859 is a "business" within the meaning of this Article—*Watkins* v. *Fox*, 22 Cal. 943 (949). So also the drawing up of a conveyance, the registering of a deed or will, the registering of a company,—these are instances of business done by an attorney or vakil.

404. Termination of suit:—A solicitor who is retained to prosecute or defend an action enters into an entire contract to carry on the proceedings until the action is finally *terminated*, and he cannot sue for his costs until that time has arrived—*Harris* v. *Osborne*, (1834) 2 C. & M. 629; *Whitehead* v. *Lord*, (1852) 7 Ex. 691. The termination of a suit is the date when judgment is given by the Court in which the suit was commenced—*Balkrishna* v. *Govind*, 7 Bom. 518; *Watkins* v. *Fox*, 22 Cal. 943; *Rothery* v. *Munnings*, (1830) 1 B. & Ad. 15. But in many proceedings in the High Court Original Side, of which administration suits are an example, the termination of the suit is not the date of the final decree; and the time from which the period of limitation for an attorney's suit for costs begins to run is the issue of the allocatur at the earliest—*Attormani* v. *Ramesh Chunder*, 52 C.L.J. 197, 129 I.C. 787, A.I.R. 1930 Cal. 651 (652). When an appeal is brought, and the same Vakil or Attorney continues to conduct the suit in appeal, that will be a cotinuation of the original suit, and time will not run until the deposal of the appeal—*Harris* v. *Quine*, (1869) L.R. 4 Q.B. 653 (658). See also 36 Cal. 609 (614) (where the attorney acted in the suit as well as in the appeal). But see *Venkatarama* v. *Zamindar of Sivagiri*, supra. An action for costs may be brought within 3 years of the termination of the suit, and the fact that certain items in the bill of costs are more than three years old, is immaterial. See *Martindale* v. *Falkner*, (1846) 2 C.B. 706.

Execution proceedings are not part of a suit. A suit can ordinarily be said to terminate when there is nothing more to be done in it except execution. The fact that the attorney may have to appear in execution proceedings cannot postpone his right of action for costs which arises as soon as the judgment is passed—*Administrator-General* v. *Chunder Cant*, 22 Cal. 952 (Note).

Proceedings taken in connection with the taxation of the costs are not part of the suit in which the attorney was engaged; the suit terminates as soon as the judgment is delivered, and the period of limitation for an action by the attorney for the recovery

of his costs begins from the date of judgment—*Watkins* v. *Fox*, 22 Cal. 943; *Rothery* v. *Munnings*, (1830) 1 B. & Ad. 15; the taxation of the costs is not condition precedent to the institution of the suit for costs by the attorney—*Makham Lal* v. *Nalin*, 35 Cal. 171 (175). But the Madras High Court is of opinion that after judgment is given it is the duty of the solicitor to see that the decree is properly drawn up, and the suit does not end until the costs are regularly taxed and inserted in the decree and the decree is issued—*Narayana* v. *Champion*, 7 Mad. 1. And it has been held in a later Calcutta case that the period of limitation for the attorney's action for the recovery of his costs runs from the date of the last work done by the attorney in relation to the suit in which he was engaged, and the work includes the taxation of costs in the suit and appeal in which the attorney has acted. The attorney's cause of action does not arise until the costs are taxed, for until taxation the amount payable by the client cannot be ascertained—*Atul Chunder* v. *Lakshman*, 36 Cal. 609.

A compromise between the parties not made through or certified to the Court is not a termination within the meaning of this Article. A solicitor was retained in July 1871, to execute a decree. In November 1871, a prohibitory order was made in the case, after which the solicitor did nothing more in the matter. In June 1872, the decree-holder and judgment-debtor settled the matters in dispute between them without the knowledge of the solicitor; but this compromise was not made through or certified to the Court which passed the decree. In a suit brought in December 1875, by the solicitor against the decree-holder to recover the amount of his bill of costs, it was held that the compromise did not terminate the business for which the solicitor was retained and that the plaintiff's claim was not barred by this Article—*Hearn* v. *Bapu*, 1 Bom. 505. But a compromise terminates a suit when the suit is disposed of in terms of the compromise and time will run from the date of the compromise—*Venkatarama* v. *Zamindar of Sivagiri*, supra.

In respect of "business", *i.e.*, non-litigious matters, time runs from the termination of the business. If there are natural breaks in the business, separate bills may be sent in for each separate item of the business, and the period of limitation will run separately in respect of each item; hence later items cannot be relied on to save earlier ones—*Phillips* v. *Broadley*, (1846) 9 Q B. 744.

405. Costs:—The word "costs" in this Article does not mean only the out-of-pocket expenses of the legal practitioner but includes also the remuneration payable to him—*Rajah of Vizianagram* v. *Narasinga Row*, 29 I.C. 763 (Mad.).

85. For the balance due on a mutual, open and current account, where there have been reciprocal demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

406. Mutual, open and current account:—An open *account* is one which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions. An *account current* is an open or running account between two or more parties or an account which contains items between the parties from which the balance due to one of them is or can be ascertained. *Mutual accounts* are such as consist in reciprocity of dealings between the parties, and do not embrace those having items on oneside only, though made up of debits and credits. An account under which *one party* has merely received and paid monies on account of the other

is not a mutual account properly so called. *Each party* must receive and pay on account of the other. In such an account, each party should be able to say to the other "I have an account against you"—*Ram Pershad* v. *Harbans*, 6 C.L.J. 158; *Fyzabad Bank Ltd.* v. *Ram Dayal*, 4 P.L.T. 571, A.I.R. 1924 Pat. 107; *Daui Dayal* v. *Pearey*, 50 All. 645, A.I.R. 1928 All. 236 (238); *Tea Financing Syndicate* v. *Chandra Kumar*, 56 Cal. 575; *Ram Dhan* v. *Mahomed Dost*, 12 Lah. 420, 134 I.C. 513, A.I.R. 1931 Lah. 241; *Ebrahim Ahmed* v. *Abdul Haq*, 8 L.B.R. 149, 27 I.C. 879; *Gopal Rai* v. *Firm Harchand Ram*, 3 P.L.T. 492, A.I.R. 1922 Pat. 364; *Joharmal* v. *Hiralal*, 7 Pat. 238, A.I.R. 1928 Pat. 221 (222); *Bholat* v. *Motala*, A.I.R. 1938 Rang. 224, 177 I.C. 265. An account in which only one party lends is not a mutual account; an account which is settled is not an open account; an account which is closed is not a current account—*Premji* v. *Sassoon*, 29 Bom.L.R. 375, 102 I.C. 225, A.I.R. 1927 Bom. 125. Where the plaintiff treated the account with the defendant as finally closed and started a new account and treated it as entirely separate, the mere adding of the old balance later on, in order to avoid limitation, at the end of the new dealings would not make it an open account—*Firm Bhagwan Das* v. *Firm Nand Singh*, 28 P.L.R. 146, 100 I.C. 815, A.I.R. 1927 Lah. 848 (849). Where there was no formal closing of the account, the account only being totalled each year and the balance due being carried forward, *held* that the account was an open one—*Imrat* v. *Lal Chand*, 75 P.R. 1910, 124 P.L.R. 1910, 79 I.C. 715. An acknowledgment closes an old account, which ceases to be open and current account by such acknowledgment—*Tapi* v. *Shankarlal*, I.L.R. (1941) Nag. 222, 1939 N.L.J. 109, A.I.R. 1939 Nag. 113, 184 I.C. 139. As soon as an account ceases to be open it becomes an account stated (Art. 64).

To constitute a *mutual* account there must be transactions on each side creating independent obligations on the other, and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations—*Shiva Gowda* v. *Fernandez*, 34 Mad. 513; *Velu Pillai* v. *Ghose Mahomed*, 17 Mad. 293; *Kunhikuttiali* v. *Kunhammad*, 44 M.L.J. 184, A.I.R. 1923 Mad. 278; *Ratan Chand* v. *Asa Singh*, 4 Lah.L.J. 217, A.I.R. 1922 Lah. 188; *Ram Dhan* v. *Mahomed Dost*, 12 Lah. 420, 134 I.C. 513, A.I.R. 1931 Lah. 241; *Ganesh* v. *Gyanu*, 22 Bom. 606; *Satappa* v. *Annappa*, 47 Bom. 128 (136); *Appa* v. *Ramakrishna*, 53 Bom. 652, A.I.R. 1930 Bom. 5 (11); *Chittar Mal* v. *Behari Mal*, 32 All. 11; *Gopal Rai* v. *Firm Harchand Ram*, 3 P.L.T. 492, A.I.R. 1922 Pat. 364; *Bhimbai Morarji & Co.* v. *Hargovind*, A.I.R. 1938 Rang. 270, 177 I.C. 442; *Vidya* v. *Shanti*, 1942 A.L.W. 321. For an account properly to be called a mutual account, there must be mutual dealings in the sense that both parties come under mutual liability to each other—*Padwick* v. *Hurst*, 18 Beav. 575.

The test of mutuality is, that the dealings between the parties should be such that the balance is sometimes in favour of one party and sometimes in favour of the other. An account which consists of entries of payments made by one party in deduction of a debt to another and of payments made by the latter on behalf of the former, is not a mutual account—*Gopal Rai* v. *Firm Harchand Ram*, 3 P.L.T. 492, 66 I.C. 30, A.I.R. 1922 Pat. 364; *Bhimbai Morarji & Co.* v. *Hargovind*, A.I.R. 1938 Rang. 270, 177 I.C. 442.

Thus, where the plaintiff alone has been the banker making advances and receiving part payments from time to time, and the balance has always been in plaintiff's favour, the account cannot be said to be a *mutual* account—*Budh Ram* v. *Ralli Ram*, 103 P.W.R. 1916, 37 I.C. 300; *Kunhikuttiali* v. *Kunhammad*, 44 M.L.J. 184, A.I.R. 1923 Mad. 278. Where there is only a solitary instance of deposit made by the defendant to his credit in the account opened in his name by the plaintiff, and the deposit is the only occasion on which he is in a position of being able to make a demand on the

plaintiff, the existence of this solitary credit is not sufficient to show there was mutual and reciprocal dealings between the parties. The account cannot in such a case be said to be mutual account—*Bholat* v. *Motala*, A.I.R. 1938 Rang. 224, 177 I.C. 265. Where the account of the plaintiff Bank showed that the defendant borrowed a sum of money, and on various dates during the period of the account certain sums were paid by the defendant which were all credited to the account and set off against the pre-existing debt, and the account never showed any balance in favour of the defendant, *held* that the account indicated nothing more than the record of a loan transaction, and the payments made by the defendant were made in part discharge of the obligation under which he lay with respect to the Bank; the account was not a mutual account within the meaning of this Article—*Bank of Multan Ld.* v. *Kamta Prasad*, 39 All. 33, 14 A.L.J. 949, 35 I.C. 199; *Uma* v. *Bank of Bihar*, 1941 P.W.N. 638, A.I.R. 1942 Pat. 201, 197 I.C. 449 (case of payment of interest of overdraft amounts). Where the defendant made part payment from time to time of the price of goods supplied to him by the plaintiff and the amount of payment did not at any time exceed the amount due to the plaintiff, *held* that there were no reciprocal demands between the parties, and it was not a mutual account. The case fell under Art. 52—*Lalji* v. *Ghast Ram*, 7 O.W.N. 420, A.I.R. 1930 Oudh 287 (288), 128 I.C. 276. Where periodical consignment of goods was made by the defendants to the plaintiff simply and solely on account of antecedent loans advanced by the plaintiffs and with a view to reduce the balance due thereunder, *held* that there was no mutuality and reciprocity between the parties, and the suit for recovery of the sums due did not fall under this Article—*Shiva Gowda* v. *Fernandez*, 34 Mad. 514; *Lakshmanan* v. *Nalla*, (1942) 2 M.L.J. 337, A.I.R. 1943 Mad. 13, 1942 M.W.N. 561, 207 I.C. 133.

But where the plaintiff advanced money to the defendant and the latter consigned goods to the former for sale on commission, it was held that there were independent obligations on both sides, because there existed on the one side between the plaintiff and the defendant the relation of creditor and debtor, and on the other side between the defendant and the plaintiff, that of principal and agent; and the account between the parties was a mutual open and current account—*Namberumal* v. *Kottayya*, 14 M.L.T. 498, 21 I.C. 773; *Bengal National Bank* v. *Jatindra*, 56 Cal. 556, 33 C.W.N. 412 (417); *Ratan Chand* v. *Asa Singh*, 4 Lah.L.J. 217, A.I.R. 1922 Lah. 188; *Firm Behari Lal* v. *Har Narain*, 92 I.C. 674, A.I.R. 1926 Lah. 283; *Ruldu* v. *Basant*, 41 P.L.R. 809, A.I.R. 1939 Lah. 356, 185 I.C. 805. In *B. B. T. & Co.*, v. *B. L. Bann*, A.I.R. 1937 Rang. 340 it was held that to constitute a mutual account it is sufficient if there be only one set of transactions, but that set creates alternately debits and credits which are to be set-off against one another. The plaintiff who owned a ginning factory, lent money to the defendants for buying cotton. The cotton, when purchased, was ginned and pressed by the plaintiff, who sold it on behalf of the defendants. The ginning and pressing charges as well as the principal and interest were debited to the defendants and the sale proceeds of the cotton bales were credited to the defendant's account as against advances made by the plaintiff, the commission earned and other items. *Held* that there was a mutuality of dealings—*Madhab Motiram* v. *Jairam*, 23 Bom.L.R. 540, A.I.R. 1921 Bom. 451, 63 I.C. 950. Where a man lends money in one capacity and in another capacity acts as an agent for the borrower, and the two accounts are put together, there is a mutuality of dealings between the parties, although the money may have been lent for the express purpose of enabling the borrower to provide business as commission agent to the lender. In such a case, Art. 85 applies—*Dou Dayal* v. *Pearey*, 50 All. 645, A.I.R. 1928 All. 236 (239), 108 I.C. 694. Where A supplies B with one kind of goods or work and obtains from him another kind, debiting him with the cost of the former and crediting him with the value of the latter, *held* that it was a case of mutual account—*Srinath* v. *Park Pittar*, 5 B.L.R. 550; *Sitayya* v.

Rungareddi, 10 Mad. 259. Where, by virtue of an agreement, advances were made from time to time by the plaintiffs to the defendant in lieu of his agreeing to consign tea crop to the plaintiffs for sale, the proceeds of such sale to be appropriated towards the advances, and it appeared from the account that certain sums were debited against the defendant as having been paid by the plaintiff, and certain consignment of tea were sent and the plaintiff credited the defendant with the sale-proceeds of tea but also debited him with a certain amount of commission, *held* that there was a mutual, open and current account between the parties. Under the agreement the making of advances and the consignment of tea were to be brought together into one account as items which would produce a balance. The tea sent by the defendant was not sent merely by way of discharging the defendant's debt but was sent in the course of dealings designed to create a credit to the defendant which when brought into the account would operate by way of set-off to reduce his liability, the obligation to account for the proceeds of the tea received being an independent obligation on the plaintiff, inspite of the fact that he was expected and intended to apply such proceeds in liquidation of his advances—*Tea Financing Syndicate* v. *Chandra Kamal*, 58 Cal. 649, 34 C.W.N. 1175 (1189), 133 I.C. 801, A.I.R. 1931 Cal. 359 (reversing *Tea Financing Syndicate* v. *Chandra Kamal*, 56 Cal. 575). Where there are entries on one side showing cash advances, price of cloth sold, payments made to third persons on behalf of the defendants for things supplied and commission charged, for purchases made by the plaintiff for the defendants, and on the other side there are entries showing that the plaintiff firm received various kinds of grain from the defendants and having sold them in the market credited the proceeds to the defendant, the case comes under this Article—*Abdul Haq* v. *Firm Shivaji Ram*, A.I.R. 1922 Lah. 338, 71 I.C. 259. Where the plaintiff sometimes borrowed money from the defendant, and the defendant sometimes borrowed from the plaintiff, *held* that there was a mutual account—*Ganesh* v. *Gyanu*, 22 Bom. 606. Where the balance, when the account was opened, was in favour of the defendant and later on as a result of borrowings from the plaintiff, the balance went against them, it was a mutual account—*Mansa Ram & Sons* v. *Hira Lal*, I.L.R. (1940) All. 147, 1940 A L.J. 51, A.I.R. 1940 All. 209. Where accounts have been kept from year to year extending over a period of 20 years in which the balance has been drawn every year but no formal adjustment has been made at any time between the parties, and there is nothing to shew that the payment made by the defendants to the plaintiff were mere part payments of the advances already made, *held* that this was really a business account on either side and that there was a mutual, open and current account—*Satappa* v. *Annappa*, 47 Bom. 128 (135), 24 Bom.L.R. 1284, A.I.R. 1923 Bom. 82.

It is not necessary to constitute a mutual account that the accounts should be kept by both the parties. Where it was shewn that the accounts were going on between the parties, and balances were struck and entries were made sometimes to defendant's debit and sometimes to his credit, the mere fact that the accounts were *kept by one party only* was no sufficient cause for holding that the account was not a mutual, open and current account—*Jas Ram* v. *Attachand*, 16 P.R. 1916, 178 P.L.R. 1915, 30 I.C. 491. A employed B as his agent to manage certain boats for which he was to receive a commission. B alone kept accounts in which he credited the sums received from the hire of boats and debited the amounts which had been paid for their upkeep and the commission due to him. *Held* that this account showed reciprocal demands and that it fell under this Article—*Lakshmayya* v. *Jagannatham*, 10 Mad. 199.

In Madras, it has been held that it is not even necessary that an account in order to be a mutual account, should *have been kept in writing*.. It is sufficient if the dealings amonted to mutual debit and credit on both sides; and if the account is kept in

writing, it is enough if one of the parties kept it so.—*Lakshmayya* v. *Jagannatham*, 10 Mad. 199.

The fact that the balance is a shifting one, sometimes in favour of the plaintiff and sometimes in favour of the defendant, though valuable as an index of the nature of the dealings, is not a decisive test as to the mutuality of the account—*Ganesh* v. *Gyanu*, 22 Bom. 606; *Ram Pershad* v. *Harbans*, 6 C.L.J. 158; *Thupatti* v. *Ranga Charlu*, 23 M.L.J. 516, 17 I.C. 48. A shifting balance is a test of mutuality but its absense is not conclusive proof against mutuality -*Ram Pershad* v. *Harbans*, 6 C.L.J. 158; *Dau Dayal* v. *Pearey*, 50 All. 645, A.I.R. 1928 All. 236 (238); *Joharmal* v. *Hiralal*, 7 Pat. 238, A.I.R. 1928 Pat. 221 (222); *Velu* v. *Ghosh*, 17 Mad. 293; *Ganesh* v. *Gyanu*, 22 Bom. 606; *Tapi* v. *Shankarlal*, I.L.R. (1941) Nag. 222, 1939 N.L.J. 109, A.I.R. 1939 Nag. 113, 184 I.C. 139; *Ruldu* v. *Basant*, 41 P.L.R. 809, A.I.R. 1939 Lah. 156, 185 I.C. 805. Although the criterion of shifting balance is not conclusive that the account did not start as or did not continue as a mutual one yet when an account has started as a mutual one, and thereafter one is always indebted to the other and the course of dealing between the parties consists merely of partial repayments of that indebtedness and incidental and passing small transactions creating independent obligations on one side, but insignificant in amount and never such as would by their nature be likely to result in that party being able in a position to make a demand on the other, the account ceases to retain its character of mutuality—*Bhimbai Morarji & Co.* v. *Hargovind*, A.I.R. 1938 Rang. 270, 177 I.C. 442. Where the accounts consisted entirely of sums advanced by the plaintiff which were repaid from time to time by the defendant, and on two occasions by reason of a slight over-payment the balance shifted in defendant's favour, and the payments by the defendant were only made in repayment of his debts, it was held that the account was not mutual, and the suit was not governed by this Article—*Gokuldas* v. *Radhakishan*, 29 N.L.R. 20, 142 I.C. 123, A.I.R. 1933 Nag. 50. If there is a balance in favour of either party, it follows that there must be mutual liabilities of both parties to each other. If the balance is always in favour of one party in the very nature of the transactions, then the case is one in which there are not separate mutual dealings. In order to prove a mutual, open and current account, it is sufficient to prove mutual dealings between the parties consisting of sales made or services performed by each party to or for the other, creating mutual duties or reciprocal demands—*Kunhi Kuttiali* v. *Kunhammad*, 44 M.L.J. 184, A.I.R. 1923 Mad. 278; *Ram Pershad* v. *Harbans*, supra. The mere fact that the defendants have been debtors throughout does not show that the accounts were not mutual. Whether an account is mutual or not depends upon the nature of the dealings between the parties. It is sufficient, for an account to be mutual, if the dealings are such that the balance *might have been* in favour of either party; it is not essential that the balance should in fact have been in favour of the defendants at some stage—*Satappa* v. *Annappa*, 47 Bom. 128 (135), 24 Bom. L.R. 1284, A.I.R. 1923 Bom. 82; *Bhimbai Morarji & Co.* v. *Hargovind*, A.I.R. 1938 Rang. 270, 177 I.C. 442; *Vidya* v. *Shanti* 1942 A.L.W. 321 or for the last few years —*Gopi* v. *Chameli*, I.L.R. (1938) All. 741, 1938 A.L.J. 773, A.I.R. 1938 All 504, 177 I.C. 115; *Bholaram* v. *Smt. Jait*, A.I.R. 1952 Cal. 92. It is not necessary that the balance should actually shift from one side to the other; all that is necessary is that from the nature of the transactions it is *capable of* so shifting—*Premji Virji* v. *Sir E. E. Sassoon*, 29 Bom. L.R. 375, 102 I.C. 225, A.I.R. 1927 Bom. 125. The test for determining whether an account is a mutual one is, not that there must be a shifting balance, but that such was a possible and likely incident of mutual transactions in regard to which the account was kept—*Basanta* v. *Chota Nagpur Banking Association*, 26 Pat. 231, A.I.R. 1948 Pat. 18. See also *Kesava* v. *Ramanatha*, A.I.R. 1956 Mad. 210, and *Travancore Mica Co. Ltd.*, v. Keli, A.I.R. 1956 Trav. Co. 97.

It has been held that this Article is intended to apply to cases where an account

has been going on between two parties, and *balances have been struck* from time to time, showing the amount due from one of such parties to the other; and the suit to which this Article is intended to apply is a suit brought by one of those parties against the other for the balance found to be due on that account—*Laljee* v. *Raghunundun*, 6 Cal. 447. But this Article does not require that the balances should have been actually struck; it simply requires that the accounts should be such that if the balances were actually struck at various times, the balances at those times should have been sometimes in favour of the plaintiff and sometimes in favour of the defendant.

It is not correct to say that an account is closed whenever a balance is struck, until it is re-opened by fresh dealings. Where it appears that there were mutual dealings and that though balances were struck from time to time these were mere acknowledgments and not agreements to pay, *held* that the case was not one of a closed account (Art. 64) but of a mutual, open and current account. The mere fact that there were no further transactions between the parties since the striking of the last balance, did not change the natre of the account: for it cannot be held that an account becomes closed whenever a balance is struck—*Jwala Das* v. *Hukum Chand*, 66 I.C. 387, A.I.R. 1922 Lah. 316. A contrary view has been taken in *Tapi* v. *Shankkarlal*, 1939 N.L.J. 109, A I.R. 1939 Nag. 113, 184 I.C. 139, I.L.R. (1941) Nag. 222.

407. Reciprocal demands:—An account is mutual when each has a *demand* or right of action against the other; and therefore unless both the parties could, during the currency of the account, each have said to the other 'I have an account against you' there can be no mutual account. And therefore, if the balance was sometimes in favour of the defendant but generally in favour of the plaintiff, the banker, the account would not be a mutual one—*Hajee Sayud* v. *Ashrufoonnissa*, 5 Cal. 759 (763); *Joharmal* v *Hiralal*, 7 Pat. 238, A.I.R. 1928 Pat. 221 (222); *Ram Sundar* v. *Amrit*, 4 P.L.T. 424, A.I.R. 1923 Pat. 242. Where there is no evidence that the defendant ever made or was in a position to make any sort of demand whatever upon the plaintiff, *held* that there was no *reciprocal* demand between the parties—*Tea Financing Syndicate* v. *Chandra Kamal*, 56 Cal. 575, A.I.R. 1929 Cal. 641 (643). (Set aside in appeal, 58 Cal. 649). But it is not necessary that the parties in the course of their dealings should have made *actual* demands upon one another. This Article applies where the nature of the business between the parties is such as to give rise to reciprocal demands, *i.e.*, where the dealings are such that sometimes the balance may be in favour of one party and sometimes in favour of the other—*Naradas* v. *Vissandas*, 6 Bom. 134; *Khushalo* v. *Behari*, 3 All. 523; *Satappa* v. *Annappa*, 47 Bom. 128 (136); *Fyzabad Bank* v. *Ramdayal*, 4 P.L.T. 571, 74 I.C. 831, A.I.R. 1924 Pat. 107; *Tapi* v. *Shankarlal*, 1939 N.L.J. 113, A.I.R. 1939 Nag. 113, 184 I.C. 139, I.L.R. (1941) Nag. 222. Where the transactions sometimes resulted in profit and sometimes resulted in loss; at one time the account stood in favour of the defendant, at another time in favour of the plaintiff; *held* that there was reciprocity of demands between the parties and the account was not made up of items on one side only. The defendant was at one time in a position to say to the plaintiff that he had an account against him—*Joharmal* v. *Hira Lal*, 7 Pat. 238, A I.R. 1928 Pat. 221 (223), 107 I.C. 533. And this is so, even though during the last few years the balance has been always in favour of the plaintiff—*Imrat* v. *Lal Chand*, 75 P.R. 1910, 124 P.L.R. 1910, 7 I.C. 719; *Gopi* v. *Chameli*, I.L.R. (1938) All. 741, 1938 A.L.J. 773, A.I.R. 1938 All. 504. 177 I.C. 815. Where the accounts are such that the defendants could not have made any such demand during the currency of the account, the requirements of this Article have not been fulfilled—*Hardilal* v. *Pukhar Das*, 3 Lah.L.J. 362, 67 I.C. 933, A.I.R. 1921 Lah. 256.

In order to apply this Article, it must be established that there have been mutual

obligations and that it has been the intention of the parties that such obligations would be set off against each other. It is not of course necessary that there should be a direct evidence of a contract as such a contract can be gathered from the surrounding circumstances——*Bishesher* v. *Baijnath*, A.I.R 1938 Lah. 264, 178 I.C. 259.

408. Limitation:—The period of limitation runs from the close of the year in which the last item was admitted or proved. If a mutual, open and current account be adjusted in the middle of a current year, and in that year there is entered one item admitted or proved, limitation will run from the end of the year and not from the date of the *adjustment*—*Ganesh Lal* v. *Sheogolam*, 5 C.L.R. 211; *Gurdinomal* v. *Usto*, I.L.R. (1942) Kar. 442, A.I.R. 1943 Sind. 26, 204 I.C. 481. Where the last item in a mutual, open and current account was advanced to the defendants within limitation but this item was advanced more than three years after the close of the year in which the last preceding item was entered, the suit is barred by limitation in respect of the previous account—*Gobind Ram* v. *Jawala Ram*, 1 Lah. 12, 55 I.C. 872.

An open mutual account will not be statute barred, if there is any item in it within the period of limitation, even though the earlier items may be beyond the period; because as long as the account is continued the statute of limitation does not apply—*Foster* v. *Hodgson*, (1812) 19 Ves. 183; *Tea Financing Syndicate* v. *Chandra Kamal*, 58 Cal. 649, 34 C.W.N. 1175 (1188), 133 I.C. 801, A.I.R. 1931 Cal. 359. See also *Montosh* v. *Central Calcutta Bank*, 57 C.W.N. 852. But the plaintiff will have to prove that the balance struck is in fact due by production of the account book of that year. The balance is not proved by an entry of the same in the account book of the succeeding year—*Bholaram* v. *Smt. Jiat*, A.I.R. 1925 Cal. 92. The statute is retarded by every fresh item falling within the period of limitation, and it makes no difference on which side the account is—*Ord.* v. *Ruspini*, (1797) 2 Esq. 569. See also *Catling* v. *Skoulding*, (1795) 6 T.R. 189.

86. (*a*) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.	Three years.	(*a*) The date of the death of the deceased.
(*b*) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.	Three years.	(*b*) The date of the occurance causing the loss.

These clauses were substituted by sec. 122 of the Insurance Act, 1938 (4 of 1938) as amended by sec. 68 of the Insurance (Amendment) Act, 1941 (13 of 1941).

Prior to the change effected as aforesaid the Article stood as set out below:

86. On a policy of insurance, when the sum assured is payable im-	Three years.	When proof of the death, or loss is given to or received by the insurers

mediately after proof of the death or loss has been given to or received by the insurers.		by or from the plaintiff or any other person.

408A. Time now runs under this Article not from the date when proof of death or loss is given to or received by the insurers but from the date of the death or loss. The policies affected are no longer described as those under which the sum is payable *immediately* after proof of the death or loss has been given to or received by the insurers. An agreement providing that a suit upon the policy must be brought within a time (*e.g.*, three months or one year) which is shorter than that provided by Art. 86, is not void under sec. 28 of the Contract Act, and a suit brought after the stipulated period would not be maintainable—*Baroda Spinning Co.* v. *Satyanarayan Insurance Co.*, 38 Bom. 344, 21 I.C. 694 (696); *Hira Bhai* v. *Manufacturers' Life Insurance Co.*, 14 Bom.L.R. 741, 16 I.C. 1001; *Ruby General Insurance Co. Ltd.* v. *Bharat Bank Ltd. A.I.R.* 1950 E.P. 352; *Giridhari Lal Hanumanbux* v. *Eagle Star & British Dominions Insurance Co. Ltd.*, 27 C.W.N. 955. See also *South British Insurance Co.* v. *Brojo Nath*, 36 Cal. 516, 13 C.W.N. 425, 2 I.C. 573; *Saroj Bandhu Bhaduri* v. *Jnanada Sundari Debya*, 36 C.W.N. 555 (558).

408B. The suit contemplated by this Article is only a suit by the insured against the Insurance company—*Ramaswami* v. *Satyanarayana*, A.I.R. 1958 A.P. 309.

87. By the assured to recover premia paid under a policy voidable at the election of the insurers.	Three years.	When the insurers elect to avoid the policy.
88. Against a factor for an account.	Three years.	When the account is, during the continuance of the agency, demanded and refused or, where no such demand is made, when the agency terminates.

409. A factor is an agent who is entrusted with possession of goods for sale or account of his principal.

Demand, Refusal, Termination of Agency:—See Notes 415 and 416 under the next Article.

The agency of a person entrusted to sell goods on behalf of the plaintiff does not terminate when the goods are sold and the money is received by the agent; therefore limitation does not begin to run when any portion of the goods is sold, but only from the date of *demand* made by the principal during the time the price remains unpaid by the agent—*Babu Ram* v. *Ram Dayal*, 12 All. 541; *Fink* v. *Buldeo*, 26 Cal. 715.

89. By a principal against his agent for moveable property received by	Three years.	When the account is, during the continuance of the agency, demanded

the latter and not accounted for.	and refused or, when no such demand is made, when the agency terminates.

It should be noted that Articles 88, 89 and 90 apply to suits by *principals* against agents; suits by *agents* against principals are not provided for in these Articles.

410. Suit for account and money:—A suit for account will lie if the defendant is under an obligation to account and obligation to account arises only (i) if the person upon whom the obligation is sought to be imposed must have received some kind of property not belonging to himself (ii) that the person seeking to impose the liability must be the owner or must have some title to that property as would enable him to recover it, (iii) that the defendant must have received the property in his possession and control; and (iv) there must be fiduciary relationship between the plaintiff and the defendant—*Ashutosh* v. *Arun*, A.I.R. 1950 Dac. 13. This Article applies to a suit by a principal against his agent for an account and for any money that may be found due on such account being taken; the phrase "moveable property" includes money—*Shib Chandra* v. *Chandra Narain*, 32 Cal. 719; *Hafezuddin* v. *Jadunath*, 35 Cal. 298; *Pran Ram* v. *Jagadish*, 49 Cal. 250 (252), A.I.R. 1922 Cal. 355; *Venkatachalam* v. *Narayanan*, 39 Mad. 376; *Jogendra* v. *Debnath*, 8 C.W.N. 113; *Madhab* v. *Debendra*, 1 C.L.J. 147; *Asghur Ali* v. *Khurshed*, 24 All. 27 (P.C.); *Annu* v. *Somasundara*, 54 Mad. 654, 131 I.C. 165, A.I.R. 1931 Mad. 185 (188). A suit for recovery of money found due on an account and a suit for account are really one and the same thing—*Jhapajhannessa* v *Bamasundari*, 16 C.W.N. 1042, 16 I.C. 414.

A suit by a principal against his agent for an account as a preliminary step to enable the principal to recover from the agent the moneys received by him and not accounted for, is governed by this Article, but so far as it seeks to obtain certain *account papers* from the agent, the suit is governed by Article 120 and the cause of action arises from the date when such papers are to be submitted to the principal according to the contract between them—*Madhab* v. *Debendra* 1 C.L.J. 147. Where a suit is instituted against an agent for the recovery of a definite sum, and there is a prayer that the amount stated in the plaint or any larger sum proved by the decision of the Court to be due by the agent may be decreed to be paid, it is virtually a suit for an account—*Hurronath* v. *Krishna*, 14 Cal. 147 (P.C.).

Even where there is a *contract* to render account year by year, a suit by the principal against his agent for such account is governed by this Article (which is more specific) and not by Art. 115 which is only a residuary Article relating to contract —*Bhabatarini* v. *Sheikh Bhadur*, 30 C.L.J. 90, 53 I.C. 675; *Venkatachalam* v. *Narayana*, 39 Mad. 376 (380); *Pran Ram* v. *Jagodish*, 49 Cal. 250 (253); *Jogindra* v. *Chinai Muhammad*, 4 Pat. 289, A.I.R. 1925 Pat. 494, 89 I.C. 275; *Madhusudhan* v. *Rakhal*, 43 Cal. 248 (dissenting from *Jogesh* v. *Benode*, 14 C.W.N. 122, *Debendra* v. *Sheikh Esha*, 14 C.W.N. 121 and *Easin v. Baroda*, 11 C.L.J. 43). In the last three cases, as well as in *Moti Lal* v. *Amin*, 1 C.L.J. 211, the suit was held to be governed by Article 115.

A suit by plaintiffs against their step-mother for recovery of their father's property which she was managing on behalf of the family under an arrangement, is governed by this Article or Article 90, so far as the moveable property is concerned, and by Art. 120 or 144 in respect of immoveable property—*Kally* v. *Dukhee*, 5 Cal. 692. A suit for account by one daughter against another daughter who is appointed manager and lambardar during her lifetime under the terms of her father's will is governed by this

Article. The managing daughter is in control of the interests of the other daughters in the estate with their consent and therefore this Article applies—*Asharfi* v. *Ram*, I.L.R. (1939) All. 594, 1939 A.L.J. 428, A.I.R. 1939 All. 442. A suit for accounts against the agent in respect of money alleged to have been improperly advanced by him to counsel for purposes of litigation of the principal is governed by this Article, and the agent is bound to prove that the moneys drawn by him for payment as illegal gratification to the counsel reached their destination—*Fox* v. *Beni*, 13 C.W.N. 212, 4 I.C. 556. A suit by a principal against an agent to recover a specified sum of money lent by the agent to persons to whom he was not authorized to lend the money falls under this Article and not under Art. 90, as such a suit is really a suit for a mere money-account—*Muthiah* v. *Alagappa*, 41 Mad. 1.

If after partition among the members of a joint Hindu family, one member collects the family debts which were left undivided at the time of partition, it may be implied that he realises the debts as an agent of the other members. Consequently a suit against him by the other members may fall under this Article. Art. 62 cannot apply—*Yerukola* v. *Yerukola*, 45 Mad. 648, 42 M.L.J. 507, A.I.R. 1922 Mad. 150; *Gabu* v. *Zipru*, 45 Bom. 313. See Note 372 under Art. 62. This view has been upheld by the Privy Council in *Virayya* v. *Adenna*, 58 M.L.J. 245, 51 C.L.J. 136, A.I.R. 1930 P.C. 18 (21), 121 I.C. 205.

A suit by one co-owner of property against another who has received more than his share of the income of the joint property is governed by this Article if the suit is for accounts of agency, otherwise Article 120 would be the proper Article to apply—*Sita Ram* v. *Narayan*, 45 Bom.L.R. 424, A I.R. 1943 Bom. 216, 208 I.C. 340.

A suit by one partner for partnership accounts based on an express agreement between the partners to render accounts and to distribute the profits annually is governed by Art. 120, and not by Art. 89. No doubt every partner is deemed to be an agent of the partnership, but an individual partner cannot be regarded as an agent of another individual partner—*Binjraj* v. *Kisanlal*, 29 N.L.R. 34, 141 I.C. 277, A.I.R. 1933 Nag. 127 (130).

Where a petrol pump and tank are provided by the principal to the agent for the sale of the petrol to be returned on the termination of the agency, the cause of action for return of the pump, tank and accessories arises on the termination of the agency and this Article applies. So a suit instituted beyond three years after the accrual of the cause of action is barred—*Western India Oil Distributing Co. Ltd.* v. *Rathnasebapath*, I.L.R. (1948) Mad. 296, (1947) 1 M.L.J. 360, A I.R. 1948 Mad. 76.

411. Suit to enforce a charge:—Where immoveable properties were hypothecated to the principal by the agent as security for the proper discharge of his duty, a suit by the principal against the agent for recovery of the sum found due upon adjustment of accounts, by sale of the properties hypothecated, is a suit to enforce a charge under Article 132, and does not fall under this Article—*Madhusudhan* v. *Rakhal*, 42 Cal. 248 (dissenting from *Jogesh* v. *Benode*, 14 C.W.N. 122 where the suit was held to fall under Art. 116); *Pran Ram* v. *Jagodish*, 49 Cal. 250 (253); *Hafezuddin* v *Jadunath*, 35 Cal. 298; *Troilokhya* v. *Abinash*, 21 C.L.J. 459, 24 I.C. 18. But where the suit is simply for an account (and not to enforce any charge) it will fall under this Article, inspite of the fact that the agent has hypothecated certain properties to the principal—*Suresh* v. *Nawab Ali*, 20 C.W.N. 356, 29 I.C. 848. Where the agent executed a *kabuliat* in 1305 by which he hypothecated certain properties as security against defalcation and default, and was dismissed in 1306, but was re-appointed in 1307, and then committed defalcation and default in 1307 and 1308, a suit for account against him would be governed by Article 89; Art. 132 cannot apply as the agent's position

in 1307 after dismissal and re-appointment could not be governed by the *kabuliat* of 1305 —*Behari Lal* v. *Hara Kumar*, 21 C.L.J. 458, 29 I.C. 748.

412. 'Not accounted for':—A suit contemplated by this Article is a suit in which accounts *have to be* taken; where accounts *have* been rendered, this Article has no application. Where an account has been taken and adjusted, and a sum of money has been found due from the agent to the principal, a suit to recover that sum is governed by Art. 64 or 115—*Kesho Prasad* v. *Sarwan Mal*, 21 C.W.N. 591, 25 C.L.J. 335.

413. Registered contract:—When the contract under which the agent is employed is contained in a duly registered instrument, the suit is governed by Art. 116 —*Mati* v. *Amin*, 1 C.L.J. 211; *Easin* v. *Barada*, 11 C.L.J. 43, 5 I.C. 186; *Jogesh* v. *Benode*, 14 C.W.N. 122, 5 I.C. 59; *Harender* v. *Administrator-General*, 12 Cal. 357; *Mathura* v. *Cheddu*, 39 All. 355. But in *Hafezuddin* v. *Jadu Nath*, 35 Cal. 298 (301) and *Pran Ram* v. *Jagadish*, 49 Cal. 250 (253), A.I.R. 1922 Cal. 355, the Calcutta High Court has expressed the view that even if the contract of agency is registered, the case will fall under Article 89 and not under Art. 116 because the former Article is more specific than the latter, and also because a suit for account cannot be looked upon as a suit for compensation for breach of contract. The same High Court has in a subsequent case held that where an agent has undertaken by a registered agreement to repay the amount found to have been misappropriated by him within a month of the ascertainment of the amount, a suit by the principal for the recovery of the misappropriated amount is governed by Article 116 and should, therefore, be instituted within six years from the date on which the amounts are payable under the agreement—*Mohini* v. *Bikram*, 44 C.W.N. 793, 72 C.L.J. 480, A.I.R. 1941 Cal. 257. In fact a suit for compensation for breach of contract is a suit for recovery of a *definite* sum of money; but a suit for account is not a suit for a definite sum of money but is a suit for ordering the defendant to account to the plaintiff for money received by him, and the first result is that the plaintiff gets a decree for discovery. And if anything is found due to the *agent* himself, he likewise can get a decree for it, even through he has not claimed it in his pleadings. Such a state of things can never happen in a suit for compensation for branch of contract; consequently Art. 116 does not apply to a suit for account against an agent—*Annu* v. *Somasundara*, 54 Mad. 654, 131 I.C. 165, A.I.R. 1931 Mad. 185 (188).

Where sums received by an agent outside the scope of the registered instrument are sought to be recovered, the three years' limitation will apply—*Harender* v. *Administrator-General*, 12 Cal. 357.

414. Suit against agent's representatives:—If after the termination of the agency by death of the agent, a suit is brought against the heirs of the deceased agent, it would not be governed by Art. 89 for it cannot be said to be a suit for rendition of *accounts* (the liability to render accounts being *personal* to the agent, and the representatives of the agent not being liable to render accounts), but it is a suit for money payable to the principal by the representatives of the agent out of the assets in their hands—*Kumeda* v. *Asutosh*, 17 C.W.N. 5, 16 I.C. 742; *Seth Chand Mal* v. *Kalian Mal*, 96 P.R. 1886; *Rao Girraj* v. *Ram Raghubir*, 31 All. 429; *Fatima* v. *Intiazi*, 1 P.R. 1912, 13 I.C. 930; *Rameswari* v. *Narendra*, 5 P.L.T. 355, A.I.R. 1923 Pat. 259; *Ashutosh* v. *Arun*, A.I.R. 1950 Dac. 13. In the Calcutta case (17 C.W.N. 5) the suit was held to be governed by Article 115 or 120; in 96 P.R. 1886, by Article 62 or 120; in 1 P.R. 1912, by Article 120, and not by Article 62 or 89; in 31 All. 429 the suit was held to be governed by Article 120, and not by Art. 57, 62 or 89. That is, Article 120 has been held to be the most appropriate.

In the Patna case, the suit was held to be governed by Art. 62 or 115 and not by Art. 120. In the Dacca case, the suit was held to be governed by Art. 62.

In an earlier Calcutta case it was held that if an agent had never been called on to render account during his life-time and then he died and the agency thereby terminated, the principal acquired a fresh right to have an *account rendered* by the agent's representatives, and that right was recognised by Article 89, and limitation ran from the death of the agent (or from the date when administration was taken to the agent's estate, sec. 17). In other words, the legal representatives of the agent were held bound *to render accounts*, and the suit for such accounts was held to fall under Article 89—*Lawless* v. *Calcutta Landing and Shipping Co., Ld.*, 7 Cal. 627 (632). In *Deorao* v. *Laxman*, I.L.R. (1943) Nag. 470, 1943 N.L.J. 308, A.I.R. 1943 Nag. 227, it has been held that a suit for accounts by the principal against the legal representatives of an agent is governed by this Article.

The omission of any mention of legal representatives in the words under "Description of suit" in Art. 89 does not mean that the Article is not intended to apply to a suit against his representatives—*Bikram Kishore* v. *Jadabchandra*, A.I.R. 1935 Cal. 821, 40 C.W.N. 245, 62 C.L.J. 464; *Ashutosh* v. *Arun*, A.I.R. 1950 Dac. 13.

In *Harender* v. *Administrator-General*, 12 Cal. 357, and *Mathura* v. *Chhedu*, 49 All. 355, it was held that a suit against the agent's legal representatives for recovery of the amount not accounted for by the agent would fall under Article 116, if the contract of agency had been registered. Where in a suit for recovery of certain sums from the sons of the deceased *Karpardar* or agent, it is found that the *Karpardar* was under no liability to pay over the sums directly to the principal on receipt, and that there was a running account, the arrangement being that he should keep in his hands sufficient amount out of the collections for costs of litigation on behalf of his principal, the proper Article applicable to the suit is Art. 89 or Article 120—*Sadhu* v. *Krishnamani*, 23 Pat.L.T. 457, A.I.R. 1942 Pat. 181.

If the time had commenced to run during the life-time of the agent (*i.e.*, if the agency had terminated in the agent's life-time, by dismissal from service) and then the agent died, a suit against his legal representatives would be governed by Article 89, for it is based on the same cause of action as a suit against the agent himself, and the period of limitation in respect of the suit against the representatives would run from the same date as it would have run in respect of a suit against the agent himself had he lived, *viz.*, from the date of the termination of the agency, and not from the date of the agent's death—*Arunachellan* v. *Raman Chetty*, 16 M.L.T. 614, 27 I.C. 807; *Parthasarathi Appa Rao* v. *Subba Rao*, 50 Mad. 249, A.I.R. 1927 Mad. 157, 99 I.C. 456; *Parthasarathi* v. *Turlapati Subba Rao*, 47 M.L.J. 483, A.I.R. 1924 Mad. 840.

415. Demand and refusal:—There must be an *express* demand and refusal; it cannot be supposed that demands were going on as long as the business was in existence. In the absence of any evidence of demand and refusal, limitation runs from the termination of the agency—*Nabin Chandra* v. *Chandra Madhab*, 44 Cal. 1 (8) (P.C.) (reversing *Chandra Madhab* v. *Nabin*, 40 Cal. 108); *Bhabatarini* v. *Sheikh Bahadur*, 30 C.L.J. 90, 53 I.C. 675. But where the agency is not terminated and is still in existence the limitation will run from the time the account is demanded and refused—*Brij Lal* v. *Chander*, 1943 A.L.W. 138. If there has been a demand for accounts and the agent has not responded to the call, there is by implication a refusal within the meaning of this Article—*Madhusudhan* v. *Rakhal*, 43 Cal. 248; *Pran Ram* v. *Jagodish*, 49 Cal. 250 (254). This is the case also where the agent has

submitted accounts but has failed to explain the account-papers in spite of the principal's demands to do so—*Madhusudhan* v. *Rakhal*, 43 Cal. 248, 19 C.W.N. 1070. Where the agent does not refuse to render an account but promises to submit the same on a certain future date, which however he neglects to do, it must be held that the account was refused at that date and limitation will run therefrom—*Hori Narain* v. *Administrator*, 3 C.L.R. 446. But it cannot be affirmed as a general fact that the failure of the agent to render accounts necessarily amounts to a refusal, when the agent while in service had been all along saying that he would render accounts. The failure to render accounts on demand may be due to various causes, such as illness, or delay in preparing the accounts, or sometimes procrastination. The question whether the failure to render accounts amounts to a refusal depends upon the circumstances of each case—*Bhabatarini* v. *Sheikh Bahadur*, 30 C.L.J. 90, 53 I.C. 675; *Fatima* v. *Intiazi*, 1 P.R. 1912, 13 I.C. 930. Where the defendant was asked to render accounts repeatedly, and he put it off but never refused to render accounts, *held* that the putting off was equivalent to postponement, and postponement was not tantamount to refusal; on the contrary, it implied an admission that an account was due and would be rendered. In such a case, limitation ran from the termination of the agency —*Saiyad Hasan Imam* v. *Debi Prasad*, 3 Pat. 546, 5 P.L.T. 303, A.I.R. 1924 Pat. 664, 80 I.C. 956.

Where there is a covenant to deliver accounts year by year, the omission to render such accounts amounts to a refusal within the meaning of this Article—*Easin* v. *Baroda*, 11 C.L.J. 43, 5 I.C. 186.

Where the defandant is an agent of two joint principals, limitation for a suit for account does not run until there has been a *joint* demand for account by the principals. A demand for account by one only of the principals will not give a starting point of limitation. In the absence of a joint demand, limitation will run from the termination of the agency—*Jagdip* v. *Rajo Kuer*, 2 Pat. 585, 4 P.L.T. 531, A.I.R. 1923 Pat. 464.

Where there was a demand and refusal during the life time of the agent, who subsequently dies, then a suit brought against his legal representatives more than three years after such demand is barred by limitation on the ground that where a cause of action accrues and limitation once commences to flow it will not cease to flow—*Ashutosh* v. *Arun*, A I.R. 1950 Dac. 13.

416. Agency:—The guardian is not an agent and the relationship between the guardian and ward is not that of a principal and agent but is in the nature of a fiduciary relationship—*Mani* v. *Annapurna*, 22 Pat. 114, A.I.R. 1943 Pat. 218, 206 I.C. 126. A lunatic for whose estate the District Judge appoints a manager, cannot be said to be the principal of the manager of his estate within the meaning of this article—*Musst. Piari* v. *Kashi*, 23 Luck. 65, 1947 O.W.N. 530, A.I.R. 1949 Oudh 51. It need not necessarily be established by a written document. It may be inferred from circumstances. In order to constitute agency by implication there must have been proof of the one having acted for the other in transactions and having dealt with the estate—*Ahmed* v. *Yehiya*, A.I.R. 1950 Hyd. 52.

416A. Termination of agency:—Under sec. 201 of the Contract Act, an agency is terminated, among other ways, by the principal revoking his authority, or by the agent renouncing the business of the agency or by the business of the agency being completed, and it is from this point that time is to begin to run in a suit under this Article—*Venkatachalam* v. *Narayan*, 39 Mad. 376 (378), 28 M.L.J. 140, 26 I.C. 740; *Brij Lal* v. *Chander*, 1943 A.L.W. 138. In *Babu Ram* v. *Ram Doyal*,

12 All. 541 and *Fink* v. *Buldeo*, 26 Cal. 715, the Judges expressed an opinion that an agency terminates under this Article only when the sums received by the agent had been fully accounted for by him to the principal. But this is contrary to the terms of this Article, because the words "not accounted for" indicate that the agency may terminate before the moneys are accounted for by the agent. Therefore where the principal revoked the authority of the agent, and the latter handed over charge to his successor, the agency terminated then and there (under sec. 201 of the Contract Act) though the agent has not yet handed over to his principal the money and accounts and passed the accounts—*Venkatachalam* v. *Narayan*, 39 Mad. 376 (dissenting from 12 All. 541 and 26 Cal. 715 cited above. An agency is terminated when the agent ceases to represent the principal even though his liability in respect of acts done by him may continue. Where an agent appointed specially to carry on the principal's business at a particular place for a particular period, handed over charge to his successor appointed by the principal and left the place and appeared before the principal sometime later for getting the balance of salary due to him and for having his accounts passed, it was held that the agent had ceased to represent the principal in respect of the agency after he handed over charge to his successor and that the period of limitation under Art. 89 commenced to run from that date—*Somasundaram Chetti* v. *Nachal Achi*, A.I.R. 1935 Mad. 707, 1935 M.W.N. 967, 42 L.W. 342, 158 I.C. 573. Where an agency is revoked by a letter, the agency is not terminated by the posting of the letter but by receipt of the letter revoking the agency—*Ramchander* v. *Rure*, 1939 A.L.J. 961, A.I.R. 1939 All. 738, 185 I.C. 233. The agency terminates when the business of the agency has been completed, *e.g.*, when the agent is instructed to buy and sell goods on behalf of his principal, the business of the agency terminates on the agent's carrying out the principal's instructions. And the mere liability to render accounts is not a continuation of the relation between the agent and the principal—*Gordhan Das* v. *Gokal*, 21 S.L.R. 336, A.I.R. 1926 Sind 264 (following 39 Mad. 376, and dissenting from 12 All. 541 and 26 Cal. 715).

The question as to when an agency terminates is a question of fact and depends upon the circumstances of each case, and not a question of law—*Muthiah* v. *Alagappa*, 41 Mad. 1; *Nagappa* v. *Chidambaram*, 31 M.L.J. 687, 36 I.C. 662; *Ramanathan* v. *Kasi*, 31 M.L.J. 685, 36 I.C. 804. It terminates on the date after which there have been no dealings between the parties, even though the agent had not accounted for all monies alleged to be due to the latter—*Kuppuswami* v. *Veerappa*, 37 I.C. 875.

Where an agent acting under a general power of attorney to manage all the principal's business collects a certain amount the agency is not terminated on the date when the amount is collected. Thus, where in such circumstances a sum was collected by the agent in 1937 and a suit was brought by the principal for its recovery in 1941, the suit is not barred—*Varisai* v. *Kadir*, (1945) 2 M.L.J. 484, A.I.R. 1946 Mad. 122, 1945 M.W.N. 735, 223 I.C. 531.

A legal practitioner who happens to be the agent of a party does not cease to be such agent merely because he gets a Vakalatnama from his principal and sues on the strength of it for realising the amount due to his principal—*Hira Wazir* v. *Md. Ali*, A.I.R. 1935 Lah. 49, 157 I.C. 815.

In a suit for accounts by the principals against the agent, instituted on 31st May 1923, it appeared that all the transactions of purchase and sale into which the agent entered on behalf of the principals had been completed on 29th May 1920, but the parties had agreed that the accounts should be settled on the 1st June 1920. *Held* that the suit was not barred, because the agency did not terminate until the 1st June 1920. The 1st of June was the appointed settling day, and until that day was over

it could not be said that the defendant had ceased to represent the plaintiffs as their agent and to do acts in that capacity, although the transactions of purchase and sale might have been completed on the 29th May 1920—*Lakhmi Chand* v. *Chajju Mal*, 91 I.C. 487, A.I.R. 1926 Lah. 200.

In a suit for recovery of money received by the defendant as agent for the plaintiff on account of plaintiff's winnings in a lottery, the agency does not terminate when the money is received by the defendant, but continues so long as the money is held by the defendant for the plaintiff, and the right to sue arises when the money is demanded and payment is refused—*Hormasji* v. *Ho Hmyin*, 12 Bur.L.T. 9, 51 I.C. 530. The agent received a sum of money on behalf of his principal in 1902; in May 1903, disputes arose between the principal and agent in which the agent denied the principal's right to the money. But in June 1903, the agent again received another sum *as agent* on behalf of his principal; after that date, there was no demand or refusal or termination of agency. The principal filed a suit in 1907 to recover the money from the agent. It was held that the suit was not barred; although the agent asserted his own right in May 1903, the adverse claim was not continued, and when in June 1903 he again received the money on behalf of the plaintiff his conduct amounted to a continuation of the agency—*Nathubhai* v. *Devidas*, 12 Bom.L.R. 951, 8 I.C. 637. Where an agent threw up the agency at Rangoon and came back to Madras, the termination of the agency was the starting point of limitation. The fact that he went back to give evidence and again acted for a time until the principal sent a successor cannot prevent the running of time as regards the first agency, provided there was no acknowledgment of liability to account after such termination —*Palaniappa* v. *Alagappa*, 39 I.C. 691 (Mad.).

As agency determines on the death of a principal, therefore a suit by the representative of the late principal against the agent for an account of money received by the agent during the late principal's life-time, falls under this Article, because after the death of the principal, the position of the agent is not altered into that of a trustee—*Nabin Chandra* v. *Chandra Madhab*, 44 Cal. 1 (7) (P.C.). Where an agency is created between two persons and the principal dies but the agent continues in the service of his sons and they file a suit for accounts for period both before and after the death of their father, as the former agency terminates with the death of the father, the two periods should be separately considered and if a suit for accounts in respect of the anterior period is instituted more than three years after the date on which the agency terminated the suit for accounts must be regarded as barred—*Bikramkishore* v. *Jadabchandra*, A.I.R. 1935 Cal. 817, 40 C.W.N. 245, 62 C.L.J. 464. Therefore the suit should be brought within 3 years of the death, even though the representative of the late principal should continue to employ the agent—*Mohendra* v. *Jadu Nath*, 9 C.L.J. 107, 3 I.C. 684; *Sarashibala* v. *Chuni Lal*, 26 C.W.N. 320, A.I.R. 1922 Cal. 53; *Girjibai* v. *Narayan*, 26 Bom.L.R. 1165, A.I.R. 1925 Bom. 148, 88 I.C. 975. For, where on the death of the principal the agent continues in the service of his heirs, the old agency terminates and a new agency independent of the original contract is created, and the suit for accounts in respect of the old agency must be brought within three years of the termination of that agency—*Madhusudhan* v. *Rakhal*, 43 Cal. 248, 19 C.W.N. 1070.

417. Account for more than three years before suit:—Although a suit must be brought within 3 years, still there is nothing in the words of this Article to show that the plaintiff is entitled to *accounts for only three years* antecedent to suit. Thus, in a suit brought in 1911, in which accounts were claimed from 1899, it was held that the plaintiff was entitled to the accounts claimed—*Suresh* v. *Nawab*,

20 C.W.N. 356, 29 I.C. 848. See also *Pran Ram* v. *Jagdish*, 49 Cal. 250 (256), 35 C.L.J. 111, A.I.R. 1922 Cal. 355, where in a suit instituted on 27th August 1918, a claim for account from 13th April 1914 was decreed; and *Subramania* v. *Kannappa*, A.I.R. 1938 Mad. 38, 183 I.C. 82.

90. Other suits by principals against agents for neglect or misconduct.	Three years.	When the neglect or misconduct becomes known to the plaintiff.

418. This is a residuary Article with regard to actions between principal and agent, and should be applied only if no other Article can possibly be regarded as applicable to the facts of the particular case—*Madhavan Nair* v. *Zamorin*, A.I.R. 1928 Mad. 906 (907). The expression "neglect or misconduct" must be construed technically as referring to what is termed negligence or misconduct of the agent in the conduct of the business of the agency. It does not cover everything that may in ordinary parlance be called misconduct—every failure of duty on the part of the agent, failure to render account, failure to pay over money in his hands to the principal and so on—*Madhavan* v. *Zamorin*, supra. The word "other' in this Article shows that this Article does not include suits which properly come within Article 89. A suit by the principal against an agent for the recovery of money lent by the latter to persons to whom he was not authorized to lend, is a suit for an ordinary money account under Article 89, and is not therefore governed by Art. 90—*Muthiah Chetty* v. *Alagappa Chetty*, 41 Mad. 1 (2). For a suit against an agent for misconduct, see 41 All. 635.

Plaintiff paid a certain sum to his agent (defendant) to be paid to A. Defendant not having paid the money to A, the latter brought a suit against plaintiff and obtained a decree for the money. It was held that the plaintiff's suit against defendant was governed by Art. 90; time began to run when the plaintiff came to know of defendant's misconduct and not from the date of payment by the plaintiff to A under the decree —*Rangasami* v. *Srinivasa*, 21 M L.J. 453, 9 I.C. 54.

Where during the tenure of the office of the Chairman of a Municipal Council, the manager embezzled sums of money, a suit by the Municipal Council against the Chairman for recovery of the money on the ground that the embezzlement took place through his negligence in supervision, is governed by Art. 36, and not by Art. 89 or 90, as the Chairman is not an agent of the Council although it is his duty to collect the dues and see that proper accounts are kept—*Srinivasa* v. *Municipal Council*, 22 Mad. 342. But in an Allahabad case, where during the tenure of the office of the Secretary and the Executive officer of the Municipal Board, the head accountant embezzled sums of money, it was held that the Secretary and the Executive Officer of the Municipal Board were the agents of the Board within the meaning of this Article, and that a suit against the Secretary on the ground that it was his neglect of official duties (*viz.*, want of supervision over the cash book and over the receipt of all taxes and income of the Board) which mainly contributed to the embezzlements, fell under this Article—*Mukherji* v. *Municipal Board of Benares*, 46 All. 175, 22 A.L.J. 26, 80 I.C. 241, A.I.R. 1924 All. 467. The Lahore High Court also holds that a Chairman of the Board of Directors of the branch firm of a Bank is an agent of the Bank, and a suit by the Bank against such Chairman for making certain advances to some persons improperly, *mala fide* and negligently, falls under this Article—*Daulat Ram* v. *Bharat National Bank*, 5 Lah. 27, 79 I.C. 740, A.I.R. 1924 Lah. 435.

A suit by a sabha against an ex-secretary claiming a sum of money on the ground that he had wrongfully retained the money of the sabha by not entering them in the accounts and had shown certain sums of money falsely as having been spent on

behalf of the sabha when as a matter of fact they were not at all spent, is governed by this Article as there is allegation of misconduct—*Sankaranarayana* v. *Bayanai*, 1938 M.W.N. 1133, A.I.R. 1939 Mad. 114, 180 I.C. 390.

A suit in which a client claims damages for negligence of his advocate is governed by this Article—*Saw Hla 'Pru* v. *Halkar*, 9 Rang 575, 135 I.C. 648, A.I.R. 1932 Rang. 1 (2); *Annamalai* v. *Cowasjee*, 1938 Rang. L.R. 457, A.I.R. 1938 Rang. 258 (F.B.).

419. Starting point of limitation:—Limitation begins to run when the agent's neglect becomes known to the principal, and not when the principal comes to know that there is sufficient ground for a good case being run against the agent—*Janki Koer* v. *Mahabir*, 25 I.C. 706 (Cal.). In other words, time runs from the date when the *negligent act* or omission becomes known to the plaintiff, and not from the time when he realises or concludes that the act was negligent. This Article is not happily worded, for the law knows nothing of neglect or misconduct in the abstract, and no suit can lie which is founded on negligence or misconduct as such. The word 'neglect' means some negligent *act or omission*, and when column 3 says that time runs when the neglect or omission becomes known to the plaintiff, it means when the negligent *act or omission* becomes known to the plaintiff, and not when the plaintiff *realised* or concluded that the act (or omission) was negligent—*Saw Hla Pru* v. *Halkar*, 9 Rang. 575, 135 I.C. 648, A.I.R. 1932 Rang. 1 (2, 3). This Article does not say that time begins to run when the cause of action for neglect or misconduct became known to the plaintiff, but when the neglect or misconduct became known—*Annamalai* v. *Cowasjee*, supra. Where a principal sued his agent in regard to his misconduct in making a secret profit and concealing the same from the plaintiff, *held* that the crucial point was not the date on which the defendant had made the secret profit but the date on which the plaintiff *knew* that the defendant had made the secret profit—*Kishori Lal* v. *Jauhari*, 25 A.L.J. 448, 103 I.C. 221, A.I.R. 1927 All. 436. Knowledge of the agent's negligence includes constructive knowledge, and the plaintiff must be deemed to have got constructive notice of the defendant's negligence when it was first reported in the office of the plaintiff that some rents had become time-barred through the defendant's negligence to collect them—*Anand Parshad* v. *Perbhu Narain*, 6 I.C. 456.

91. To cancel or set aside an instrument not otherwise provided for.	Three years.	When the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.

420. Where Article does not apply:—(1) This Article will not apply when the cancellation of a document is not an *essential* part of the plaintiff's relief—*Unni* v. *Kunchi*, 14 Mad. 26; *Shankaran* v. *Keshavan*, 15 Mad. 6 (10); *Puraken* v. *Parvathi*, 16 Mad. 138; *Radhu* v. *Malak*, 84 P.L.R. 1915, 29 I.C. 199. Where in a suit some substantial relief (*e.g.*, recovery of some property) is prayed for, and the cancellation of the instrument is merely incidental or auxiliary to such relief, this Article does not apply—*Bachchan* v. *Kamta*, 32 All. 392 (395), 5 I.C. 585; *Sundaram* v. *Sithammal*, 16 Mad. 311; *Abdul Rahim* v. *Kirparam*, 16 Bom. 186; *Muhammad* v. *Mango Mal*, 22 All. 90; *Ikram* v. *Intizam*, 6 All. 260 (262); *Uma Shankar* v. *Kalka*, 6 All. 75; *Ramausar* v. *Raghubar*, 5 All. 490; *Hazari* v. *Jadaun*, 5 All. 76 (*per* Straight J.); *Bageshra* v. *Sheo Nath*, 14 A.L.J. 464, 32 I.C. 930; *Chhajumal* v. *Multan Singh*, A.I.R. 1936 Lah. 996. Such a case arises where the instrument is *null and void*. Such a

document need not be cancelled or set aside by a suit brought within three years under this Article, but the plaintiff can bring a suit for *declaration, possession or other relief* without praying for cancellation of the instrument. To such a suit Article 91 does not apply—*Md. Nazir* v. *Zulaikha*, 50 All. 510, A.I.R. 1928 All. 267; *Krishnadhan* v. *Brojendra*, 34 C.W.N. 642 (645), A.I.R. 1930 Cal. 748; *Chandi Charan* v. *Sarat Chandra*, A.I.R. 1955 Assam 231; *Appanna* v. *Venkatapadu*, A.I.R. 1953 Mad. 611; *Ambammal* v. *Muddiah*, A.I.R. 1952 Mys. 65; *Gouri Amma* v. *Parameswaran*, A.I.R. 1957 T.C. 312. Thus, a deed of gift executed by a Hindu widow transferring the bulk of the property to an idol is void and not voidable; a suit to set aside the gift and for possession of the property does not fall under this Article—*Chooramoni* v. *Baidya Nath*, 32 Cal. 473. So also a suit for declaration that a mortgage deed was without consideration and null and void is not governed by this Article but by Article 120 —*Aisha* v. *Kundan*, I.L.R. 1945 All. 494, 1945 A.L.J. 196, A.I.R. 1945 All. 367. A document which was never intended by the executant to be operative and which was not properly signed by him is a nullity; it does not require to be set aside by the person entitled to the possession of the property as against the person in whose favour the document stands—*Banku* v. *Kristo Govinda*, 30 Cal. 433 (438). Thus where, to avoid a wife's claim to dower debt, a fictitious document is executed no title passes to the vendee under the sale deed and the vendor continues to be the owner of the property and hence it is not incumbent on him to have it set aside and so this Article can not be pleaded as a bar to his suit for declaration of ownership—*Khaliq* v. *Ghulam*, 1939 A.L.J. 389. If a deed of relinquishment executed by a purdanashin lady is a void document, it is not necessary to avoid it or get it cancelled; this Article has no application to a case where a suit is brought by her for possession upon declaration that an instrument under which the defendant claims is void—*Ishar* v. *Anwar*, 1939 A.L.J. 642, A.I.R. 1939 All. 348, 182 I.C. 801. But where the deed of relinquishment is not a void document it has got to be avoided within the time prescribed by this Article—*Gyan* v. *Mt. Dukhan*, 19 Pat.L.T. 362, A.I.R. 1938 Pat. 69, 173 I.C. 479. An alienation of joint family property by a coparcener without the consent of the other coparceners is void; it is not necessary to have the deed of gift set aside, and Art. 91 has no application—*Muktabai* v. *Karam*, 7 A.L.J. 783, 6 I.C. 841. An alienation of the management of a temple by the trustee is void and need not be set aside; therefore a suit to recover the estate from the alienee is governed by Art. 124, and not by this Article—*Narayana* v. *Lakshmanan*, 39 Mad. 456 (458). An alienation which is null and void under sec. 3 of the Bombay Bhakdari Act (V of 1862) need not be set aside by a suit under this Article; the plaintiff can seek a declaration that the sale is void against him, and Art. 120 applies to the suit—*Shankarbhai* v. *Bai Shiv*, 54 Bom. 837, 32 Bom.L.R. 1013, A.I.R. 1930 Bom. 545 (553), 127 I.C. 897. A *benami* conveyance which is an inoperative instrument and which was never intended to be operative need not be set aside. A suit to recover the property comprised in the conveyance is not governed by Article 91 but by Article 144—*Petherpermal* v. *Muniandy*, 35 Cal. 551 (P.C.); *Sham Lal* v. *Amarendra*, 23 Cal. 460 (469); *Ma Ma* v. *Mg. Shet*, 4 Bur. L.J. 250, A.I.R. 1926 Rang. 71, 93 I.C. 197. The alienation of temple property by a trustee is null and void, and need not be set aside; consequently a suit by the succeeding trustee to recover the property is not governed by this Article—*Sheo Shanker* v. *Ram Sewak*, 24 Cal. 77. A suit to recover possession of property alienated by a Hindu widow is not governed by this Article, when the alienation is found to be sham—*Manchcharam* v. *Panabhai*, 40 Bom. 51. Where it is established that the plaintiff by defendant's misrepresentation was got to execute a deed of sale, believing the same to have been a deed of a different kind, the transaction is void and not voidable only, and Art. 91 has no application to a suit to recover the property which passed under the void sale-deed—*Sanni Bibi* v. *Siddik Husain*, 23

C.W.N. 93, 49 I.C. 76. Where an illeterate person executes a document under the impression it is a lease, though in fact it is not a lease, on the misrepresentation that it is a lease, there is no real execution. As there is no real execution, the document is wholly void and this Article has no application—*Raja* v. *Chai*, 20 Pat L.T. 957, A.I.R. 1940 Pat. 201, 185 I.C. 816. Where the plaintiff brought a suit for a declaration that a deed of gift executed by her was void and inoperative, as she signed the deed believing, on account of the fraud and misrepresentations of the defendant, that it was only a power of attorney, and she also prayed for a declaration of title in the properties gifted, *held* that the deed of gift was void *ab initio*, and did not require to be set aside. Consequently, the suit was governed not by Art. 91 or 95 but by Article 120—*Sarat Chandra* v. *Kanai Lal*, 26 C.W.N. 479, A.I.R. 1921 Cal. 786, 70 I.C. 525; *Brindoban* v. *Dhuba*, 49 C.L.J. 540, 121 I.C. 404, A.I.R. 1929 Cal. 606. Where the claim was not to set aside the sale deed, but for a declaration that from its very inception it was a sham transaction, *held* that there was no necessity for the plaintiff to have the deed set aside, and therefore this Article did not apply—*Jagardeo* v. *Phuljhari*, 30 All. 375; *Md. Nazir* v. *Zulaikha*, 50 All. 510, A I.R. 1928 All. 267, 109 I.C. 54. Where the plaintiff (a person of weak mind) was got to execute a deed of sale or mortgage in favour of the defendant by fraud of the latter, and no consideration passed under the deed, *held* that the deed was a nullity and it is not necessary for the plaintiff to have it set aside under this Article; he can bring a suit to recover possession under Article 144—*Sundaram* v. *Sithammal*, 16 Mad. 311; *Abdur Rahim*, v. *Kriparam*, 16 Bom. 186; *Boo Jinathoo* v. *Shah Nagar*, 11 Bom. 78. Where during the minority of the plaintiff, a property belonging to him was alienated to the defendant by a person who was not his lawful guardian, and without any necessity, the deed was void, and a suit by the minor after attaining majority is governed by Art. 142, and not by Article 91 or 44—*Sajjad Ali* v. *Zulfikar*, 33 I.C. 943, 83 P.R. 1916; *Anandappa* v. *Totoppa*, 17 Bom.L.R. 1137 (Note), 33 I.C. 441; *Ramausar* v. *Raghubar*, 5 All. 490; *Narsagauda* v. *Chawagauda*, 42 Bom. 638 (F.B.); *Uttam Singh* v. *Barkat Ali*, 15 P.R. 1913, 19 I.C. 235; *Sardar Shah* v. *Haji*, 182 P L.R. 1980, 1 I.C. 545, 28 P.R. 1909; *Husain* v. *Rajaram*, 10 N.L.R. 133, 26 I.C. 813. Where a sale-deed was executed by persons purporting to be guardians, but no consideration passed under the sale-deed, and the defendant never obtained possession under it, no suit is necessary to set aside the deed; Article 144 and not 91 applies—*Nawab Mir Sayad* v. *Yasin Khan*, 17 Bom. 755 (758). Where a deed of gift is executed by a person governed by the Muhammadan law, and the possession of the property comprised in the gift has not been delivered, the gift would be void *ab initio*, and no question of limitation will arise as regards a suit to set aside the deed of gift. But if afterwards the defendant takes possession, the gift becomes operative by law, and limitation (Art. 91) for a suit to set aside the gift runs from the moment the defendant takes possession—*Mulani* v. *Maula Bakhsh*, 46 All. 260 (262, 264), 22 A.L.J. 149, 78 I.C. 222, A.I.R. 1924 All. 370. Where the plaintiff executed a registered sale-deed in favour of the defendant, and the defendant executed a receipt in favour of the plaintiff stating "I shall without any objection give up your land at any time you may ask me to give up" and it was proved that no consideration passed under the sale-deed, *held* that the sale-deed was a mere paper transaction and inoperative, and a suit to recover possession of the land was governed by Article 144 and not by Art. 91—*Sangawa* v. *Huchangowda*, 48 Bom. 166, 82 I.C. 533, 25 Bom.L.R. 1207, A.I.R. 1924 Bom. 174. Where a zemindar granted a village to a person for life for his maintenance, but the grantee gave a permanent lease of the village, *held* that after the death of the grantee the lease became spent and void and not merely voidable, and a suit by the zemindar to recover possession from the lessee was not governed by Article 91—*Beni Pershad* v. *Dudhnath*, 27 Cal. 156 (165) (P.C.). Where a transaction containing both legal and illegal parts

is embodied in either one or two instruments the whole transaction becomes void *ab initio* and this Article has no application—*Asaram* v. *Ludheswar*, I.L.R. (1939) Nag. 1, A.I.R. 1938 Nag. 335, 177 I.C. 6 (F.B.).

(2) *Secondly*, this Article does not apply where the transaction, though a *voidable* one, does not require to be set aside through the intervention of the Court. Thus, where the certificated guardian of a minor had granted a perpetual lease of the minor's property without the sanction of the Court the transaction is a voidable one, and it is not necessary for the minor (after attaining majority) to bring a suit to have the instrument of lease cancelled. He can simply repudiate the transaction and bring a suit for possession—*Abdul Rahaman* v. *Sukhdayal*, 28 All. 30. Where a guardian sells immoveable property belonging to a minor without the sanction of the District Judge, and subsequently executes a second sale with the sanction of the Judge, the latter transferee can sue for possession outright and need not expressly sue to have the first sale set aside. To such a suit, Art. 91 does not apply—*Nagendra* v. *Mohini*, 58 Cal. 128, 34 C.W.N. 948, A.I.R. 1931 Cal. 131, 130 I.C. 273. So also where a widow had granted a lease for a period extending beyond her own life, a suit by the reversioner to recover possession of the property is governed by Art. 141 and not by this Article. Such an alienation is voidable at the election of the reversionary heir, who may treat it as a nullity without the intervention of the Court, and he can show his election to do so by commencing an action for recovering possession of the property; the cancellation of the lease is not a condition precedent to the right of action of the reversionary heir—*Bijoy Gopal* v. *Krishna Mohishi*, 34 Cal. 329 (P.C.) (reversing *Bijoy Gopal* v. *Nilratan*, 30 Cal. 990); *Harihar* v. *Dasarathi*, 33 Cal. 257; *Rakhmabai* v. *Keshab*, 31 Bom. 1. Similarly, where a Hindu widow in possession of her husband's estate sold the property and then adopted the plaintiff and died, a suit by the adopted son to recover possession of the estate from the purchaser was not governed by Art. 91. There is no essential difference between the position of the adopted son seeking to enforce his rights with reference to the property alienated by the widow before the adoption, and the position of a reversioner seeking to enforce his rights with regard to the property alienated by the widow before her death. The adopted son was not required to set aside the sale any more than a reversioner. The suit was governed by Article 144 and not by Article 91—*Hanamgowda* v. *Irgowda*, 48 Bom. 654, 26 Bom.L.R. 829, A.I.R. 1925 Bom. 9. A suit by a landlord to avoid a transfer made by a tenant in contravention of section 43 of the C. P. Tenancy Act is not governed by this Article. The landlord is not bound to set aside the transfer and may sue for possession treating the transferee as a trespasser—*Saguncband* v. *Chhabilram*, 18 N.L.R. 11, A.I.R. 1922 Nag. 60. The members of a tarwad need not sue to set aside an alination made by the karnavan, but can sue to recover possession on the strength of title, because the alienation is not binding on the tarwad. Consequently, Article 91 does not apply to a suit to recover possession of the property alienated, but Article 144 would apply—*Kanna Panikkar* v. *Narichan*, 46 M.L.J. 340, A.I.R. 1924 Mad. 607, 78 I.C. 564.

(3) *Thirdly*, this Article does not apply where the suit was not to *cancel* or set aside an instrument, but only to amend it by substituting the name of the plaintiff for the name of another person mentioned in the deed. Thus, where the plaintiff asks for a declaration that the first defendant whose name appears as lessee in a certain lease-deed has no interest under the lease, and that the person really interested under the lease is the plaintiff himself for whom the first defendant acted as *benamidar*, *held* that the suit does not fall under this Article but Art. 120, as the plaintiff does not ask to annul the lease itself—*Basant Lal* v. *Chidammi*, 35 All. 149. Similarly, this Article does not apply where the plaintiff does not seek to *cancel* the instrument but simply asks for a declaration that his own interests are not affected by it. Thus, where a relation of the plaintiff executed in favour of the defendant a sale-deed by which he

professed to transfer the whole of a joint family property, one-fourth of which belonged to the plaintiff, and the plaintiff brought a suit asking that he might be maintained in his joint possession on the property by cancellation of the deed so far as it was injurious to his rights, *held* that the suit was not to *cancel* the sale-deed, because the plaintiff cannot dispute the validity of the deed except in so far as it affects his rights. Article 120 governed the case—*Din Dayal* v. *Har Narayan*, 16 All. 73.

(4) *Fourthly*, this Article does not apply where the plaintiff *was not a party* to the instrument sought to be avoided. This Article is restricted to a suit between the parties to the instrument or their successors-in-interest. Where the instrument was not executed by the plaintiff (or his predecessor) *he is not bound to set it aside* and this Article does not apply—*Vithu* v. *Devidas*, 15 N.L.R. 55, 51 I.C. 943; *Kunjilal* v. *Chandra*, 17 N.L.R. 169, 64 I.C. 775; *Ganapati* v. *Sivamalai*, 36 Mad. 575. Thus, where a suit by mortgagee is in effect one for a declaration that a sale by his mortgagor to a third party is null and void, Art. 120 applies to the case and not Art. 91—*Misan* v. *Shwe Ba*, 1 Bur.L.J. 106, A.I R. 1923 Rang. 82. A land belonging to defendant No. 1 was mortgaged by him to defendant No. 5, and afterwards the plaintiff purchased it at sale in execution of a certain decree against defendant No. 1; the plaintiff thereupon brought a suit for a declaration that the mortgage was fraudulent and without consideration. *Held* that the suit did not fall under this Article. "No doubt a declaration that defendant No. 5 has no title to the land would be to that extent equivalent to setting aside that mortgage, but such declaration would still leave the deed to operate as between the parties thereto, and therefore would not amount to cancelling that deed. Moreover the plaintiff has no title or interest to set aside the deed as *between the parties* thereto"—*Pachamuthu* v. *Chinnappan*, 10 Mad. 213 (215); *Unni* v. *Kunchi*, 14 Mad. 26; *Uma Shankar* v. *Kalka Prasad*, 6 All. 75. A suit by a reversioner to obtain a declaration that a kanom executed by the widow in favour of the defendant is not binding on the estate or on the plaintiff is not governed by this Article, as the plaintiff was not party to the deed—*Puraken* v. *Parvati*, 16 Mad. 138 (following *Pachamuthu* v. *Chinnappan*, 10 Mad. 213). A suit by a person who is not a party to the deed for a declaration that the donee did not acquire any title to the property by the deed of gift executed by a pardanashin lady on the ground that it was void *ab initio* as the lady did not know that it purported to be a deed of gift and did not intend to execute such a deed and that she had no independent advice is not governed by this Article—*Mt. Bibi Saleha* v. *Md. Zakariya*, A.I.R. 1950 Pat. 247. The mortgagor, in contravention of the terms of the mortgage, granted a perpetual lease of the mortgaged property, and the mortgagee brought a suit upon the mortgage and in execution of a decree brought the mortgaged property to sale which was purchased by the plaintiff. The plaintiff on becoming aware of the perpetual lease sued for its cancellation and for a declaration that the defendant (lessee) had no right to interfere with or obstruct the plaintiff in respect of the property in question. *Held* that Art. 91 did not apply but Art. 120; the prayer for the cancelment of the deed could be treated as merely incidental to the main relief (declaration) asked. "What the plaintiff wants is a declaration that the shadow cast upon his title may be dispersed. It is otherwise nothing to him whether the lease between the mortgagor and the defendant is or is not binding upon those who were parties to it"—*Muhammad Baqar* v. *Mango Mal*, 22 All. 90 (93). A suit filed by a creditor under section 53 of the Transfer of Property Act for a declaration that a transfer by way of sale by his debtor was intended to defeat or delay his creditors including the plaintiff and as such was not binding on the plaintiff and the other creditors is not governed by this Article but by Article 120—*Abdulla* v. *Purshottam*, 49 Bom.L.R. 875, A.I R. 1948 Bom. 265, (on Letters Patent appeal from 46 Bom.L.R. 613, A.I.R 1944 Bom. 267, 219 I.C. 52); *Marthandu* v. *Channa*, (1950) 2 M.L.J. 653, A.I.R. 1950 Mad. 388, 1950 M.W.N. 791.

Instrument:—The instrument to be cancelled or set aside which is referred to in this Article is that instrument which the plaintiff himself has actually asked to have cancelled or set aside and not one which he ought to have set aside—*Mariam* v. *Cassim*, 1940 Rang.L.R. 35, A.I.R. 1939 Rang. 278.

Will:—This Article does not apply to a suit to set aside a will—*Sajid Ali* v. *Ibad Ali*, 23 Cal. 1 (at p. 10) (P.C.); *Firoz* v. *Sultan*, 96 I.C. 835, A.I R. 1926 Lah. 635. Article 120 applies to the suit—*Firoz* v. *Sultan*, supra.

Award:—An award is an instrument within the meaning of Art. 91, and the plaintiff cannot impeach the decree incorporating the award, unless he can show that a suit to set aside the award was brought within the period prescribed by Art. 91—*Nidhan Singh* v. *Sassoon & Co.*, 28 P.L.R. 106, A.I.R. 1927 Lah. 172, 100 I.C. 596.

421. Where Article applies:—Article 91 applies to those cases where the prayer for cancellation of the instrument is an *essential* part of the relief claimed *i.e.*, where it is necessary for the plaintiff to set aside the instrument before he can obtain the other relief claimed by him. In other words, if the instrument is binding upon the plaintiff, then even though the plaint may have been made to look like a suit for recovery of lands, the plaintiff in order to get any such relief must have the instrument cancelled or at any rate have a declaration of its invalidity as against him. And a suit for such relief is governed by this Article—*Radhika Mohan* v. *Hari Bashi*, 37 C.W.N. 1141 (1143), 146 I.C. 1010, A I.R. 1933 Cal. 812. Where the cancellation of an instrument is the *substantial* relief sought, and the recovery of the property is only an incidental or auxiliary relief thereto, the suit falls under this Article—*Rampal* v. *Balbhaddur*, 25 All. 1 (P.C.). Where an instrument is *not void but voidable*, and can be avoided at the option of the party aggrieved, he must come to Court within three years to have it set aside—*Md. Nazir* v. *Zulaikha*, 50 All. 510, A.I.R. 1928 All. 267, 109 I.C. 54. If the immoveable property cannot be recovered until a document is set aside, it is necessary to bring a suit to set it aside, and such suit will fall under this Article, even though it is framed as a suit for recovery of possession of the property—*Banku Behari* v. *Krishto Gobindo*, 30 Cal. 433 (436); *Jaffar Ali* v. *Nasimannessa*, A.I.R. 1937 Cal 500. This Article must apply to suits in which the documents sought to be set aside were intended to be operative against the plaintiff, and would remain operative or would defeat his suit to recover possession of any property, if they are not set aside—*Sham Lal* v. *Amarendra*, 23 Cal. 460 (466); *Jan Mahomed* v. *Datu Jafar*, 38 Bom. 449, 22 I.C. 195. Articles 91 and 92 are particularly concerned with instruments which if allowed to stand unchallenged once they become known, might become important evidence against the person whose rights they purported to affect—*Raghubar* v. *Bhikya*, 12 Cal. 69 (74).

Thus, a deed of relinquishment which operates to put an end to the plaintiff's right to certain property is not void *ab initio* but is voidable only, *i.e.*, it is a valid document and binding on the plaintiff until it is set aside, and the plaintiff's right to recover the property will be barred, if he fails to bring a suit to set aside the deed within the time prescribed by this Article—*Rameshwar* v. *Lachmi Prosad*, 31 Cal. 111; *Gyan* v. *Mt. Dukhan*, 19 Pat.L T. 362, A.I.R. 1938 Pat. 69, 173 I.C. 479. But where the deed of relinquishment is a void document, this Article has no application—*Ishar* v. *Anwar*, 1939 A.L.J. 642, A.I.R. 1939 All. 348. Where a sale becomes voidable by subsequent failure of consideration, the title nevertheless passes to the purchaser by such sale, and the vendor or other persons claiming to recover the property must get the sale avoided within the period prescribed by this Article, before they can recover possession—*Govindasami* v. *Ramaswamy*, 32 Mad. 72. When in a suit for possession of immoveable property it is necessary that a lease-deed executed by the plaintiff's

predecessor must be first set aside before possession can be claimed, the suit must be governed by this Article—*Raja Rajeswara* v. *Arunachellam*, 38 Mad. 321. Where a sale-deed is executed by the plaintiff or his predecessor-in-title, and some consideration (though inadequate) passes, and the nature of the transaction shows that it is not void but voidable only, the suit is governed by Article 91, even though the plaintiff sues for possession—*Janki Kunwar* v. *Ajit Singh*, 15 Cal. 58 (P.C.). A Muhammedan executed a deed of gift of his property, under which possession was taken by the donee. The donor during his lifetime never took any steps to have the deed set aside. A suit was brought by his heir claiming a share in the donor's estate by right of inheritance and by having it declared that the deed was procured from the donor by fraud and undue inluence. It was held that the cancellation of the deed was a substantial and necessary incident of the claim, and the suit fell under this Article, notwithstanding that the plaintiff chose to call the suit one for possession—*Hasan Ali* v. *Nazo*, 11 All. 456. Where a suit is to declare that a deed of gift executed by the plaintiff is invalid and ineffectual, as it was executed without the knowledge of its real nature, it is governed by this Article—*Ibrar* v. *Kamni*, 1938 A.L.J. 502, A.I.R. 1938 All. 451, 176 I.C. 874; this Article applies even when the deed of gift was executed under undue influence—*Lingo* v. *Dattatraya*, 39 Bom.L.R. 1233, A.I.R. 1938 Bom. 97, 173 I.C. 817; *Jivaji* v. *Laxman*, 72 I.A. 21, I L.R. (1945) Bom. 440, I.L.R. (1944) Kar. (P.C.) 115, 1945 A.L J. 280, 49 C.W.N. 303, A I.R. 1945 P.C. 54, (1945) 1 M.L.J. 253 (P.C). Where a Hindu father executes a sale-deed under undue influence, and has not avoided it within the time fixed by this Article, his sons cannot recover the property —*Narogopal* v. *Paragowda*, 41 Bom 347, 39 I.C. 23; *Rajarajeswara* v. *Kuppuswami*, 41 M.L.J. 474, A.I.R. 1921 Mad. 349, 68 I.C. 352. A suit by the reversioners to set aside an *ikrarnama* executed by the last male owners (and which is binding on the reversioners) is governed by Art. 91 and not by Art. 144, even though the prayer in the suit is for recovery of possession of the property comprised in the *ikrarnama*—*Mahabir* v. *Harrihur*, 19 Cal 629. Where a person is, *prima facie*, bound by a decree, he cannot, by suing ostensibly for possession, ignore the decree and evade the operation of law; and where such a decree is an impediment to the plaintiff's way in obtaining relief inconsistent with it, he must bring his suit within the period prescribed by law for setting aside a decree—*Hitendra* v. *Rameshwar Singh*, 4 Pat. 510, 6 P.L.T. 634, A.I.R. 1925 Pat. 625, 88 I C. 141 (per Das J.). A suit to set aside a sale, under sec. 90 of the Probate and Administration Act, 1881 (sec. 307 of the Indian Succession Act, 1925) is governed by this Article, the sale being voidable only, and not void altogether—*Ma Ken* v. *Ma Bwin*, 5 Rang. 266, 103 I C. 264, A I.R. 1927 Rang. 186.

In some cases, the broad proposition has been laid down that Art. 91 is intended to apply to suits of the kind mentioned in sec. 39 of the Specific Relief Act, and to cases where the plaintiff seeks to cancel or set aside an instrument which he has been induced by misrepresentation, concealment of facts or other means of like kind to enter into, or where the cancellation or setting aside of an instrument is the only relief prayed for—*Hazari* v. *Jadaun*, 5 All. 76; *Sobha* v. *Sahodra*, 5 All. 322; *Uma Shankar* v *Kalka*, 6 All. 75; *Bakatram* v. *Kharsetji*, 27 Bom. 560; *Safdar* v. *Akbar*, 5 I.C. 497.

422. Starting point of limitation:—The words "when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him" must be construed to mean "when, having knowledge of such facts, a cause of action has accrued to him, and he is in a position to maintain a suit." In this case the defendant had on the 1st December 1875 transferred certain property subject to attachment before judgment in a suit which both the lower Courts dismissed but which the High Court decreed in favour of the plaintiff on the 7th August 1876. The present suit for cancellation of the transfer was brought more than three years after the plaintiff knew of the

transfer, but within three years from the date of the decree of the High Court. *Held* that the suit was within time, as the plaintiff's cause of action arose on the date of the High Court's decree—*Tawangir* v. *Kura Mal*, 3 All. 394. Where the plaintiff and his guardian were perfectly aware of the facts entitling them to set aside an award, the plaintiff must prove that he attained majority within three years before the suit. Limitation ran from the date of the award and not from the date when the Court refused to file it—*Kirkwood* v. *Maung Sing*, 5 Rang. 186 (P.C.), A.I.R. 1925 (P.C.) 216, 89 I.C. 773.

In a suit to set aside a deed executed by the plaintiff himself, on the ground of undue influence and fraud, if the facts relied upon by the plaintiff (*i.e.*, undue influence, etc.) were known to him from the date of the instrument, the period of limitation would begin to run from that date—*Janki* v. *Ajit Sing*, 15 Cal. 58 (P.C.); *Someshwar* v. *Tribhawan*, 9 Luck, 178 (P.C.), 11 O.W.N. 784; *Ram Sumran* v. *Sarjoo*, 4 Luck. 270, 114 I.C 806, A.I.R. 1929 Oudh 67 (71), 5 O.W.N. 1062. Thus where a suit is instituted to set aside a deed of gift executed under undue influence the time runs under this Article from the date of the knowledge, that is, the date of document, and not from the date of removal of undue influence—*Jivaji* v. *Laxman*, 72 I.A. 21, I L.R. (1945) Bom. 440, I.L.R. (1944) Kar. (P.C.) 115, 1945 A.L.J. 280, 49 C.W.N. 303, A.I.R. 1945 P.C. 54, (1945) 1 M.L.J. 253 (P.C.) So also, the time for setting aside a settlement deed executed under undue influence runs from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to the plaintiff and not from the date of the removal of the undue influence—*Buchi Bai* v. *Nagpur University*, I.L.R. (1946) Nag. 433, 1946 N.L J. 406, A.I.R. 1946 Nag. 377. If, however, the undue influence continues to be exercised after the execution of the instrument, limitation runs only when the influence ceases and the plaintiff may be said to have full knowledge of all the matters—*Rajeswara* v. *Rajagopala*, 1917 M.W.N. 906, 43 I.C. 164. No laches is attributable to the donor until he is sufficiently acquainted with his rights to enable him to assert them, and until he is free from the influence which invalidates the gift—*Allcard* v. *Skinner*, (1887) 36 Ch. D. 145 (163) (*per* Kekewich J.). The word "plaintiff" as defined in sec. 2 (8) includes any person through whom the present plaintiff derives his right to sue. Therefore, if a deed had been executed by the plaintiff's predecessor-in-title through fraud and undue influence, and that person had failed to bring a suit to set aside the deed on the ground of fraud etc., within three years from the date of execution, the right of the plaintiff would likewise be barred—*Ram Sumran* v. *Sarjoo*, supra.

Under the Mahomedan Law, a gift becomes operative only after delivery of possession; therefore the cause of action for a suit to set aside a gift arises not on the execution of the deed of gift but from the moment when by delivery of possession it becomes operative in law—*Medo Bibi* v. *Imaman*, 6 All. 207 (210); *Mulani* v. *Maula*, 46 All. 260 (263).

Where the plaintiff executed a sham sale-deed in favour of his sons, and they began to set up a title under the deed, the cause of action for a suit for its cancellation would arise not from the date of the sale-deed, but from the date the plaintiff apprehended injury to his interest, *i.e.*, the date when the defendants began to set up a title under the deed—*Singarrappa* v. *Talari*, 28 Mad. 349. In a suit by the mortgagor against the dispossessing mortgagee for cancellation of the mortgage-deed and for possession, on the ground that the mortgage was sham, limitation runs from the date of dispossession and not from the date of the mortgage-bond—*Vithal* v. *Hari*, 25 Bom. 78. But in an Allahabad case, where the plaintiff brought a suit to set aside a sham mortgage-deed on the ground that the defendant recently threatened to bring a suit on the basis of it, though when it was executed it was never intended to be acted upon,

it was held that limitation ran from the date of the execution of the mortgage-deed, and not from the date when the defendant threatened to sue upon it, in as much as the facts entitling the plaintiff to have the document set aside were known to the plaintiff from the very outset—*Qasim* v. *Muhammad*, 37 All. 640 (dissenting from 28 Mad. 349 and 25 Bom. 78 cited above). Where the plaintiff executed a registered deed of adoption in which he declared that he had adopted a certain boy and had conveyed to him a certain property, and afterwards brought a suit for a declaration that the adoption-deed was void and of no effect as against the plaintiff, *held* that the suit was governed by either Article 91 or 118, and that limitation ran from the date of execution of the adoption-deed, because the fact that no adoption had ever taken place was perfectly well known to the plaintiff on the very date on which he put his signature to the adoption-deed and caused it to be registered—*Udit Narain* v. *Randhir Singh*, 45 All. 169 (176), 69 I.C. 971. A suit by a reversioner to set aside an instrument executed by the last male owner must be brought within three years from the date of the death of the widow—*Mahabir* v. *Hurrihur*, 19 Cal. 629. A suit to set aside an instrument executed during the minority of the plaintiff, must be brought within three years after the minor plaintiff has attained majority—*Chanvirapa* v. *Danava*, 19 Bom. 593; *Kulyan* v. *Bipro*, 6 W.R. 321. A suit for cancellation of a document by which certain properties were dedicated for construction of a mosque by the plaintiff reserving for himself a perpetual connection with the mosque in his capacity of its president is in time when instituted within three years of the time at which he admittedly occupied the office of the president—*Jamiat* v. *Md. Shariff*, A.I.R. 1938 Lah. 869, 180 I.C. 799.

Burden of proof:—In a suit under this Article, if the defendant pleads that the cause of action for the plaintiff's suit to cancel the deed arose earlier than the period alleged by the plaintiff, the burden lies on the defendant to prove that the plaintiff acquired full information of the true state of facts at a time too remote to allow him to maintain the suit—*Nibaran* v. *Nirupama*, 26 C.W.N. 517, 34 C.L.J. 563, A.I.R. 1921 Cal. 131, 69 I.C. 476; *Ishar* v. *Fatima*, 1939 A.L.J. 642, A.I.R. 1939 All. 348, 182 I.C. 801; *Rahima* v. *Mustafa*, A.I.R. 1938 Rang. 264 (case of undue influence by a person standing in fiduciary relation); *Abdulla* v. *Purshottam*, 49 Bom.L.R. 875 (mere hints and clues raising suspicion are not enough); where a deed is executed by a pardanashin lady, it is not enough that she had an opportunity of reading the document and that the terms were not complex or obscure. It must be shown that the terms were explained to her and she was apprised of the nature and effect of the deed—*Parikh Atmaram* v. *Bai Hira*, 75 I.A. 108, 1948 A.L.J. 241, I.L.R. (1948) Bom. 148, 52 C.W.N. 701, 50 Bom.L.R. 495, A.I.R. 1948 P.C. 111, 29 Pat.L.T. 251, 1948 M.W.N. 449 (P.C.).

423. Effect of bar of Limitation:—Where a sale is voidable for fraud and no suit is brought to set aside the sale within the period prescribed by this Article, the right to recover the property is also barred—*Gobindasamy* v. *Ramasamy*, 32 Mad. 72 (76). But though a party's remedy as *plaintiff* to have the instrument set aside may be barred, it is competent to him to say by way of equitable *defence*, if sued, that the instrument ought not to be enforced. Article 91 applies only to suits brought by a plaintiff to have instruments avoided. A defendant may, by way of equitable defence, set up the invalidity of the deed, although his right to have it avoided by a suit has become time-barred—*Lakshmi* v. *Roop Laul*, 30 Mad. 169 (178).

92. To declare the forgery of an instrument issued or registered.	Three years.	When the issue or registration becomes known to the plaintiff.

424. Application of Article:—Arts. 91 to 93 apply to suits brought expressly to cancel, set aside or declare the forgery of an instrument; but where some substantial relief (*e.g.*, possession of property) is sought and the cancellation or declaration is subservient or merely ancillary and not necessary to the granting of such relief, these Articles do not apply—*Abdul Rahim* v. *Kirparam*, 16 Bom. 186 (189). Thus, a suit by the plaintiff for *possession* and to set aside on the ground of forgery a deed of sale alleged to have been executed by his father in favour of the defendant is governed by Art. 144 and not by Article 92 or 93—*Trilochan* v. *Nobokishore*, 2 C.L.R. 10. Where a will is contested not merely on the ground that it was a forged will but also on the ground of want of capacity on the part of the testator, this Article does not apply—*Gnakaprakasam* v. *Parasakthi*, 52 L.W. 440, 1940 M.W.N. 983. But if the relief asking for a declaration that the document is forged is the principal relief and any other relief is merely subsidiary to it, the suit falls under this Article—*Muradan* v. *Raghunandan*, A.I.R. 1927 All. 826 (827), 102 I.C. 287.

425. "Issued":—An *anumatipatra* (deed of permission to adopt) was given to a widow by her husband. She adopted a boy, and the reversionary heirs brought a suit, to set aside the adoption on the ground of forgery of the anumatipatra. *Held* that the words *issued* was intended to refer to the kinds of documents to which people commonly apply that term in business, and that an *anumatipatra* could not be said to be "issued" when an adoption was made under it; therefore this Article did not apply to the suit. Article 93 also did not apply because it was very difficult to say that an adoption followed by nothing more was in any sense an *enforcement* of power *against* other persons within the meaning of that Article. Art. 118 applied to the suit—*Hurri Bhushan* v. *Upendra Lal*, 24 Cal. 1 (P.C.). A suit to declare an unregistered will as forged and beyond the power of the testator to make, is governed by Art. 120. Art. 92 does not apply to the case as the will is neither 'issued' nor registered—*Gauhar* v. *Ghulam*, 1909 P.L.R. 82, 4 I.C. 923.

93. To declare the forgery of an instrument attempted to be enforced against the plaintiff.	Three years.	The date of the attempt.

426. Application of Article:—This Article applies to suits brought expressly to declare the forgery of an instrument. Where the declaration is an ancillary relief and only incidental to a substantial relief claimed, this Article will not apply—*Abdul Rahim* v. *Kirparam*, 16 Bom. 186 (189). For instance, where the suit is one for possession, and the plaintiff avers that the sale-deed relied on by the defendant is a forgery, this Article would not apply—*Narayanan* v. *Kannammal*, 28 Mad. 338 (343). Or, where the suit is for declaration of plaintiff's title to a certain property, and to set aside a will which the plaintiff alleges to be a forgery, the suit is not governed by the three years' rule under this Article—*Nistarini* v. *Anundomoyi*, 2 C.L.J. 561. See also *Trilochan* v. *Nobokishore*, 2 C.L.R. 10, cited under Art. 92.

427. Attempt to enforce:—An attempt to recover rent under a forged lease is an attempt to enforce it; but an attempt to merely have the lease recorded under the Bombay Record of Rights Act (IV of 1903) is not such an attempt because to have the lease recorded does not amount to enforcement of the lease against any person's right—*Achyut* v. *Gopal*, 40 Bom. 22 (27). Similarly an attempt to register a document is not an attempt to enforce it against any person's right—*Ibid; Kama-*

lanadhan v. *Sattiraju*, 32 I.C. 99 (Mad.). An adoption by the widow by virtue of an *anumatipatra* (deed of authority to adopt) cannot be said to be an enforcement of the *anumatipatra* against the reversionary heirs—*Hurri Bhushan* v. *Upendra*, 24 Cal. 1 (P.C.) cited under Art. 92. A widow applied for a succession certificate to enable her to collect the debts due to her deceased husband, stating in her petition that her husband left no heirs nearer to herself, and she based her claim to the certificate expressly on the ground that she was her husband's widow and as such entitled to the certificate under the Hindu law. In the petition she made mention of a will and stated that under it she was the legatee of her deceased husband but nowhere did she base her right to collect the debts upon her position as legatee. In a subsequent suit by the reversioners for a declaration that the will was a forgery, it was held that the mere mention of the will in the application for succession certificate was not an attempt on the part of the widow to enforce the will against the reversioners. The suit did not fall under this Article—*Kamalanadhan* v. *Sattiraju*, supra. So also, the mention of a will in a written statement filed by the widow in a previous suit brought by the reversioners, in which the genuineness of the will was not the point at issue, and which was dismissed on other grounds, does not amount to an attempt on the part of the widow to enforce the will against the reversioners, and therefore, a subsequent suit by the latter to declare the invalidity of the will is not governed by this Article and is not barred if brought more than three years from the date of the written statement filed by the widow in the previous suit—*Achamma* v. *Seethamma*, 40 M.L.J. 348, A.I.R. 1921 Mad. 545, 62 I.C. 531.

428. Limitation:—The period of limitation will be calculated from the date of the attempt, even though that attempt might not have been known to the plaintiff —*Nistarini* v. *Anundomoyi*, 2 C.L.R. 561. The period must be calculated from the *first* attempted enforcement of the instrument and not from the date of any subsequent attempt, though the defendant might not have sought in his first attempt to obtain the entire fruits thereof—*Fakharoodden* v. *Pogose*, 4 Cal. 209. Where a person claiming under a deed of sale wants to be made a party in a suit in order to enforce his claim, the date of the order of the Court making him a party is the "date of the attempt" within the meaning of this Article, and a suit to declare the forgery of the deed of sale must be brought within three years from that date—*Fakharuddin* v. *Official Trustee*, 8 Cal. 178 (P.C.).

94. For property which the plaintiff has conveyed while insane.	Three years.	When the plaintiff is restored to sanity, and has knowledge of the conveyance.
95. To set aside a decree obtained by fraud, or for other relief on the ground of fraud.	Three years.	When the fraud becomes known to the party wronged.

429. Scope of Article:—Article 95 applies to a suit to set aside a decree obtained by fraud or for other relief on the ground of fraud. This, it is clear, applies and must apply to a case where the plaintiff has sustained loss or damages on account of the fraud of the defendant—*Kaikhusroo* v. *Gangadas*, A.I.R. 1936 Bom. 322, 38 Bom.L.R. 712, 165 I.C. 184. This Article is not intended to apply to suits for possession of immoveable property when fraud is *merely a part* of the machinery by which

the defendant has kept the plaintiff out of possession. It applies only to cases where a party has been *by means of* fraud induced to enter into some transaction, execute some deed, or do some other act, and desires to be relieved from the consequences of such act—*Chunder Nath* v. *Tirthanand*, 3 Cal. 504 (507); *Kaliprasanna* v. *Haripada*, 34 C.W.N. 801 (805, 806), 129 I.C. 871, A.I.R. 1931 Cal. 69. This Article is limited in its application to cases where the relief is claimed on the *sole ground of fraud*—*Siddappa* v. *Vishvanathasa*, 45 Bom.L.R. 825, A.I.R. 1943 Bom. 419, 214 I.C. 272. It does not apply to every case in which fraud enters as an element in the conduct of the defendant. It does not apply where fraud is not the basis of the relief, but some other matter, although the defendant may have acted fraudulently—*Gour Mohaun* v. *Dinonath*, 25 Cal. 49; *Jamsetji* v. *Hirjibhai*, 37 Bom. 158. In other words, this Article does not apply where the relief claimed on the ground of fraud is merely *ancillary* to some main relief, as for instance where the main relief is the declaration of the plaintiff's title to the property, but there is also a prayer in the plaint for a declaration of a deed as fraudulent and void against the plaintiff—*Burjorji* v. *Dhunbai*, 16 Bom. 1 (9); *Sarat* v. *Kanai Lal*, 26 C.W.N. 479, A.I.R. 1921 Cal. 786, 70 I.C. 525; nor does this Article apply where the auction purchaser brings a suit for possession of immoveable property against the mortgagee from the judgment-debtor, after avoidance of the mortgage as being fraudulent, fictitious and void as against the plaintiff. Such a suit is governed by Art. 138—*Uma Shankar* v. *Kalka*, 6 All. 75 (77). But it would be laying down too wide a proposition to say that a suit for possession is not governed by Art. 95 at all. It seems clear that when a party is *prima facie* bound by a fraudulent decree, he cannot by suing ostensibly simply for possession ignore that decree and thereby evade the operation of Art. 95. Where there is such a decree standing in the way of his obtaining relief which is inconsistent with that decree, he must first of all bring a suit under Art. 95 to get the decree out of the way; he cannot ignore the decree and bring a suit for possession on the basis of title. Otherwise, if that decree could be ignored altogether, there would be no purpose of Art. 95—*Kaliprasanna* v. *Haripada*, 34 C.W.N. 801 (805), A.I.R. 1931 Cal. 69.

A suit to set aside a decree obtained by fraud or for relief on the ground of fraud is governed by Art. 95. In such a case the plaintiff must show that the decree was obtained by fraud. He must show that the summons was fradulently suppressed and by fraud of the plaintiff in that suit he was kept ignorant of the decree—*Abbasali* v. *Ram Kanai*, A.I.R. 1935 Cal. 95.

Again, this Article does not apply unless the plaintiff was *a party to the decree* or to the transaction in which the fraud was committed—*Saburdas* v. *Gopalji*, 45 Bom.L.R. 526. A.I.R. 1943 Bom. 283, 211 I.C. 230; *Kala Mydeen* v. *Narayanan*, A.I.R 1954 Trav. Co. 312. Therefore, where a fraudulent decree was passed against a person in possession with a limited interest, a suit by the reversionary heir for a declaration that the decree is void is not governed by this Article but by Art. 120, in as much as he was not a party to the decree—*Tallapragada* v. *Boorugapalli*, 30 Mad. 402 (404), dissenting from *Parekh* v. *Bai Vakhat*, 11 Bom. 119. A stranger who is intended to be defrauded by the decree cannot seek to have it set aside; all that he can sue for is to have it declared that his interest cannot be affected by such a collusive decree. A suit for such declaration falls under Article 120—*Saburdas* v. *Gapalji*, supra. Where a sale was held during the lifetime of the deceased, a suit to set aside the sale brought by persons claiming as shebaits or beneficiaries under the will of the deceased does not fall under this Article. The plaintiffs were not parties to the sale-transaction nor can they be treated as representatives of the deceased—*Kaliprasanna* v. *Haripada*, supra. So also, this Article is inapplicable to a suit brought by the real owner for possession of immoveable property, and for setting aside a sale held in execution of

a fraudulent decree passed against the *benamidar;* because that real owner not being a party to the decree in which the fraud was practised was in no way affected thereby and it is not necessary for him to have the sale set aside—*Ananda Pershad* v. *Prosannamoyi*, 34 Cal. 711 (717) (P.C.).

If fraud is not proved, the suit does not fall under this Article—*Thamman Singh* v *Dalchand*, 9 O.L.J. 171, A.I.R. 1922 Oudh 113, 67 I.C. 595. A suit to set aside a decree not on the ground of fraud, but on the ground that it was passed against the plaintiff when he was a minor and that his guardian *ad litem* was grossly negligent in not properly defending the suit in which the decree was passed, falls under Article 110—*Basavayya* v. *Bapanna*, 58 M.L.J. 349, A.I.R. 1930 Mad. 173. Where relief is sought on the ground of negligence this Article does not apply—*Abbaka* v. *Palli*, (1947) 2 M.L.J. 177, 1947 M.W.N. 457. If a decree is sought to be set aside not on the ground that it was obtained by fraud but on the ground that it is voidable (*e.g.*, a compromise decree entered into on behalf of a minor, without the permission of the Court), the proper Article applicable to the suit is Art. 120 and not Art. 95—*Phulwanti* v. *Janeshar*, 46 All 575 (590), 22 A.L.J. 521, A.I.R. 1924 All. 625, 83 I.C. 782. The Patna High Court has held in *Sheorani* v. *Kamakshoy*, 21 Pat.L.T. 269, 189 I.C. 535 that a decree obtained against a person treating him as a minor while in reality he is a major is not a nullity but voidable and a suit to challenge the decree is governed by this Article and must be brought within three years from the date of the decree.

430. Suits under this Article:—

Suit to set aside fraudulent sale:—If a sale is sought to be set aside on the ground that the decree in execution of which the sale took place was obtained by fraud, the suit is giverned by Article 95 which is more specific, and not by Article 12—*Kumar Rameshwar* v. *Mahabir*, 5 Pat. 759, 96 I.C. 529, A.I.R. 1926 Pat. 401 (403); *Natha Singh* v. *Jodha Singh*, 6 All. 406 (414); *Ambikamoni* v. *Khettra*, 30 C.W.N. 59 (62), 90 I.C. 866, A.I.R. 1926 Cal. 167; *Parekh* v. *Bai Vakhat*, 11 Bom. 119; *Moti Lal* v. *Russick*, 26 Cal. 326, at p. 333 (Note). But where a suit is based on allegation of fraud regarding the confirmation of sale, this Article has no application and Article 12 applies—*Gauri* v. *Jaishi*, A.I.R 1950 H.P. 1. A suit for a *declaration* that a decree and a sale held in execution of the decree are fraudulent and not binding upon the plaintiff, is the same thing as a suit to set aside a decree on the ground of fraud and is governed by Art. 95, not by Art. 120—*Ambikamoni* v. *Khettra*, supra.

A suit to set aside a sale held under the Public Demands Recovery Act (Bengal) on the ground that the sale was held without giving any notice, the notice having been suppressed by the fraudulent act of the defendant, is a suit for 'relief on the ground of fraud,' and falls under the second part of this Article. As the certificate issued under the Public Demands Recovery Act operates as a decree, the suit may also be treated as a suit 'to set aside a decree on the ground of fraud' falling under the first part of this Article—*Syamlal* v. *Nilmony*, 34 Cal. 241 (247). But in a later case the same High Court has ruled that a suit to set aside a fraudulent sale held under the Public Demands Recovery Act does not fall under this Article, because no decree is passed in the proceedings under that Act and the certificate cannot be treated as a decree, and also because the plaintiff was not a party to the transaction in which the sale was held; so that neither the first part nor the second part of Art. 95 applies to the case—*Kaliprasanna* v. *Haripada*, 34 C.W.N. 801 (805, 806), A.I.R. 1931 Cal. 69, 129 I.C. 871.

Where plaintiff's land was sold by the Revenue authorities for default of payment of assessment due upon it, a suit by the plaintiff to set aside the sale on the ground that

the sale was brought about by the fraud practised by the inamdar, would be governed by this Article—*Bajaji* v. *Pirchand*, 13 Bom. 221.

A suit by the auction-purchaser for setting aside the execution sale and for refund of purchase-money on the ground that the property was encumbered and the existence of incumbrance was concealed from him by the decree-holder, is a suit for relief on the ground of fraud under this Article, and is not governed by Article 12—*Sree Raja Datla Venkata Suryanarayana* v. *Galuguri Bapiraju*, 34 Mad. 143 (150). It cannot be treated as a suit for recovery of purchase-money on the ground of failure of consideration under Art. 97, because, if fraud is alleged, the suit is governed by the specific Article 95 and not by Art. 97—*Balasubramanya* v. *Maruthamalai*, 16 I.C. 215 (216).

Suit to set aside partition:—A suit by a minor after attaining majority to set aside a deed of partition on the ground of fraud is governed by this Article or Art. 97, and must be brought within three years after the minor plaintiff attained majority—*Chanviraja* v. *Donava*, 19 Bom. 593. If, however, there be no allegation of fraud or mistake, but only an allotment of less than his share to the minor, a suit by the minor on attaining majority to recover his full share will not be governed by three years' rule of limitation under this Article—*Lal Bahadur* v. *Sispai*, 14 All. 498.

Suit for compensation money:—Where the compensation for acquisition of land was awarded to a wrong person, through fraud or mistake, a suit by the real owner would fall under this Article—*Viraraghava* v. *Krishnasami*, 6 Mad. 344.

Suit under Madras Revenue Recovery Act:—A suit simply to set aside a sale for arrears of revenue held under the Madras Revenue Recovery Act (II of 1864), on the ground of fraud, is governed by the six months' limitation specially provided by sec. 59 of that Act, and not by this Article—*Venkata* v. *Chingadu*, 12 Mad. 168 (F.B.); *Iswara* v. *Karuppan*, 3 M.L.J. 255. But where the suit is to set aside the sale on the ground of fraud, *as well as to recover possession* from the purchaser, it will be governed by this Article, because the Revenue Recovery Act applies to a suit merely for setting aside a sale, and not for any other relief claimed—*Venkatapathi* v. *Subramania*, 9 Mad. 457; *Kuppusami* v. *Subramania*, 7 M.L.J. 73.

Suit to set aside compromise decree:—A suit to set aside a compromise decree on the ground of fraud is governed by this Article—*Muhammad Buksh* v. *Mahomed Ali*, 5 All. 294; *Mohendra* v. *Gour*, 22 C.W.N. 860, 46 I.C. 867; *Mahomed Jan* v. *Commissioner*, 37 I.C. 797 (Pat.).

Suit for damages for fraud:—Such a suit falls under this Article. The words "other relief" mentioned in Art. 95 do not mean relief of the same kind as the setting aside of a decree but is comprehensive enough to include suits for compensation for damage caused to the plaintiff by defendant's fraud—*Bank of Madras* v. *Multan Chand*, 27 Mad. 343. See also *Balasubramanya* v. *Maruthamalai*, 16 I.C. 215 (216). Thus where a sale in execution of a fraudulent decree is confirmed in favour of a stranger, a suit for damages on the ground of fraud against appropriate parties is the proper relief and not an application for setting aside sale unless the applicant shows that ignorance of his right to file the application is due to fraud of the auction purchaser—*Ghulam* v. *Negapattinam*, (1950) 1 M.L.J. 432, 1950 M.W.N. 240, A.I.R. 1950 Mad. 460.

Suit to set aside award:—A suit to set aside an award, when that award has been incorporated in a decree, on the ground of fraud falls under this Article—*Nidhan Singh* v. *Sassoon & Co.*, 28 P.L.R. 106, A.I.R. 1927 Lah. 172, 100 I.C. 596.

431. Knowledge of fraud:—So long as a person upon whom fraud has been practised remains in ignorance of it, no time will run against him; but when he has acquired knowledge of such fraud, he must, within three years from the date of obtaining

such knowledge, come into Court for relief—*Muhammad Baksh* v. *Mahomed Ali*, 5 All. 294. The knowledge predicated by the terms of this Article is not mere suspicion, but such *definite* knowledge as enables the person defrauded to seek his remedy in Court—*Natha Singh* v. *Jodha Singh*, 6 All. 406 (415); *Indra* v. *Rooka*, 3 I.C. 316; *Jago* v. *Narayan*, I.L.R. (1947) Lah. 985, 1948 N.L.J. 65, A.I R. 1948 Nag. 150. The defendant setting up the defence of limitation must shew that the plaintiff had clear and definite knowledge of the facts which constitute the fraud at a time which is too remote to allow him to bring the suit. The mere fact that some hints and clues reached the plaintiff which if vigorously and acutely followed up might have led to a complete knowledge of the fraud, is not enough to constitute clear and definite knowledge of it—*Rahimbhoy* v. *Turner*, 17 Bom. 341 (P.C.), affirming 14 Bom. 408 The knowledge of fraud means the knowledge of circumstances on which any reasonable man concludes that a fraud has been committed. It may be that his knowledge or conclusion is further corroborated by additional circumstances known to him subsequently. He cannot however say that he had no knowledge of fraud till the last piece of evidence came to light or till the persons committing fraud admitted it—*Jago* v. *Narayana*, supra. When it is doubtful at what precise time the fraud became known to the plaintiff, the *onus* is on the defendant to shew that the suit is out of time—*Punnayil* v. *Raman*, 31 Mad. 230 (233). Where a suit by a person for possession of certain property on the ground that a decree obtained against him during his minority is not binding on him, based not only on allegations of gross negligence on the part of the *guardian ad litem* but also on the assertion that the agent of the guardian had colluded with the opposite party and had failed to produce material evidence, it *prima facie* falls within the purview of Art. 95 and limitation runs from the date of knowledge of the fraud—*Gurbachan Singh* v. *Hazara Singh*, A.I.R. 1935 Lah. 961.

Article 36 is a residuary article. A suit for a relief on the ground of fraud is governed by Article 95 and not by Article 36. That being so, time begins to run from the date of the knowledge of fraud—*Dehradun Mussoorie Electric Tramway Co., Ltd.* v. *Hunsraj*, A.I.R. 1935 All. 995.

432. Effect of bar of limitation:—Although a person may be debarred by lapse of time from bringing a suit *as plaintiff* for setting aside a decree obtained by fraud still he can, as a *defendant*, in an action in which such decree is used as evidence against him, shew that it was obtained by fraud—*Rajib Panda* v. *Lakhan*, 27 Cal. 11 (23).

96. For relief on the ground of mistake.	Three years.	When the mistake becomes known to the plaintiff.

433. Scope:—This Article is limited in its application to cases of mistake committed in transactions arising in the course of relations which are more or less *contractual* in character, and the Article in any event has no application to a case where the mistake is on the part of the *defendant*, and not on the part of the *plaintiff*. Therefore, where the plaintiffs and the defendants were owners of adjoining coal-lands, and the defendants, due to a mistake regarding the boundary line between the collieries, trespassed into the plaintiff's colliery and extracted coal therefrom, whereupon plaintiffs sued the defendants for damages, *held* that this Article did not apply, as the suit was based on *tort*, and as the mistake was not on the part of the *plaintiffs*—*Panna Lal* v. *Adjai Coal Co. Ld.*, 31 C.W.N. 82 (95), 101 I.C. 62, A.I.R. 1927 Cal. 117. (This case has been reversed by the Privy Council in 57 Cal. 1341 on another ground). This Article has no application where the mistake is not of the plaintiff but of his employees to carry out the instructions of the plaintiff. Thus where due to the mistake of the

employees a wrong bill for electric current was supplied to the defendant a suit by the plaintiff for recovery of the balance is not governed by this Article—*Attar* v. *Municipal Committee*, 40 P.L.R. 143, A.I.R. 1938 Lah. 338, 180 I.C. 510. Mere carelessness of officers or clerks of a bank in honouring cheques drawn by the customer when presented for payment without funds to his credit will not make the monies paid under a mistake so as to attract the application of this Article—*Uma Shankar* v. *Bank of Behar Ltd.*, 1941 P.W.N. 638, A.I.R. 1942 Pat. 201, 197 I.C. 449.

A suit to rectify on the ground of mistake a petition for adjustment of a decree and the order passed thereon alleging that the same did not represent correctly the intention of the parties falls under Art. 96. There is no scope for the application of Art. 120 to such a suit—*Abdul Sattar* v. *Abdul Rusan*, 39 C.W.N. 966.

This Article applies only if the plaintiff wants to sue for rectification of the deed and prays only for that relief. But if other reliefs are asked for in the suit and the relief regarding rectification is only formal or incidental or not necessary for awarding the main relief prayed for, this Article has not application—*Sooramma* v. *Venkayya*, (1938) 1 M.L.J. 805, A.I.R. 1938 Mad. 589, 176 I.C. 875.

This Article has no application to a case to which sec. 70 of the Contract Act applies—*Jiwan* v. *Radha*, 18 Lah. 623, 40 P.L.R. 300, A.I.R. 1938 Lah. 99, 175 I.C. 588; nor does it apply to a suit to recover money paid as tax to the Municipality on the ground that it was illegally levied by the Municipality—*City Municipality, Bhusawal* v. *Nusserwanji*, 42 Bom.L.R. 491, A.I.R. 1940 Bom. 252, 189 I.C. 678.

Cases:—A suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum actually payable is governed by this Article rather than Article 62—*Tofa Lal* v. *Syed Moinuddin*, 4 Pat. 448, A.I.R. 1925 Pat. 765 (767), 93 I.C. 129; *Mathuranath* v. *Debendranath*, 12 Cal. 533. Thus, the defendants who purchased some bales of articles from another, sold the same to the plaintiff and afterwards it was found that some of the bales did not contain the stipulated number of pieces. The plaintiff thereupon sued the defendants for the price of the pieces short delivered, *i.e.*, for refund of the excess price paid. *Held* that the suit fell under this Article, not under Art. 62 and limitation ran from the date of his knowledge of short delivery—*Ramiah* v. *Sadashiv Mudaliar*, 48 Mad. 925, 49 M.L.J. 228, A.I.R. 1925 Mad. 1255.

A suit to re-open a partition and to re-adjust the shares of the parties on the ground that certain properties wrongly allotted to the share of the plaintiff really belonged to a third party who obtained a decree for possession of those properties from the plaintiff is governed by this Article and not by Art. 127 or 144. Time runs when the plaintiff is dispossessed in pursuance of that decree—*Ramakotayya* v. *Sundararamayya*, 54 Mad. 883, A.I.R. 1931 Mad. 707 (709), 135 I.C. 9. But where a separated member of a Hindu family brings a suit for his share in a part of the family property which he alleges was not included at the prior partition through the fraud of the other members this Article does not apply as this Article has no application to a suit for possession—*Siddappa* v. *Vishvanathasa*, 45 Bom.L.R. 825, A.I.R. 1943 Bom. 419, 214 I.C. 272. A suit for amendment or rectification of a lease on the footing of a common mistake of the lessor and the lessee under which some land was wrongly included in the lease, is governed by this Article—*Bijoy Chand Mohatab* v. *Secretary of State*, 48 I.C. 972 (Cal.). A suit for possession of immoveable property, when relief is claimed on the ground of mistake, falls under Art. 96 and not under Art. 144, and it is immaterial whether the mistake was made by the plaintiff or by a third party—*Sultan Mahomed* v. *Alim Khan*, 1905 P.L.R. 3. Where compensation for acquisition of land was awarded by mistake to a person who was not entitled to it, a suit by the

real owner to recover the money falls under this Article—*Viraraghava* v. *Krishnasami*, 6 Mad. 344. The mistake contemplated by this Article may be that of the plaintiff or of a third party through which the plaintiff's rights have been affected—*Ibid* (at p. 350). A suit by a creditor for setting aside a discharge made by him on the ground of mistake is governed by this Article—*Madras C. S. & S. Factories* v. *William Show*, 14 M.L.J. 443.

The plaintiff mortgaged seven out of his eight properties, but by a mistake made by the plaintiff in the bond, all the eight properties were sold under a decree on the mortgage, and purchased by the defendant. The plaintiff now brought a suit to recover from the defendant the value of the eighth property which was not the subject of the mortgage. *Held* that since the plaintiff was solely responsible for the mistake, he cannot treat the sale as a nullity and ignore it; it is necessary for him to get the sale set aside before he is entitled to any relief on the ground of mistake. The suit therefore falls under Article 12 and not under this Article—*Nagabhatta* v. *Nagappa*, 46 Bom. 914. A suit for refund of advance paid under a void agreement (*viz.*, an agreement to transfer a non-transferable property) falls under this Article, and the period of three years is to be counted from the date when the agreement is discovered to be void, which in this case is the date of the agreement, because when the agreement is one forbidden by law, the plaintiff must be deemed to have been aware of the fact when he entered into it. The period of limitation may also be counted from the date when the contract was declared to be vaid in a previous suit between the parties, because it was suggested in this case that the plaintiff was unaware of the illegality of the agreement until the Court gave its decision in that suit—*Auryaprabhakara* v. *Gummudu Sanyasi*, 48 M.L.J. 598, 88 I.C. 557, A.I.R. 1925 Mad. 885. But a suit for recovery of the purchase price or compensation in a case where possession of the property was delivered to the purchaser under a contract of sale which is subsequently discovered to be void is not governed by this Article even though the basis of the suit was mistake committed by the parties; the reason being that it is not the basis of the suit but the relief and cause of action on which the suit is founded that determines the article of the Limitation Act applicable to the case—*Punjab Government* v. *Baijnath*, 47 P.L.R. 122, A.I.R. 1945 Lah. 164, 221 I.C. 524. A suit by the auction purchaser against the decree-holder for recovery of purchase money on the setting aside of the sale in a suit under Or. 21 r. 63 C. P. Code is governed by this Article when the fundamental basis of the claim made by the plaintiff was the existence of a mistake as to true state of affairs regarding the property and its title—*Rudrayya* v. *Subba*, 1941 M.W.N. 484, A I.R. 1941 Mad. 742; *Nagayya* v. *Penukonda Co-op Town Bank*, (1946) 2 M.L.J. 231, A.I.R. 1947 Mad. 90, 230 I.C. 233. A Hindu, while next reversioner to an Oudh estate, purported to sell half the estate, declaring by the sale-deed that when he would succeed to the estate on the death of the widow he would put the vendee in proprietary possession. After the death of the widow, the purchaser sued the vendor for possession or alternatively to recover the purchase money with interest. *Held* that the claim for possession could not be granted as there was no effectual transfer of the estate, which was only an expectancy at the time of the sale; that the vendee was entitled only to recover the purchase money; and that the period of limitation for the claim to recover the purchase money ran from the date when the misapprehension of the vendor as to his right to sell the estate was discovered by the plaintiff, which was not earlier than the time at which his demand for possession was resisted *i.e.*, the time when the sale was declared to be void in this suit—*Harnath* v. *Indar Bahadur*, 45 All. 179 (184) (P.C.).

The mistake may be of law or of fact. In England it has been held that the Court has power to relieve parties against mistakes of law as well as against mistakes of fact

—*Stone* v. *Godfrey*, (1854) 5 D.M. & G. 76 (90). But under the Indian law, if a mistake is a pure mistake of law, and not a mistake bearing upon the private or special right of the petitioner, and if such mistake of law results in the payment by one person to another making it inequitable that the payee should retain the money, still it is no ground for relief—*Appavoo* v. *S. I. Ry. Co.*, 56 M.L.J. 269, A.I.R. 1929 Mad. 177 (178).

If there is *mutual* mistake, *i.e.*, if both the plaintiff and the defendant are under a mistake of fact, there can be no fraud, consequently the suit falls under Art. 96 and not Art. 95—*Martand* v. *Dhondo*, 45 Bom. 582.

Suit to set aside decree:—This Article is intended to apply to those cases in which the Courts are asked to relieve parties from the consequences of mistakes committed by them in the course of *contractual* relations. It does not refer to a suit to set aside a *decree* on the ground of mistake made by the plaintiff. Such a suit is not at all maintainable——*Ramzan Khan* v. *Yakub Khan*, 11 I.C. 537 (Oudh). This Article is so general in its character that it can hardly be said that it affords any authority for holding that a suit to set aside a decree on the ground of mistake is maintainable. The mistake can be certified by proceeding under sec. 108 C.P. Code (1882) or by way of appeal or review—*Chand Mean* v. *Asima Banu*, 10 C.W.N. 1024 (1025, 1026).

While Article 95 refers to a suit for setting aside a *decree* on the ground of fraud, the words used in Article 96 refer to relief on the ground of mistake; it does not refer to a suit to set aside a *decree* on the ground of mistake; and obviously refers to a suit for relief on the ground of mistake not made in a decree—*Jogeshwar* v. *Ganga Bishnu*, 8 C.W.N. 473 (475).

434. Limitation:—Where a plaintiff is mistaken as to his rights, time will only run against him from the discovery of his mistake (and not earlier)—*Brookbank* v. *Smith*, (1836) 2 Y. & C. Ex. 58. Thus, in a suit for recovery of money paid by the plaintiff to the defendant by mistake in excess of the amount legally due, time runs not from the date of the mistaken payment but from the time when the mistake is discovered—*Tofa Lal* v. *Syed Moinuddin*, 4 Pat. 448, 93 I.C. 129, A.I.R. 1925 Pat. 765 (768). And it is immaterial that the mistake remained undiscovered for three years from the date of payment—*Ibid.* But time runs *as soon as the mistake is known* to the plaintiff. Thus, on a partition of family properties between the plaintiff and the defendant, the former got certain properties including a mortgage-debt due to the family. The money due on the mortgage had been long ago paid off by the mortgagor, but both the plaintiff and the defendant were under a mutual mistake that the money was still due. The plaintiff brought a suit against the mortgagor, and it was, as a matter of course, dismissed in 1912, and the order of dismissal was confirmed by the Hight Court on appeal in July 1914. In June 1917 the plaintiff brought the present suit against the defendant to recover from him the share of the mortage-money. *Held* that as there was a mutual mistake, there was no fraud, that the suit fell under Article 96, and that the suit was barred under this Article, as time ran from the date of the dismissal of the previous suit against the mortgagor by the Court of first instance in 1912 that being the date when the plaintiff was aware of the mistake, and not from the date of the High Court's order in 1914—*Martand* v. *Dhondo*, 45 Bom. 582 (589), A.I.R. 1921 Bom. 184, 23 Bom.L.R. 69, 61 I.C. 34. The starting point of limitation for a suit by an auction purchaser for recovery of purchase money on the setting aside of the sale in a suit under Or. 21, r. 63, C. P. Code begins from the date of the trial Court's judgment in the suit under Or. 21, r. 63, C. P. Code and not from the appellate Court's judgment—*Rudrayya* v. *Subba*, 1941 M.W.N. 484, A.I.R. 1941 Mad. 742; *Nagayya* v. *Penukonda Co-Op. Town Bank*, (1946) 2 M.L.J. 231, A.I.R. 1947 Mad. 90, 230 I.C. 233.

97. For money paid upon an existing consideration which afterwards fails.	Three years.	The date of the failure.

435. Articles 62 and 97:—It seems that many of the cases governed by this Article would also fall under Article 62. But there is a distinction between the two, and it is this; where the transaction is *void ab initio*, there cannot be any "existing consideration which afterwards fails" within the meaning of this Article, but the consideration fails *ad initio*; in such a case the suit for refund of money would fall under Article 62 and not under this Article. But where the transaction is not void *ab initio* but *voidable* only, and the consideration fails by reason of some subsequent event, the suit would more properly fall under the present Article than under Article 62. This principle ought to be borne in mind in considering whether the case falls under Article 62 or 97, and this distinction has been clearly pointed out in the cases cited in Note 374 to Art. 62 under heading "Suit for refund of consideration-money." Where a contract of sale is wholly void *ab initio* the suit for refund of purchase money may be governed by Art. 62, but that in a case where the sale was not necessarily void, but only voidable Art. 97 would be applicable as governing a suit to recover money upon an existing consideration which had afterwards failed and that time would run when the vendee endeavoured to obtain possession of the property and being opposed found himself unable to obtain possession—*Municipal Committee, Gujranwala* v. *Chiranjilal*, A.I.R. 1935 Lah. 685. This Article applies only to cases where there is some consideration at some stage which fails subsequently. But, in a void contract the consideration is unlawful from the very beginning and no question of its failing at any subsequent stage can arise—*Panchoo* v. *Ram Sunder*, I.L.R. (1943) All. 604, 1943 A.L.J. 250, A.I.R. 1943 All. 294.

The leading authority on this subject is the decision of the Privy Council in *Hanuman* v. *Hanuman*, 19 Cal. 123. In this case, the manager of a joint Hindu family, governed by the Mithila law, sold a portion of the joint family property, but on objection made by the other members of the family to the transfer when the purchaser attempted to take possession, the sale was set aside. The purchaser then brought a suit for refund of the purchase-money. Their Lordships of the Judicial Committee expressed the view that the suit did not fall under Article 62 but under Article 97, and observed (at p. 126): "If there *never was any consideration*, then the price paid by the appellant (purchaser) was money had and received to his account by Dowlat Mandur (vendor). But their Lordships are inclined to think that the sale was not necessarily *void* but was only *voidable* if objections were taken to it by the other members of the joint family. If so, the *consideration did not fail at once* but only from the time when the appellant endeavoured to obtain possession of the property, and being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration and he would have had a right to sue at that time to recover back his purchase-money upon a failure of consideration, and therefore the case appears to be within the enactment of Article 97." In *Raja of Venkatagiri* v. *Sobhanadri*, I.L.R. (1944) Mad. 663, (1943) 2 M.L.J. 645, A.I.R. 1944 Mad. 211, 216 I.C. 120 the Madras High Court has held that this Article, which is the proper Article to apply with regard to voidable transactions is not inapplicable to cases where the contract was void *ab initio*. The reason given is that there are several sections of the Contract Act of which sections 24, 30 and 36 may be mentioned as examples of agreements with consideration which for one reason or another are void. If there was consideration for the original contract, then that consideration continued as long as one party was in enjoyment of the money and other

of the land. It was only when the dispossession took place the consideration failed. Their Lordships further held that the decision of the Privy Council reported in 19 Cal. 123 was a case of void contract in which possession was not given. The same view has been taken in *Sonaswatibai* v. *Madhukar*, I.L.R. (1950) Nag. 467, 1950 N.L.J. 145, A.I.R. 1950 Nag. 229. Even though a mortgage be void, still if a mortgagee gets possession, it should be held that he has an existing consideration for his mortgage, and it would fail when the mortgagee is finally dispossessed. The suit for recovery of the money falls under this Article—*Ram Harek* v. *Salik Ram*, 89 I.C. 332, A.I.R. 1926 Oudh 19.

A suit by a lessee under a registered lease who has been dispossessed from the property for return of the nazarana or premium paid by him to the lessor or any subsequent costs or damages on the ground that the lessor had no title, is governed by Article 116, even though it may apparently fall within this Article. As between the lessor and the lessee the transaction cannot be regarded as void *ab initio* when both parties have considered that the lessor had a good title to convey and when possession has been taken under the lease by the lessee—*Debi* v. *Haji*, 18 Pat. 654, A.I.R. 1940 Pat. 81, 186 I.C. 674. Where an agreement to sell is not void *ab initio*, but is afterwards declared to be void by the Court which refuses specific performance, a suit for refund of the consideration is governed by Article 97 and not by Article 62—*Munni* v. *Kunwar Kamta*, 45 All. 378 (379); *Maung Kyi* v. *Maung Kyaw*, 4 Bur.L.J. 197, 93 I.C. 119, A.I.R. 1926 Rang. 7.

Where the plaintiff has paid consideration and the defendant has promised to execute a lease but afterwards resiles from the promise and refuses to execute the lease, and the plaintiff files a suit for return of money, the cause of action for the suit does not arise on payment of the money. The suit is governed by Art. 97 or by Art. 115. It is either a claim for money paid upon existing consideration which afterwards failed in that the payments were made in consideration of the promise to execute the lease and the promise was afterwards repudiated or it was a claim for compensation for the breach of any contract express or implied not in writing registered and not specially provided for. The cause of action arises on breach of the promise to execute the lease—*Abdul Shakur* v. *Rajendra*, A.I.R. 1935 All. 759, 1935 A.L.J. 766. 155 I.C. 1092.

Where the plaintiff wrongly pays the defendant to redeem a mortgage, but on a third person obtaining a foreclosure decree he has to pay the money again for redeeming the mortgage, a suit for recovery of the money wrongly paid to the defendant is governed by Art. 97 and not by 116 or 120. The period of limitation runs from the date of the foreclosure decree—*Shambhu Dutt* v. *Ram Baksh*, A.I.R. 1935 Oudh 378, 1935 O.W.N. 549, 155 I.C 299.

436. Suit for refund of purchase money upon failure to obtain possession or upon subsequent dispossession:—Where the sale is not void *ab initio* but *voidable only*, and the purchaser fails to obtain possession of the property purchased, or obtains possession but is subsequently dispossessed by reason of a defect of title in the vendor, a suit for refund of the purchase-money is governed by this Article and not by Article 62 as the consideration did not fail *ab initio*, but failed *subsequently* by reason of the purchaser failing to obtain possession or of his subsequent dispossession—*Hanuman* v. *Hanuman*, 19 Cal. 123 (P.C.); *Tulsiram* v. *Murlidhar*, 26 Bom. 750; *Narsing* v. *Pachu*, 37 Bom. 538; *Venkatanarasimhulu* v. *Peramma*, 18 Mad. 173; *Munni Babu* v. *Kunwar Kamta Singh*, 45 All. 378 (380). See these cases fully cited in Note 374 under Article 62; *Punjab Government* v. *Baijnath*, 47 P.L.R. 122, A.I. R. 1945 Lah. 164, 221 I.C. 524. See also *Mahant Mahabir* v. *Ram Lakhan*, A.I.R. 1958 Pat. 1,

But it has been held in several cases of the Madras High Court, that after the passing of the Transfer of Property Act (1882), a covenant of title and quiet enjoyment must be implied in every contract of sale, under sec. 55 of that Act, and therefore a suit by the purchaser for refund of purchase-money on account of failure to get possession is to be deemed as a suit for "compensation for breach of contract in writing registered" (if there is a *registered* sale-deed) and is therefore governed by Article 116, and time runs from the date of dispossession or when the possession ought to have been delivered—*Arunachala* v. *Ramasami*, 38 Mad. 1171; *Chidambaram* v. *Sivathasamy*, 15 M.L.J. 396; *Nageswara* v. *Sambasiva*, (1911) 1 M.W.N. 361, 11 I.C. 337; *Krishnan* v. *Kannan*, 12 Mad. 8. This view is also taken by the Bombay High Court in *Multan Mal* v. *Budhumal*, 45 Bom. 955 (960), and by the Allahabad High Court in *Muhammad Sidiq* v. *Muhammad Nuh*, 52 All. 604, 124 I.C. 185, A.I.R. 1930 All. 771 (775). So also, where under a registered usufructuary mortgage, the mortgagor failed to secure the mortgagee in possession whereupon the latter brought a suit for refund of the mortgage-money, it was held that the mortgagor's liability to give possession to the usufructuary mortgagee or, in default, to repay the mortgage-money was a liability imposed by section 68, Transfer of Property Act, and the suit must be regarded as one for breach of contract in writing registered, governed by Article 116 —*Umichaman* v. *Ahmed*, 21 Mad. 242. In these cases, the rulings in *Hanuman* v. *Hanuman*, 19 Cal. 123 (P.C.) and *Sawaba* v. *Abaji*, 11 Bom. 475 were distinguished on the ground that the Privy Council case referred to a sale deed executed prior to the passing of the T. P. Act, and the Bombay case was decided before the T. P. Act was extended to that province). *A fortiori*, where a registered deed of sale contained an *express covenant* to the effect that in the event of a claim being advanced by a co-sharer or in the event of the purchaser losing any part of the property in any other way, he would be entitled to a refund of the consideration and to damages, and the purchaser failing to get possession of part of the property purchased sued for refund of a proportionate part of the consideration money and for *damages for breach of the contract, held* that the suit was governed by Article 116 and not by Article 97—*Mul Kunwar* v. *Chaltar Singh*, 30 All. 402; *Ram Jaggi* v. *Kauleshar*, 30 All. 405 (Footnote); *Ratanbai* v. *Ghasiram*, 55 Bom. 565, 134 I.C. 1157, A.I.R. 1932 Bom. 36 (38). So also, in a case of lease—*Zemindar of Vizianagram* v. *Behava Suryanarayana*, 25 Mad. 587 (597).

In *Ramchandar* v. *Tohfah Bharti*, 26 All. 519, where a suit for refund of purchase-money was brought on an *express covenant* in the sale deed whereby the vendor agreed to recoup the purchaser in the event of disturbance of possession, the suit was held to be governed by Art. 97. In a recent Allahabad case, the Judges have decided to follow the Privy Council ruling in *Hanuman* v. *Hanuman*, (*viz.*, that Article 97 applies) in preference to the other decisions which are in favour of the application of Art. 116—*Kundan* v. *Bisheshar*, 50 All. 95. A.I.R. 1927 All. 734, 25 A.L.J. 841, 103 I.C. 165; *Thakur Hansram* v. *Kishorilal*, A.I.R. 1937 All. 689. But the case reported in 50 All. 95 has been disapproved of in another case of the same High Court—*Hanwant* v. *Chandi*, 51 All. 651, 1929 A.L.J. 433, A.I.R. 1929 All. 293 (295). In the Punjab, however, the T. P. Act does not apply, and there is no implied covenant for title; consequently, a suit for refund of consideration on the ground of the plaintiff's failure to get possession is governed by Article 97 and not by Art. 116—*Partab Singh* v. *Ganga Singh*, 28 P.L.R. 74. Even in a case where there was an *express* covenant for quiet possession and enjoyment, a suit on the basis of the convenant was held to be governed by Art. 97—*Gopal* v. *Dhanna*, 9 Lah. 191, 29 P.L.R. 208, A.I.R. 1927 Lah. 570 (572), 106 I.C. 804.

But Art. 116 applies when there is a breach of contract on the part of the *defendant*, and not where the breach is committed by the *plaintiff*. If a contract

of lease goes off on account of the failure of the lessee (plaintiff) to perform his part of the contract, and the lessor refuses to deliver possession, a suit brought by the lessee, under sec. 65, Contract Act, for refund of the consideration paid by him, falls under Art. 97 and not under Art. 116—*Anant* v. *Sarup*, 26 A.L.J. 492, A.I.R. 1928 All. 360 (363). So also this Article governs a suit for refund of part purchase price paid on sale which afterwards goes off by reason of the failure of the buyer to complete payment—*Madhavdas* v. *Jan Mahomed*, I.L.R. (1941) Kar. 495, A.I.R. 1942 Sind 37, 199 I.C. 438.

A obtained possession of a certain revenue-paying property under an order passed in mutation proceedings, and whilst in possession collected rents from the tenants and paid the revenue due in respect of the property. But the order in favour of A was subsequently set aside, and he had to relinquish possession and refund to the tenants the rents collected. Thereupon he brought a suit to recover the revenue he had paid during the period of his possession. *Held* that the suit was governed by Article 61 and not by Article 97. The consideration for payment of revenue could not be the realisation of rents from the tenants; the revenue was paid because the property was liable for revenue and demand was made for it; it was payable by the person in possession whether he had collected rents or not; and the refund of rents cannot be said to be a failure of the consideration. Nor can it be said that the fact that he was in possession was a consideration for the payment of revenue—*Alayar* v. *Bibi Kunwar*, 42 All. 61 (62, 63).

A suit for return of consideration by the vendee of the mortgagee rights against his vendor on the dismissal of a suit on the mortgage which was found to be without consideration and not binding on the heirs of the executant is governed by this Article—*Baljeet* v. *Shudarshan*, 1942 A.L.W. 50.

Suit for refund of advance:—Where in a contract of sale of certain premises which were subject to *waqf* the condition was that the vendor should use due diligence in obtaining an order of the Court for sale and take legal advice and that on his failure to do so the vendee could recover the advance money, and it appeared that for 2 years the vendor remained quiet and then mortgaged the property to another who had it sold in satisfaction of the mortgage, *held* that a suit by the vendee for return of the advance-money was governed by Art. 97, and not by Art. 60 or 115, and time began to run when the contract became impossible of performance, *i.e.*, when the property was sold away under the mortgage—*Galstaun* v. *Sahebzadi Mamoodi*, 56 Cal. 445, 33 C.W.N. 115 (116), 117 I.C. 700, A.I.R. 1929 Cal. 216.

437. Other suits:—The pre-emptor obtained a decree for pre-emption allowing him to purchase the property at Rs. 1500. He paid the money to the vendor out of Court. But on appeal the amount was raised to Rs. 1900, and as the amount was not paid within the specified time, the decree for pre-emption became void. A suit brought by the pre-emptor against the vendor, for the refund of the amount of Rs. 1,500 fell under this Article or Art. 120, and not under Art. 62—*Koji* v. *Ishar*, 8 All. 273. The plaintiff sued for sale of a mortgaged property on foot of a registered mortgage. The property however, being a cultivatory holding and thus not being liable to sale, the plaintiff in his replication desired a money-decree. There was a further plea of the plaintiff that the defendant had fraudulently represented the property to be alienable property; but no fraud was found to have been proved. *Held* that the suit did not fall under Article 97, because there was no existing consideration whatever from the very inception of the mortgage, the property in suit being not alienable. The suit fell under Art. 116—*Thamman* v. *Dalchand*, 9 O.L.J. 171, 67 I.C. 595, A.I.R. 1922 Oudh 113.

A usufructuary mortgagee assigned the mortgage to another person by an un-

registered instrument, and put him in possession. Sometime after, the mortgagor sued both the assignor (mortgagee) and the assignee for redemption, and the Court passed a decree for redemption but refused to recognise the title of the assignee, the deed of assignment being unregistered. The mortgagor redeemed the property by paying the money to the mortgagee (assignor) and got back possession. The assignee who had to give up possession then brought the present suit to recover from the assignor the consideration for the assignment. *Held* that the suit fell under this Article, and time ran when the assignor received the mortgage-money from the mortgagor. The suit also fell under Art. 62, in as much as the assignor, by receiving the mortgage-money in fraud of the assignee, had received it for the latter's use—*Sriramulu* v. *Chinna*, 25 Mad 396. The plaintiff paid a sum of money to the defendants for the consideration of the latter relinquishing certain rights. But the deed of relinquishment was afterwards set aside at the instance of the defendant's sons. The plaintiff then brought a suit for the recovery of the money paid. It was held that the suit was governed by Art. 62 or 97—*Bageshwar* v. *Bikramjit*, 1930 A.L.J. 1112, A.I.R. 1930 All. 785.

Where the defendant borrowed money from the plaintiff on an unregistered mortgage and put him in possession, but subsequently taking advantage of the non-registration of the mortgage-deed, put him out of possession, it was held that a suit by the plaintiff for the amount due would be governed by this Article and time ran from the date of the dispossession—*Gurumukh* v. *Chandu*, 183 P.R. 1888. Where goods already paid for are afterwards found to be short delivered, a suit to recover the amount overpaid will be governed by this Article, the date of the failure of consideration being the date of delivery—*Atul* v. *Dyon*, 14 Cal. 457.

A suit for recovery of money in respect of realisation by the decree-holder of the decretal dues twice over is a suit for damages for breach of an implied contract by the decree-holder to get the payments certified and not to execute the decree and the Article applicable is Article 115 or possibly this Article—*Jagat* v. *Parmeshwar*, 28 Pat. 974, A I.R. 1951 Pat. 348.

A suit by an auction purchaser against the decree-holder under sec. 315 C. P. Code, 1882 (O. 21, r. 93 of the Code of 1908) to recover purchase-money on the ground that the judgment-debtor had no saleable interest in the property sold is governed by Article 62, and not by this Article. Since the judgment-debtor had no title to the property that was sold as his property, there was *no consideration* at all for the purchase-money that was paid and the suit fell not under Article 97 but under Art. 62—*Ram Kumar* v. *Ram Gour*, 37 Cal. 67 (70); *Rustomji* v. *Vinayak*, 35 Bom. 29 (34, 35). The Madras High Court was of opinion that a suit under sec. 315, C. P. Code by the auction purchaser for refund of purchase-money on the ground that the judgment-debtor had no saleable interest, was governed by Article 120, no special period of limitation being fixed for such suit by any other Article—*Nilakanta* v. *Imamshihib*, 16 Mad. 361 (363). In a later case the Calcutta High Court has pointed out that the wording of O. 21, r. 93, C.P. Code of 1908 is different from the wording of sec. 315 of the C. P. Code of 1882, and that the remedy of an auction purchaser under O. 21, r. 93 to recover his purchase-money on the ground that the judgment-debtor had no saleable interest is not by a *suit*, but by an *application* under Article 181 (where his remedy under the Code of 1882 was often by a suit or by an application)—*Makar* v. *Sarfuddin*, 50 Cal. 115 (122), A.I.R. 1923 Cal. 85, 27 C.W.N. 183, 70 I.C. 606.

But where upon the sale being set aside at the instance of the judgment-debtor under sec. 311, C. P. Code (1882) a suit is brought by the auction purchaser for recovery of a sum of money *not from the decree-holder* but from a third person who had, after the sale and the deposit of the money in Court, attached that sum in

execution of his decree against the judgment-debtor, as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, the suit is governed by Article 120; neither Art. 62 nor Art. 97 applies to the case, because those Articles contemplate a suit between the *contracting parties* to the sale which afterwards proves infructuous; but in the present case, the suit by the auction purchaser against a third party cannot be regarded as a suit between the *contracting parties* to the sale—*Amrita Lal* v. *Jogendra*, 40 Cal. 187 (191). But see *Murugappa* v. *Arunachala*, (1949) 1 M.L.J. 449, 1949 M.W.N. 596, A.I.R. 1949 Mad. 638 where it has been held that this Article applies. So also, a suit by the purchaser for refund from creditors who were paid by sale proceeds on the decree being passed in a suit by a third party declaring that the property sold was not judgment debtor's property is governed by Article 120 and not by this Article—*Shamchand* v. *President, Anjuman Imdad Qarza*, 228 I.C. 479.

A being indebted to B agreed to sell him certain property setting off the debt against the purchase-money. No money was paid, and disputes arising as to the other terms of the agreement, a litigation followed in which the agreement was held to be unenforceable. B then brought a suit against A for the debt, and A pleaded limitation. It was held that the amount claimed by B should no longer be regarded as the old debt; that the old debt had changed its character, having been the subject of an agreement by which it became the consideration for a proposed sale of land; and that the sale being declared unenforceable, the present suit must be deemed as one to recover money paid on a consideration which has failed; and that limitation ran from the date of the dismissal of the former suit (by which the contract was declared unenforceable), that being the date of the failure of consideration—*Bassu Kuar* v. *Dhum Singh*, 11 All. 47 (P.C.) overruling—*Dhum Singh* v. *Ganga Ram*, 8 All. 214. See this case cited in Note 102 under sec. 9. Where after the death of the mortgagor the mortgagee without acting in good faith obtained a sale of the mortgaged property from the guardian of the minor sons of the mortgagor reciting the amount due under the mortgage to be part of the consideration and the sale was set aside in a subsequent suit, the mortgagee cannot ask the Court to treat his mortgage alive. Since he chose at the time of the sale to abandon his mortgage security and use the money due under the mortgage in part payment of the price of the vended property, he is entitled to get a money decree for the specific sum which was set off as part of purchase money and was lost to him by the sale being set aside. Such a suit is governed by this Article and the time will begin to run from the date on which the mortgagee was deprived of his possession of the property—*Dhani* v. *Bishun*, A.I.R. 1942 Pat. 245, 197 I.C. 498.

438. Partial failure of consideration:—A case of *partial* failure of consideration does not fall under this Article. Thus, under a compromise which was incorporated in a decree of Court, the plaintiffs were to become the owners of certain parcels of property on payment of a sum of money to the defendant; they paid this money but afterwards they were dispossessed from part of the property. The plaintiffs sued to recover the money they had paid for the property in suit alleging that the existing consideration failed within the meaning of this Article. *Held* that as the plaintiffs are still in possession of part of the property dealt with by the compromise they are not entitled to bring a suit for the entire consideration; the fact that they are in possession of some of the properties transferred goes to the root of their title to recover the purchase money on the ground of failure of the existing consideration. If part of a consideration is in the hands of the plaintiffs, it is not a case of failure of consideration—*Karim Bux* v. *Abdul Wahid*, 27 O.C. 348, 1 O.W.N. 416, A.I.R. 1924 Oudh 377. But see the case of *Venkatarama* v. *Venkata*, 24 Mad. 27 cited under Note 440, in which the suit was based on a partial failure of consideration, and yet this

Article was applied; but it appears that virtually there was a total failure of consideration in that case.

439. Fraud:—When fraud is alleged, the suit falls under Article 95. Thus, where a person owned money to another, and assigned to him a debt which he alleged to be due to him from a third party, and the assignee's suit against this last person was dismissed on the ground that no debt was due from him to the assignor, a subsequent suit by the assignee against the assignor for damages on the ground that the assignor had by deceitful misrepresentation induced the assignee to take the assignment, is governed by Article 95 and not by Art. 62 or 97—*Punnayil* v. *Raman Nair*, 31 Mad. 230 (233).

440. Starting point of limitation:—A member of a joint family governed by the Hindu law executed a sale, and the purchaser having applied for mutation of names, the Collector rejected the application in 1880, on opposition by the other members of the vendor's family. The purchaser sued for possession but that suit was dismissed on 18th December 1882, and finally by the High Court in 1884. On 4th March 1885, the purchaser brought a suit for refund of purchase money. *Held* that under Art. 97, the suit was barred, as the consideration failed when the purchaser endeavoured to obtain possession of the property, and being opposed by the other members of the family, found himself unable to obtain possession—*Hanuman* v. *Hanuman*, 19 Cal. 123 (126) (P.C.). In other words, time ran when the purchaser was effectually resisted in taking possession (1880) and their Lordships overruled the contention that the starting point was the date of dismissal of the prior suit for possession (18th December 1882). The Privy Council ruling was followed in *Tulsiram* v. *Murlidhar*, 26 Bom. 750, where it was held that the time ran when the purchaser failed to obtain possession, and not from the date when the Court had decreed in a previous suit that the property did not pass by the sale. The same view has been taken in *Begam Jan* v. *Malik*, 195 I.C. 844. Where the vendee at first obtained possession but was subsequently evicted from the property under a decree on the ground that the vendor had no right to sell the property, *held* in a suit against the vendor for recovery of the purchase money, that time ran from the date of the decree in the prior suit under which the paintiff was evicted—*Venkata Narasimhulu* v. *Peramma*, 18 Mad. 173; *Subbaroya* v. *Rajagopala*, 38 Mad. 887. But see *Murugappa* v. *Arunachala*, (1949) 1 M.L.J. 449, 1949 M.W.N. 596, A I.R. 1949 Mad. 638; *Punjab Government* v. *Baijnath*, 47 P.L.R. 122, A.I.R. 1945 Lah. 165. Where the purchasers, being disturbed in their possession brought a suit for refund of the consideration money, on a *covenant* contained in the sale-deed whereby the vendor agreed to recoup the purchasers in the event of disturbance of possession, *held* that the cause of action arose not on the date of the decree in the prior suit which negatived the plaintiff's title, but when the plaintiffs were actually dispossessed in execution of that decree—*Ram Chandar* v. *Tohfah Bharti*, 26 All. 519 (521). Where a purchaser under a voidable sale-deed from a qualified owner is dispossessed in execution of a decree obtained by a person entitled to avoid the sale, the period of limitation for a suit by the purchaser for the return of the price runs not from the date of the decree but from the date of actual dispossession in execution of the decree—*Sankara Variar* v. *Ummer*, 46 Mad. 40, 43 M.L.J. 721, A.I.R. 1923 Mad. 46, 70 I.C. 878; see also *Mahomed Ali* v. *Budharaju*, 39 M.L.J. 449 (455), 60 I.C. 235. The defendant and his son sold a certain house to the plaintiff. But the plaintiff not having been given possession, sued for possession; it was then found that the sale did not bind the son's interest in the property, and that though the plaintiff was entitled to possession of the father's share, a division ought not to be effected, on the ground of inconvenience attending the division of the house. The plaintiff was awarded the value of the

defendant's share. He now sued to recover the balance of the price paid, on the ground of failure of consideration to the extent of the son's share. *Held* that the failure of consideration must be taken to have occurred when it was found in the suit for possession that the plaintiff was not entitled to recover the son's share—*Venkatarama* v. *Venkatasubramanian*, 24 Mad. 27 (31). The starting point of limitation for a suit to recover a specific amount due under a mortgage which was set off as a part of consideration of conveyance of the mortgaged property to the mortgagee is the date when the mortgagee was dispossessed from the property and not from the date of the decree setting aside the conveyance—*Dhani* v. *Bishun*, A I.R. 1942 Pat. 245, 197 I.C. 498. Where after the dismissal of the suit on a mortgage, the vendee of the mortgagee rights against his vendor brings a suit for return of consideration, the starting point of limitation is the date of the dismissal of the suit on the mortgage when the consideration failed—*Baljeet* v. *Shadarshan*, 1942 A.L.W. 50.

In a suit by an auction purchaser to recover purchase-money under sec. 315, C. P. Code, 1882 (O. 21, r. 93, C. P. Code, 1908), on the ground that the judgment-debtor had no title to the property sold, the cause of action arises not on the date when the Court of first instance decides that the judgment-debtor had no saleable interest in the property, but on the date on which the auction purchaser is *actually dispossessed* in pursuance of a decision of the High Court on appeal from the decree of the first Court—*Gurshidawa* v. *Gangawa*, 22 Bom. 783 (785). But the Madras High Court is of opinion that the starting point of limitation is the date of the decree of the first Court declaring the judgment-debtor to have no saleable interest in the property, and not the date of the decree of the appellate Court confirming the first Court's decree—*Nadukandee* v. *Kuttayil*, 16 L.W. 285, A.I R. 1923 Mad. 23, 70 I.C. 45. See also, *Mirza* v. *Ghulam*, 194 I.C. 565. The Calcutta High Court holds that the time runs from the date when the sale is set aside on the ground of defect of title of the judgment-debtor and not from the date when the plaintiff actually lost possession—*Bijraj* v. *Raja Bijoy Singh*, 30 C.W.N. 79, 91 I.C. 768, A.I.R. 1926 Cal. 297.

A purchaser of a patni under Reg. VIII of 1819 brought his suit for recovery of purchase money from the zeminder as the sale of the patni had been set aside on the suit of a darpatnidar. The Judicial Committee held that the period of limitation ran from the date of the decree of the Court of first instance setting aside the sale, and not from the date of the appellate decree affirming the first Court's decree, nor from the date when the purchaser lost possession—*Juscurn* v. *Prithichand*, 46 Cal. 670 (P.C.), 23 C.W.N. 721, A.I.R. 1918 P.C. 151.

Moneys were advanced on a mortgage executed on behalf of a minor, and interest paid for some time. A mortgage-decree was subsequently obtained and the property sold. Afterwards in a suit by the minor the mortgage was declared void and the sale set aside. A suit was then brought to recover the amount of the loan from the parties who acted for the minor. *Held* that Article 97 applied; there was no total failure of consideration *ab initio*, because the mortgagee had obtained interest for some time. The consideration failed on the date on which the decree was passed setting aside the mortgage and the period of limitation ran from that date—*Ma Hnit* v. *Fatima*, 5 Rang. 283 (P.C.), 31 C.W.N. 830, 101 I.C. 414, A.I.R. 1927 P.C. 99.

Where in a suit for specific performance of a contract to sell or for refund of the earnest money in the alternative, the Court finds the contract to be unenforceable, a decree would be passed for refund of the money and the consideration must be deemed to have failed from the date of the judgment pronouncing the contract to be unenforceable, and the claim for refund is not therefore barred by limitation—*Anna Bibi* v. *Udit Narain*, 31 All. 68 (P.C.), 36 I.A. 44, 1 I.C. 690, 9 C.L.J. 512, (affirming *Udit Narain* v. *Minnatullah*, 25 All. 618); *Jagannadhayya* v. *Ramanatha*, A.I.R. 1955 Orissa 11. Similarly, where a suit for specific performance of a contract for sale of a

certain property is dismissed, and the plaintiff afterwards brings a suit for recovery of the earnest money he had paid in pursuance of the contract for sale, the period of limitation for this suit begins to run from the date of the judgment dismissing the plaintiff's previous suit for specific performance—*Munni Babu* v. *Kunwar Kamta Singh*, 45 All. 378 (379), 21 A.L.J. 265, 72 I.C. 86. A.I.R. 1923 All. 321; *Maung Kyi* v. *Maung Kyaw*, 4 Bur.L.J. 197, 93 I.C. 119, A.I.R. 1926 Rang. 7.

A Hindu widow sold some property to S in 1888, and in 1897 the reversioners instituted a suit for declaration that the sale by the widow should not affect their reversionary rights, and this suit was eventually decreed by the Privy Council in 1909. In the meantime, S had sold the property to the plaintiffs in 1898. After the death of the widow in 1919, the reversioners brought a suit for possession of the property, which was decreed in 1921, and the plaintiffs had to give up possession. They then instituted a suit in 1921 for recovery of the purchase-money. *Held* that time ran when the plaintiffs were actually dispossessed in 1921 for it was then that the consideration failed, and not from the date of the Privy Council decision in 1909, for that decision had not negatived the vendees' title but only declared the alienation to be voidable after the death of the widow—*Gopal Dai* v. *Dhanna*, 9 Lah. 191, 106 I.C. 804, 29 P.L.R. 208, A.I.R. 1927 Lah. 570 (572). In September 1908, defendant No. 1 contracted with the plaintiff for a price to procure from defendant No. 2 a reconveyance of certain property to the plaintiff. The property at the time was already in the plaintiff's possession. In November 1908, the defendant No. 2 conveyed his property to V, who sued to recover its possession from the plaintiff, and obtained a decree in July 1911. In January 1912 the plaintiff sued to recover the consideration money from the defendant No. 1. It was held that the suit was time-barred, the cause of action arising in November 1908, the moment there was a conveyance to V; although the plaintiff retained possession till 1911, that possession was merely on sufferance and by the grace of V—*Gulab Chand* v. *Narayan*, 41 Bom. 31, 36 I.C. 613.

A, a purchaser from a junior member of his share in joint family properties, attempted to take possession thereof, but was resisted by a prior purchaser of those properties from the manager of the family. A then instituted a suit for the recovery of the share purchased by him and the litigation was carried up to the High Court whose decision was against him. Within three years of the date of the judgment of the High Court but more than three years after the date on which he was resisted, A instituted a suit for the recovery of the sale-price and of the costs incurred in the unsuccessful litigation. *Held*, that the suit was not barred by limitation as the consideration for the sale failed on the date of the High Court's decision, and the cause of action for the suit arose only on that date—*Sarvothama* v. *Chinnasami*, 42 Mad. 507.

Where a lessee was evicted by a person claiming a title superior to the lessor, the cause of action for a suit by the lessee against the lessor to recover the amount of premium paid for the lease arose not from the date when the successful claimant obtained a decree against him for possession but from the date when he was *actually evicted* in execution of that decree—*Sukmoy* v. *Shashi*, 10 I.C. (Cal.); *Debi* v. *Haji*, 18 Pat. 654, A.I.R. 1940 Pat. 81, 186 I.C. 674. In a suit for refund of money paid under a contract of lease which subsequently becomes void, time runs when the contract becomes void—*Anant* v. *Sarup*, 26 A.L.J. 492, A.I.R. 1928 All. 360 (363).

98. To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust.	Three years.	The date of the trustee's death, or, if the loss has not then resulted, the date of the loss.

441. The suit contemplated by this Article is a suit not for recovery of the trust property, but for *compensation* for the loss. This Article does no more than carry a deceased trustee's liability for breach on to his estate after his death. It does not contemplate any different cause of action—*Sahandra* v. *Deo Radha*, I.L.R. (1940) Nag. 94, A.I.R. 1938 Nag. 30, 176 I.C. 57; *Hariharabrahmam* v. *Janikiramaiah*, A.I.R. 1955 Andhra 18.

The distinction between sec. 10 and Article 98 is that, if the loss occasioned by a breach of trust is the loss of trust-monies and such moneys may be followed in the hands of the legal representatives of the deceased trustee, sec. 10 will apply—*Chintaman* v. *Khanderao*, 52 Bom. 184, 30 Bom.L.R. 45, A.I.R. 1928 Bom. 58; but if such moneys have to be recovered from the general estate of the deceased trustee, Art. 98 will apply.

In an earlier Bombay case Scott J. has remarked that the "loss" in this Article means the loss of the specific property mentioned in sec. 10. If the specific property is irrecoverable, then its value can be recovered out of the general estate of the deceased trustee within 3 years under this Article—*New Fleming S. & W. Co.* v. *Kessowji*, 9 Bom. 373 (400). But U. N. Mittra is of opinion that "this Article applies to any loss, (whether of the *specific* property or not) occasioned by any breach of trust, whether fraudulent or not"—U. N. Mitra's Limitation, 5th Edn., p. 1014.

A guardian of property appointed under the Guardian and Wards Act is not a person in whom the property is vested for a specific purpose. He is a trustee. Therefore, this Article applies to a suit against legal representatives of guardian of minor's property for amount taken by the guardian from minor and not repaid. Sec. 10 has no application to such a suit—*Mirabai* v. *Kaushalyabai*, I.L.R. 1948 Nag. 794, 1949 N.L.J. 154, A.I R. 1949 Nag. 235.

General estate:—The joint family property of the father and sons, which passes by survivorship to the sons on the death of the father, does not form the "general estate" of the deceased trustee (father)—*Subramania* v. *Gopala*, 33 Mad. 308.

99. For contribution by a party who has paid the whole or more than his share of the amount due under a joint decree, or by a sharer in a joint estate who has paid the whole or more than his share of the amount of revenue due from himself and his co-sharers.	Three years.	The date of the payment in excess of the plaintiff's own share.

442. The words "the whole amount" in the Act of 1877 have been changed into "the whole or more than his share of the amount" in the Act of 1908. Under the old Act, this Article did not apply to a case where not the *whole*, but only a *part*, of the money due under a joint decree was realised from the plaintiff; and therefore where a decree-holder having a joint decree against the plaintiff and the defendant brought to sale the property of the plaintiff and received out of the sale-proceeds a *part* of the decretal amount, this Article did not apply to a suit for contribution brought

by the plaintiff against the defendant and it was doubtful whether Art. 61 or 120 applied—*Pattabhiramayya* v. *Ramayya*, 20 Mad. 23. In *Ibn Hasan* v. *Brijbhukhan*, 26 All. 407, also Stanley C. J. doubted whether this Article applied to a case where only a part of the money was realised from the plaintiff. But his doubt has been removed by the change introduced into the present Article; and a suit such as one mentioned above would now fall under it.

443. Payment whether creates a charge:—In *Khub Lal* v. *Pudmanand*, 15 Cal 542, it has been held that whether a co-sharer of a revenue-paying estate pays the whole amount of the arrears of revenue in order to save the estate from sale, he does not thereby acquire any *charge* upon the shares of the other co-sharers, but is only entitled to contribution; consequently his suit fails under Article 99 and not under Article 132. The same view is taken in *Bhubneshwari* v. *Manir*, 7 Pat. 613, 9 P. L. T. 573, A.I.R. 1928 Pat 641 (649), 111 I.C. 84; *Upendra* v. *Girindra*, 25 Cal. 565 (569); *Kinoo Ram* v. *Muzaffar*, 14 Cal. 809 (F.B) (overruling *Enayet Hussain* v. *Muddunmoonee*, 14 B.L.R. 155); *Kristo Mohini* v. *Kali Prosanna*, 8 Cal. 402 (419); *Shivrao* v. *Pundlick*, 26 Bom. 437 (439) (dissenting from 11 Bom. 313). This view is based on the following observations of Cotton L. J. in *Falcke* v. *Scottish Imperial Assurance Co.*, (1886) 34 Ch. D. 234 (at p. 241): "A man by making a payment in respect of property belonging to another, if he does so without request, is not entitled to any lien or charge on that property for such payment." In the same case Bowen, L. J. observed: "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited." In another English case also it has been held that the right to contribution is a personal right, and this remedy is a personal remedy, and there is no lien in respect of which the contribution arises—*Per* Fry, J. in *Leslie* v. *French*, (1883) 23 Ch. D. 552 (564).

But a contrary view has been taken in *Seshagiri* v. *Pichu*, 11 Mad. 452, *Rajah of Vizianagram* v. *Rajah Setrucherla*, 26 Mad. 686 (715) (F.B.); *Alayakammal* v. *Subbarayya*, 28 *Mad.* 493 (494) and *Kotayya* v. *Kotayya*, 49 M.L.J. 117, A.I.R. 1926 Mad. 141 (142), 90 I.C. 551; in these cases a payment of revenue by one of the co-sharers has been held to create a charge in his favour so as to entitle him to take advantage of Art. 132. The same remark has been made (by way of obiter) in *Achut* v. *Hari*, 11 Bom. 313 (318).

"The way in which the two lines of decision may be reconciled is, that if a money decree is sought, then three years is the period of limitation, but if the overpayment is a charge on the land and it is sought to recover it out of the land, then the case falls under Article 132"—Starling 5th Edn., pp. 298-299. Where only a personal decree is sought, and the suit is not intended to enforce any charge, it would come under Art 99, or if for some reason or other this Article is not applicable, Art. 61 would apply. But it would not fall under Art. 120, which is a most general Article—*Raja of Vizianagram* v. *Raja Setrucherla*, 26 *Mad.* 686 (F.B.). If the payment of revenue is made by a person other than a co-sharer (*e.g.*, by a lessee), he acquires a charge—*Ram Dutt* v. *Horakh*, 6 Cal. 549. (This ruling has been doubted in 8 Cal. 402 and dissented from in 14 Cal. 809 F.B.).

444. Voluntary and involuntary payment:—In cases in which the right to contribution exists under the law, it is immaterial whether the party seeking contribution paid the money *voluntarily* or *involuntarily*, i.e., whether he made the payment of his own will and thus averted a coercive process against his property, or whether the amount was realised by seizure and sale of his property—*Raja of Vizianagram* v. *Raja Satrucherla*, 26 Mad. 686 (693) (F.B.). In an earlier case the Calcutta High

Court was of opinion that money realised by the sale of plaintiff's property was not money *paid* within the meaning of Arts. 61 and 99—*Janki* v. *Domi*, 18 C.W.N. 480, 20 I.C. 24. But in a later case it has adopted the more liberal view and laid down that it does not matter whether the money in respect of which the right of contribution arises was actually handed over by the party seeking contribution or was realised from him by coercive process by the creditor, as for instance, by execution of a decree. In either case the right of contribution arises from the fact that one of the co-debtors has paid in excess of his share and the joint liability of all of them has been discharged —*Goti Nath* v. *Chandra Nath*, 26 C.W.N. 340, 57 I.C. 884, A.I.R. 1921 Cal. 814.

It seems that the words "or more than his share" would imply involuntary payments. A person who would voluntarily pay would pay the *whole* and not anything less.

445. Starting point of limitation:—The question of the date of payment under this Article is one of fact to be decided with reference to the circumstances of each case. No rigid formula can be safely laid down—*Ganesh* v. *Bhawan*, A.I.R. 1940 Pat. 151, 185 I.C. 73. Where the plaintiff, a joint judgment-debtor, deposited the entire decretal amount in Court, and the Court accepted the money on behalf of the decree-holder in full satisfaction of the decree, but the decree-holder withdrew the money on a later date, *held* in a suit for contribution by the plaintiff, that the deposit of the decretal amount in Court was 'payment' within the meaning of the 3rd column of this Article, and time ran from the date of deposit and not from the date when the decree-holder withdrew the money from Court. The criterion in each case must be whether the deposit made by the plaintiff in excess of his share did or did not remain under his control—*Gahar Ali* v. *Abdul*, 56 Cal. 192, 32 C.W.N. 1030 (1034. 1035), A.I.R. 1928 Cal. 361, 49 C.L.J. 5. See also *Chinnupati* v. *Thotakuru*, A.I.R. 1954 Mad. 185; *Khetro* v. *Sukuru*, A.I.R. 1957 Orissa 224. In an earlier Calcutta case, where a joint judgment-debtor in an execution case made an application to the Court stating that a certain sum was in deposit in his account in another Court and praying that the execution Court should send for so much of the amount as would be necessary to satisfy the decree, and the money was received by the executing Court on 1st April 1873 and paid on the same day to the decree-holder, *held* in a suit for contribution by the joint judgment-debtor, that time ran not when the money was offered or ordered to be paid, but when it was actually paid over to the decree-holder—*Radha Kristo* v. *Rup Chunder*, 3 C.L.R. 480. In this case the money was received by the executing Court and paid over to the decree-holder on the same day, and so there is no conflict with the ruling in 32 C.W.N. 1030 above. Where the payment is *involuntary* (*i.e.*, where money is realised by attachment and sale) limitation runs from the time the judgment-creditor drew the money out of Court, and not from the date when the money was realised by execution sale—*Fuckorudden* v. *Mohima*, 4 Cal. 529. Cf. *Pattabhiramayya* v. *Ramayya*, 20 Mad. 23.

Plaintiff and his three brothers formed a joint Hindu family and were indebted to a certain person, who filed a suit against the plaintiff and another brother and obtained a decree in 1913. Subsequently the family separated and later on execution was taken out against the plaintiff, and he executed a mortgage in favour of the decree-holder in 1924, in lieu of the decretal amount. The plaintiff then instituted a suit for contribution against the other members of the family in 1927. It was held that time began to run when the plaintiff executed the mortgage in 1924, for when he took upon himself the entire responsibility for the joint-debt by executing the mortgage, it was tantamount to "payment in excess of his share" within the meaning of the 3rd column of this Article—*Sat Rohan* v. *Bharath*, 1931 A.L.J. 651, 134 I.C. 452, A.I.R. 1931 All 652 (653).

446. Suits under this Article:—This Article applies to a suit for contribution in respect of a joint *personal* decree. It does not apply to a case where liability is not *personal*, but attaches to immoveable property—*Babu Lal* v. *Bindhajachal*, 22 Pat. 187, 211 I.C. 334, A.I.R. 1943 Pat. 305. Where by an agreement of partnership every partner was at liberty to borrow money on his own credit and to pay the money into the firm for carrying on the business, and where a partner borrowed money on his individual credit for the benefit of the business, and after-wards the money was realised from him under a decree by the creditor, a suit by the partner for contribution against the other partners was maintainable, and would be governed by this Article—*Durga Prosonna* v. *Raghunath*, 26 Cal. 254 (257).

A mortgagee was directed to pay off a prior mortgage out of the consideration for his own mortgage. Default having been made in payment, the prior mortgagee sued both the mortgagor and the subsequent mortgagee and obtained a joint decree. The mortgagor paid off the decree and sued to recover the amount from the subsequent mortgagee. *Held* that the suit was governed by Article 99, and not by Article 61 or 116, and the period of limitation ran from the date when the decree was satisfied by the mortgagor—*Lakhi* v. *Murat Tiwari*, 22 A.L.J. 737, A.I.R. 1924 All. 843, 83 I.C. 875.

447. Suits not under this Article:—Where rent, not revenue, is paid by one of the co-sharers in respect of the entire holding, a suit for contribution is governed by Art. 61 (and not by this Article)—*Swarnamoyi* v. *Hari Das*, 6 C.W.N. 903 (904). But in *Thanikachella* v. *Shudachella*, 15 Mad. 258, this Article was applied to such a suit. No reason is stated and the judgment is a very short one. Probably the learned Judge over-looked the fact that the word 'revenue' and not 'rent' is used in the Article. Moreover the rent was not paid in pursuance of a *decree* for rent, so as to make the earlier part of this Article applicable. The judgment is, it is submitted, incorrect.

Where a person *other than a co-sharer* (*i.e.*, a lessee) pays off the revenue to save his interest in the estate, a suit by him to recover the money cannot be said to be a suit for 'contribution'; he is entitled to a charge on the property and therefore Article 132 will govern his suit—*Ram Dutt* v. *Horakh*, 6 Cal. 549. Where the owner of two villages sold under a decree obtained upon a mortgage which included other villages, claims contribution proportionately against the owners of those other villages (who were not however made parties in the mortgage suit), *held* that Article 99 cannot apply as this is not a case where a person has paid money under a joint-decree. The plaintiff is entitled to a charge on the other properties and the suit is governed by Art. 132—*Ibn Husain* v. *Ramdai*, 12 All. 110. See also *Bhagwan Das* v. *Karam Husain*, 33 All. 708 (F.B.).

100. By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution.	Three years.	When the right to contribution accrues.

448. Limitation does not run against a trustee claiming contribution against a co-trustee in respect of a liability incurred by loss occasioned to the trust-estate by the joint default of the trustee, until the claim of the *cestui que trust* has been established against one of them—*Robinson* v. *Harkin*, [1896] 2 Ch. 415.

101. For a seaman's wages.	Three years.	The end of the voyage during which the wages are earned.
102. For wages not otherwise expressly provided for by this Schedule.	Three years.	When the wages accrue due.

449. This Article applies only to a suit for wages as such brought by the person entitled to the wages, and not to a suit brought by a person to recover the money which he had paid to certain servants as their wages on behalf of another person. Thus, on a dispute between A and B as regards possession of a property, C was put in charge of the property as supurdar, pending the determination of their rights. After these rights were determined and C had restored possession, C was sued for their wages by two watchmen whom he had appointed to watch the standing crops. C paid up the decrees and instituted a suit against A and B for recovery of the money he had to pay to the watchmen. It was held that this suit was governed by Article 61 or 120 but not by Art. 102—*Lachhmi Narain* v. *Putti Lal*, 7 O.W.N. 760, A.I.R. 1930 Oudh 420 (422), 128 I.C. 66.

The plaintiffs who were hereditary temple-servants paid in monthly wages, being suspended from their offices by the trustees, brought a suit, questioning the legality of the suspension, against the trustees, and also against the persons who discharged their duties during their suspension, for pay for the period of suspension, for the value of perquisites payable from the temple as well as from other sources during such period, and for damages for mental distress, loss of dignity etc. It was held that as regards the pay and perquisites payable by the temple, the suit was governed by Art. 102, and not by Article 4 or 7; that as regards the perquisites which were received from third persons, they were not wages and Art. 102 would not apply but Art. 36; and as regards the claim against the persons who received the plaintiff's pay and perquisites during the period of suspension, the suit might fall under Article 62—*Baradwaja* v. *Arunachala*, 41 Mad. 528 (532), 45 I.C. 414.

For the meaning of 'wages', see Notes under Article 7. The term 'wages' in this Article is not used in the restricted sense of remuneration for mechanical or manual labour, but is used in the large sense of remuneration for service of an employee—*Upendra* v. *Bimalendu*, I.L.R. (1944) 2 Cal. 283, 48 C.W.N. 317, A.I.R. 1944 Cal. 302. The word "wages" in this Article covers salary also; it is intended to cover all claims for wages, pay or salary not expressly provided for in any other article of the schedule—*Province of Punjab* v. *Tarachand*, 1947 F.L.J. 56, 49 Bom.L.R. 697, (1947) 2 M.L.J. 389 (F.C.), 52 C.W.N. (F.R.) 2, A.I.R. 1947 F.C. 23, Therefore this Article applies to a suit for remuneration for service both of a higher class and of a lower class of servant—*Upendra* v. *Bimalendu*, supra, or to a suit by a servant of the Crown to recover arrears of pay—*Province of Punjab* v. *Tarachand*, supra.

A suit by the *dwaris* of a temple for recovery of certain dues which they claim to be payable to them as remuneration in respect of their services in connection with the temple does not fall under this Article, because the *dwaris* are not paid regular recurring *wages* but are entitled to certain specific payments as emoluments attached to their hereditary office. The suit falls under Article 120—*Sri Sri Baidyanath Jiu* v. *Har Datt*, 5 Pat. 249, 7 P.L.T. 465, 94 I.C. 826, A.I.R. 1926 Pat. 205.

Where the particular Art. 102 applies the more general Art. 131 is excluded. A suit by an archaka against the trustee for his allowance called "Tastik" (paid to

the Archaka in lieu of wages for the services rendered to the temple) is governed by Art. 102, Limitation Act—*Shivaram Joi Sha* v. *Nagappaya*, A.I.R. 1936 Mad. 149, 70 M.L.J. 220, 161 I.C. 475.

The Archaka is a servant of the trustee or a temple and the emoluments are his wages. And a suit by a hereditary archaka of a temple against the trustee of the temple, for recovery of emoluments due to him, consisting of rice and food offerings assessed at a money value, is governed by Art. 102 and not by Art. 36 or 120 of the Limitation Act—*Vedagiri Sastriar* v. *Sankaracharya Swamigal*, A.I.R. 1935 Mad.. 128, 68 M.L.J. 132, 41 L.W. 40, 1935 M.W.N. 120, 155 I.C. 591.

A wet-nurse is not a domestic servant under Article 7; a suit by her to recover her wages falls under Article 102—*Mohan Lal* v. *Jumerat*, 10 A.L.J. 395, 17 I.C. 658. A *bisardar* in Oudh is not a domestic servant, and his suit for wages falls under Article 102 and not under Article 7—*Ghasi Ram* v. *Uma Datta*, 26 O.C. 327, 10 O.L.J. 348. A suit for wages by a weighman in a shop is governed by this Article and not by Article 7—*Mutsaddi* v. *Bhawan*, 48 All. 164 (see this case cited in Note 265 under Article 7). A *sahana* who is merely employed to watch crops and to see that they are not taken away, cannot be described as a labourer. And consequently a *sahana* in suing for his wages comes under Art. 102, and not under Art. 7, and the period is three years from the time the charges accrued—*Babulal* v. *Hukamsingh*, A.I.R. 1935 All. 102, 1935 A.L.J. 78. A hotel cook's suit for arrears of salary is governed by this Article —*Balanath* v. *Givondan*, A.I.R. 1937 Mad. 340. A person who is engaged to supervise a work is not a household servant, artisan or labouror. Therefore a suit by a contractor for remuneration for supervising a work falls under this Article—*Anupchand* v. *Nimraji*, I L.R. (1949) Nag. 578, 1949 N.L.J. 200, A.I.R. 1949 Nag. 329.

A motor driver is an artisan. And a motor driver and especially one who is provided with board and lodging by the employer, would come within the definition of a domestic servant. A suit by a motor driver for his wages is governed by Art. 7 and not by Art. 102—*Sita Ram* v. *Jagan Nath*, A.I.R. 1936 Lah. 661, 38 P.L.R. 296, 160 I.C. 1042. See, however, *Maniklal* v. *Ramesh*, A.I.R. 1955 Cal. 290.

This Article has no application to a suit for recovery of agreed remuneration between the date of dismissal and the date of reinstatement—*The District Board, Mainpuri* v. *Devendra*, 1943 A.L.W. 513.

Art. 102 lays down that wages not otherwise expressly provided for in the schedule must be taken to be subject to a time which begins to run from the time when the wages accrue due. In the case of monthly wages the wages accrue and become due on the final day of the month—*Gajadhar* v. *Dharma*, A.I.R. 1935 All. 716, 1935 A.L.J. 379, 154 I.C. 713.

103.	By a Muhammadan for exigible dower (*mu'ajjal*).	Three years.	When the dower is demanded and refused or (where, during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce.

450. A suit by the heirs of the deceased wife against the husband, for prompt as well as deferred dower, is not a suit for recovery of the goods of the deceased in

the hands of the defendant, but a suit under Articles 103 and 104. It is a suit based on a contract which the heirs of the wife are entitled to enforce—*Asiatulla* v. *Dains Mohamed*, 50 Cal. 253 (255, 257), 36 C.L.J. 379, 70 I.C. 169, A.I.R. 1923 Cal. 152, *Mahamad Mazaharat* v. *Mahamad Azimuddin*, 27 C.W.N. 210 (217), 37 C.L.J. 108, A.I.R. 1923 Cal. 507, 73 I.C. 17. But see 33 All. 568, cited under Article 104.

Where a wife demanded only a portion of her prompt dower from her husband during his lifetime, limitation as to her claim to the remainder will count from the date of her husband's death, and not from the date of her former demand—*Begoo Zaun* v. *Gashee Beebee*, 6 W.R. Civ. Ref. 19. Prompt or exigible dower may be considered as a debt always due and demandable, and certainly payable upon demand, and therefore upon a *clear and unambiguous demand* and refusal a cause of action would accrue, and the Statute would begin to run. An application by a Mahomedan lady for leave to sue her husband *in forma pauperis* for her dower, which was rejected, was not held to constitute a demand for prompt dower sufficient to set the period of limitation running—*Khajooroonissa* v. *Ryeesoonnissa*, 24 W.R. 163 (P.C.), 2 I.A. 235, 15 B.L.R. 306. If there was no demand and refusal during the continuance of the marriage, the period of limitation would run from the dissolution of the marriage by death or divorce. If the husband deliberately and fraudulently withholds from the wife all knowledge of the divorce, in other words, if the wife does not know her right to claim dower by reason of the fraudulent conduct of her husband, time will only begin to run against the wife when she knows of the fraud—*Khadim* v. *Burekhan*, 45 P.L.R. 231, A.I.R. 1943 Lah. 215, 209 I.C. 157 (on appeal from *Burekhan* v. *Khadim*, A.I.R. 1941 Lah. 166, 198 I.C. 326).

If the deed of dower be registered(Article 116 would apply to a suit for recovery of the dower debt, because such a suit is a suit for compensation for breach of a contract in writing registered, the suit being one to enforce a simple money-claim founded on a contract entered into by the husband—*Mahamad Mazaharal* v. *Mahamad Azimuddin*, 27 C W.N. 210 (216-217); *Asiatulla* v. *Danis*, supra.

Where a Muhammadan husband executed a registered deed long after marriage, promising to pay the dowry then still due from him, on demand , and hypothecating certain immoveable properties as security for its due payment, *held* that the bond converted the dower-debt into a mortgage-debt, and Article 103 was inapplicable. If the suit for recovery of the dowry prays for a simple money-decree and not a decree for sale, the six years' rule of limitation under Article 116 would apply, time running from the date of execution of the deed—*Kubra Begum* v. *Fazal Husain*, A.I.R. 1927 All. 268, 99 I.C. 553.

104. By a Muhammadan for deferred dower (*mu'-wajjal*).	Three years.	When the marriage is dissolved by death or divorce.

451. It is a part of the Mahomedan law that so far as a wife's claim for dower is concerned, the marriage is said to be dissolved by divorce only when it comes to the notice of the wife, and there is nothing in Art. 104 against this rule. So, a suit by a Mahomedan wife for deferred dower is in time if brought within three years from the date when the *talak* pronounced in her absence by her husband was communicated to her, though it may be more than three years from the date of pronouncement—*Kathiyumma* v. *Urathel*, 1931 M W.N. 570, 133 I.C. 375, A.I.R. 1931 Mad. 647 (649).

A suit by the heirs of the wife for deferred dower falls under this Article—*Asiatulla* v. *Dawis Muhammad*, 50 Cal. 253 (257); *Mahomad Ishaq* v. *Akramal Haq*, 12 C.W.N. 84, 6 C.L.J. 558. Where a Muhammadan widow remains in possession of her husband's property in lieu of her dower, but is afterwards dispossessed by the other heirs of her husband and then dies, and a suit is brought by one of her heirs to recover his (plaintiff's) share of the dower-debt, out of the assets in the hands of the heirs of her husband, the suit is not governed by this Article—*Hamidullah* v. *Najjo*, 33 All. 568 (570), 8 A.L.J. 578, 10 I.C. 282. But the judgment does not specify which Article applies.

105. By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee.	Three years.	When the mortgagor re-enters on the mortgaged property.

452. Where a mortgagee takes possession of the mortgaged property as a security for his debt, he has no right to be in possession of the estate after he has paid himself what is due to him out of the property. If he holds the property subsequent to his having been paid, the mortgagor would be entitled to possession and surplus profits together with interest thereon. The limitation applicable to a suit for recovery of such profits with interest thereon is that provided by this Article—*Abdul Hassan* v. *Jagwanta*, 32 I.C. 729 (Oudh).

A usufructuary mortgage contained a stipulation that the mortgagee should deduct the interest from the collections and pay over the balance annually to the mortgagors, the property being redeemable on payment of the principal money on the expiry of seven years. After redemption of the mortgage without the intervention of the Court, a suit was brought by the mortgagor for recovery of the balance of collections which remained in the hands of the mortgagee after deducting the interest for the years during which the collections had been made. The defendant pleaded that the suit was governed by Article 109, and that the cause of action arose each year for the profits of that year, and that the suit was time-barred. *Held* that Art. 109 did not apply because it could not be said that the profits were *wrongfully* received by the defendants, when the deed expressly gave them power to realise the profits, though they were no doubt required to pay over the profits to the plaintiff. The suit fell under the purview of Article 105 and having been brought within three years from the date of restoration to possession, was within time. The use of the word 'annually' in the deed did not make the cause of action accrue year by year; the ordinary principle regulating the rights of the mortgagee is that when he is in possession of the property he must account to the mortgagor for all sums realised in excess of the amount to which he was entitled, and it is at the time of redemption that accounts are made up and settled between the parties—*Bikramjit* v. *Raj Raghubar*, 20 O.C. 25, 38 I.C. 610.

Art. 105 should not be so construed as to conflict with the provisions of sec. 43, C P. Code, 1882 (O. 2, r. 2, C. P. Code 1908) and must be deemed to refer to cases where the mortgagor has got possession of the mortgaged property *otherwise than by a suit for redemption;* for where a mortgagor brings a suit for redemption, he is bound to claim an account for any surplus received by the mortgagee after discharge of the mortgage-debt and if he omits to make such claim in that suit, he cannot maintain a second suit for recovery of the surplus collections, sec. 43 C. P. Code being a bar to

such a suit—*Ramdin* v. *Bhup*, 30 All. 225 (228, 230). The ruling in 30 All. 225 has been followed by the Calcutta High Court in *Prasanna* v. *Nilambar*, 26 C.W.N. 123, A.I.R. 1922 Cal. 189, 64 I.C. 75. The Bombay High Court likewise holds that a redemption suit has for its purpose the complete adjustment of the rights of the parties, and therefore if a mortgagee at first brings a suit for redemption but in that suit does not claim to recover the surplus profits, a subsequent suit for recovery of the surplus collections is barred by *res judicata*, because the claim is one which ought to have been decided in the suit for redemption—*Vinayak* v. *Dattatraya*, 26 Bom. 661 (668). See also *Zakiuldin* v. *Chunnilal*, 103 I.C. 290, A.I.R. 1927 Nag. 302.

But where the mortgagor brings a suit for redemption without claiming for the surplus collections and gets a decree, he can afterwards bring a suit contemplated by this Article, *by permission of the Court* obtained under section 43, C. P. Code 1882 (O. II, r. 2, C. P. Code, 1908). Although, when a redemption suit is brought, the claim for surplus collections should be made along with the claim for redemption, still *if permission be obtained* under sec. 43, C. P. Code, to bring a subsequent suit for the recovery of the surplus collections, there is no conflict between the provisions of this Article and those of sec. 43, C. P. Code—*Muhammad Fayaz* v. *Kallu Singh*, 33 All. 244 (247), 8 I.C. 689, 7 A.L.J. 1201 (distinguishing *Ramdin* v. *Bhup Singh*, 30 All. 225). The Nagpur Court, however, is of opinion that if the Court orders the suit for surplus collections to be tried separately from the redemption suit, such order does not alter the nature of the suit for surplus profits, and the suit is governed by Art. 148 and not by Article 105—*Zakiuldin* v. *Chunnilal*, supra.

Where in a suit for redemption of a usufructuary mortgage, the mortgagor alleges that if accounts were taken, a large sum would be found due from the mortgagee, and the mortgagor accordingly prays that an account may be taken and a decree may be passed for the amount which may be found due to him after adjustment of accounts, *held* that since the claim for recovery of the surplus profits received by the mortgagee is a relief which is a part of the suit for redemption itself, Article 105 does not apply, and if the suit for redemption is brought within the period of limitation prescribed by Article 148, the claim for surplus profits is not barred—*Prasanna* v. *Nilambar*, 26 C.W.N. 123, 64 I.C. 75, A.I.R. 1922 Cal. 189.

A suit by a mortgagor against a mortgagee, brought after redemption of the mortgage, for compensation for loss caused by the latter having cut down trees standing on the mortgaged property during the subsistence of his possession, is governed by this Article and not by Article 109, and the period of limitation runs from the time when the mortgagor re-enters on the property—*Ram Sukh* v. *Indur Kunwar*, 6 O.L.J. 53, 50 I.C. 152.

A subsequent suit for recovery of surplus profits is maintainable where the profits have been received by the mortgagee after the mortgagor has deposited the redemption money in Court. But such a suit is not a suit for surplus collections received by the 'mortgagee' because the collections were made by a person who had ceased to be a mortgagee—*Sahari Dutta* v. *Sheikh Ainuddy*, 14 C.W.N. 1001 (1005), 6 I.C. 336, 12 C.L.J. 620. Article 62 applies to the suit.

106. For an account and a share of the profits of a dissolved partnership.	Three years.	The date of the dissolution.

453. Application of Article:—This Article applies to suits brought *after* the dissolution of partnership. So long as a partnership business is subsisting, a suit for

share and accounts is not maintainable, though a suit for partnership *accounts only* may be allowed under exceptional circumstances, where equity requires such a course—*Kassa* v. *Gopi*, 9 All. 120 (121); and to such a suit Art. 120, and not Art. 106, applies —*Gokul* v. *Sasimukhi*, 16 C.W.N. 299, 15 C.L.J. 204, 13 I.C. 23. Thus, a suit by one partner for partnership accounts (without a prayer for dissolution of partnership) based on an *express agreement* between the parties to render accounts and to distribute the profits annually is governed by Art. 120 and not by Art. 106—*Binjraj* v. *Kisanlal*, 29 N.L.R. 34. 141 I.C. 277, A.I.R. 1933 Nag. 127 (130).

This Article applies only in the case of a partnership that has already been dissolved. A suit which is in terms one *for dissolution* of a continuing partnership, and stated in the plaint to be so, is governed by Art. 120, and not by this Article, even though the parties treated the suit as one for accounts of a dissolved partnership —*Narayanaswami* v. *Gangadhara*, 37 M L.J. 353, 48 I.C. 89; *Srinivasalu* v. *Ramakrishna*, 1933 M.W.N. 689, 144 I.C. 573; *Khorasamy* v. *Acha*, 6 Rang. 198, A.I.R. 1928 Rang. 160 (162), 110 I C. 349; *Haramohan* v. *Sudarshan*, 25 C.W.N. 847, A.I.R. 1921 Cal. 538, 66 I.C. 811. A suit for a declaration that a partnership existed between certain persons, praying that if the partnership still existed it might be dissolved and that if it had been dissolved the date of the dissolution may be fixed, and that in either case a liquidator may be appointed to take an account, and, after realising assets and discharging obligation, to pay to the plaintiff his share of the balance, is a suit for dissolution of partnership governed by Art. 120, and not by this Article—*Harrison* v. *Delhi and London Bank*, 4 All. 437 (451). A suit for division of immoveable property which formed part of the partnership assets, after the dissolution of partnership, is governed by this Article—*Gobardhan* v. *Ganeshi*, 11 I.C. 288 (All.).

A suit was brought in 1900 for account and share in a property acquired by the plaintiff and the defendant as undivided brothers in a contract business carried on by them by an implied agreement of partnership till 1894, and then continued by the defendant alone till the date of suit. *Held* that the suit fell under this Article and being brought more than three years after the agreement came to an end in 1894, was barred—*Sudarsanam* v. *Narasimhulu*, 25 Mad. 149. Where the manager of a joint Hindu family enters into a partnership for the family benefit with a person who is a stranger to the family, the partnership is dissolved on the death of the manager, in the absence of any agreement with the surviving members of the family, and the fact that some of the goods which were purchased during the subsistence of the partnership were sold after the dissolution, with the consent of one of the surviving members of the family, is not an indication that the partnership continued. The goods had to be sold and converted into cash after the dissolution as there was no necessity of keeping them; they merely represented the assets of the partnership—*Rambhau* v. *Prayag Das*, 20 N.L R. 49, 78 I.C. 198, A.I.R. 1924 Nag. 263; *Sokkanadha* v. *Sokkanadha*, 28 Mad. 344.

Where on the division of a joint Hindu family two of the members enter into a partnership and carry on business and on the death of one of them, the members of his family and those of the other partner continue the business and after some time, the members of the deceased partner's family sue the others for dissolution and rendition of accounts, it was held that a fresh partnership came into existence after the death of one of the original partners and as such the suit was not barred by this Article—*Parma Nand* v. *Thakur Prasad*, A.I.R. 1939 All. 217, 181 I.C. 695.

Where, after a partnership has been dissolved by death of one partner, the surviving partners continue to carry on the business, as if no such dissolution has taken place, the statute of limitation is no bar to the taking of accounts of the new partnership by going into the accounts of the old partnership which have been carried on into the new partner-

ship without interruption or settlement, and consequently a suit for an account and a share of the profits (of the old as well as the new partnership) brought within three years of the dissolution of the new partnership is in time, and is not barred by this Article by reason of the lapse of more than three years from the date of dissolution of the old partnership—*Maharaj Kishen* v. *Hargobind*, 101 P.R. 1914, 27 I.C. 69; *Ahinsa Bibi* v. *Abdul Kader*, 25 Mad. 26 (31); *Harchand* v. *Jugal Kishore*, 5 Lah.L.J. 55, A.I.R. 1922 Lah. 349, 68 I.C. 722; *Abdul Jaffar* v. *Venu Gopal*, 46 M.L.J. 503, 80 I.C. 378, A.I.R. 1924 Mad. 708. It should be noted that the above rule will apply only if the suit is brought by a person who was a member of both the new and the old partnerships, or by a person who is a member of the new partnership only; if the suit is brought by a person who was a partner of the old partnership business only and *not a member of the new partnership*, and the suit is brought for the accounts of the old partnership and is instituted more than three years after the dissolution of the old partnership, though within three years from the dissolution of the new, the suit is barred—*Abdul Jaffar* v. *Venugopal*, supra. Where a partnership is dissolved on the death of a partner and it is sought to make the sons of the partner liable for debts due from him as a member of the partnership, a suit for recovery of the debts is governed by Art. 106, and must be instituted within three years of the death of the partner—*Kanhayalal* v. *Devidayal Brijlal*, A.I.R. 1936 Lah. 514. See also *Nagaranjan* v. *Hotz*, A.I.R. 1954 Punj. 278.

This Article applies to a suit for an account and a share of the profits, that is, for an *unascertained* share of the profits of a dissolved partnership. But where after the dissolution of a partnership, accounts were taken and scrutinized between the partners, and as a result of the scrutiny the defendant admitted in writing in the plaintiff's *bahi* a debit balance of Rs. 4,000 due from the defendant to the plaintiff, *held* that a suit for the amount did not fall under Article 106 but was a suit on an account stated under Article 64—*Nand Lal* v. *Partap*, 3 Lah. 326, A.I.R. 1922 Lah. 425, 69 I.C. 502. Where the partners have settled the accounts of the partnership between themselves on a dissolution, this Article has no application as there can no longer be any question of a suit for dissolution and accounts within the meaning of this Article. This Article applies only in cases where the accounts have yet to be taken—*Thirumalappa* v. *Ramappa*, (1937) 2 M.L.J. 511, A.I.R. 1938 Mad. 133.

This Article contemplates suits between partners *inter se*, and does not apply to an action by a partner against the sub-partner. Such a suit is governed by Art. 120—*Seenayya* v. *Ramalingayya*, 57 Mad. 347, 65 M.L.J. 789, 148 I.C. 204, A.I.R. 1934 Mad. 12 (13). Article 120 is also what applies to a suit filed by a sub-partner for accounts and for recovery of his share of the amount of profits ascertained to be due—*Veeraraghaviah* v. *Seshachalam*, A.I.R. 1957 Andhra 76.

Presumption of dissolution:—Where it is proved that since the establishment of the business in 1868 down to 1891, annual accounts were regularly rendered between the contending parties, and that these accounts entirely ceased in 1891 in which year a final account was made out showing a complete division of the partnership shares, it was held that the presumption was in favour of dissolution in the year 1891—*Joopoody* v. *Pulavarti*, 36 Mad. 185 (P.C.), 25 M.L.J. 128, 17 C.W.N. 1006, 19 I.C. 513.

A partnership for a fixed term becomes dissolved on the expiry of that term and a suit for accounts and share of profits of the dissolved partnership filed within three years of expiry of term is within limitation—*Meera* v. *Yegnanarayana*, A.I.R. 1951 Tra-Co. 177.

454. Suit by heir of a deceased partner:—When a member of the partnership dies, there is a dissolution of the firm, and a suit by the heir of the deceased

partner against the surviving partners for an account and for the share of the deceased in the partnership assets, comes under this Article—*Jatti* v. *Banwari Lal*, 4 Lah. 350 (P.C.); *Mohit* v. *Rajnarain*, 9 C.W.N. 537; *Nihal Devi* v. *Kishore Chand*, 97 P.R. 1910, 8 I.C. 999 (1008); *Rambhau* v. *Prayag Das*, 20 N.L.R. 49, A.I.R. 1924 Nag. 263; *Sokkhandha* v. *Sokkhandha*, 28 Mad. 344. See also *Peeran* v. *Pedda*, A.I.R. 1958 Andhra 48. Two Muhammadan brothers S and M carried on business jointly and the property A was purchased out of the money acquired in the joint business, in the name of M. S died 18 years before this suit. On the death of S, his two sons carried on various business with M and one K and the property B was purchased out of the earnings of these businesses. K died more than three years before suit. The heirs of S now brought this suit against M for their share of the properties purchased out of the earnings of the several businesses and for their share of the monies collected therein. It was held that the suit to recover the share of the property A was barred under this Article about 15 years ago, and the claim for a share in property B was also barred, being brought more than three years after the death of K. *Held* also that Art. 127 did not apply because in Muhammadan Law there is no such thing as joint family property. Even if Art. 123 were to apply in respect of property A, the suit is also barred—*Mohideen* v. *Syed Meer Saheb*, 38 Mad. 1099, 32 I.C. 1002. But this Article does not apply to a suit by a legal representative of a deceased partner for accounts of the partnership business which was carried on by the surviving partners after the death of the partners. The reason is that the right of the legal representative is not a right to a share of the profits of a dissolved partnership within the meaning of this Article, but is a right accruing to him by the subsequent dealing with the assets belonging to the deceased partner—*Nilmadhab* v. *Narmada*, 45 C.W.N. 1065.

455. Suit by servant partner:—A suit by a servant remunerated by a share of the profits of the business, for an account is governed by this Article, and not by Article 120—*Kalidas* v. *Draupadi*, 22 C.W.N. 104, 43 I.C. 893. The facts of this case have been fully stated in Note 215 under sec. 22.

456. Assets realised after dissolution:—It was held by the Bombay and Madras High Courts that where after the dissolution of a partnership, a partner realised some assets, a suit by the other partner (or his representative) for recovery of his share in those assets was governed by Art. 62, and was maintainable if brought within 3 years of the date of the realisation, though a suit for a general account in respect of the partnership business might be then barred under this Article—*Merwanji* v. *Rustomji*, 6 Bom. 628 (635); *Sokkanadha* v. *Sokkanadha*, 28 Mad. 344; *Rivet-Carnac* v. *Goculdas*, 20 Bom. 15. But this view has not been accepted by the Punjab Chief Court in *Nihal Devi* v. *Kishore Chand*, 97 P.R. 1910, 8 I.C. 999 (1013, 1014), where it has been held that if a suit relating to the general account of a partnership business is barred by Article 106, it is equally barred in respect of the assets of the business realised after dissolution. And this view of the Punjab Chief Court has been confirmed by the Privy Council in *Gopala Chetty* v. *Vijayaraghavachariar*, 45 Mad. 378 (P.C), 43 M.L.J. 305, A.I.R. 1922 P.C. 115, 74 I.C. 621 (approving 97 P.R. 1910, and disapproving the Bombay and Madras cases cited above).

457. Registered deed of partnership:—Even though the instrument of partnership is registered, a suit for accounts and profits of a partnership would be governed by this Article and not by Article 116, because the latter Article is restricted to suits for 'compensation', and a suit for taking accounts of a partnership cannot be deemed to be a suit for compensation for breach of contract—*Kothandapani* v.

Sreemanavedan, 57 Mad. 378, 66 M.L.J. 625, 151 I.C. 81, A.I.R. 1934 Mad. 162; *Viravan* v. *Ponnayya*, 22 Mad. 14.

458. Starting point of limitation:—In a partnership agreement it was stated that the partnership was to continue up to a certain date, but prior to that date the partnership was dissolved; it was held that limitation ran from the *actual* date of dissolution, and not from the date mentioned in the agreement—*Sooleman* v. *Bhagwandas*, 34 Bom. 515 (516). Where a partnership business began to fail in 1906, and was closed in 1909 and the only work done subsequently consisted in realising the assets, paying debts due to creditors, and recovering rents from tenants of immoveable property belonging to the partnership, the business was held to have been dissolved in 1909, and a suit for rendition of accounts, brought in 1913 was barred—*Amirchand* v. *Jawahir*, 49 P.W.R. 1916, 32 I.C. 853. For a suit for dissolution and account of a partnership formed for running a chit fund with the partnership as stake holder time will not begin to run until all the assets of the partnership are realised and the liabilities paid, when alone the partnership business can be said to come to an end—*Samuel* v. *Thangayya*, (1941) 2 M.L.J. 490, 1941 M.W.N. 1045, A.I.R. 1942 Mad. 104.

107. By the manager of a joint estate of an undivided family for contribution, in respect of a payment made by him on account of the estate.	Three years.	The date of the payment.

459. Where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity, his right to contribution arises from the date when he expends the money. The period of limitation in respect of his suit for contribution runs from that date and not from the date on which he repays the loan to the person from whom he had borrowed and releases his security—*Aghore Nath* v. *Grish Chunder*, 20 Cal. 18 (21). Where the manager borrowed money and applied it for the purposes of the family and subsequently borrowed money to pay off the former loan, and then paid off the second loan from his private funds, limitation ran from the date on which he expended the first loan for family purposes and not from the date on which he borrowed money for the second time to pay off the first loan—*Ram Kristo* v. *Muddun Gopal*, 12 W.R. 194. Where a manager borrowed money and spent it for family purposes and then executed a fresh bond in favour of the lender for the amount originally borrowed, the period of limitation for his suit against the other members for contribution ran from the date on which he expended the money on behalf of the family, and not from the date on which he gave the fresh bond—*Sunkur* v. *Gourey*, 5 Cal. 321.

It should be noted that in 20 Cal. 18 the money was borrowed by the manager not as manager, but on his personal security, and consequently the debt was conidered to be the personal debt of the manager, though the money was spent for family purposes. In the judgment no Article of the Limitation Act has been mentioned, but it is clear that Art. 107 was not applied, for if this Article were applied, time would have run from the date when the manager repaid the loan, for it is that date which is the "date of payment" under column 3 of this Article. The two other cases (12 W.R. 194 and 5 Cal. 321) which were followed in 20 Cal. 18 were decided

under the old Limitation Acts of 1859 and 1871, which contained no provision exactly corresponding to Art. 107.

Plaintiff and his three brothers who formed a joint family were indebted to a certain person. The creditor filed a suit against the plaintiff and another brother in 1913. Subsequently the family separated and later the execution was taken by the decree-holder against the plaintiff, and the latter executed a mortgage in favour of the decree-holder on 4th June 1924 in lieu of the decretal amount. Plaintiff instituted a suit for contribution against the other members of the family on 4th June 1927. It was held that Article 107 was not applicable, because when the plaintiff executed the mortgage by taking upon himself the sole responsibility for the debt (which was tantamount to "payment on account of the estate") the family was no longer *undivided* and he was no longer the "manager of a joint estate" within the meaning of this Article. The appropriate Article was Art. 99, and the suit was just in time—*Sat Rohan* v. *Bharath*, 1931 A.L.J. 651, 134 I.C. 452, A.I.R. 1931 All. 652 (653). Where a manager sues for partition after his right to contribution in respect of certain moneys expended by him on account of the estate is barred by limitation under this Article he is not entitled to set off the amount in adjustment of equities between the parties—*Subramanian* v. *Kumarappa*, A.I.R. 1955 Mad. 144.

108. By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease.	Three years.	When the trees are cut down.

460. This Article applies only when a *suit* is brought by the landlord to recover the value of trees cut down by the tenants; it does not apply where the landlord claims by way of *set-off* that in taking accounts as between himself and the tenants the value of trees cut down should be debited against the tenants who claim credit for the value of improvements made by them—*Pumpalia* v. *Kunhamma*, 27 M.L.J. 266, 25 I.C. 794.

109. For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant.	Three years.	When the profits are received.

461. "Received":—The word 'received' means *'actually received'*; the liability of the defendant is for the profits which he has actually received; consequently, if he had been out of possession for any part of time during the period of his wrongful possession, no profit can be recovered from him for that time—*Abbas* v. *Fassihuddin*, 24 Cal. 413. If the defendant has not received *any* profits at all, the plaintiff cannot claim anything by way of *mesne profits* under this Article, but can claim *damages* for trespass and his suit will fall under Article 39—*Ramasami* v. *Authi Lakshmi Amma*l, 34 Mad. 502. In 24 Cal. 413 the Judge made a passing observation that the plaintiff can claim *mesne profits* to the extent of what the defendant might have received with ordinary diligence during the period of his possession. This observation was unnecessary for the decision of the case. But it is true in one sense,

viz., that the amount of damages will be measured by the amount of profits which the defendant might with due diligence have received [See section 2 (12) of C. P. Code, 1908]. But the claim is still one for *damages* and not for *mesne profits.* See 34 Mad. 502 at p. 504.

The plaintiff is entitled to recover only the profits which have been received by the defendant during three years previous to suit. Thus, if the defendant had been in possession from 18th May 1900 to 11th September 1901, and the suit is instituted on the 6th April 1904, the plaintiff will be entitled to recover the profits received by the defendant from 6th April 1901 to 11th September 1901; the claim for profits received by the defendant from 18th May 1900 to 5th April 1901 will be barred—*Peary Mohan* v. *Khelaram,* 35 Cal. 996; *Hays* v. *Padmanand,* 32 Cal. 118; *Kishnanand* v. *Partab,* 10 Cal..785 (P.C.).

The plaintiff is entitled to recover the rents and profits actually received by the defendant during the three years before suit without reference to the time when the rents fall due. It is the actual receipt of rents, whenever they may have fallen due, which creates the liability—*Abbas* v. *Fassihuddin,* 24 Cal. 423. Thus, in a suit instituted by the plaintiff on the 1st day of 1301 B.S. he would be entitled to claim the *mesne* profits actually received by the defendant during the years 1298—1300 B.S. The fact that the rent for the year 1297 would fall due on the 1st day of 1298 would not entitle the plaintiff to claim it, unless it was actually received by the defendant during 1298—1300 B.S.

462. "Wrongfully":—This Article is applicable only to cases where the profits have been *wrongfully* received by the defendant; but so long as the defendant remains in possession by virtue of a decree of the Court, the receipt of profits during that period cannot be said to be *wrongful,* even though the decree is afterwards set aside; therefore a suit for profits received by the defendant during that period is governed not by this Article but by Art. 120—*Holloway* v. *Ghuneshwar,* 3 C.L.J. 182. This decision has subsequently been overruled by the Privy Council in Feroz *Shah* v. *Akbar Khan.* 43 C.W.N. 897, 41 Bom. L.R. 1071, A.I.R. 1939 P.C. 178, where it has been held that this Article applies to a suit for mesne profits, even when possession was obtained and held through a receiver appointed by a Court in execution, it having been subsequently held in a suit by the plaintiff that he was entitled to possession. (*Saroj* v. *Premchand,* 22 C.W.N. 263 approved). A suit by a mortgagor, after the mortgage has been satisfied, to recover the surplus collections realised by the mortgagee in possession, is not a suit governed by this Article, because it cannot be said that the mortgagee has *wrongfully* received those profits. The suit falls under Article 105 which expressly provides for such a case—*Bikramjit* v. *Raj Raghubar,* 20 O.C. 25, 38 I.C. 610; *Md. Faiyaz Ali* v. *Kallu Singh,* 33 All. 244 (248).

The receipts of rents and profits by one of several tenants-in-common on behalf of all cannot be said to be wrongful. It is one of the ordinary modes of common enjoyment of property—*Yerukola* v. *Yerukola,* 45 Mad. 648 (667) (F.B.), 42 M.L.J. 507, A.I.R. 1922 Mad. 150; *V. Sundararaja* v. *Raghava,* A.I.R. 1936 Mad. 654. So, this Article does not apply to an action for claim of profits of immoveable property against a person who is in possession of the property as co-heir—*U. Aung* v. *Daw Mya,* A.I.R. 1938 Rang. 416, 178 I.C. 475; Daw Ein v. *Daw Chan,* A.I.R. 1938 Rang. 365, 186 I.C. 210, 1940 Rang. L.R. 136.

This Article does not apply to a suit for recovery of profits of property entrusted to the defendant by the plaintiff for safe custody and management as the defendant was in rightful possession and received the profits rightfully but it is his retention

that was wrongful—*Shri Mahadeoji* v. *Baldeo*, I.L.R. (1942) Nag. 92. 1941 N.L.J. 184, A.I.R. 1941 Nag. 181.

This Article is inapplicable to a suit by a person who is ultimately found to be entitled to the estate to recover the rents and profits received by a person recognised by the collector under sec. 3 (5) of the Madras Estates Land Act as a "landlord" during the pendency of the ultimate decision by the Civil Court of a litigation respecting the estate—*Suryaprakasa* v. *Maharaja of Pithapuram*, 75 I.A. 101, I.L.R. (1949) Mad. 1, (1948) 2 M.L.J. 52, A.I.R. 1948 P.C. 175 (*Suryaprakasa* v. *Maharaja of Pithapuram*, I.L.R. (1942) Mad. 562, (1942) 1 M.L.J. 472, A.I.R. 1942 Mad. 487 overruled).

A suit was instituted by the owner of a *patni* for recovery of mesne profits against the defendant who had purchased the *patni* at a sale under Reg. VIII of 1819 and had been in possession under the purchase which was subsequently set aside. It was held that the defendant wrongfully received the profits which were receivable by the plaintiff but for the illegal *patni* sale, and that Article 109 governed the case and not Art. 120—*Peary Mohan* v. *Kheldram*, 35 Cal. 996 (998), 13 C.W.N. 15. When an execution sale is set aside even though the purchasers had entered into possession by virtue of a court sale the profits received by them would be "wrongfully received" by them within the meaning of this Article and the suit in respect of it would be governed by this Article—*Ramcharan* v. *Bansidhar*, I.L.R. (1942) All. 671, 1942 A.L.J. 411, A.I.R. 1942 All. 358, 203 I.C. 223. Crops raised by the tenant and standing on the tenure at the time of his ejectment belong to the tenant and not to the landlord; if the landlord after ejecting the tenant cuts and carries them away, his act is *wrongful*, and a suit by the tenant, after the decree of ejectment is reversed and he recovers possession, for the value of the crops falls under this Article —*Surnomoyee* v. *Pattarri*, 4 Cal. 625 (627, 628).

Where an alienation of immoveable property made by an insolvent is nominal and fictitious, the transferee holds the property as a constructive trustee for the insolvent. The transferee, thus being in possession of the property with the consent of the insolvent, cannot be said to have received the profits thereof wrongfully. This Article has no application to an application made by the receiver in insolvency to recover mesne profits received by the transferee—*Raoji Bapuchand* v. *Bavachekar*, 52 Bom.L.R. 606, A.I.R. 1950 Bom. 399.

Where the reversioner's suit for recovery of property in the possession of a transferee of a Hindu widow was decreed in part, a subsequent suit for mesne profits against the transferee is governed by Art. 109 and not Art. 120—*Bharat Singh* v. *Gur Prasad*, A.I.R. 1935 Oudh 515, 1935 O.W.N. 985, 157 I.C. 960.

After a mortgage decree has been obtained by the mortgagee, the mortgagor granted a usufructuary mortgage in favour of one A. A entered into possession of the property under it, and realised rents from certain tenants of the property. The plaintiff purchased the property at a sale in execution of the mortgage decree mentioned above, and after obtaining possession of the property through the Court from A, brought a suit against him for recovery of the rents and profits realised by him from the tenants of the property. *Held* that as the unfructuary mortgage in favour of A was *pendente lite*, it was invalid against the plaintiff, and the rents were wrongfully collected by A. The suit was therefore governed by this Article. The period of limatation would run from the date when the profits were received—*Nagendra* v. *Sarat Kamini*, 26 C.W.N. 386, 66 I.C. 873, A.I.R. 1922 Cal. 235; *Sarat Kamini* v. *Nagendra* 29 C.W.N. 973, 89 I.C. 1000, A.I.R. 1926 Cal. 65. In the latter case it was held that the period during which an application by the judgment debtor to set aside the execution sale

was pending should not be excluded, because the plaintiff might have instituted the suit during that period, and although he could not have obtained a decree without the sale certificate, the absence of the sale-certificate would not have been a reason for dismissing his suit.

Certain mortgagees brought a suit for sale against the original mortgagor and against one S, an ostensible transferee of the property, and having obtained a decree against S, put to sale his right, title and interest and themselves purchased it, and obtained possession in 1900. Thereupon S instituted a suit in 1911 to recover possession, and in 1920 obtained a decree from the High Court for possession. In 1922 he instituted the present suit for recovery of mense profits from 1911 and, in answer to the defendant's plea of limitation, contended (1) that the period of limitation was suspended during the time when the previous litigation was pending, and (2) that a fresh cause of action arose after the passing of the High Court's decree. *Held* that the suit was barred, as the period of limitation ran from the date when the profits were received, and was not suspended, sec. 9 being imperative on this point; and that the decision of the High Court in the previous case did not give a fresh cause of action. The plaintiff ought to have instituted the suit for mesne profits before the time expired, and allowed it to be stayed pending the disposal of the former litigation—*Ram Charan* v. *Gopa*, 49 All. 565, 25 A.L.J. 425, 102 I.C. 96, A.I.R. 1927 All. 446; *Ubaidullah* v. *Abdul Jalil*, AI.R. 1937 All. 481.

463. Suit by usufructuary mortgagee:—Where under a mortgage the mortgagee is entitled to enter into possession of the mortgaged property and to receive the rents and profits, the appropriate suit by a mortgagee who has been wrongfully dispossessed by the mortgagor is a suit for possession and mesne profits; the suit for possession is governed by Art. 142, and for the latter remedy by this Article because the property 'belongs' to the mortgagee for the period of mortgage—*Ram Sarup* v. *Harpal*, 39 All. 200; *Govindrao* v. *Jiwanji*, 2 Bom.L.R. 201. In 39 All 200, Walsh, J. however held that the claim for mesne profits could be justified as money had and received under Article 62. But in another Allahabad case, where a usufructuary mortgagee, who never obtained possession of the mortgaged property, brought a suit for possession within six years from the date on which he ought to have obtained possession, and in that suit claimed profits for the entire period of six years, it was held that the mortgagee was entitled to the profits for six years, as the mortgagor's failure to give possession was a breach of registered contract under Art. 116 and that Article 109 did not apply—*Nirbhai Sinha* v. *Tulsi*, 31 I.C. 894 (All.). Where a mortgagor covenants to deliver possession to the mortgagee before a certain date and to pay rent at a certain rate till then and fails to do so and the mortgagee sues for possession and compensation, the suit is governed by Article 116 and not by this Article and it will be in time if brought within 6 years from the date fixed for delivering possession, when the breach occurs—*Daulat* v. *Raghbir*, 6 *Luck.* 203, 1940 O.W.N. 875, A.I.R. 1941 Oudh 1, 190 I.C. 721.

464. Starting point of limitation:—Under Art. 109 the starting point of limitation is the date from when the profits are received—*Ma Pwa Thein* v. *Ma Me Tha*, A.I.R. 1936 Rang 80, 161 I.C. 461; *Ubaidulla* v. *Abdul Jalil*, A.I.R. 1937 All. 481; and not from the date when the cause of action to recover those profit arises—*Dullababhai* v. *Gulabbhai*, I.L.R. (1938) Bom. 107, 40 Bom.L.R. 100, A.I.R. 1938 Bom. 158.

110. For arrears of rent.	Three years.	When the arrears become due.	

465. Rent:—This Article applies only to a suit for rent, *i.e.*, money payable

by a tenant to a landlord under a contract (express or implied) between them. It does not apply to a suit for compensation against the defendant for use and occupation of the plaintiff's premises, where the relationship of landlord and tenant does not exist between the parties. Such a suit is governed by Article 120—*Madar* v. *Kader Mohideen*, 39 Mad. 54; *Robert Watson* v. *Ram Chand*, 23 Cal. 799. So also this Article does not apply to a suit for damages for use and occupation against a tenant continuing in possession without landlord's consent—*Partap* v. *Ramdhan*, A.I.R. 1946 All 447, 224 I.C. 201. But where a tenancy by sufferance after the termination of an agricultural lease is converted into a tenancy of holding over by receipt of rents for faslis subsequent to the termination of the lease, the possession of the person holding over is that of a tenant and this Article applies to a claim against him for the period of holding over as the claim is on the basis of rent—*Viswanatham* v. *Balerami*, (1948) 2 M.L.J. 542, 1948 M.W.N. 761, A.I.R. 1949 Mad. 421. A suit by an inamdar for arrears of 'assessment' against a person who was not let into possession of the holding under any agreement of tenancy but who held lands in the village is a suit for land revenue and not a suit for arrears of *'rent'*, (because the relation between the plaintiff and the defendant is not that of landlord and tenant, but that of superior holder and inferior holder) and is not governed by this Article but by Art. 120—*Sadashiv* v. *Ram Krishna*, 25 Bom. 556 (558). This Article does not apply where the Government has assigned a right to receive assessment and the assignee sues for it—*Kasturi* v. *Anantaram*, 26 Mad. 730.

Where rent is assigned by the landlord to a third party, it does not lose its character as such, and a suit by the assignee to recover rent falls under this Article—*Siris Chandra* v. *Nasim Quazi*, 27 Cal. 827 (F.B.), 4 C.W.N. 357; *Sheikh Munsar* v. *Loke Nath*, 4 C.W.N. 10; *Gajadhar* v. *Thakur Prasad*, 1 P.L.J. 506, 38 I.C. 102.

A suit to recover *meras* or customary dues to a *chatram* claimed by the plaintiff not as 'rent' due to landlord but as money recoverable by custom, does not fall under this Article but under Art. 120—*Venkataraghava* v. *District Board*, 16 Mad. 305.

Royalty payable in respect of a coal mine cannot be treated on the same footing as rent, because the amount can not be possibly ascertained until the raisings of the coal have been weighed and checked, etc.—*Byomkesh* v. *Madabhabji*, 21 Pat.L.T. 442, A.I.R. 1940 Pat. 609, 188 I.C. 411.

Arrears of cess are recoverable as arrears of rent (sec. 47, Bengal Cess Act, IX of 1880); and the rule of limitation of this Article applies—*Bhuneshwari* v. *Gopal*, 8 Pat. 358, A.I.R. 1929 Pat. 331 (332), 118 I.C. 733. *Road Cess* payable to the landlord by the tenant is regarded as 'rent'—*Nabin* v. *Bansinath*, 21 Cal. 722. Where *dak-cess* is claimed under the contract by which rent is payable, it must be regarded as part of the rent—*Watson* v. *Sree Kristo*, 21 Cal. 132. *Chaukiddry Tax* is rent, when such tax is legally recoverable—*Assanulla* v. *Tirthabasini*, 22 Cal. 680.

A suit by the Zamindar to recover *jodi* and road-cess from the defendant who held the land on service inam under him subject to payment of jodi as well, is a suit under this Article, as *jodi* is favourable rent—*Sambasadasiva* v. *Maddulappa*, 74 I.C. 968, A.I.R. 1924 Mad. 73, 1923 M.W.N. 524.

Fee charged by the Municipality for issuing a permission for use of Municipal land under the provisions of sec. 90, Bombay Act 18 of 1925, is not rent within the meaning of Art. 110, and a suit for recovery of such fee is not governed by Art. 110, but by Art. 120—*Masand Motiram* v. *Shikarpur Municipality*, A.I.R. 1936 Sind 184, 30 S.L.R. 146, 165 I.C. 369.

Money due on settlement by auction of date and toddy palm trees under which the settlement-holder obtains the right to collect the juice of the trees for the season,

does not amount to rent, and a suit to realize such money is governed by Art. 110—*Rameshwar Singh* v. *Mahabir Pasi*, A.I.R. 1936 Pat. 403, 15 Pat. 626, 17 P.L.T. 363.

Claim for damages for use and occupation from the date of revenue sale to the date of annulment of undertenure by the revenue sale purchaser under sec. 37 of Bengal Act XI of 1859 is not a claim "for arrears of rent" within the meaning of this Article—*Bibhuti* v. *Promoda*, 43 C.W.N. 469, 69 C.L.J. 220, A.I.R. 1939 Cal. 468.

Where a liability arises under a statute, apart from any contract between the parties, this Article has no application. Thus the liability of a buyer for reasonable charges for care and custody of the goods arises under sec. 44, Sale of Goods Act and as such does not attract the operation of this Article—*Kamruddin* v *Anjangaon Municipality*, 1950 N.L.J. 363, A.I.R. 1951 Nag. 148.

466. When the arrears become due:—When a lease provides that the rent should be paid in four instalments on four specific days in the year, the period of limitation begins to run from the date on which each instalment falls due, and not from the last day of the agricultural year—*Gajadhar* v. *Thakur Prasad*, 1 P.L.J. 506, 38 I.C. 102.

The rent becomes due not always necessarily on the close of the period in respect of which it is to be paid. It may be due on a different time according to legislation or custom or express contract or the special circumstances of the case. Thus, if before the institution of a suit for rent, it is necessary for the landlord to take proceeding under the Madras Rent Recovery Act (VIII of 1865) to enforce acceptance of the *pattah* and to have the proper rate of rent ascertained, the period of limitation for a suit for arrears of rent runs from the date of the final decree determining the rent, and not from the close of the year for which the rent is payable, because no rent can be said to be 'due' under this Article until the rate has been finally ascertained by the decree of the Civil Court. The word "rent" means *ascertained* rent—*Rangayya* v. *Bobba Sriramulu*, 27 Mad. 143 (150, 151) (P.C.); *Syed Ghulam* v. *Shunmugam*, 34 Mad. 438 (441).

The condition of tendering a *patta* which was necessary before the institution of a suit under the Madras Rent Recovery Act, 1865, has now been dispensed with by the Madras Estates Land Act (I of 1908). Under this Act, the landlord is entitled to maintain a suit for rent without tendering a patta. The limitation for a suit for rent is three years from the time when it accrues due, and it accrues due when it is payable according to the contract between the parties or according to usage—*Satrucherla Veerabhadra* v. *Ganta Kumari*, 22 M.L.J. 451, 15 I.C. 393; *Kanthimathi* v. *Muthusamia*, 37 Mad. 540 (543).

In 27 Mad. 143, cited above, the Privy Council have pointed out that legislation, custom or express contract or the special circumstances of any case may make rent become due at a point of time different from the close of the period in respect of which it is to be paid, and that in India, by custom of the country, agricultural rents are often payable before the close of the fasli year. Thus, where according to custom, the melveram is due immediately after the harvest is gathered when the share of the landlord is divided from the tenants' share, that is, where the rent is ascertained and is payable on some date before the close of the fasli year, the period of limitation does not run from the close of the fasli year, but runs when the rent is ascertained as soon as the harvest is reaped. Nor does the period of limitation in such a case run from the tender of the *patta*, because here there is no dispute as to the amount of rent payable and consequently the tender of the patta is not necessary for the ascertainment of rent, but merely a condition precedent to the institution of the suit for arrears

of rent under the Rent Recovery Act—*Arunachellam* v. *Kadir Rowthen*, 29 Mad. 556 (557), distinguishing *Rangayya* v. *Bobba Sriramulu*, 27 Mad. 143 (P.C.).

Where it is necessary that the amount of rent should be fixed by the Deputy Commissioner under sec. 65 (4) (*d*) of the C. P. Land Revenue Act, no arrears of rent become due until the amount has been finally determined by proper proceedings between the parties. Limitation runs from the date on which the rent is thus finally determined and not from the close of the year for which it is payable—*Ragunath* v. *Sarva*, 7 N.L.R. 169, 12 I.C. 804.

A temple was the owner of the melvaram in certain lands, and a mutt was the owner of the kudivaram therein, liable to pay the melvaram to the temple. The defendant was both the head of the mutt and the trustee of the temple, until he was removed from the trusteeship by the Court which appointed the plaintiff as the receiver. The receiver sued to recover from the defendant as the head of the mutt the arrears of melvaram due to the temple, that had accrued during the defendant's trusteeship. The defendant pleaded limitation. *Held* that so long as the defendant was both head of the mutt and the trustee of the temple (*i.e.*, so long as the same person was the landlord and the tenant) there was none to sue for rent; consequently limitation did not run, and no arrears became due during that period; and the arrears became due within the meaning of this Article only when there was some one to whom they were payable, *i.e.*, when a different person (the plaintiff) was appointed as the receiver of the temple—*Annamalai* v. *Govinda Rao*, 46 Mad. 579 (582), 44 M.L.J. 318, 72 I.C. 5, A.I.R. 1923 Mad. 461.

A suit for recovery of the arrears of rent for which the patni was sold brought within three years from the date when the patni sale was set aside and the patnidar was restored to possession is within time under this Article. The reason is that the amount of rent does not accrue in such a case until the sale of the patni is set aside and until that time the statute does not run—*Official Trustee* v. *Bijoy Chand*, I.L.R. (1941) 1 Cal. 335, 45 C.W.N. 787, A.I.R. 1942 Cal. 222, 199 I.C. 788.

467. Registered kabuliat:—A suit to recover arrears of rent due under a registered agreement has been held by the Calcutta, Bombay, Madras and Patna High Courts to be governed by Art. 116 and not by Art. 110—*Umesh* v. *Adarmani*, 15 Cal. 221; *Ambalavana* v. *Vaguran*, 19 Mad. 52; *Vythilinga* v. *Thetchanamurti*, 3 Mad. 76; *Mackenzie* v. *Rameshwar*, 1 P.L.J. 37. 34 I.C. 754; *Ramanandhan* v. *Achuta*, 23 I.C. 753; *Lalchand* v. *Narayan*, 37 Bom. 656. The Allahabad High Court held such a suit to be governed by Art. 110—*Jaggilal* v. *Sriram*, 34 All. 464 (465), 16 I.C. 146; *Ram Narain* v. *Kamta*, 26 All. 138; but the Allahabad rulings must now be deemed to have been overruled by the Privy Council in *Tricomdas* v. *Gopinath*, 44 Cal. 759 (P.C.), 25 C.L.J. 279 which has now definitely settled the question by holding that in case of a registered lease, the limitation for a suit for rent is six years under Article 116. In this case the Judicial Committee have made this important observation that if a contract is contained in a registered instrument, Art. 116 will apply, inspite of the fact that a special provision has been made in some other Article in respect of a similar instrument not registered. The view expressed in this case was recently re-affirmed by the Judicial Committee in *Ariadne* v. *Eftichia*, (1958) 3 W.L.R. 265, a case from Tanganyika where this Act applies. A suit for recovery of arrears of rent against the assignee of a registered lease is governed by Article 116 and not by this Article. The reason is that though the assignee's liability to pay rent to the lessor arises out of the privity of estate, it is really based on the covenant to pay rent contained in the original registered lease which in law runs with the land and the suit for rent is in substance on the basis of such covenant—*Dwijendra* v. *Promode*, 54 C.W.N. 671, A.I.R. 1951 Cal. 251,

A suit to recover royalty, if it is based on a registered kabuliyat, would be governed by Article 116 and not by Article 110—*Tricomdas* v. *Gopinath Jiu*, 44 Cal. 759 (P.C.); *Peary Lal* v. *Madhoji*, 17 C.L.J. 372, 19 I.C. 865.

468. Rent suit under Bengal Tenancy Act:—A rent suit brought under the *Bengal Tenancy Act* (VIII of 1885) is always governed by the three years' rule of limitation according to Sch. III of that Act, whether the *kabuliyat* be registered or not; the Limitation Act will not apply to such a suit—*Iswari* v. *Crowdy*, 17 Cal. 469; *Mackenzie* v. *Haji Syed*, 19 Cal. 1 (F.B.); *Kali Charan* v. *Harendra*, 4 C.L.J. 553. In a suit for recovery of arrears of putni rent, the relevant provisions for determining the period of limitation are those to be found in Art. 2, Sch. III of the Bengal Tenancy Act; the provisions of this Article do not apply—*Uday Chand* v. *Dibakar*, A.I.R. 1950 Cal. 134. The decision in *Official Trustee* v. *Bijoy Chand*, I.L.R. (1941) 2 Cal. 335, 45 C.W.N. 787, A.I.R. 1942 Cal. 222 was distinguished on the ground that there the question was decided whether Art. 110 or Art. 115 was applicable to a suit for arrears of rent for which the patni was sold on the sale being set aside and the patnidar being restored to possession.

A lease for building purposes and for establishing a coal depot or for establishing a godown, and not for agricultural or horticultural purposes, does not come under the Bengal Tenancy Act, and a suit for rent based upon such a lease, if registered, will be governed by Art. 116 of the Limitation Act—*Raniganj Coal Association* v. *Jadoonath*, 19 Cal. 489; *Umrao* v. *Mahomed*, 27 Cal. 205, *Ahmed* v. *Bipin*, 11 I.C. 6.

Where rent is assigned by the landlord to a third party, Art. 110 of the Limitation Act, and not Art. 2, Sch. III of the Bengal Tenancy Act, is applicable to a suit brought by the assignee for the arrears of rent—*Mahendra* v. *Kailash*, 4 C.W.N. 605; *Ahmedulla* v. *Kaminudin*, 2 I.C. 989; *Gajadhar* v. *Thakur Pershad*, 1 P.L.J. 506, 38 I.C. 102; *Hayat Majid* v. *Hajari Lal*, 63 I.C. 524 (Pat.).

111. By a vendor of immoveable property for personal payment of unpaid purchase-money.	Three years.	The time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.

469. The first column of this Article in the Act of 1877 ran thus: "By a vendor of immoveable property to enforce his lien for unpaid purchase money."

But it was held by the High Courts of Bombay, Madras and Allahabad that a suit by the vendor to enforce his lien or charge on the property for his unpaid purchase-money fell under Article 132, and not Art. 111—*Virchand* v. *Kumaji*, 18 Bom. 48; *Chunilal* v. *Bai Jethi*, 22 Bom. 846; *Har Lal* v. *Muhamdi*, 21 All. 454; *Munirunnissa* v. *Akbar*, 30 All. 172 (174); *Rama Krishna* v. *Subramania*, 29 Mad. 305 (F.B.) (overruling *Natesan* v. *Soundararaja*, 21 Mad. 141, *Subramania* v. *Poovan*, 27 Mad. 28 and Avuthala v. *Dayumma*, 24 Mad. 233). In the light of these decisions the Article has been changed into its present form, and it is now applicable only to suits in which the vendor claims to recover the money from the vendee *personally*.

If the personal remedy is barred under this Article, the vendor is still entitled to enforce his charge *within* 12 years under Article 132—*Bashir Ahmed* v. *Nazir Ahmed*, 43 All. 544 (545); *Meghraj* v. *Abdullah*, 12 A.L.J. 1034, 25 I. C. 208.

If the sale-deed is registered, a suit for recovery of unpaid purchase-money would fall under Article 116 by force of the Privy Council decision in *Tricomdas* v. *Gopinath*,

(44 Cal. 759)—*Ram Raghubir* v. *United Refineries Ld.*, 9 Rang. 56, 134 I.C. 737, A.I.R. 1931 Rang. 139 (144). Hence it follows that this Article is limited to cases where the immoveable property is of value less than Rs. 100, and there is no registered deed of sale. In all cases where there has been either a claim for compensation under a contract in writing registered or a claim to enforce payment of sums of money payable under a contract in writing registered, Art. 116 has always been held to apply. But where the action is not one for compensation for the breach of contract in writing registered but one for enforcing a statutory obligation Art. 111, and not Art. 116, is applicable—*Ramparikha Pandey* v. *Mt. Ramjhari*, A.I.R. 1937 Pat. 44.

Where the purchaser undertook to pay, out of the consideration-money, a debt due by the vendor to certain persons, but the purchaser not having made that payment, the vendor himself had to pay his creditors, and then he sued, to recover the money from the phrchaser, *held* that the suit was governed by Art. 116 (the sale-deed being registered) and not by Art. 111. Art. 116 applies to all suits for recovery of money under a registered contract, although a special provision may have been made in some other Article in respect of a contract not registered—*Ram Rachhya* v. *Raghunath*, 8 Pat. 860, A.I.R. 1930 Pat. 46 (49), 122 I.C. 244 (following *Tricomdas* v. *Gopinath*, 44 Cal. 759, P.C.); *Abdul Qadir* v. *Bilas Kaur*, 14 Lah. 646, 34 P.L.R. 734, 144 I.C. 362, A.I.R. 1933 Lah. 793; see also *Gulzari Mal* v. *Maghi Mal*, 14 Lah. 380, 141 I.C. 435, A.I.R. 1933 Lah. 109 (111); *Navamaninadar* v. *Vedamanicka*, 56 Mad. 724, 144 I.C. 550, A.I.R. 1933 Mad. 424; *Makund Lal* v. *Bhola*, 1931 A.L.J. 985, 131 I.C. 686, A.I.R. 1931 All. 419; *Brahamdeo* v. *Jaikishun*, A.I.R. 1941 Pat. 452, 193 I.C. 172.

An unusual case recently cropped up before the Lahore High Court in which the applicability of this Article was in question. The plaintiff, acting as guardian of two minor girls sold a certain property, and it was stipulated that the purchase-money should remain with the vendee to be paid to the minors on their attaining majority. One of the girls, while still a minor, married, and by the customary law of the family she lost her right in the money, so that her younger sister became entitled to the whole of the purchase-money. Afterwards she died; and the plaintiff as reversioner became entitled to the whole of the purchase-money and sued to recover it from the vendee. *Held* that Art. 111 did not apply as the plaintiff was not the vendor of the property but had acted merely as the guardian of the minors. Having regard to the nature of the transaction and the facts of the case, the only Article that could be applied was Art. 120, and time ran from the date of death of the younger girl—*Gulub* v. *Sarwan Jan*, 15 Lah. 35, 35 P.L.R. 161, 147 I.C. 269, A.I.R. 1933 Lah. 860 (861).

112. For a call by a company registered under any Statute or Act.	Three years.	When the call is payable.

470. A suit for recovery of unpaid calls, brought, not by the company, but by the *official liquidator*, after the winding up of the company, is not governed by this Article but by Art. 120—*Parell Spinning and Weaving Company* v. *Maneck Haji*, 10 Bom. 483; see also *Karam Chand* v. *Jullundur Bank Ld.*, 29 P.L.R. 64, 9 Lah.L.J. 293, A.I.R. 1927 Lah. 543, 102 I.C. 705, where such suit was held to be governed by Article 112 or 120. But a contrary view has been taken in *Mohd. Akbar* v. *Associated Banking Corporation of India*, 52 Bom.L.R. 559, A.I.R. 1950 Bom. 386 where it has been held that a suit to recover call money by a company is governed by this Article and not by Art. 120 even if winding up supervenes. It has been

held that the decision reported in 10 Bom. 483, supra has been held overruled by the Privy Council in *Hansraj* v. *Dehra Dun M.E. T. Co.*, 35 Bom.L.R. 319, A.I.R. 1933 P.C. 63. If the shares of the shareholder have been *forfeited*, a suit by the official liquidator, after the winding up of the company, is governed by Article 115, and time runs from the date of forfeiture of the shares—*Maneklal* v. *Suryapur Mills Co., Ld.*, 52 Bom. 477, A.I.R. 1928 Bom. 252 (255); *Bishambar* v. *Agra Electric Stores Ld.* 54 All. 541, 1932 A.I.J. 354, 140 I.C. 502, A.I.R. 1932 All 342 (343).

When a suit to recover the call money has become barred by time under this Article, the fact that simply because the defaulter's name is kept in the register as a share-holder and the share is forfeited only subsequently does not revive the debt, and the company cannot claim that limitation should run from the date of forfeiture —*Shri Mahalakshmi Sugar Corpn.* v. *Jasjit Singh*, 10 O.W.N. 447, 146 I.C. 825, A.I.R. 1933 Oudh 285 (287); distinguishing 52 Bom. 477. A clause in the Articles of Association of a company provided: "Any member whose shares have been forfeited shall notwithstanding be liable to pay and shall forthwith pay to the company all calls owing at the time of the forfeiture. ....and the directors may enforce the payment thereof as they think fit." The defendant, a shareholder not having paid calls, his shares were forfeited, and the company filed a suit to recover the calls according to the above clause. *Held* that there was a special contract whereby the defendant agreed that in the event of his shares being forfeited he would be liable to pay to the company all the moneys that were due from him for calls, and the cause of action arose when the company forfeited the shares; therefore the present suit to recover what was due from the defendant on his shares was within time, if brought within three years of the date of forfeiture, that being the date on which the calls were payable within the meaning of this Article—*Habib Rawji* v. *Aluminium & Brass Works Ld.*, 49 Bom. 715, 27 Bom. L.R. 574, 88 I.C. 96, A.I.R. 1925 Bom. 321. Where the articles of association of a company provide that a person shall continue to be liable for the unpaid balance of share money though his share is forfeited, the result is that the share-holder on forfeiture ceases to be a member of the company, and all that is left is the new liability to pay all monies which at the date of the forfeiture were payable by him to the company in respect of his shares. Hence the starting point of limitation for a suit to recover such unpaid balance of share money is the date of forfeiture and not the date of the allotment of shares—*Mudholkar* v. *Malak*, 1940 N.L.J. 300, A.I.R. 1940 Nag. 235, 190 I.C. 639.

Even though the calls have become barred by reason of the company not having sued to realise them within the period prescribed by this Article, a suit by the official liquidator for recovery of the calls is not barred, if brought within the period prescribed by Article 120—*Prayan Prasad* v. *Gaya Bank and Trades Association*, 10 Pat. 249, 12 P.L.T. 215, 130 I.C. 534, A.I.R. 1931 Pat. 44 (48).

113. For specific performance of a contract.	Three years.	The date fixed for the performance, or, if no such date is fixed, when the plaintiff has notice that performance is refused.

471. Suit based on award:—An award is not a contract. No doubt an award springs out of an agreement to submit to arbitration (and there may also be an implied agreement to abide by the decision of the arbitrators) but the award itself is a decision and not a contract. Therefore a suit for possession of land based

on an award of arbitrators cannot be regarded as a suit for the specific performance of a contract, and Article 113 cannot apply to such a case. The suit falls under Art. 144—*Sarnavalli* v. *Muthayya* 23 Mad. 593 (596); *Sheo Narain* v. *Beni Madho*, 23 All. 285 (287); *Bhajahari* v. *Behary Lal*, 33 Cal. 881 (883, 885). Where an award declares that A is to retain possession of certain property as security for the sum of Rs. 150 and that the other co-sharers of A are entitled to recover this property on payment of the sum of Rs. 150 to A, a possessory charge is created in favour of A by the award, and a suit to enforce the charge is governed by the 12 years' rule of limitation, and not by Article 113 as the award is not a contract—*Surat Singh* v. *Umrao*, 20 A.L.J. 611, A.I.R. 1922 All. 410, 77 I.C. 113.

As an award is not a contract, a suit for recovery of a certain sum of money based on an award which decides the plaintiff's title to the money is not a suit for specific performance of a contract under Art. 113, but is governed by Article 120—*Kuldip* v. *Mahan Dube*, 34 All. 43 (48), 8 A.L.J. 1138, 11 I.C. 705 (doubting *Sukho Bibi* v. *Ram Sukh*, 5 All. 263, and *Raghubar* v. *Madan*, 16 All. 3); *Radha Kishen* v. *Delhi Cloth Mills*, 32 P.R. 1931, 16 I.C. 804; *Rajmal* v. *Maruti*, 45 Bom. 329 (335, 336), A.I.R. 1921 Bom. 389, 59 I.C. 755; *Sornavalli* v. *Muthayya*, 23 Mad. 593; *Bhajahari* v. *Behary*, 33 Cal 881; *Somasundaram* v. *Rangasami*, 31 I.C. 816. A suit to recover damages, on the basis of the award, would not come under Article 115, nor under Article 113. The proper Article is Art. 120—*Khubchand* v. *Jethanand*, 23 S.L.R. 417, A.I.R. 1929 Sind 168 (169), 117 I.C. 153. A suit to recover money payable under an award cannot be properly called a suit for *specific performance* of the award (just as a suit on a bond cannot be called a suit for specific performance of the bond). Consequently Art. 113 cannot apply, but Art. 120—*Somjimal* v. *Tolomal*, 6 S.L.R. 148, 19 I.C. 376 (377); Cf. *Fardunji* v. *Jamsetji*, 28 Bom. 1.

A suit to enforce an award even though it is signed by the parties is not a suit based on a contract. The award is none the less an award and does not become a contract when signed by the parties. Consequently, Article 113 or 115 does not apply to the suit, but Art. 120—*Harbhaj Mal* v. *Diwan Chand*, 102 P.R. 1915, 32 I.C. 88 (89). But in another Punjab case it has been remarked that if the parties sign the arbitrators' award in token of their acceptance and thus merge the award into a new contract between themselves, the claim may be regarded as one for compensation for breach of contract (Article 115)—*Radha Kishen* v. *Delhi Cloth Mills*, 32 P. R. 1913. 16 I.C. 804. But this remark was merely an *obiter*, because the parties did not sign the award in this case.

But where the award does not merely decide the right or title of the parties, but distinctly provides for *something* to be done, a suit based upon the award is virtually one to enforce specific performance of the thing to be done; and Art. 113 would apply. For instance, where the award declared that in accordance with a compromise entered into between the parties they should transfer different portions of the disputed property to each other, a suit by one of the parties to recover the property agreed to be transferred to him, would be governed by Art. 113 and not by Art. 144—*Talewar* v. *Bahori*, 26 All. 497 (499); *Mahbul* v. *Munshi*, 32 P.L.R. 761, 135 I.C. 202, A.I.R. 1932 Lah. 34 (35). So also in *Sukho Bibi* v. *Ram Sukh*. 5 All. 263 and *Raghubar* v. *Madan*, 16 All. 3, the award directed something to be done, and Art. 113 was applied. But all these rulings have been doubted in *Kuldip* v. *Mahan Dube*, 34 All. 43 (46-48).

472. Suits based on sale:—A suit for specific performance of a contract for the sale of immoveable property and for possession is governed by this Article and not by Art. 144, because the suit is essentially one for specific performance,

and the right to possession is merely dependent on the right to specific performance —*Mohiuddin* v. *Majlis*, 6 All. 231.

Once there is an agreement to sell immoveable property, and the vendee has done his part of the contract by paying the purchase-money, the vendor is bound to do everything necessary in order to complete the title of the vendee by executing a registered deed of conveyance under sec. 54 of the Transfer of Property Act. A suit by the vendee for execution of such a conveyance is governed by this Article— *Mya Bin v. Maung Kya*, 33 I.C. 761 (Bur.); *Maung Le Dun* v. *Ma Le*, 9 Bur.L.T. 86, 32 I.C. 573.

After the sale of a house by the defendant's father to the plaintiff's father, the former remained in possession according to an agreement in the sale-deed (dated 1880) promising to vacate the house at the end of two years from the date of sale. But the defendant's father, and after his death, the defendant, continued to be in possession of the house, and in 1893 the plaintiff brought a suit for possession of the house. *Held* that the suit was essentially a suit for possession to which the 12 years' rule of limitation would apply under Art. 139 or 144, and not a suit for specific performance of a promise to vacate the house, to which Art. 113 might apply—*Sivrudrappa* v. *Balappa*, 23 Bom. 283 (286).

Under a decree against the plaintiff's father certain villages were sold in 1883 and were purchased by the first defendant as the agent of, and at the request of, the plaintiff's father. Afterwards in 1888 the defendant agreed in writing to convey those lands to the plaintiff upon payment of Rs. 99,000. The plaintiff brought a suit in 1900 for declaration of title to and possession of those villages upon payment of such sum as may be fixed by the Court. The High Court decided that the first defendant was a trustee for the plaintiff's father and the suit was one brought by a beneficial owner for possession on payment of such sums as were due, and was not barred by any rule of limitation. But it was held by the Privy Council that the agreement of 1888 was a contract for sale and the suit was one for specific performance of the contract under Article 113—*Subbaraya* v. *Rajah of Karvetnagar*, 45 Mad. 641 (P.C.), 44 M.L.J. 740, 27 C.W.N. 408, 68 I.C. 172, A.I.R. 1922 P.C. 345.

473. **Other suits:**—Where a person who has agreed to execute a lease fails to do so, a suit by the promisee for specific performance of the agreement (*i.e.*, demanding execution of the lease) is governed by this Article, and limitation runs from the refusal of the defendant to grant the lease—*Staya Kinker* v. *Rajah Shiva Prosad*, 4 P.L.J. 447 (452), 52 I.C. 452; *Khusi* v. *Munshi*, 42 P.L.R. 194, A.I.R. 1940 Lah. 225, 189 I.C. 418. Where a contract of lease has been executed under which the lessee is entitled to be put in possession of the land leased, but he is not put in possession, and he sues for possessoin under his lease, the suit is really one for specific performance of contract. The plaintiff really asks that the contract to be put in possession of the property should be carried out. To such a suit Art. 113, and not Art. 144 is applicable—*B. Suraj Patish* v. *Mt. Atul Bibi*, A.I.R. 1935 All. 569, 1935 A.L.J. 662, 156 I.C. 894. But in *Suraj* v. *Atul*, I.L.R. (1938) All. 664, 1938 A.L.J. 561, A.I.R. 1938 All. 439 the same High Court has held that Article 144 and not this Article applies to such a suit when the lease is a registered one. The reason is that the rights acquired by the lessee are real rights which might be enforced by a suit for possession.

Where the defendant agreed to give half of the land to the plaintiff who was to help him in recovering it, and then refused to give half of the land after recovery, *held* that this was a suit for specific performance of a contract, and limitation ran when the defendant refused to deliver the land—*Shriram* v. *Babaji*, A.I.R. 1923 Nag. 47, 71 I.C. 40.

A suit by the mortgagor against the mortgagee under a registered mortgage for the balance of the consideration payable by the latter to the former, and for damages in the shape of interest for non-payment of the amount in time, is a suit for compensation for breach of contract in writing registered and is governed by Art. 116; such a suit is not one for specific performance of a contract under Art. 113—*Naubat* v. *Indar*, 13 All. 200 (204). Where a mortgage decree for sale is assigned under a registered deed, which provides *inter alia* that part of the consideration money remaining unpaid should be paid by the assignee to the assignor on the assignee realising the decree, a suit by the assignor for the amount due and interest thereon is a suit for compensation for breach of a contract falling under Art. 116 and not a suit for specific performance so as to make this Article applicable—*Sheonarain* v. *Ganga*, 1939 P.W.N. 769, A I.R. 1940 Pat 155, 185 I.C. 63. A suit for recovery of land leased to the plaintiff under an *arthamulgeni lease* is not a suit based merely on the contract in the lease to put the plaintiff in possession, but is a suit for possession based on a completed title to possession acquired by the plaintiff by virtue of the lease, and is governed by Art. 144, not by Art. 113 or 116—*Mogera* v. *Parameswara*, 31 Mad. 51. Plaintiffs who had contributed to a common fund to be utilised for family requirements, brought a suit claiming that their shares in the said fund should be determined and paid. *Held*, that the claim was one which must be dealt with according to equitable principles apart from any question of partnership and account and that the suit fell under Art. 120 and not under Art. 113 or 106—*Commercial Bank* v. *Allavoodeen*, 23 Mad. 583 (592).

A Zemindar granted a lease of certain chaukidari chakran lands to the lessee. But subsequently the lands were resumed by the Government in consequence of which the lessee lost possession. Many years after, the lands were again made over to the Zemindar by the Government. The lessee thereupon brought a suit to recover possession of those lands from the Zemindar. *Held* that the suit was one for possession, and not one for specific performance of a contract, because there was no agreement in the lease to grant a patni of these lands to the lessee in case the lands were made over to the Zemindar after resumption—*Banwari Mukunda* v. *Bidhu Sundar*, 35 Cal. 346 (349) (dissenting from *Ranjit Singh* v. *Radha Charan*, 34 Cal. 564); *Ranjit Singh Bahadur* v. *Maharaj Bahadur Singh*, 46 Cal. 173 (181) (P.C.).

A deed of exchange contained a covenant that each party would make good any loss caused to the other in case the latter was dispossessed from the lands he got in exchange, by reason of want of title of the former. The plaintiff, in a suit to which the defendant was a party, was declared not to be entitled to a portion of the land received from the defendant in exchange. The defendant refused to give the plaintiff other land in place of the land so lost to him. Thereupon the plaintiff sued the defendant for the recovery of equivalent land. *Held* that the suit was one for specific performance of the agreement contained in the exchange and was governed by this Article, the cause of action accruing from the date of the defendant's refusal—*Hari* v. *Raghunath*, 11 All 27 (F B.). But where A and B exchanged lands under a registered deed which contained the following clause: "There is no dispute in respect of the said lands: if disputes should so arise the respective party should be answerable to the extent of his private property" and A, being deprived of some of the land he got by the exchange, sued B on the above covenant for the *value of the lands* of which he was dispossessed, *held* that a suit for failure to pay money according to the contract should be regarded as a suit for compensation for breach of contract and not a suit for specific performance. The suit therefore did not fall under Article 113, but under Article 83 read with Article 116—*Srinivasa* v. *Rangasami*, 31 Mad. 452 (453). Where the parties to a deed of exchange expressly covenanted that if there should arise any dispute in the matter of enjoyment of the property exchanged, each should return to the

other what is taken, and then in execution of a decree obtained by a third party against the defendant, some of the lands obtained by the plaintiff were sold away, whereupon the plaintiff sued the defendant to recover possession of the lands given by him to the defendants. *held* that the suit was not one for specific performance of a contract under Article 113, but a suit for possession governed by Article 143—*Srinivas* v. *Johnsa Rowther*, 42 Mad. 690 (691).

A transaction whereby certain shares in a company were allotted to the defendant on the understanding that the latter was to transfer the shares to the plaintiffs on their paying him a certain sum of money, does not constitute a trust in favour of the plaintiff for any specific purpose, but an agreement which can be specially enforced; and a suit for such specific performance by compelling the registration of the share in the plaintiff's name falls under Art. 113—*Ahmed* v. *Adjein*, 2 Cal. 323.

A compromise effected in the course of a litigation between the parties is not a contract (just as an award is not a contract), and a suit for recovery of possession of land, based on such compromise is not a suit for specific performance of a contract, but a suit for possession of immoveable property, and would be governed by Art. 144, not by this Article—*Betts* v. *Mahomed Ismail*, 25 W.R. 521; *Bashewar* v. *Depi Prasad*, 20 P.R. 1913, 19 I.C. 411. But a suit for damages for breach of the terms of a compromise decree is a suit for damages for breach of contract and falls under Art. 115 —*Gopal Saran* v. *Chhakauri Lal*, 12 Pat. 792, 15 P.L.T. 197, A.I.R. 1934 Pat. 7 (9), 148 I.C. 375.

473A. Registered contract:—A suit for specific performance of a registered contract does not fall under Article 116, because that Article refers to suits for *compensation for breach* of contracts in writing registered, and does not apply to suits for *specific performance* of such contracts—*Srinivasa* v. *Rangasami*, 31 Mad. 452 (453).

474. Starting point of limitation:—The words "date fixed" in the third column does not mean merely a date by calender. The words include a date which can be ascertained with reference to an event certain to happen—*Muniswami* v. *Shamanna*, (1950) 2 M.L.J. 163, 1950 M.W.N. 412, A.I.R. 1950 Mad. 820. The question as to whether the first part of this Article is or is not applicable depends to the great extent on the language of the agreement—*Alopi* v. *Court of Wards*, A.I.R. 1938 Lah. 23, 181 I.C. 728. Time runs from the date fixed for the performance; this date must be a date expressly fixed in the contract itself which is to be specifically enforced, and not a date which the parties may have fixed by necessary implication without stating expressly what it was. If it is not expressly stated, the date of notice of refusal of performance is the starting point of limitation, as provided in the second clause of the third column—*Kashi Prasad* v. *Chhabi Lal*, 1933 A.L.J. 300, 145 I.C. 586, A.I.R. 1933 All. 410; *Khushi* v. *Munshi*, 42 P.L.R. 194. A.I.R. 1940 Lah. 225, 189 I.C. 418; *Hutchegowda* v. *Basaviah*, A.I.R. 1954 Mys. 29. Thus where an agreement between A and B provided that B would finance a litigation of A in respect of certain property and in return should get a share of the property after the passing of the decree and that in case of an appeal to the Privy Council B's share would be increased. in a suit by B against A brought three years after the decree but within three years from the date of refusal it has been held that by the agreement no date was fixed and the date of the decree could not be time fixed within the meaning of the first part as B was entitled to get the share after the decree which meant when it became unassailable—*Alopi* v. *Court of Wards*, A.I.R. 1938 Lah. 23, 181 I.C. 728. When a purchaser of a portion of a property had agreed to release it of an existing mortgage, but he fails to do so, the cause of action for a suit by the vendor on such covenant arose either on the date on which the payment was to be made or at least not later

than the date when the vendor called upon the purchaser to do so—*Chand Bibi* v. *Santosh Kumar*, 60 Cal. 761, 16 I.C. 863, A.I.R. 1933 Cal. 641.

In a suit for the specific performance of an agreement entered into in 1858 to grant pattah when required, it appeared that the plaintiffs applied to the defendants for a pattah in 1874, and in March 1875 the defendants finally refused to make the grant, and the plaintiffs thereupon instituted their suit for specific performance; it was held that limitation ran from the date (1875) when the plaintiffs had notice that their right was denied—*New Beerbhoom Coal Co.* v. *Buloram*, 5 Cal. 175. Where the plaintiff was entitled to get a transfer of a decree from the 1st defendant in case the 2nd defendant paid the 1st defendant a certain sum of money within six months from the date of the agreement, and the 2nd defendant so paid the money, it was held, in a suit brought by plaintiff for the specific performance of the contract to transfer, that as no specific date was fixed for performance, the 2nd clause of the third column applied, *i.e.*, limitation ran from the date of refusal by the 1st defendant to perform the contract, and not from the date of payment by the 2nd defendant—*Venkanna* v. *Venkata Krishnayya*, 41 Mad. 18 (22), 33 M.L.J. 35, 41 I.C. 807.

Under the second clause of the third column of this Article, specific demand by the plaintiff is necessary to make the date of refusal the starting point—*Virasami* v. *Ramasami*, 3 Mad. 87. In the absence of a date fixed for performance of the contract, time does not continue to run until there has been a demand and refusal—*Ma Ma Gye* v *Ma Nyo Po*, 1 Bur.L J. 171, A.I R. 1923 Rang. 44; *Mallikharjuna* v. *Parthasaradhi*, I.L.R. (1944) Mad. 742, (1943) 2 M.L.J. 584, A.I.R. 1944 Mad. 218.

Although a suit for specific performance may be brought within three years from the accrual of the cause of action, still if the plaintiff is guilty of laches in bringing his suit within that time (*e.g.*, if the suit is brought on the very last day of limitation), the Court, exercising its discretion with which it is vested under the Specific Relief Act, may think it right to dismiss the suit—*Mokund Lal* v. *Chotay Lal*, 10 Cal. 1061 (1068).

Effect of bar of limitation:—Although the provisions of this Article may prevent the defendant from suing for specific performance of a contract of sale, still he is not debarred from setting up his contract in defence to a suit for possession by the vendor—*Maung Po Kywe* v. *Maung Po Thin*, 7 Rang. 288, 119 I.C. 744, A.I.R. 1929 Rang. 251 (252). The principle is that rules of limitation apply to suits but not to a claim set up by the defendant in *defence*. See Note 7, *ante*.

114. For the rescission of a contract.	Three years.	When the facts entitling the plaintiff to have the contract rescinded first become known to him.

475. This Article refers to the rescission of contracts as between promissors and promisees and not to suits by third parties to have the instrument of contract cancelled or set aside, such suits being governed by Art. 91—*Bhawani* v. *Bisheshar*, 3 All. 846. The last remark is incorrect, for Article 91 does *not* apply to a suit brought by a person who was *not a party* to the instrument sought to be cancelled. See Note 420 (4), *ante*. A suit for dissolution of a partnership is not a suit for rescission of a contract, and is not governed by Art. 114 but by Art. 120—*Khorasany* v. *Acha*, 6 Rang. 198, A I.R. 1928 Rang. 160 (162), 110 I.C. 349. A suit by a plaintiff, as reversioner, to recover possession of a plot of land in an occupancy tenure from the defendant who claims under a purchase from the widow, is not a suit under this

Article, as the suit is not brought with the object of rescinding a contract, but falls under Art. 141—*Budda* v. *Khan*, 141 P.R. 1882. Where the claim to rescission of a contract is based on misrepresentation, time runs when the facts which would have entitled the plaintiff to bring a suit for rescission became known to him, on the analogy of an action for deceit—*Molloy* v. *Mutual Reserve Life Insurance Co.*, (1906) 94 L.T. 756. This Article applies to a suit for rescission of a contract to take shares from a company on the ground of fraud and misrepresentation. If during the currency of the limitation period there is delay in filing the suit such delay so long as the company has not gone into liquidation will not prevent the proceedings succeeding unless it shows waiver or abandonment or acquiescence or occasions alteration in the position of the other party—*Calcutta Celluloid Works, Ltd.* v. *Labanya*, 47 C.W.N. 421. In England a suit for rescission of contract is not subject to any law of limitation, but must be brought as soon as the plaintiff knows all the facts, with the utmost promptitude. But in this country, the Legislature has allowed a definite period of three years; and the doctrine of laches is wholly inapplicable to such suits. And although a person may be barred by this Article from bringing a suit as plaintiff for rescission of the contract, he will not be debarred from *defending* a suit brought on the contract against him, on the ground of misrepresentation—*Mohun Lal* v. *Sri Gungaji*, 4 C.W.N. 369 (388).

115. For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for.	Three years.	When the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.

476. Scope of Article:—This is a residuary Article in respect of suits on contract, and is applicable only when no other Article is appropriate—*Nand Lal* v. *Pratab Singh*, 3 Lah. 326. See also *Johury* v. *Thakoor Nath*, 5 Cal. 830 (832). Art. 115 is a general provision applying to all actions *ex contractu* not specifically provided for otherwise—*Md. Baksh Hafiz* v. *Rawalpindi Club Ld.*, A.I.R. 1935 Lah. 222. Where the liability does not account owing to the breach of a contract but arises on account of a statute this Article has no application. Thus a suit to recover license fee assessed by the Municipal Committee under sec. 180 Bihar Municipal Act, in respect of a platform erected by the defendant in his holding is governed by Art. 120 and not by this Article as the liability arises out of an obligation imposed by the statute—*Mathura* v. *Special Officer*, A.I.R. 1938 Pat. 192, 175 I.C. 86. So also, a suit to recover terminal tax is not governed by this Article but by Art. 120—*Larkana Municipality* v. *Kaloomal*, 173 I.C. 678, A.I.R. 1938 Sind 48. So also, the liability of a buyer for reasonable charges for care and custody of the goods arises under sec. 44 of the Sale of Goods Act and this Article has no application to a suit to recover such a claim—*Kamruddin* v. *The Municipal Committee*, 1950 N.L.J. 363, A.I.R. 1951 Nag. 148.

Compensation:—For the meaning of the word see Notes under section 29. The word compensation in Art. 115 as well as in Art. 116 has the same meaning as it has in sec. 73, Contract Act—*Md. Baksh Hafiz* v. *Rawalpindi Club Ld.*, A.I.R. 1935 Lah. 222.

This Article is not limited to the case of damages for breach of contract, but it is also applicable to a case of liability under a simple debt due—*Sreenath* v. *Peary Mohan*, 21 C.W.N. 479, 39 I.C. 205. The words "compensation for breach of any contract" do not restrict the operation of this Article to suits for unliquidated damages for breach of contract but they also include suits for *definite* sums of money agreed to be paid under any contract (*e.g.*, a suit against a *del credere* agent for the value of goods sold by him)—*Dukur Pershad* v. *Foolcoomaree*, 16 W.R. (P.C.) 35. In *Johury* v. *Thakoor*, 5 Cal. 830 (832), however, the word 'compensation' was interpreted in the sense of *damages* and not a specific sum of money payable by the defendant; and the same view is taken by the Patna High Court in *Gopal Saran* v. *Chhakauri*, 12 Pat. 792. 15 P.L.T. 197, A.I.R. 1934 Pat. 7 (8).

A *breach of trust* is not the same thing as a breach of contract; consequently Article 115 does not apply to a suit against a company's directors for misfeasance in the nature of a breach of trust (*e.g.*, misapplication of company's funds). The suit falls under Art. 120—*Govind* v. *Rangnath*, 54 Bom. 226, 32 Bom.L.R. 232, A.I.R. 1930 Bom. 572 (584), 127 I.C. 305.

477. Suits on contracts:—Where the defendant borrowed a motor car from the plaintiff for his private use, and while it was in his use, it met with an accident which caused considerable damage to it, a suit by the plaintiff to recover the cost of repairs fell under this Article, as it was a case of contract of bailment under sec. 151 of the Contract Act—*Holloway* v. *Holland*, 10 O.W.N. 1105, 145 I.C. 1001, A.I.R. 1933 Oudh 518 (519).

Where the defendant had agreed to pay a certain rate per acre for those lands of his which were watered by a canal of the plaintiff, a suit to recover the amount would not be one for rent (as the hire of water would not come within the definition of rent) but would fall under this Article—*Ala* v. *Sodhi*, 171 P.R 1883. On the marriage of his son the defendant caused a sum of money to be set apart in the books of his firm in the name of the first plaintiff, his son, for the purpose of making ornaments for the second plaintiff, his son's wife, but the money so set apart was not to be called for three years. It was held that the case was not one of trust or of deposit, but one falling under Article 115; that the contract between the parties was that the money should be paid when the plaintiff demanded it after three years, and that the period of limitation therefore ran from the date of the demand which date must be taken as the date of breach of contract—*Manekji* v. *Nuserwanji*, 20 Bom. 8 (13). The defendant agreed to sell to the plaintiff certain goods belonging to another person on the implied representation that he had authority from that person to sell those goods, when in fact he had none. He failed to sell those goods to the plaintiff. A suit by the plaintiff for compensation for breach of the contract falls under this Article. It is an action connected with and arising out of *contract*, and not one arising in tort, and therefore Art. 36 does not apply—*Vairavan* v. *Avicha*, 38 Mad. 275 (277). A suit for money on the basis of the terms of an *ekrarnama* on the allegation that the defendant failed to perform the obligations imposed by the *ekrarnama*, is governed by this Article and not by Art. 120 or sec. 10—*Tarak* v. *Rajani*, A.I.R. 1948 Cal. 207.

After an adjustment of accounts between the landlord (plaintiff) and the tenant (defendant), the defendant was found liable for Rs. 158 on account of rent. It was arranged that sum of Rs. 136 should be left with the defendant as deposit for payment to the superior landlord on account of rent payable by the plaintiff to the latter, and that the balance was to be paid to the plaintiff. The amount of Rs. 136 not having been paid to the plaintiff's landlord, he sued the plaintiff and obtained a

decree for Rs. 225 which was realised from the latter. The plaintiff then brought a suit against the defendant to recover the amount which he had to pay to his superior landlord. *Held* that by the arrangement between the landlord and tenant for the payment of Rs. 136 to the superior landlord, the amount ceased to be rent, and the claim for recovery of the amount which the plaintiff had to pay to the superior landlord is one for damages under this Article and not for rent under Article 110—*Lachmi Missir* v. *Deoki Kuar*, 19 C.W.N. 174, 19 I.C. 752.

When the parties had agreed on the 2nd April 1905 that a settlement of partnership accounts between them should be made upon a certain basis and the final adjustment took place on the 20th August 1906 and entries to that effect were made in the books on that date but not signed by the parties, and a suit was brought on the 6th April 1908 to recover the amount due on such adjustment, *held* that the suit was governed by Article 115 or 120, and as the adjustment of 20th August 1906 gave rise to a fresh cause of action from that date, the suit was not barred—*Jalim Singh* v *Choonee Lall*, 15 C.W.N. 882 (887), 11 I.C. 540. See also *Mohamad Kassam* v. *Raghavan*, A.I.R. 1954 T.C. 203. A settlement of account between partners of a dissolved partnership accompanied by a promise to pay the amount found due affords a fresh cause of action and a suit filed within three years of that cause of action is within time and is governed by this Article—*Bajranglal* v. *Anandilal*, I.L.R. (1944) Nag. 101, 1944 N.L.J. 99, A.I.R. 1944 Nag. 124.

Where a judgment-debtor paid a portion of the decree-amount to the decree-holder out of Court, but the latter took out execution without giving credit for it, a suit by the judgment-debtor to recover the amount paid by him out of Court and for damages is governed by Article 115—*Ganpat* v. *Kirparam*, 79 P.R. 1892; *Gopala Swami* v. *Nammalwar*, 36 M.L.J. 176, 48 I.C. 810. A suit by a broker to recover commission on certain sales is governed by this Article; it is not a suit for wages governed by Art. 102—*Sushil* v. *Gauri*, 39 All. 81 (84). But a suit by a servant of the Crown to recover arrears of pay is governed not by this Article but by Art. 102 as the word "wages" covers salary also—*Province of Punjab* v. *Tarachand*, 1947 F.L.J. 56, A.I.R. 1947 F.C. 23, (1947) 2 M.L.J. 389 F.C., 49 Bom L.R. 697. A suit by a purchasing agent for money due for the purchase of stores for Government is governed by this Article—*Doya Narain* v. *Secretary of State*, 14 Cal. 256.

Articles 115 and 116 are meant to *particular and specific contracts* that are broken. A suit under sec. 235 of the Indian Companies Act by an official liquidator against the auditor and the directors calling upon them to make good a large sum of money on the ground that as between themselves they have allowed the money of the Company to be mis-spent, is not governed by Article 115 or 116 but by Art. 120—*In re Union Bank*, 47 All. 669, 23 A.L.J. 473, A.I.R. 1925 All. 519. See also *Govind* v. *Rangnath*, 54 Bom. 226, 32 Bom.L.R. 232, A.I.R. 1930 Bom. 572 (584, 585).

A suit by a share-holder to recover dividend is governed not by this Article but either by Article 116 or Article 120, as when the dividend is declared it becomes a debt and is only payable to a person whose name is registered when the dividend is declared —*Sri Sri Hariseswar Idols* v. *Khorooriah Majojill Zemindary Syndicate Ltd.*, 48 C.W.N. 693.

As to suits against a carrier for compensation for non-delivery or short-delivery of goods, see Notes 309 and 312 under Articles 30 and 31.

A suit for damages for use and occupation against a tenant holding over may fall under this Article—*Madar* v. *Kader Moideen*, 39 Mad. 54 (56). In *Viswanathan* v. *Balarami*, (1948) 2 M.L.J. 542, 1948 M.W.N. 761, A.I.R. 1949 Mad. 421 the Madras High Court has held that this Article is the only Article applicable to such a case.

The reason is that the basis of the action is an implied contract and not either on tort or a statutory obligation. The Allahabad High Court has however held that this Article has no application to such a suit as the liability of the tenant to put the lessor into possession of the property on the determination of the lease is a statutory liability and this Article does not provide for breach of such a liability or statutory duty—*Sukhdei* v. *Lachmi*, 1946 A.L.J. 305; *Partap* v. *Ramdhan*, A.I.R. 1946 All. 447, 224 I.C. 201.

A suit for rent based on a registered *kabuliyat* is governed by this Article and not either by Art. 116 or Art. 120—*Madan* v. *Radha*, 1942 A.L.W. 659.

In the case of a suit against the Government in respect of a breach of a contract which is required to comply with the formalities provided by sec. 175 (3), Government of India Act of 1935, time does not begin to run till the date the contract is signed as required by that Act, and the Article applicable to such a suit is Article 115—*India Trader Corporation* v. *Union of India*, A.I.R. 1957 Cal. 153.

Suit based on compromise decree:—A compromise decree has got the features and characteristics both of a compromise and a decree; and the question really is whether the present suit is based on the declaration contained in the compromise *decree* or is a suit based on the *contract* as contained in the compromise. This must be decided according to the facts of each case. Where a compromise decree declares the right of a party to obtain money found due on taking accounts, a suit for the monies found due is a suit based on the *decree* and does not fall under Art. 115, because the suit is not on a contract between the parties. The proper Article is Art. 120—*Arunachalam* v. *Raja Rajeswara*, 22 L.W. 195, A.I R. 1925 Mad. 1260. 91 I.C. 338 (341). But where the suit is one for compensation for breach of a term of a *compromise* which has been embodied in a decree, it is governed by Art. 115 and not by Art. 120; and the fact that the compromise has been merged in a decree none the less makes it a contract within the meaning of Art. 115—*Gopal Saran* v. *Chhakauri*, 12 Pat. 792, 15 P.L.T. 197, A.I.R. 1934 Pat. 7 (9), 148 I.C. 375. Where a dispute between the proprietor of certain land and his lessees, with regard to the mineral rights, was settled by a decree in terms of a written compromise entered into by the parties to the suit, under which the lessees were liable to pay to the proprietor a specific royalty on the amount of coal raised, *held* that a suit for recovery of the royalty was governed by Art. 115 as being a suit based upon the agreement of compromise. The agreement did not cease to be an agreement because it was confirmed by a decree—*Smith* v. *Kinney*, 2 Pat. 749 (752), A.I.R. 1924 Pat. 231, 81 I.C. 298.

Suit for money lent payable within fixed time:—A suit to recover money lent with interest upon an agreement that the loan should be repaid within a fixed time, (*e.g.*, within one year) is governed by this Article and not by Article 57—*Rameshwar* v. *Ram Chand*, 10 Cal. 1033; *Ramasami* v. *Muttusami*, 15 Mad. 380. See Note 355 under Article 57.

A owes money to B for which he executes a hundi in favour of B on C. C accepts the hundi and obtains a discharge subsequently by executing a document in favour of B. C sues A. The cause of action arises only when C obtains a discharge from B and not from date of acceptance of hundi by C. Art. 115 is applicable—*Bodh Ram* v. *Devi Das, Hari Chand*, A.I.R. 1936 Lah. 668, 38 P.L.R. 276, 163 I.C. 928.

Suit for Malikana:—A suit for *malikana*, where the plaintiffs do not seek to enforce the charge upon the land, is governed by Art. 115, in as much as the claim in such a case arises out of a *quasi*-contract created by law—*Kallar* v. *Ganga*, 23 Cal. 998. If the suit is one to enforce the charge on the land, Art. 132 applies.

A suit for compensation for wrongfully withholding payment of *malikana* is governed by Art. 115; the plaintiff is entitled to damages upon each annual sum in arrear only for three years prior to suit—*Mahamaya* v. *Ramkhelawan*, 15 C.L.J. 684, 15 I.C. 911.

Suit against surety:—A borrowed a sum of money from the plaintiff on a promissory note payable on demand, and the defendant had guaranteed the repayment of the loan if A made default in payment. It was held that the suit against the surety fell under this Article, and the cause of action arose on the same date as it arose against the principal debtor, *viz.*, the date of execution of the promissory note—*Brojendra Kishore* v. *Hindusthan Co-operative Insurance Society*, 44 Cal. 978; *Sreenath Roy* v. *Peary Mohan*, 21 C.W.N. 479, 25 C.L.J. 91, 39 I.C. 205.

Suit by official liquidator to recover unpaid calls of forfeited shares:—A suit by the official liquidator, after the winding up of a company, to recover the unpaid calls from a shareholder whose shares had been forfeited before the winding up of the company, is governed by this Article. As the shareholder ceases to be a member of the company, on forfeiture, his liability to pay future *calls* is gone, and all that is left is a new liability to pay the company "all moneys which at the date of forfeiture were presently payable by him to the company in respect of the shares." Such person is liable to pay the unpaid calls not as a contributory, but as a debtor to the company. This gives the company a fresh cause of action, and the period of limitation for a suit to enforce this new obligation begins to run from the time the shares are forfeited—*Maneklal* v. *Suryapur Mills Co., Ld.*, 52 Bom. 477, 30 Bom.L.R. 549, A.I.R. 1928 Bom. 252 (253), 110 I.C. 33; *Bishambhar* v. *Agra Electric Stores Ld.*, 54 All. 541, 1932 A.L.J. 354, 140 I.C. 502, A.I.R. 1932 All. 342 (343).

Breach of implied contract:—The expression 'implied contract' is used in this Article in the sense in which it is understood in English law. The Contract Act and the Limitation Act are not statutes *in pari materia*, and it should not be assumed that Article 115 is confined to cases of what would be implied contracts according to the definition given in sec. 9 of the Contract Act. The result of confining it to such cases would be that where a suit is instituted against the principal and an agent together and relief is claimed against them in the alternative according as the act was authorised or not by the principal, a different period of limitation would be applicable against each of them, though the obligation arises out of the same transaction. This could not have been intended by the Legislature—*Vairavan* v. *Avicha*, 38 Mad. 275 (278).

A suit by a member against the District Council to recover travelling allowance which the latter has undertaken to pay by its resolution is governed by this Article as there is a breach of implied contract to pay—*Mritunjoy* v. *District Council*, I.L.R. (1946) Nag. 392, 1946 N.L.J. 358, A.I.R. 1947 Nag. 153. Where by a resolution the Municipality gives permission to a person to collect the tolls of the market on his paying a certain amount and on the failure to pay the said amount the Municipality brings a suit to recover the said amount it was held that there was an implied contract to pay and this Article applied—*Ganesh* v. *Jawad*, 17 Pat. 277, 19 Pat.L.T. 653, A.I.R. 1938 Pat. 429, 177 I.C. 272.

Where a Municipal Committee continues to hold a cattle fair on other's land from year to year, an inference can be drawn that there was an implied contract between the Committee and the land-holder that the Committee should pay the owner and the owner should allow the Committee to hold the fair. A suit therefore, for compensation not received is governed by this Article and not by Art. 39 or Art. 120—*Municipal Committee* v. *Kanshi*, A.I.R. 1938 Lah. 267, 178 I.C. 49.

A suit for recovery of money in respect of realisation by the decree-holder of the

decretal dues twice over is a suit for damages for breach of an implied contract by the decree-holder to get the payments certified and not to execute the decree and is governed by this Article or possibly Art. 97—*Jagat* v. *Parmeshwar*, 28 Pat. 974, A.I.R. 1951 Pat. 348.

A suit for compensation for the subsidence of plaintiff's tank, caused by the removal of pillars of coal in the coal mine belonging to the defendant, falls under this Article, as it is a suit based on an implied covenant running with the land that the surface-owner had the inherent right of support from the underground mines—*Jagannath* v. *Kali Das*, 8 Pat. 776, A.I.R. 1929 Pat. 245 (246, 247), 120 I.C. 626; and the period of three years ran from the time when specific injury was caused (sec. 24), *viz.*, when the subsidence took place—*Ibid.*

Where a doctor is engaged to treat a patient without any arrangement being made at the time as to his fee, there is an implied contract to pay the fee, and a suit by the doctor to recover his fee is governed by this Article—*Hurish* v. *Brojonath*, 13 W R 96; *Bareda Kant* v. *Court of Wards*, 1931 A.L.J. 949, A.I.R. 1931 All. 752 (753), 133 I.C. 537; and the cause of action arose when the doctor demanded the fees and the patient promised to pay the money but did not pay; or at any rate, on the date of the last visit; if the patient died of the illness, then the period began to run from the date of such death—*Baroda Kant* v. *Court of Wards*, supra. A suit by the doctor to recover the price of medicines supplied to the patient falls under the more specific Article 52 and not under Art. 115—*Baroda Kant* v. *Court of Wards*, supra.

The Madras High Court has held in *Venkatarama* v. *Zamindar of Sivagiri*, (1947) 1 M.L.J. 173, A.I R. 1947 Mad. 457, 1947 M.W.N. 151 that this Article has no application to suit for recovery of advocate's fees but in *Shri Gobind* v. *Milap*, 43 P.L.R. 97 the Lahore High Court has taken a contrary view and has held that a suit by a legal adviser for his remuneration for services rendered on the basis of an *express agreement* with the client is governed by this Article and not by Article 120.

A suit by some of the proprietors of a village against the *lambardar* for an account of the profits of the village is governed by this Article, or Article 89, and not by Art. 120; because in so far as the proprietors permit the *lambardar* to collect rents and manage the village on their behalf, he is an agent and as such bound by an implied contract to render an account at the end of each agricultural year. Limitation runs from the date when the account ought to have been rendered under the implied contract—*Anantram* v. *Ganeshram*, 4 P.L.J. 304 (305), 51 I.C. 733.

The plaintiff sued the defendant who had married the plaintiff's deceased brother's widow to recover, by way of compensation, the money expended by his deceased brother's family on the marriage, founding his claim upon a custom of the Jats of Ajmere, whereby a member of that community marrying a widow is bound to recoup the expenses incurred by her deceased husband's family on his marriage. It was held that this was a suit for compensation for breach of an implied contract, and it fell under this Article—*Madda* v. *Sheo Baksh*, 3 All. 385.

Where a mortgage, which is not validly registered contains a covenant for payment of certain amount by the mortgagee to a prior mortgagee and no date is fixed for such payments, the default in payment by the mortgagee must be taken to have occurred on the very date the mortgage is executed; and the express covenant to pay is turned, after its breach, into an implied covenant to the mortgagor himself and a breach of it gives rise to a cause of action to the mortgagor at once and such a suit is governed by this Article—*Gouri* v. *Nathu*, A.I.R. 1951 All. 589.

Where in a suit for assessment of a fair and equitable rent and compensation for

use and occupation the tenants are willing to pay a reasonable rent and dispute only the figure at which a reasonable rent should be fixed, it cannot be said that the tenants are guilty of breach of implied contract to pay reasonable rent and therefore this Article does not apply—*Manindra* v. *Baramdi*, A.I.R. 1940 Cal. 400, 190 I.C. 631.

478. Successive breaches:—In a suit for breach of a contract to be performed at different times, the period of limitation must be calculated from each breach of contract as it arises. Where there is a contract for performing certain duties in each of several years, each breach of the contract is a complete cause of action, and damages are recoverable for each separately—*Mahi Sahu* v. *Fordes*, 6 W.R., Act X, 61; *Rhotas Industries Ltd.* v. *Maharaja of Cossimbazar China Clay Mines*, I.L.R. (1951) 1 Cal. 420.

Upon failure to pay the principal and interest upon the day appointed for such payment, a breach of the contract to pay is committed, and the fact that the money subsequently remains unpaid does not constitute successive breaches within the meaning of this Article—*Mansab Ali* v. *Gulab Chand*, 10 All. 85.

Successive breaches happen in those cases only in which there is a promise to perform periodically, such as payment of rent or of annuity; continuing breach applies only to contracts obliging one of the parties to adopt some given *course* of action during the continuance of the contractual relation—*Raghubar* v. *Jaij Raj*, 34 All. 429 (431); U. N. Mitra's Limitation, p. 304.

Where a decree-holder does not certify a payment made to him out of Court by the judgment-dobtor, and applies for execution without giving credit for such payment, a suit by the judgment-debtor for any damage he may have suffered by the decree-holder's neglect to certify and by the proceedings in execution, is one for breach of the implied promise to certify the payment to Court and is governed by this Article. The filing of the execution petition in itself gives a cause of action, though no money may have been realised, and successive applications will give rise to successive breaches and fresh cause of action. If money is subsequently realised that will give rise to a further breach of the covenant and a fresh cause of action—*Gopalasami* v. *Nammalvar*, 36 M.L.J. 176, 48 I C. 810.

479. Continuing breach:—Where the lessor fails to give delivery of possession of a portion of the land demised to the lessee on account of the obstruction by a person claiming under a paramount title, the breach, whether it be considered as a breach of a covenant to deliver possession or of a covenant for quiet enjoyment, occurs once for all on the date of failure to deliver possession, and is not continuing but complete and final; consequently, the period of limitation for a suit by the lessee for damages for breach of the covenant commences to run from the date of such failure and not from the close of the term of the lease—*Secretary of State* v. *Pemmaraju*, 40 Mad. 910 (919), 30 M.L.J. 575, 35 I.C. 254.

Specific injury:—See 8 Pat 776 cited under "Breach of implied contract," *supra*.

Part VII—Six years.

116. For compensation for the breach of a contract in writing registered.	Six years.	When the period of limitation would begin to run against a suit brought on a similar contract not registered.

479A. Scope:—The Limitation Act has drawn a broad distinction between

occur in Article 115 do not find a place either in the first column of Article 116 or in unregistered and registered instruments. The words "not specially provided for" which the third column after the words "not registered" and the conclusion is that if the instrument is registered, Article 116 will apply in spite of the fact that a special provision has been made in some other Article in respect of a similar instrument not registered—*Tricomdas* v. *Gopinath*, 44 Cal. 759 (767) (P.C.); *Mohamad Mazaharal* v. *Mahamad Azimuddin*, 27 C.W.N. 210 (214, 215), 73 I.C. 17; *Ram Raghubir* v. *United Refineries Ld.*, 9 Rang. 56, 134 I.C. 737, A.I.R. 1931 Rang. 139 (144); on appeal, *Ram Raghubir* v. *United Refineries*, 11 *Rang.* 186 (P.C.), 37 C.W.N. 633, 142 I.C. 788, A.I.R. 1933 P.C. 143; *Munshi Alauddin* v. *Tomizuddin*, A.I.R. 1937 Cal. 587. Therefore a suit to recover royalties due under a registered lease is governed by Art. 116 and not by Article 110—*Tricomdas* v. *Gopinath*, 44 Cal. 759 (767) (P.C.), 44 I.A. 65. See also *Ram Rachhya* v. *Raghunath*, 8 Pat. 860, A.I.R. 1930 Pat. 46 (49) (suit *held* governed by Art. 116 and not by Art. 111); *Lakhpat* v. *Durga*, 8 Pat. 432, A.I.R. 1929 Pat. 388 (390) (suit governed by Art. 116 and not by Art. 97).

The word 'compensation' in this Article need not be restricted to a suit for unliquidated damages and can be held to include a claim for a definite sum payable under the terms of a contract—*Ganappa* v. *Hammad*, 49 Bom. 596, A.I.R. 1925 Bom. 440; *Tricomdas* v. *Gopinath*, supra; *Ram Raghubir* v. *United Refineries Ld.*, supra. The term 'compensation' is wider than the term 'damages'; it includes all claims whether they sound in debt or in damages. The expression 'compensation' is not ordinarily used as equivalent to damages although compensation may have to be measured by the same rule as damages. The word signifies that which is given in recompense, as equivalent rendered; it is commonly used to mean something given or obtained as an equivalent—*Md. Mazaharal* v. *Md. Azimuddin*, 27 C.W.N. 210 (216), 73 I.C. 17, A.I.R. 1923 Cal. 507.

The word 'compensation' not only applies to cases in which a specified sum of money due on a registered bond is sued for, but also applies to cases where the vendee having agreed to apply a portion of the consideration-money to the payment of a previous debt due by the vendor to a third person, fails to make that payment, in consequence of which the vendor himself has to pay his creditor and then brings a suit to recover the money from the vendee—*Ram Rachha* v. *Raghunath*, 8 Pat. 860, A.I.R. 1930 Pat. 46 (50), 122 I.C. 244; See also *Ishri Prasad* v. *Muhammad Sami*, 19 A.L.J. 81, 60 I.C. 829, A.I.R. 1921 All. 133; *Raghubar* v. *Jaij Raj*. 34 All. 429.

The word 'contract' in the Article means a contract express or implied'; the words 'express or implied' used in Article 115 should be read into Article 116. It will therefore include an *implied* contract, *e.g.*, a covenant of title and quiet possession which is implied in a deed of sale under sec. 55 (2) of the Transfer of Property Act. A suit by a vendee for return of purchase money owing to the defect of title of the vendor is governed by this Article—*Ganappa* v. *Hammad*, supra; *Hanwant* v. *Chandi*, 51 All. 651, 1929 A.L.J. 433, A.I.R. 1929 All. 293 (295); *Shankarro* v. *Bhujangras*, A.I.R. 1937 Nag. 246. See also Note 484 *post*.

If the covenant is neither express nor can be implied from the terms of a sale-deed, this Article has no application. Thus, a property was sold by B to A, and it was stipulated that out of the consideration money A should discharge a mortgage decree on the property in favour of C, the amount of which was stated to be Rs. 16,000. But afterwards the decree was amended and the decretal amount was raised to Rs. 23,000, which A had to pay in order to release the property. A thereupon sued B for Rs. 7,000 (the difference between Rs. 23,000 and Rs. 16,000). It was held that in the absence of an express covenant in the sale-deed, it could not be implied that B

was liable to pay any amount in excess of Rs. 16,000, and the suit could not be deemed a suit for compensation for breach of any implied contract. Article 116 therefore did not apply—*Bidhu Bhusan* v. *Umesh*, 57 Cal. 683, 51 C.L.J. 538, A.I.R. 1930 Cal. 568 (572), 128 I.C. 183.

This Article applies where the breach is committed by the *defendant*. If the contract goes off on account of a breach committed by the *plaintiff*, a suit brought by him under sec. 65, Contract Act, to recover the money paid by him under the contract, is governed by Art. 97 and not by Art. 116—*Anant* v. *Sarup*, 26 A.L.J. 492, A.I.R. 1928 All. 360 (363).

480. Registered contract:—It was held in an earlier Madras case that the word 'registered' in the Article must be read as defined in the General Clauses Act, sec. 3 (45). Under that section the term 'registered' was held to include documents registered under any special law, such as the Companies Act, Copyright Act, as well as documents registered under the Registration Act. Therefore, a suit by a shareholder against a company registered under the Companies Act to recover dividends was governed by this Article as the right to the dividends arose out of the *contract* between the shareholders and the members of the Company which is embodied in the registered memorandum and articles of association—*Ripon Press and Sugar Mills Co. Ld.*, v. *Venkatarama*, 42 Mad. 33 (34, 35), 35 M.L.J. 253, 48 I C. 903. But this decision has afterwards been overruled by the Full Bench in *Rama Seshayya* v. *Tripurasundari Cotton Press*, 49 Mad. 468, 50 M.L.J. 520, 94 I.C. 515, A.I R. 1926 Mad. 615 (Full Bench Reference on appeal from 46 M.L.J. 563, A.I.R. 1924 Mad. 721), where it has been held that the relation between a shareholder and the company is *not a contractual relation*, and a suit by a shareholder of a limited company for recovery of arrears of dividend is a claim for a *debt*, and as the Limitation Act does not specially provide for such suit, Article 120 would apply. The Judge of the Full Bench further remarked that the word 'registered' in this Article should be interpreted in the ordinary sense of registration under the *Registration Act*, and the deposit of the Memorandum and Articles of Association with the Registrar of Joint Stock Companies did not amount to registration. This Full Bench decision appears to be the correct statement of the law, and the case of 42 Mad. 33 was decided upon a misunderstanding of sec. 3 (45), General Clauses Act. The word "registered" is defined in that section as follows: "Registered" used with reference to a document shall mean "registered in British India under the law for the time being in force *for the registration of documents*." But the Indian Companies Act cannot be called a "law for the registration of documents"; it is the Indian Registration Act which answers to that description; moreover, the officer who is appointed under the Companies Act is a Registrar of Joint Stock Companies, and *not of documents*, and the Articles of Association deposited with the Registrar of Companies cannot be said to be "registered" under the law in force for the registration of documents. And so the Bombay High Court was of opinion that a suit by an official liquidator of a company against a shareholder did not fall under Art. 116—*Maneklal* v. *Surjapur Mills Co., Ld.*, 52 *Bom.* 477, 110 I.C. 33, A.I.R. 1928 Bom. 252 (256, 258). In a later case of the same High Court, however, it has been said that the word 'registered' in this Article includes Articles of Association registered under the Indian Companies Act, and is not confined to registration under the Registration Act; but it has also been observed that a suit against the directors of a company does not fall under Art. 116, as it is not strictly speaking a suit on a *contract*, because the *whole of the contract governing* the relationship of the company to its directors is not in writing registered, but *part* only, *viz.*, that which is contained in the Articles of Association. Art. 120 applies to the suit—*Govind* v. *Rangnath*, 54 Bom. 226, 32 Bom.L.R. 232, A.I.R. 1930 Bom.

572 (584); 127 I.C. 305. The same High Court has subsequently held in the Full Bench case of *Lalita* v. *Tata Iron and Steel Co.*, I.L.R. (1940) Bom. 165, 42 Bom. L.R. 57, A.I.R. 1940 Bom. 97, that the words "writing registered" include a document registered with the Registrar of Joint Stock Companies under the Indian Companies Act. A suit by a share-holder of a company for dividends payable under the Articles of Association is governed by this Article or by Article 120. The Sind Court takes the same view as the Madras Full Bench; see *Karachi Bank* v. *Shewaram*, 143 I.C. 713, A.I.R. 1933 Snd 103 (108). The Calcutta High Court has held that a suit by a share-holder to recover dividend is governed either by this Article or Art. 120—*Hariseswar* v. *Khoraoriah Majolil Zemindary Syndicate Ltd.*, 48 C.W.N. 693. In England, however, the relation between a company and its shareholders is treated as a *contractual relation*, and the moneys (e.g.. dividends) due from a company, in pursuance of its Articles of Association, to its members to whom share-certificates have been issued under the company's seal, are treated as specially debts, since the Articles rank as a deed between the company and its members. See *Lightwood*, p. 196. In India also, it has been held in an Allahabad case that the relation between a company and its directors is a contractual relation constituted by the Articles of Association: see *In re Union Bank*, 47 All. 669, cited in Note 317 under Art. 36.

A suit instituted not by a shareholder but by a purchaser in Court auction of the shares of a company, to recover the arrears of dividends in respect of those shares, is governed by Article 120, and not by Article 116—*Ramaseshayya* v. *Tripurasundari Cotton Press*, supra.

Where a document is registered in a particular Registration Office through the perpetration of fraud on the Registration Law, it can not be treated as a registered document—*Inderdeo* v. *Ramlal*, 18 Pat. 429, 19 P.W.N. 268,, A.I.R. 1939 Pat. 502.

481. Suit on registered bond:—Where the plaintiffs are given under a registered instrument a right of suit for recovery of their share of profits collected by the defendants if the plaintiff's share is not paid to them, a suit for recovery of the profits is governed by Art. 116—*Kir Girwar Singh* v. *Ram Sarup*, A.I.R. 1935 All. 945. A suit is none the less a suit for *compensation* for breach of contract in writing registered, within the meaning of this Article, although it has been brought for recovery of a *specified* sum of money on a registered bond or other contract—*Gonesh* v. *Madhavrav*, 6 Bom. 75; *Ram Narain* v. *Ohindra*, 17 C.W.N. 369, 13 I.C. 440, 15 C.L.J. 17; *Girijanand* v. *Sailajanand*, 23 Cal. 645 (663); *Challaphroo* v. *Banga*, 20 C.W.N. 408, 22 C.L.J. 311; *Seshayya* v. *Annamma*, 10 Mad. 100; *Rathnasami* v. *Subramanya*, 11 Mad. 56; *Ram Baksh* v. *Moghar*, 86 P.R. 1881; *Collector of Etawah* v. *Beti Maharani*, 14 All. 162; *Nistarini* v. *Chandi*, 12 C.L.J. 423, 8 I.C. 788; *Susil* v. *Gouri*, 39 All. 81. This Article applies to a suit to recover money on the basis of a registered simple bond wherein a day is specified on which the debtor would pay the loan and the suit, if within six years of the day on which the debtor had contracted to repay the loan, would be within time—*Bhubaneshwar* v. *Satyadeo*, A.I.R. 1940 Pat. 74, 186 I.C. 850.

This Article applies to a suit against an infant on a registered bond given for necessaries, but in such a case it is requisite that the consideration for which the bond is given should be proved, and then the bond becomes a registered contract which binds the infant—*Sham Charan* v. *Chowdhury Debya Singh*, 21 Cal. 872.

482. Suit on instalment bond:—This Article is applicable to a suit on a registered instalment bond, notwithstanding the express provisions of Art. 74. The present Article is intended to apply to all contracts in writing registered, whether

there is or is not an express provision in this Act for similar contracts not registered —*Din Doyal* v. *Gopal*, 18 Cal. 506; *Narayana* v. *Gopi*, 11 C.W.N. 903.

483. Suit on personal covenant in mortgage:—This Article and not Article 132, applies to a suit by a mortgagee against the mortgagor to recover money on the basis of the *personal covenant* in the mortgage, and time runs from the date when the money becomes due under the mortgage—*Raghubar* v. *Lachmin*, 5 All. 461 (462); *Kameshar* v. *Raj Kumari*, 20 Cal. 79 (84) (P.C.); *Miller* v. *Ranganath*, 12 Cal. 389; *Rathnasami* v. *Subramanya*, 11 Mad. 56 (59); *Rahmat* v. *Abdul*, 34 Cal. 672 (675); *Ram Narayan* v. *Nand Kumar*, 25 O.C. 164; *Ram Narain* v. *Odindra*, 17 C.W.N. 369, 13 I.C. 440; *Dinkar* v. *Chhaganlal*, 38 Bom. 177 (181); *Ram Chandra* v. *Jairam*, 22 Bom. 686 (690); *Ratnasabapathi* v. *Daivasingamoni*, 52 Mad. 105 (F.B.), 56 M.L.J. 10, A.I.R. 1929 Mad. 53 (58, 59), 116 I.C. 817; *Chengalamma* v. *Veeraraghava*, 55 M.L.J. 506, A.I.R. 1928 Mad. 1124 (1126), 114 I.C. 340; *Umapada* v. *Haripada*, 35 C.W.N. 1030 (1031), 53 C.L.J. 520; *Dharanidhar* v. *Indra Narayan*, 36 C.W.N. 117 (118); *Kishen* v. *Raghunath*, 51 All. 473, A.I.R. 1929 All. 139 (141), 116 I.C. 488; *Kaloo* v. *Sundarabai*, 95 I.C. 707, A.I.R. 1926 Nag. 449; *Jai Indra* v. *Khairati*, 4 Luck. 107, 113 I.C. 489, 5 O.W.N. 836, A.I.R. 1928 Oudh 465 (468); *Sheo Dass* v. *Kunj Behari*, 5 O.W.N. 1128, 114 I.C. 813; *Suraj Baksh* v. *Munnoo*, 6 O.W.N. 974. A suit by a mortgagee against the mortgagor, on a personal covenant contained in a registered deed on mortgage, to recover the amount remaining due after the mortgaged property has been sold is governed by Art. 116—*Vasanji* v. *Eruchshaw*, A.I.R. 1935 Bom. 203, 37 Bom.L.R. 170, 59 Bom. 634, 156 I.C. 286; *U. Sein* v. *U. San*, 1938 Rang.L.R. 35, A.I.R. 1937 Rang. 484. In a recent Privy Council case it has been held that the suit is governed by Article 66—*Ganesh Lal* v. *Khetramohan*, 5 Pat. 585 (P.C.), 53 I.A. 134, 31 C.W.N. 25, A.I.R. 1926 P.C. 56, 95 I.C. 839. But, as pointed out by the Indian High Courts, it is not clear whether the mortgage in that case was validly and properly registered; and it was unnecessary for the Judicial Committee to decide whether the 3 years' rule (Art. 66) or six years' rule (Art. 116) applied, as in either case the suit was barred, having been brought 10 years after the due date of the mortgage. . See *Ratnasabapathi* v. *Daivasigamoni* and *Chengalamma* v. *Veeraraghava*, supra. In *Lalubai* v. *Narain*, 6 Bom. 719 (F.B.) (overruling *Pestonji* v. *Abdul Rahiman*, 5 Bom. 463) it was held that a suit for a simple money decree on a mortgage was governed by Article 132. But this Bombay Full Bench case must be deemed to have been over-ruled by the Privy Council case of *Ramdin* v. *Kalka*, 7 All. 502 in which their Lordships have laid down that Article 132 applies only to suits brought for money charged upon immoveable property for the purpose of recovering it *out of the property* so charged.

In this Privy Council case (7 All. 502, at p. 505) the Judicial Committee had made an inadvertent remark that a suit for recovery of money personally from the mortgagor (under a registered mortgage) must be brought within the same period of limitation as a suit on a bond for money, viz, *three* years. This ruling cannot be supported, and from the fact that no cases are referred to in the judgment, it would appear that none were cited in the argument, and that the Privy Council consequently were not aware of the current of decisions in India"—*Starling*, 5th Ed. p. 363. In the Bombay case of *Dinkar* v. *Chhaganlal*, 38 Bom. 177 (181), Shah J. observes: "With regard to the observations of *Ramdin* v. *Kalka*, I may say that having regard to the facts of that case the only point which arose for decision was whether for the purposes of personal liability the period of 12 years under Art. 132 applied to the case. There was no point in that case as to whether the period of limitation would be three years or six years. Therefore the observations in the case of *Ramdin* v. *Kalka* about the shorter period of three years being applicable were not necessary

for deciding the appeal." Where, however, such a mortgage bond is executed by an agriculturist a suit so far as the claim for personal decree is concerned is not governed by this Article but by sec. 72 of the Dekhan Agriculturists Relief Act—*Gurappa* v. *Madwalappa*, 41 Bom L.R. 832, A.I.R. 1939 Bom. 392.

This Article applies to a suit for enforcement of a personal covenant to pay contained in a mortgage, which is void *ab initio* and the suit is within time if brought within six years as prescribed in this Article—*Nisar* v. *Mohan*, 67 I.A. 431, I.L.R. (1940) Kar (P.C.) 419, 73 C.L.J. 121, 43 Bom.L.R. 465, 1941 A.L.J. 316, 1941 M.W.N. 1, A.I.R. 1940 P.C. 204.

Where a mortgage-deed containing a personal covenant is registered in a particular Registration Office through the perpetration of a fraud on the Registration Law, the document can not be treated as a registered document even as regards the personal covenant for purposes of this Article—*Inderdeo* v. *Ramlal*, 18 Pat. 429, 1939 P.W.N. 268, A.I.R. 1939 Pat. 502.

A claim for personal decree in a suit for sale of the mortgaged property is barred by time where the bond provides that the mortgage money shall be paid when damanded and the suit is brought more than six years from the date of the bond but within six years from the notice of demand—*Venkataswami* v. *Ramalingam*, I.L.R. (1945) Mad. 758, (1945) 1 M.L.J. 233, A.I.R. Mad. 157 (F.B.)

If a sale held in execution of a mortgage-decree under O. XXXIV, r, 5, C. P. Code is insufficient to satisfy the mortgage-debt, an application for a supplementary decree under O. XXXIV, r. 6, is governed by the rule of limitation prescribed by this Article; that is, if the mortgage suit had been brought within six years from the date on which the mortgage-money became payable, the application is in time; but if the suit had been brought more than six years after the mortgage-amount became due, the application for the supplementary decree is barred—*Bahadur* v. *Abdul*, 43 C.W.N. 38, 68 C.L.J. 109, A.I.R. 1939 Cal. 26. See Note 692, under Art. 181, under heading, "Application under O. 34, r. 6."

When a mortgagee is deprived of his security, under a decree of a Civil Court, he is entitled to proceed personally against the mortgagor; such a suit is governed by Article 116, and limitation runs from the date of deprivation of the security and not from the date of the mortgage—*Maung Yan* v. *Maung Po*, 3 Rang. 60, 89 I.C. 56, A.I.R. 1925 Rang. 223. So also where the mortgagee is deprived of the security on account of the mortgagor's default in paying land revenue and the sale is confirmed by the Revenue member, the mortgagee is entitled to bring a suit for personal decree against the mortgagor, and such a suit is governed by this Article and is within time if brought within six years from the date of the Revenue member confirming the sale —*Prabhakar* v. *Chandrakant*, I.L.R. (1943) Nag. 422, 1943 N.L.J. 159, A.I.R. 1942 Nag. 178. Where the mortgagee's remedy against the mortgagor personally is barred, it is also barred against his surety or representatives—*Kaloo* v. *Sunderbai*, A.I.R. 1926 Nag. 449, 95 I.C. 707.

Where a registered instalment mortgage bond contained a covenant that in case of default in payment of an instalment the mortgagee would be entitled to take possession, and that if there be failure in delivering possession, the mortgagee would be entitled to recover the entire amount, from the person or the mortgaged property or the other property of the mortgagor, a suit to recover the mortgage-money *personally* from the mortgagor upon failure of the mortgagor to pay an instalment, was a suit for compensation for breach of contract under this Article and was in time if brought within 6 years from the date of the default—*Collector* v. *Dawan*, 30 All. 400 (402). An instalment mortgage bond executed in 1909 provided that the mortgage amount

was to be repaid by nine annual instalments, and contained a stipulation that if there was default in the payment of any instalment, the mortgagee would be entitled to demand the full amount secured by the bond. Default was made in the very first instalment in September 1909, and the mortgagee brought the present suit on 13th January 1920 (*i.e.*, more than 6 years after the first default) to recover the money personally from the mortgagor, *Held* that the suit was not barred in respect of the instalments that fell due within six years of the date of the suit, *viz.*, the instalments from September 1914 to 1917. The fact that the suit was not brought within six years from the default did not bar the entire claim, because it was left to the *option* of the creditor to demand the entire amount on default of payment of an instalment, and it was not obligatory on the creditor to bring a suit for realisation of the entire amount as soon as a default was made in the payment of an instalment —*Ramsekhar* v. *Mathura*, 4 Pat. 820, 90 I.C. 249, A.I.R. 1925 Pat. 557; *Bahadur* v. *Abdul*, 43 C.W.N. 38, 68 C.L.J. 109, A.I.R. 1939 Cal. 26. See also the Privy Council decision of *Lasa Din* v. *Gulab*, 7 Luck. 442, cited in Note 554A under Art. 132.

Where the stipulation for payment of interest in a mortgage bond does not constitute an independent agreement and is no more than a part of the contract for payment of principal, the mortgagee cannot get a personal decree for interest in a case where his suit for enforcement of personal remedy in respect of the principal is barred. But if the convenant for payment of interest is an independant and separate agreement, the breach of such covenant will give rise to a separate cause of action independently altogether of the cause of action arising on a breach of the covenant for payment of principal. A suit instituted within six years of such breach is within time in view of the language of this Article—*Kidar* v. *Sarajuddin*, I.L.R. (1945) Lah. 355, 47 P.L.R. 358, A.I.R. 1946 Lah. 97 (F.B.).

Other suits on mortgage:—

A suit by a usufructuary mortgagee for refund of the mortgage money on account of the mortgagor's failure to put the mortgagee in possession of the property is a suit for breach of the mortgagor's liability to give possession, imposed by sec. 68 of the Transfer of Property Act, and is governed by this Article—*Umichaman* v. *Ahmed*, 21 Mad. 242. Where the mortgagee under a usufructuary mortgage containing a covenant that the mortgagee would pay annually the peshkush to Government and on his default the mortgagor pays the same in order to prevent the property from being sold by the Government, a suit by the mortgagor to recover the amounts paid during six years immediately preceeding the suit is governed by this Article as he is entitled to rely on the mortgage-deed notwithstanding the passing of the final mortgage-decree— *Duraiswami* v. *Venkata*, 50 L.W. 889, A.I.R. 1940 Mad. 233.

Where a mortgage-deed is executed by the father in a Mitakshara joint family, under circumstances that it is not binding on the sons, the mortgage cannot be enforced against the mortgage-security; the mortgagee would be entitled only to a money decree against the sons, and the suit falls under this Article—*Surju Prasad* v. *Golab Chand*, 27 Cal. 762 (767). But if it is executed under circumstances that the debt becomes binding on the sons, (*i.e.*, if the debt is incurred for the purposes of the family, and not for immoral purposes) it will be enforceable against the estate, and the suit will undoubtedly fall under Article 132—*Maheswar*, v. *Kishun Singh*, 34 Cal. 184 (190). Where a mortgage is executed by the father partly for payment of antecedent debts and partly on receipt of cash payment, the mortgage will bind the minor son's interest in the property so far as the antecedent debt is concerned, but with regard to the cash advance, though the minor son will not be bound by the debt as a mortgage debt, his interest in the joint family property will be liable for debt and his

interest is liable to be sold in execution of a money decree against the father. This liability can be enforced even in a suit brought against the son after the death of the father. In the case of a mortgage which is registered the period of limitation for a suit against the son for a money decree is the same as for a suit against the father, *viz.*, six years from the date of the mortgage under this Article—*Gulam Khaja* v. *Shivlal*, 40 Bom.L.R. 381, A.I.R. 1938 Bom. 295.

A suit by a mortgagor to obtain from the mortgagee the amount expressed in a registered mortgage-deed to have been advanced but which was not paid by the mortgagee, together with damages for non-payment, is governed by this Article and not Art. 113, because the withholding of payment of the mortgage-money by the mortgagee to the mortgagor would amount to a breach of contract, and the suit to recover the money is nothing other than a suit for compensation for damages caused by the breach of contract, and in the absence of any specific provision to the contrary, time will run from the date of execution of the mortgage-deed—*Naubat* v. *Indar*, 13 All. 200 (204).

If a mortgage-deed is registered by a Registering Officer within whose jurisdiction the mortgaged property is not situate, the deed will be treated as a simple registered money-bond; and a suit for money based upon the bond will fall under this Article—*Joginee* v. *Bhoop*, 29 Cal. 654 (663). A contrary view has been taken in *Inderdeo* v. *Ramlal*, 18 Pat. 429, 1939 P.W.N. 268, A.I.R. 1939 Pat. 502 where it has been held that such a document will not be treated as registered document. The Allahabad High Court has taken the same view and has held that where a mortgage is not validly registered, it must be taken to be unregistered for all purposes direct and indirect, and this Article can have no application to a suit on such mortgage—*Gouri* v. *Nathu*, A.I.R. 1951 All. 589.

Where it was declared that certain property could not be sold in execution of a decree obtained by the plaintiff on foot of his mortgage-deed, and the decree thereby became infructuous, and a suit for a simple money-decree having been barred on that date, the plaintiff sued for damages for breach of covenant for indemnity contained in the mortgage-deed, it was held that the suit was governed by Article 116, and not by Article 62 or 97—*Zia-uddin* v. *Akbar*, 1932 A.L.J. 317, 136 I.C. 829, A.I.R. 1932 All. 358 (360).

Where a mortgagor covenants to deliver possession to the mortgagee before a certain date and to pay rent at a certain rate till then and fails to do so and the mortgagee sues for possession and compensation, the suit is governed by this Article and will be in time if brought within six years from the date fixed for delivering possession, when the breach occurred—*Daulat* v. *Raghbir*, 1940 O.W.N. 875, 190 I.C. 721.

483A. Interest after due date:—Where there was no stipulation in a mortgage-deed to pay interest after the day fixed for the repayment of the mortgage-money, it was held by the High Courts in India that the mortgagee could not claim *interest* after the time fixed for repayment of the mortgage-money, but could claim only *damages* in lieu of interest as long as the mortgage-money remained unpaid after the due date, that the damages were not a charge on the mortgaged property under Article 132, and that a suit for the recovery of such damages fell under Article 116 and must be brought within six years from the due date of the mortgage—*Bhagwant* v. *Daryao*, 11 All. 416 (420); *Narindra* v. *Khadim Hossein*, 17 All. 581 (587); *Gudri Koer* v. *Bhubaneshwari*, 19 Cal. 19 (25); *Golam Abbas* v. *Mahomed Jaffer*, 19 Cal. 23 (Note); *Badi Bibi* v. *Sami Pillai*, 18 Mad. 257 (262); *Thayar* v. *Lakshmi*, 18 *Mad.* 331 (334); *Mansab Ali* v. *Gulab Chand*, 10 All. 85. A Full Bench of the Calcutta High Court has laid down that though a mortgage bond contains no stipulation for payment of interest

after the due date, the mortgagee is entitled to *interest* for six years. That is, the Court awarded *interest* (and not merely *damages*) but held that the claim for interest was governed by Art. 116—*Moti Singh* v. *Ramohari*, 24 Cal. 699 (703) (F.B.).

But the question has been settled by the Privy Council in the case of *Mathura Das* v. *Raja Narindar*, 19 All. 39 (50) (P.C.), 23 I.A. 138, (on appeal from 17 All. 581) where their Lordships held that even though the mortgage-deed did not expressly stipulate for payment of interest after due date, the mortgagee was entitled to claim post-diem interest *as interest* (and not merely *damages*) and that the claim for such interest was not governed by Article 116 (but by Art. 132). In this case the mortgage was dated 17th February 1880, and the mortgage-money was payable with a certain rate of interest 'within a year.' The mortgagee sued on his mortgage in June 1890. Their Lordships held that the mortgagee should be granted the usual mortgage-decree for the principal with *interest up to the date of the decree*. The Calcutta High Court has also held in another case that although there is no stipulation for payment of interest after the due date of the mortgage, the Court is entitled to allow interest at a reasonable rate after the due date under the provisions of the Interest Act, until the final order for sale. And this interest is to be recovered from the property in the same way as the mortgage-money—*Bikramjit* v. *Durga Dayal*, 21 *Cal.* 274 (278). That is Art. 132 would apply to the claim for interest.

A mortgage-bond stipulated that interest at a certain rate should be paid annually and there were no words limiting this liability to the time fixed for the payment of the principal; it appeared from the evidence that interest had been paid for several years after the due date; it was held that the interest was a charge on the property, and that the claim for interest fell under Art. 132—*Vithoba* v. *Vigneshwar*, 22 Bom. 107 (110, 111).

484. Breach of covenant of title and quiet possession:—Where the vendor sold under a registered sale-deed a property of which he was not in possession, and even afterwards failed to secure possession to the purchaser owing to his (*vendor's* defect of title, or where the vendor at first got possession under the sale-deed but was subsequently dispossessed by a *person claiming* a better title, *held* that a covenant of title and quiet possession being implied in every transaction of sale, under sec. 55 (2) of the Transfer of Property Act, the failure to give possession to the purchaser must be regarded as a breach of contract in writing registered, and a suit by the purchaser for refund of his purchase-money would be governed by this Article (and not by Art. 97); time runs from date when it is found that the vendor had no title or when the purchaser is dispossessed of the property in consequence thereof (and not from the date of sale)—*Krishna* v. *Kannan*, 21 Mad. 8; *Ganappa* v. *Hammad*. 49 *Bom.* 596, A.I.R. 1925 Bom. 440, 89 I.C. 59. See also *Arunachala* v. *Ramasami*, 38 Mad. 1171; *Pirbhu* v. *Wazirbai*, 11 N.L.R. 186, 31 I.C. 877; *Chidambaram* v. *Sivathasamy*, 15 M.L.J. 396; *Ramdhan* v. *Purshottam*, 22 N.L.R. 49, A.I.R. 1926 Nag. 109; *Kashi Rao* v. *Zabu*, 28 N.L.R. 31 (F.B.), A.I.R. 1932 Nag. 5 (7, 9); *Multan Mal* v. *Budhumal*, 45 Bom. 955 (960); *Muhammad Siddiq* v. *Muhammad Nuh*, 52 All. 604, 1930 A.L.J. 653, A.I.R. 1930 All. 771 (775), 124 I.C. 185; *Sigamani* v. *Munibadra*, 49 M.L.J. 668, A.I.R. 1926 Mad. 255, 91 I.C. 514. The period of limitation in a suit for damages for the breach of covenant of quiet possession commences to run from the date of the actual dispossession and not from the time when title to the property terminates by reason of the absence of authority of the vendor either initial or supervining to transfer what he has purported to transfer—*Gulabchand* v. *Suryajirao*, 52 Bom.L.R. 614, A.I.R. 1950 Bom. 401. Where a purchaser pleads two causes of action (1) breach of covenant of title, (2) breach of an express covenant of quiet enjoyment, he is pleading quite clearly

that his cause of action dates from the date of dispossession—*Bhagirathi* v. *Rambaran*, 1941 N.L.J. 48, A.I.R. 1941 Nag. 169. See also *Note* 436 under Art. 97. A suit by the vendee for refund of purchase money owing to infirmity of title of the vendor is in substance a suit based on a registered document and can be regarded as a suit for breach of a contract (*e.g.*, implied contract under sec. 55, Transfer of Property Act); such a suit is governed by Art. 116, and if Art. 116 does apply, then it is quite immaterial to consider whether the case falls under some other Article (*e.g.*, Art. 97)—*Lakhpat* v. *Durga*, 8 Pat. 432, A.I.R. 1929 Pat. 388 (390), 177 I.C. 654 (following *Tricomdas* v. *Gopinath Jai*, 44 Cal. 759 P.C.); *Chandrawatibai* v. *Valabdas*, 25 S.L.R. 173, 133 I.C. 76, A.I.R. 1931 Sind 141 (142). A suit for compensation by a vendee who has been deprived of the property purchased by him in consequence of a defect in the title of the vendor is governed by Art. 116. The starting point of limitation is the time when the contract of which the breach is complained of was broken—*Jawahar Ram* v. *Jhingurilal*, A.I.R. 1935 All. 786, 1935 A.L.J. 929, 156 I.C. 177. This Article applies to a suit for refund of purchase money even in a case where the vendee was aware of the defect of the vendor's title and the contract was found to be void *ab initio*—*Saraswatibai* v. *Madhukar*, I.L.R. (1950) Nag. 467, 1950 N.L.J. 145. Where a sale-deed contained an express convenant that in the event of the purchaser losing part of the property sold owing to the defect of title of the vendor or to any other cause, he would be entitled to a refund of the proportionate part of the purchase-money, a suit for such refund, upon failure to get possession of a part of the property was governed by Art. 116 and not by Art. 97—*Mul Kunwar* v. *Chattar Singh*, 30 All. 402. Similarly, where a sale-deed set out that the property was unencumbered, and there was a covenant that if the purchaser was dispossessed of any part of the property, he would get a refund of a proportionate part of the purchase-money, a suit for such refund upon his being dispossessed of a part of the property by a prior incumbrancer fell under this Article and not Art. 97, and must be brought within six years from the date of dispossession—*Ram Jaggi* v. *Kauleshar*, 30 All. 405 (Note). Where a vendor does not disclose the existence of a prior mortgage, and the vendee is dispossessed by the prior mortgagee, the cause of action for a suit by the vendee for breach of covenant of title arises on the date of dispossession, and not on the date of conveyance—*Alagarappa Reddiar* v. *Alagirisami*, A.I.R. 1935 Mad. 636, 68 M.L.J. 588, 1935 M.W.N. 375, 41 L.W. 728, 156 I.C. 843. Where the vendor agrees to pay off the subsisting mortgage on the property with the consideration money of the sale of the property and on his failure to discharge the debt the vendee is dispossessed of the property as a result of the suit by the mortgagee, a suit by the vendee for damages is governed by this Article as the suit is one for breach of the covenant for quiet possession and the starting point of limitation is the date of dispossession—*Muthu* v. *Mottayan*, (1942) 2 M.L.J. 617, 1942 M.W.N. 687, A.I.R. 1943 Mad. 150. A registered deed of sale executed in 1905 recited: "If there is any dispute in respect of the property by relations and others, we (vendors, shall settle them at our own expense and we shall be bound to carry out this sale without obstruction." The son of one of the vendors sued to set aside the sale as regards the share of his father, and obtained a decree in 1913 for possession of that share. Thereafter a suit was brought by the vendee in 1917 for recovery of the part of the purchase-money corresponding to the share of the property lost to him. *Held* that the suit was one for compensation for breach of covenant of title and was governed not by Article 97 but by Article 116; the period of limitation ran from the date when the covenant was broken (the date of the decree of 1913 or the date of dispossession in pursuance of that decree) and the suit was not barred—*Sistla Subbayya* v. *Pach Pitchamma*, 43 M.L.J. 64, 68 I.C. 190, A.I.R. 1923 Mad. 28. In an Allahabad case, the learned judges followed the Privy Council decision of *Hanuman* v. *Hanuman*, 19 Cal. 123 (P.C.) and applied Article 97 instead of Article 116—*Kundan* v. *Bisheshar*, 50 All. 95, A.I.R. 1927 All. 734, 103

I.C. 165. But this ruling has been disapproved of in a recent case of the same High Court—*Hanwant* v. *Chandi*, 51 All. 651, 1929 A.L.J. 433, 119 I.C. 243, A.I.R. 1929 All. 293 (295). Where in such a case a registered *ekrarnama* is executed by the mortgagor after dispossession expressly covenanting to pay damages for the period of dispossession at the time of redemption can not be used as set off in a suit for redemption of a usufructuary mortgage brought after six years from the date of execution of the *ekrarnama*. The effect of the *ekrarnama* is to extend the period of limitation for a further period of six years under this Article—*Sheobachan* v. *Madho*, A.I.R. 1952 Pat. 73.

The defendant as the Karnavan of a tarwad executed for consideration an ekrar granting a license to the plaintiff for cutting trees in a forest belonging to the tarwad. In a subsequent suit it was decided that the *ekkarar* was not binding on the tarwad and the plaintiff was restrained from cutting trees. The plaintiff thereupon sued to recover the money advanced under the *ekrar*. *Held* that as the license was neither a sale nor a lease of immoverable property within the definition of those terms under the Transfer of Property Act, a covenant for title and quiet enjoyment could not be implied under sec. 55 (2) or section 108 (*c*) of that Act, and consequently the suit could not be treated as one for compensation for breach of a registered contract under section 116, but that the suit fell under Article 62 or 97—*Mammikutti* v. *Puzhakkal*, 29 Mad. 353 (357, 358).

Where a registered deed of sale contained a covenant that if the land actually conveyed proved to be less than the land purported to be conveyed, or if the profits of the property proved to be below a certain amount stated in the deed of sale, the seller would refund a proportionate amount of the purchase-money, a suit for such refund was held to fall under this Article and not under Art. 65—*Kishen Lal* v. *Kinlock*, 3 All. 712; *Amanat* v. *Ajudhia*, 18 All. 160.

485. Suit for unpaid consideration:—Where under a registered sale-deed, the vendee agrees to pay, out of the consideration money, a debt due by the vendor to his (vendor's) creditor, but the vendee not having made the payment, the vendor himself pays his creditor, and then brings a suit to recover the amount from the vendee, *held* that the suit falls under Art. 116; and time runs not from the date of the sale-deed nor from the date when the fact of non-payment comes to the knowledge of the vendor, but from the date when the vendor himself pays the money and incurs loss—*Ram Rachhya* v. *Raghunath*, 8 Pat. 860, 122 I.C. 244, A.I.R. 1930 Pat. 46 (50); *Abdul Qadir* v. *Bilas Kaur*, 14 Lah. 646, 34 P.L.R. 734, 144 I.C. 362, A.I.R. 1933 Lah. 793; *Gulzari Mal.* v. *Maghi Mal*, 14 Lah. 380, 141 I.C. 435, A.I.R. 1933 Lah. 109 (111); *Navamaninadar* v. *Vedamanicka*, 56 Mad. 724, 144 I.C. 550, A.I.R. 1933 Mad. 424; *Makund Lal* v. *Bhola*, 1931 A.L.J. 985, 131 I.C. 683, A.I.R. 1931 All. 419; *Ammanibai* v. *Anant*, 33 Bom.L.R. 136, 133 I.C. 267, A.I.R. 1931 Bom. 365; *Bhanji* v. *Govind*, 29 N.L.R. 298, A.I.R. 1933 Nag. 379; *Brahamdeo* v. *Jaikishun*, A.I.R. 1941 Pat. 452, 193 I.C. 172; *Sia Sakhi* v. *Ramautar*, A.I.R. 1950 Pat. 21; *Ram Saran* v. *Somari*, I.L.R. 34 Pat. 568, A.I.R. 1956 Pat. 277. Where in such cases on account of the deficiency of sale proceeds to satisfy the mortgage-decree, the mortgagee obtains a personal decree against the mortgagor for the deficiency and if the mortgagor, who is compelled to pay the balance to the mortgagee brings a suit against the vendee for damages for breach of contract, this Article applies and the suit if brought within 6 years of the date of payment by the mortgagor is not barred —*Gouri* v. *Ramlal*, A.I.R. 1947 Pat. 11, 223 I.C. 248. Where a subsequent mortgagee having agreed with the mortgagor to apply a portion of the consideration money towards payment of a prior mortgage fails to do so, in consequence of which the prior mortgagee brings a suit for sale and the mortgagor has to pay the amount to avert the sale, *held*

that a suit by the mortgagor to recover the amount from the subsequent mortgagee falls under this Article—*Ishri Prasad* v. *Md. Sami*, 19 A.L.J. 81, 60 I.C. 829, A.I.R. 1922 All. 133. Where the vendees covenanted with the vendors to pay a portion of the consideration money to the mortgagee of the vendors, but they did not pay in accordance with the covenant, in consequence of which the mortgagee sued the vendors upon his mortgage and obtained a decree, but the vendors however *did not pay* any money under the decree, and then they brought a suit against the vendees for compensation for breach of the covenant, *held* that the suit was maintainable and it was not necessary that the vendors should have suffered any loss (*i.e.*, should have paid any money under the decree) before they could bring their suit; and that the suit was governed by this Article—*Raghubar* v. *Jaij Raj*, 34 All. 429 (431); *Tilak Ram* v. *Surat*, I.L.R. (1938) All. 500, 1938 A.L.J. 455, A.I.R. 1938 All. 297 (F.B.); *Shanti Sarup* v. *Janak Singh*, A.I.R. 1958 All. 170 (F.B.); *Mst. Mehdatunnissa* v. *Mmt. Halimathunnissa* 17 Pat. 751, 1939 P.W.N. 361, A.I.R. 1939 Pat. 194; *Gulabrao* v. *Shamrao*, I.L.R. (1948) Nag. 454, 1948 N.L.J. 463; A.I.R. 1948 Nag. 401. As to the starting point of limitation for such suits, see the cases cited in Note 490 below.

Where the vendor of immoveable properties leaves a portion of the sale consideration in the hands of the vendee to pay it to his son on attaining majority, no trust is created. The transaction is nothing more or less than a loan and a suit for recovery of the amount is governed by this Article, where the deed of sale is registered—*Kesavalu* v. *Perumal*, (1939) 1 M.L.J. 820, A.I.R. 1939 Mad. 722.

But if the vendor frames his suit as one for "enforcement of his *lien* on the property for his unpaid purchase-money, in accordance with the provisions of sec. 55 (4) (*b*) of the Transfer of Property Act, the suit falls under Article 132 and not under Art. 116, and time runs from the date of the sale-deed—*Kallu* v. *Ram Das*, 26 A.L.J. 53, A.I.R. 1929 All. 121 (122), 107 I.C. 679.

Where property has been sold and part of the purchase money remains unpaid, a suit would lie to recover it, even though no other special damage has been proved, because the balance is payable. This would be so, even though the vendor had left the money in the hands of the vendee for payment to a creditor of his but where the property transferred is subject to a charge, and money is left in the hands of the vendee to pay off that charge the vendee would of course be entitled to pay the amount in discharge of the encumbrance and not pay it to the mortgagor direct: (2) where there has been an undertaking to release the mortgagor from personal liability or to free his property from encumbrances and there is default made by the vendee, the vendor will be entitled to enforce the covenant and bring a suit for specific performance of the contract by the vendee; (3) where there is an express contract to pay the amount and there is an express or implied contract of indemnity, then under sec. 125, Contract Act, the promisee is entitled to recover all damages, csots, etc., which he may have been compelled to pay in respect of any matter to which the promise to indemnify applied. When the suit is brought for recovery of the amount, then the charge can be enforced for the payment of the amount due if the suit is within 12 years of the original sale deed, for the charge is a statutory charge created by the document and time would begin to run for enforcement of such a charge from the date of that document. If the suit is for specific performance of the contract, then it would be governed by Art. 113, Limitation Act, and time would begin to run from the date when there was failure to perform it. Similarly in the case of compensation for breach of contract under Art. 116, Limitation Act, time would begin to run from the time when the contract was broken or in case of successive breaches from the date when the last breach occurred or, in the case of a continuing breach, when it ceased. But where the claim is upon a contract to indemnify, then time would begin to run from

the date when the plaintiff is actually damnified. It is therefore impossible to say that time would begin to run against the plaintiff even before any damage was suffered by him. Of course, if the suit is brought within three years of the date when the damage was suffered but more than 12 years after the date of the original transfer, then no charge can be enforced and only a money decree can be obtained. But if the suit is brought both within three years from the date when the damage was suffered and 12 years from the date of the sale deed, the plaintiff would be entitled both to a charge and personal decree, in case the amount is not satisfied out of the property on which the charge exists. On the other hand, if the suit is brought merely for compensation for breach of contract, then, as already remarked, time would begin to run from the date of the breach—*Ram Chandra* v. *Ram Chandra*, A.I.R. 1936 All. 870.

Where a mortgage decree for sale is assigned under a registered deed, providing *interalia* that part of consideration money remaining unpaid should be paid by the assignee to the assignor on the assignee realising the decree, a suit by the assignor for the amount due and interest thereon is a suit for compensation for breach of a contract falling under this Article—*Sheonarain* v. *Ganga*, 1939 P.W.N. 769, A.I.R. 1940 Pat. 155, 185 I.C. 63.

486. Suit on breach of covenant in exchange-deed:—Where a registered exchange deed contains a covenant to indemnify, in case of either party being deprived of the property acquired by exchange the case is governed by Article 83 read with Article 116 and a suit brought by the plaintiff within six years from the date of his being deprived of some of the lands, is within time—*Srinivasa* v. *Rangasami*, 31 Mad. 452.

487. Suit on breach of covenant in lease:—A suit to recover damages for breach of a covenant in a lease, the terms of which are embodied in a registered *pattah*, is governed by this Article—*Girish* v. *Kunjo*, 35 Cal. 683 (687); *Nabin Chandra* v. *Munshi Mandar*, 6 Pat. 606, 101 I.C. 707, A.I.R. 1927 Pat. 248.

A suit for damages by the lessee against the lessor for failure on the part of the latter to put the former in possession of the leased premises, the lease being registered, is governed by Art. 116—*Zamindar of Vizianagram* v. *Behara*, 25 Mad. 587 (596); *Obedur Rahman* v. *Darbari*, 7 Lah. 423, A.I.R. 1927 Lah. 1, 98 I.C. 584, 27 P.L.R. 663. Where a registered lease is given at an annual rent and in consideration of certain premium, but afterwards it is found that the lessee is resisted in getting possession and it is found that the lessors have no right to make such a grant, the lease is void and the lessee is entitled to a refund of the money paid to the lessors, and such a suit is governed by Art. 116, and not by Art. 65 or 97—*Rajendra Narayan* v. *Lalmohan Tribeni*, A.I.R. 1936 Pat. 462. So also a suit by a lessee under a registered lease who has been dispossessed from the property for the return of nazarana paid by him to the lessor or any consequent costs or damages on the ground that the lessor had no title, is governed by this Article and the starting point of limitation is the date of dispossession—*Debi Prasad* v. *Haji*, 18 Pat. 654, A.I.R. 1940 Pat. 81. The same principle applies even where the lessee had knowledge of the defective title of the lessor and the lessee is entitled to bring a suit for refund of nazarana in terms of the covenant in the lease for refund in case of dispossession and such a suit is governed by this Article—*Ahsan* v. *Suraj*, 17 Luck 289, 1941 O.W.N. 1182, A.I.R. 1942 Oudh 82.

488. Other suits:—

Suit for rent under registered kabuliat:—See Note 467 under Art. 110.

A suit by landlord under an irredeemable *anubhavam* tenure for arrears of rent is governed by Art. 116 and not by Art. 131 and the award of arrears of rent can be

limited to a period of 6 years—*Chathanni* v. *Narayanan*, A.I.R. 1935 Mad. 682, 1935 M.W.N. 866, 42 L.W. 596, 158 I.C. 228.

A suit for recovery of arrears of rent due on a registered lease for collecting rent is governed by this Article and not by special law of limitation provided in the Bengal Tenancy Act or in the Bihar Tenancy Act as such a lease is not for agricultural purposes—*Alauddin* v. *Tamizuddin*, I.L.R. (1937) 2 Cal. 631, 41 C.W.N. 1001, A.I.R. 1937 Cal. 587; *Maheswari* v. *Dulhim*, 23 Pat. 185, 1944 P.W.N. 6, A I.R. 1944 Pat. 87 (F.B.).

A suit for recovery of arrears of rent against the assignee of a registered lease is governed by this Article. The reason is that the assignee's liability to pay is really based on the covenant to pay rent contained in the original lease which in law runs with the land—*Dwijendra* v. *Promode*, 54 C.W.N. 673, A.I.R. 1951 Cal. 251.

This article applies to a suit for recovery of rent due under a registered *mukarrari patta*—*Jangdhari* v. *Badri Narain*, 1939 P.W.N. 220, or under a registered *patni* lease unless some special or local law has laid down a different period—*Humayan* v. *Tarini*, A.I.R. 1942 Pat. 83, 196 I.C. 466; or under kanom tenure—*Krishnan* v. *Soopi*, (1947) 1 M.L.J. 32, 1947 M.W.N. 97, A.I.R. 1947 Mad. 274. A contrary view has been taken in *Madan Lal* v. *Radha*, 1942 A.L.W. where it has been held that a suit for rent based on a registered kabuliyat would be governed only by Art. 115 and not by this Article.

Suit for rent under registered kabuliat under Bengal Tenancy Act:—See Note 468 under Art. 110.

Suit for rent under registered kabuliyat under the Bihar Tenancy Act:—A mukarraridar under a registered kabuliyat entitling him to collect rent from the occupancy tenants of a village and to cultivate land in that village is himself a tenure holder, hence a suit for recovery of arrears of makarrari rent from him is governed by the period mentioned in Sch. III of the Bihar Tenancy Act, and not by this Article—*Mt. Sofiee* v. *Yusuf*, 26 Pat. 269, A.I.R. 1948 Pat. 328.

Suit against agent under registered contract:—See Note 413 under Article 89.

Suit on registered ekrar:—A suit upon a registered ekrar executed by the priest of an idol, for recovery of arrears of maintenance is governed by this Article—*Girijanund* v. *Sailajanund*, 23 Cal. 645.

Suit based on registered award:—The word 'contract' in this Article does not include an award. Consequently a suit to recover money payable under an award does not fall under Article 116, but under Art. 120—*Somjimal* v. *Tolomal*, 6 S.L.R. 148, 19 I.C. 376 (377). See also *Sukho Bibi* v. *Ram Sukh*, 5 All. 263 and *Raghubar* v *Madan*, 16 All. 3, where the award was registered but Art. 116 was not applied.

Suit on deed of release:—A suit for recovery of certain moveable property (books) under a registered deed of release, executed by the defendant in favour of the plaintiff, in which the defendant acknowledged the books to belong to the plaintiff, fell under this Article—*Rama Nath* v. *Mohesh*, 9 C.W.N. 679.

Suit on registered power of attorney:—A suit to recover money based on a registered power of attorney authorising the defendant to withdraw and receive payment on behalf of the executant of the power of attorney and pay the amount to him is governed by this Article and not by Art. 89—*Bhabani* v. *Sarojini*, I.L.R. (1943) 1 Cal. 578, A.I.R. 1944 Cal. 106.

Suit for account against partner:—A suit for account by one partner against another after dissolution of partnership is governed by Art. 106 and not by this Article,

even though the deed of partnership is registered, because a suit for account of a partnership cannot be deemed to be a suit for compensation for breach of contract—*Kothandapani v. Sreemanavedan*, 57 Mad. 378, 151 I.C. 81, A.I.R. 1934 Mad. 162; *Vairavan* v. *Ponnayya*, 22 Mad. 14. This Article cannot be stretched to cover every case in which the plaintiff's claim may in its origin be referred to a contractual relation which is expressed in a registered agreement—*Vairavan* v. *Ponnayya*, supra.

Suit on account stated:—Where a registered partnership contract binds the parties to pay the loss according to their respective shares, a suit to recover the defendant's share of the loss, on a settlement of accounts between the plaintiff and the defendants, is not governed by Article 64 (nor by Art. 106) but by Article 116—*Ranga Reddi* v. *Chinna Reddi*, 14 Mad. 465.

Suit by surety:—Where the surety is liable under a registered contract, the limitation is six years under Article 116—*Laloo Singh* v. *Sunderabai*, A.I.R. 1926 Nag. 449, 95 I.C. 707.

489. Contract signed by one party:—A contract (lease) which has been registered, is to be treated as a contract in writing registered, notwithstanding that it bears the signature of only one of the parties (*viz., the tenant only*). There is no statutory provision requiring the signature of both parties—*Girish* v. *Kunja*, 35 Cal. 683 (688); *Ambalavana* v. *Vaguran*, 19 Mad. 52; *Kotappa v. Vallar Zamindar*, 25 Mad. 50; *Zamindar of Vizianagram* v. *Behara*, 25 Mad. 587; *Chellaphroo* v. *Banga Behari*, 20 C.W.N. 408, 31 I.C. 394; *Parbati* v. *Sarup*, 50 All. 661, A.I.R. 1928 All. 313 (315), 109 I.C. 409. The Bombay High Court holds *contra* in *Apaji* v. *Nilkanta*, 3 Bom.L.R. 667. Under sec. 107 of the Transfer of Property Act (*as amended* in 1929), if a lease of immoveable property is made by a registered instrument, such instrument, or where there are more instruments than one, each such instrument must be *executed by both the lessor and the lessee.*

490. Limitation:—Limitation runs from the date when the contract is broken, or when there are successive breaches, from the date when the breach in respect of which the suit is instituted occurs, or when the breach is continuing from the date when it ceases—*Ram Narain* v. *Odindra*, 17 C.W.N. 369, 13 I.C. 440, 15 C.L.J. 17. Upon failure to pay the money due on a bond, there is but one breach of the contract, *viz.*, the non-payment on the date agreed upon; and there is no question of continuing or successive breaches during the time the money remains unpaid —*Bhagwant* v. *Daryao*, 11 All. 416 (423); *Mansab* v. *Gulab*, 10 All. 85; *Golam* v. *Mahomed*, 19 Cal. 23 (Note); *Gudri* v. *Bhubaneswari*, 19 Cal. 19 (25). See also *Raghubar* v. *Jaji Raj*, 34 All. 429, cited in Note 478 under Art. 115.

Where a party has recurring or successive causes of action, whether under the terms of the contract or by operation of law, each cause of action will give a fresh start to the period of limitation (compare col. 3 of Art. 115), and the mere fact that the party has not availed himself of the earlier cause of action will not prevent him from availing himself of the subsequent one—*Mukhdeo* v. *Harakh Narain*, 12 P.L.T. 755, 134 I.C. 609, A.I.R. 1931 Pat. 285.

A sale-deed was executed in favour of the plaintiffs in 1901 purporting to convey the property free from incombrances and containing a covenant that should any excess sum be charged against the purchasers, the other properties of the vendor would be liable for the same together with interest and costs. At the time of the sale there was a prior simple mortgage existing on the property, and the mortgagee brought a suit for sale in 1912 which was decreed in 1914. But before sale, the plaintiffs paid off the decrees in May 1915, and in July 1915 brought the present suit for recovery of the amount which they had paid on account of the mortgage together with interest.

It was held that the suit was not barred, as the cause of action arose on the date on which the plaintiffs suffered actual loss (May 1915) by reason of being compelled to pay off the decree on the prior mortgage—*Ram Dulari* v. *Hardwari*, 40 All. 605 (609).

A mortgage was executed in 1899 and part of the consideration money was left with the mortgagee to pay off a prior mortgage, it being agreed that any interest which might accrue on this sum in future would be entirely upon his shoulders. The mortgagee neglected to pay, in consequence of which the prior mortgagee sued and brought the mortgaged property to sale in 1912; and to avert that sale the mortgagor paid off the amount, and then brought the present suit in 1916 to recover damages from the mortgagee. *Held* that in as much as the mortgagee had undertaken all responsibility for further interest and could therefore pay the prior mortgage at any time, the cause of action did not accrue on the date of the mortgage in 1899, but arose when the mortgagor was actually damnified in 1912—*Ishri Prasad* v. *Muhammad Sami*, 19 A.L.J. 81, 60 I.C. 829, A.I.R. 1922 All. 133. Similarly, where the purchaser agreed to pay out of the purchase-money a certain sum due to the vendor's creditor, but no time was fixed for making the payment to the creditors, and the purchaser undertook all future liability for interest, and the purchaser not having made the payment the vendor himself had to pay his creditors, and the vendor brought a suit against the purchaser for recovery of the amount, *held* that time ran not from the execution of the sale-deed, but from the date when the vendor paid off his creditors —*Ram Rachhya* v. *Raghunath*, 8 Pat. 860, A.I.R. 1930 Pat. 46 (52), 122 I.C. 244.

In *Raghubar* v. *Jaij Raj*, 34 All. 429 (see the facts of this case stated in Note 485 *ante*) where the plaintiffs *did not suffer any loss* (i.e., did not pay any money under the mortgage-decree) and no time was fixed for payment of the mortgage-money by the vendees to the mortgagee of the vendors, it was held that limitation ran from the date of execution of the sale-deed. It was further held that the obtainment of the decree by the mortgagee against the vendors did not give them a fresh starting point for limitation. The Judge further remarked that even if the vendors had paid any money to their mortgagee under the mortgage-decree, it was doubtful whether that would have furnished a fresh cause of action to them. This decision follows the English case of *Battley* v. *Faulkner*, (1920) 3 B. & Ald. 288, 22 R.R. 390, where it is laid down that one breach of contract can only furnish one cause of action, and that any consequential damage arising from the breach gives no new cause of action. As to other cases see Note 485,

117. Upon a foreign judgment as defined in the Code of Civil Procedure, 1908 (V of 1908).	Six years.	The date of the judgment.

Foreign judgment:—See sec. 2 (6), C.P. Code.

490A. The period of limitation for a suit to enforce an *ex parte* decree obtained in a Native State runs from the date of the *ex parte* decree, and the plaintiff is not entitled to deduct the time during which the defendants were applying before the Chief Judge of that State to set aside the *ex parte* decree, for even though it is an *ex parte* decree, it is a decree capable of being enforced. Moreover, sec. 14 does not apply to proceedings taken in foreign Courts—*Hari Singh* v. *Muhammad Said*, 8 Lah. 54, 102 I.C. 523, A.I.R. 1927 Lah. 200. If in an action in a Foreign State, an appeal is preferred from the judgment of the trial Court and is dismissed, the period

of limitation for a suit in India to enforce the foreign judgment begins to run not from the date of the judgment in the trial Court but from the date of judgment of the Appellate Court—*Baijnath* v. *Vallabhdas*, 56 Mad. 591, 144 I.C. 853, A.I.R. 1933 Mad. 511 (reversing *Baijnath* v. *Vallabhdas*, 62 M.L.J. 566, 138 I.C. 648, A.I.R. 1932 Mad. 661); *Jaisukhlal* v. *Mahomed*, I.L.R. 1939 Bom. 639, 41 Bom.L.R. 1084, A.I.R. 1939 Bom. 522. The right to sue on a foreign judgment is barred after six years from the date of the judgment, and the time spent in executing the decree in the foreign country cannot be excluded—*Heera Monee* v. *Promotho*, 8 W.R. 32.

This Article deals only with the period of limitation and does not create a right to sue. In India a foreign judgment itself forms a cause of action. If a suit on a foreign judgment is filed within the time prescribed by this Article it is in time in spite of the fact that under the law of the foreign state where the decree was obtained, execution of the decree in that state is barred by time. In a suit on a foreign judgment the question whether the decree is not enforceable because it is barred by the law of limitation prevailing in the foreign state is not relevant to be considered. The law applicable to the place where the suit is brought is applicable and the law of the place where the obligation arose need not be considered—*Jaisukhlal* v. *Mahomed*, supra.

118. To obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.	Six years.	When the alleged adoption becomes known to the plaintiff.

490B. "Invalid":—In some earlier Punjab cases it was held that a distinction should be drawn between a case where an adoption is wholly unauthorised and is therefore an *absolute nullity*, incapable of creating any jural relation between the adopter and the adoptee, and a case where the act is done with authority but in an improper exercise of that authority; and it is in the latter sense that the word 'invalid' in Article 118 should be constructed. Therefore this Article is inapplicable to a case of *void* adoption (as for instance where the widow adopted without any authority from her husband)—*Karam Dad* v. *Nathu*, 86 P.R. 1905 (F.B.); *Bhagat Ram* v. *Tulsi Ram*, 144 P.R. 1892; *Muhammad Din* v. *Sardar Din*, 67 P.R. 1901. These rulings were doubted in a later case of the same Chief Court where it was held that Article 118 applied to every case where the validity of the adoption was the substantial question in issue, and the fact that it was alleged to be invalid or was inherently invalid made no difference in the matter—*Md. Naizuddin* v. *Md. Umar Khan*, 1 P.R. 1907. The ruling in 86 P.R. 1905 (F.B.) has also been disapproved of in *Nathu* v. *Rahaman*, 44 P.R. 1911, 11 I.C. 11.

491. Suit for possession:—

Under the Act of 1871:—Article 129 of Act IX of 1871, which corresponds to the present Article, ran thus: "Suit to.....set aside an adoption—Twelve years—The date of adoption or (at the option of the plaintiff the date of the death of the adoptive father." The question arose whether, the Article applied to a suit for *possession*. It was held by the Privy Council that where the plaintiff could not succeed without displacing an apparent adoption by virtue of which the opposite party was in possession, a suit by the plaintiff for possession fell under that Article. The expression 'set aside an adoption' in Article 129 applied indiscriminately to suits for possession and to suits of a declaratory nature, and it did not denote solely a suit of the latter description—*Jagadamba* v. *Dakhina Mohan*, 13 Cal. 308 (P.C.); *Mohesh*

v. *Taruck*, 20 Cal. 487 (P.C.). It should be noted in this connection that the Privy Council case of *Raj Bahadoor* v. *Achumbit*, 6 C.L.J. 12 (in which it was held that Article 129 of the Act of 1871 did not apply to a suit for possession, and which gave rise to a good deal of misconception in Indian Courts) was not a suit to set aside an adoption but was a suit brought by a reversioner for possession and for cancellation of a deed which purported to give an absolute interest to the widow, and the defendant in the suit claimed under an adoption which was one to the widow herself and not to her husband; the Privy Council held that the adoption being void, the plaintiff was entitled to claim possession, ignoring the adoption. These decisions under the old law should not be accepted as of any authority under the present Act.

Article 129 of Act IX of 1871 applied to all suits in which the plaintiff could not succeed without displacing an apparent adoption by virtue of which the defendant was in possession. That Article prescribed 12 years as the period of time within which a suit to establish or set aside an adoption might be brought and such period of twelve years began to run from the date of adoption, or (at the option of the plaintiff) from the date of the adoptive father's death. Therefore, where no suit was brought by the reversioners to set aside an adoption made by a Hindu widow, within 12 years from the date of adoption, the reversioners were not entitled to bring any further suit after the widow's death to recover the property from the defendants who were in possession by virtue of the adoption, because Act IX of 1871 did not give to a reversioner whose right to sue for possession accrued upon the death of a Hindu widow, any further time than the 12 years given by Article 129 to any plaintiff. Although under Article 141 of the Act of 1877 the reversioner might bring a suit for possession within 12 years from the death of the widow, still if the period of limitation prescribed by the Act of 1871 had already expired before the Act of 1877 came into force, it could not be revived by the latter Act—*Vaithialinga* v. *Srirangath*, 48 Mad. 883 (P.C.), 49 M.L.J. 769, 30 C.W.N. 313, 92 I.C. 85, A.I.R. 1925 P.C. 249.

Under the Acts of 1877 and 1908:—It will be seen that the language of the Article under the present Act (which is the same as in the Act of 1877) is entirely different from the language of the Article in Act of 1871; the period of limitation, the date from which it runs, and the description of the nature of the suit have all been changed; and the question is whether the alteration of the language denotes a change of law; in other words, whether the present Article will apply to a suit for possession.

In a large number of cases of the several High Courts, it has been held that by departing from the language of Art. 129 of Act IX of 1871 and by using a language in Art. 118 in the Act of 1877 which can only refer to a suit for *declaration* it is intended that this Article should apply only to suits where such *bare declarations* are sought for; it does not apply to a *suit for possession* of property, even though it may be necessary in such a suit to decide that a given adoption is invalid—*Natthu Singh* v. *Gulab Singh*, 17 All. 167 (171); *Basdeo* v. *Gopal*, 8 All. 644 (646); *Radha Dulaiya* v. *Rashik Lal*, 45 All. 1 (4) (distinguishing *Chunni Lal* v. *Sita Ram*, 34 All. 8); *Baikanta* v. *Kali Charan*, 9 C.W.N. 222 (224); *Ram Chandra* v. *Ranjit*, 27 Cal. 242 (254); *Lala Parbhu* v. *Mylne*, 14 Cal. 401 (417); *Valaga Mangamma* v. *Bandlamudi*, 30 Mad. 308; *Maharaja of Kolhapuri* v. *Sundaram*, 48 Mad. 1; *Rama Rao* v. *Venkola*, 17 M.L.J. 282; *Kalandavelu* v. *Arumugatha*, 18 I.C. 493; *Bhagabat* v. *Murari*, 15 C.L.J. 97; *Hiralal* v. *Bai Rewa*, 21 Bom. 376; *Doddawa* v. *Yellawa*, 46 Bom. 776 (F.B.); *Shah Deo Narain* v. *Kusum Kumari*, 5 P.L.J. 164; *Surjan Singh* v. *Kharak Singh*, 96 P.R. 1908; *Nathu* v. *Rahman*, 44 P.R. 1911, 11 I.C. 11; *Wazia* v. *Tattu*, 96 P.R. 1893; *Jholi* v. *Khazana*, 8 Lah. 48. A.I.R. 1926 Lah. 654. This view of law has been approved of in *Tribhuwan* v. *Rameswar*, 28 All. 727 (P.C.) and *Md. Umar* v. *Niazuddin*, 39 Cal. 418 (P.C.), and has now been confirmed by the decision of the Judicial Com-

mittee in *Kalyandappa* v. *Chanbasppa*, 48 Bom. 411 (P.C.), 26 Bom.L.R. 509, 28 C.W.N. 666, 22 A.L.J. 508, 46 M.L.J. 598 where their Lordships have distinctly laid down (at pp. 426, 427) that the language of Article 118 of the Acts of 1877 and 1908 is different from the language of Art. 129 of the Act of 1871 that the words 'a suit to obtain a declaration' are terms of art and refer to suits under sec. 42 of the Specific Relief Act for a declaratory decree that an adoption is invalid or did not take place, and that the Article applicable to a suit for *possession* of immoveable property on the death of a Hindu female is Article 141, even if it is necessary to decide in that suit whether an adoption is or is not valid. This view is again confirmed by the Privy Council in *Padmalav* v. *Fakira*, 12 P.L.T. 563, 35 C.W.N. 465 (467), 131 I.C. 758, A.I.R. 1931 P.C. 84. The same view has been taken in *Asa Ram* v. *Fatima*, A.I.R. 1939 Lah. 135, 183 I.C. 853; *Bhoga* v. *Surajpal*, A.I.R. 1951 M.B. 40; *Hariharsingh* v. *Deonarayan*, A.I.R. 1954 Nag. 319; *Vithoba* v. *Vithal*, A.I.R. 1958 Bom. 270.

But it has been held by some cases of the Bombay and Madras High Courts and the Punjab Chief Court that the altered language has made no difference in the law of limitation; that the present Article applies to every suit for possession in which the validity of the adoption is the substantial question in dispute, whether such a question is raised by the plaintiff in the first instance, or arises in consequence of the defendant setting up his own adoption as a bar to the plaintiff's success—*Srinivas* v. *Hanmant*, 24 Bom. 260 F.B. (overruling *Fannyamma* v. *Manjanna*, 21 Bom. 159); *Srinivas* v. *Balvant*, 37 Bom. 513, 15 Bom.L.R. 533; and that this Article *does* apply to a suit for possession of immoveable property where it is necessary to challenge the validity of an adoption before a right to such property can be established—*Barot Naran* v. *Barot Jessang*, 25 Bom. 26; *Chanbasappa* v. *Kaliandappa*, 41 Bom. 728; *Parvati* v. *Saminatha*, 20 Mad. 40; *Gujur Singh* v. *Puran*, 71 P.R. 1901; *Bhupa* v. *Nigahia*, 68 P.R. 1903; *Ganesha* v. *Nathu*, 20 P.R. 1902; *Ishar* v. *Partap Singh*, 38 P.R. 1907; *Muhammad Niazuddin* v. *Muhammad Umar*, 1 P.R. 1907. But all these decisions are opposed to the view taken in the above Privy Council case of *Kalyandappa* v *Chanbasappa*, 48 Bom. 411, and are no longer of any authority.

Where a suit by the reversioners for recovery of possession of property had become barred in 1874 under Article 129 of the Limitation Act of 1871, and a title to such property had been acquired by the heirs of the adopted son under sec. 28 of that Act, it could not be affected by the provisions of the later Limitation Acts of 1877 or 1908—*Somasundaram* v. *Vaithilinga*, 40 Mad. 846 (847); affirmed, 48 Mad. 883 (P.C.).

This Article does not apply where the adoption is made by the widow not to her deceased husband, but to *herself*. Such adoption does not confer any title on the adopted son, and it is not necessary for the reversioner to sue for a declaration of the invalidity of such adoption. He can bring a suit for possession, ignoring the adoption, and such suit does not fall under this Article—*Lachman* v. *Kanhaiya*, 22 Cal. 609 (614) (P.C.).

Where the suit is expressly framed as a suit to set aside an adoption and not as a suit for possession, Article 118 applies and not Article 141 or 144—*Ayyadorai* v. *Solai Ammal*, 24 Mad. 405 (408).

Adoption challenged on the ground of forgery of anumatipatra:—See *Hurri Bhushan* v. *Upendralal*, 24 Cal. 1 (P.C.) cited under Art. 92.

Suit by natural-born son:—A suit brought by the natural-born son (who was born 2 or 3 years after the adoption) during his minority, for a declaration that the adoption made by his father is invalid, and for an injunction restraining the defendant (adopted son) from interfering with the enjoyment of the property belonging to

the plaintiff, does not fall under this Article, as the injunction is the main relief sought for and the prayer for a declaration is merely auxiliary. Moreover, under Article 118, the period of limitation runs from the time when the alleged adoption becomes known to the plaintiff, but in this case the plaintiff, being a minor, could not be fixed with the knowledge of the adoption from the date of his birth. Therefore this Article cannot apply during his minority—*Sidda Reddi* v. *Deva Jayarami*, 51 M.L.J. 557, A.I.R. 1926 Mad. 1123, 98 I.C. 435.

492. Limitation:—The cause of action arises from the date on which the adoption becomes known to the plaintiff, and not from the date of death of the adoptive father—*Ram Chandra* v. *Narayan*, 27 Bom. 614; *Shrinivas* v. *Balvant*, 37 Bom. 513; *Ganga Sahai* v. *Lekhraj*, 9 All. 253 (269). Under this Article the starting point of limitation will be the time when the alleged adoption becomes known to the plaintiff. If a person who is setting up a case of adoption begins to proclaim the alleged adoption soon after the death of the adoptive father and if the person challenging the adoption is aware of such allegation, the period of limitation in such a case will begin to run immediately after the latter comes to know of the allegation even though the alleged adoption never has taken place—*Kashi* v. *Radhika*, A.I.R. 1943 Pat. 68, 205 I.C. 133. Where the fact that a claim was made on the basis of an alleged adoption was known to the plaintiff more than six years before the suit was instituted, and he himself had attained majority nearly nine years before the suit was commenced, *held* that it was barred under this Article—*Lala Jagmohan* v. *Deokinandan*, 32 C.W.N. 153 (P.C.), A.I.R. 1927 P.C. 229, 29 Bom L.R. 1386, 4 O.W.N. 832, 53 M.L.J. 301, 106 I.C. 488; *Manbhari* v. *Surti*, 40 P.L.R 660, A.I.R. 1938 Lah. 193, 180 I.C. 626. Limitation runs when the adoption becomes known to the plaintiff, and the defendant should prove clearly that the suit is barred by reason of the plaintiff having knowledge of the adoption more than six years before the date of institution of the suit. The fact that the adoption deed was registered does not lead to the presumption that the plaintiff must have had knowledge of the adoption from the date of registration of the adoption deed, as registration is not tantamount to notice, and the plaintiff cannot be expected to go on searching the register from time to time to see whether any registered deed affecting his rights has been executed—*Gulam Muhammad* v. *Mirza*, 5 Lah. 368, A.I.R. 1925 Lah. 25, 84 I.C. 174. Registration of a deed of *transfer* may amount to notice for the purposes of the Transfer of Property Act (see sec. 3, Ezplanation I of that Act), but the registration of a deed of *adoption* is not tantamount to notice to the persons affected by the adoption for the purpose of the Limitation Act.

Where the plaintiff executed a deed of adoption in which he declared that he had adopted a certain boy, and afterwards he brought a suit for a declaration that the adoption deed was void and that the adoption had in fact never taken place, the period of limitation for the suit ran from the date of the adoption deed—*Udit Narain* v. *Randhir*, 45 All. 169 (176), 69 I.C. 971, A.I.R. 1923 All. 58.

Where the reversioners of a deceased Hindu allow a suit for a declaration of the invalidity of an adoption to become barred by time under this Article, they are not entitled to sue for a declaration that a subsequent gift to the adopted son is not binding upon them, because that gift does not give them a fresh cause of action, in that it does not involve any further denial of the rights of the reversioners than was involved in setting up the adoption in the first place—*Khushal Singh* v. *Kanda*, 5 Lah.L.J. 63, 56 I.C. 931, A.I.R. 1921 Lah. 389. If the suit for a declaration that the adoption is invalid is barred by time, the plaintiff cannot elude the operation of Art. 118 by suing for a declaration that a gift made by the adoptive female in favour of the adopted son should not bind the plaintiff—*Bhoop Singh* v. *Ramji*, 31 P.L.R. 222, 121 I.C. 296, A.I R. 1930 Lah. 438 (439).

Substitute:—The contrary view taken under the peculiar circumstances of the case in *Semba Parayan* v. *Moral*, 52 M.L.J. 711, A.I.R. 1927 Mad. 674, 102 I.C. 885, has been dissented from in *Janikamma* v. *Jhattareddi*, A.I.R. 1956 Andhra 141 (F.B.).

Quaere:—In case of an adoption by a widow, if the nearest reversioner dies before the expiry of the period of limitation (6 years) for a suit to set aside the adoption, and the next reversioner, who was a minor at the date of adoption, brings a suit to set aside the adoption within three years after attaining majority (sec. 8), is the suit barred by limitation? This question was referred to a Full Bench, but not decided, as the decision was unnecessary in view of the fact that the adoption was found to be valid—*Annapurnamma* v. *Appayya*, 52 Mad. 620 (F.B.), 56 M.L.J. 760, 119 I.C. 389, A.I.R. 1929 Mad. 577.

493. Effect of limitation:—When an adoption is made by a Hindu widow without authority, it is the duty of the immediate reversioner to bring a suit for declaration within the period prescribed by this Article; and if the immediate reversioner fails to bring a suit within that period, the remote reversioner will also be barred—*Ayyadorai* v. *Solai Ammal*, 24 Mad. 405 (407); *Chiruvolu* v. *Chiruvolu*, 29 Mad. 390 (393, 411) (F.B.); *Venkatasivayya* v. *Polepeddi Adenna*, 44 Mad. 218, 39 M.L.J. 621, A.I.R. 1921 Mad. 380, 60 I.C. 98. There is a distinction between a suit to set aside an *alienation* and a suit to set aside an *adoption*. In suits to set aside alienation by a qualified owner, the immediate reversioner cannot be held to represent the remote reversioners; but in suits to set aside an adoption, the immediate reversioner ought on principle to be held to represent the remote reversioner, so that if the immediate reversioner is barred, the remote reversioner is likewise barred. The right of each and every reversioner to set aside the adoption cannot be viewed as altogether personal to him—*Chiruvolu* v. *Chiruvolu*, 29 Mad. 390 (393, 411) (F.B.). The word 'plaintiff' in col. 3 includes a person from or through whom the plaintiff derives his right to sue; therefore, if the nearest reversioner (*e.g.*, daughter) is barred, a remote reversioner (*e.g.*, daughter's son) claiming through the nearest reversioner is also barred—*Ayyadorai* v. *Solai Ammal*, supra. The Privy Council has also laid down in *Venkatanarayana* v. *Subbammal*, 38 Mad. 406, 42 I.A. 125, that a suit by a presumptive reversioner for a declaration that an adoption is invalid is one brought in a representative capacity on behalf of all the reversioners. The Madras High Court has held in *Krishna* v. *Gomathi*, I.L.R. (1945) Mad. 450, 1944 M.W.N. 582, A.I.R. 1945 Mad. 33 that these principles can not apply where specific allegations of fraud are made by a succeeding reversioner against the previous reversioner and the adopted son. There is an inherent right of action to any person who can prove that a decree which would otherwise bind him cannot be held to bind him on the ground that it was obtained by fraud. Nothing can deprive a succeeding reversioner of his present right of action based on fraud which he asserts between the adopted son and the presumptive reversioner who brought the prior unsuccessful suit. The same view has been taken by the same High Court in a subsequent case, where it has also been held that except in case of fraud, collusion or negligence of the presumptive reversioner or where he has otherwise precluded from representing reversioner the period of limitation to such suit shall start only from the date of the knowledge of the adoption by the presumptive reversioner and the fact that the reversioner next in rank is a minor or is under a disability will not stop the period of limitation from running or give him an extended period of limitation prescribed under sec. 6 of the Limitation Act—*Thiruneelakanta* v. *Velayudha*, (1951) 1 M.L.J. 355, 1951 M.W.N. 301, A.I.R. 1951 Mad. 824.

But lapse of time does not operate to give validity to an invalid adoption; and if no suit is brought by the reversionary heir within six years to obtain a declaration that the adoption is invalid, the possession by the alleged adopted son for more than

12 years during the lifetime of the widow will not be adverse to the reversioner, who therefore will not be prevented from bringing a suit for *possession* under Arts. 140 and 141 within twelve years from the date when the widow dies or when the estate falls into possession. The adoption by the widow does not impose upon the reversioner the necessity of filing a suit to have it declared invalid during the lifetime of the widow, under pain of losing the inheritance upon the widow's death—*Hari Lal* v. *Bai Rewa*, 21 Bom. 376 (379); *Basdeo* v. *Gopal*, 8 All. 644 (646); *Natthu Singh* v. *Gulab*, 17 All. 167 (171); *Lala Parbhu* v. *Mylne*, 14 Cal. 401 (417); *Muhammad Umar* v. *Muhammad Niazuddin*, 39 Cal. 418 (432) (P.C.); *Kalyandappa* v. *Chanbasappa*, 48 Bom. 411 (426) (P.C.); *Bhagwat* v. *Murari*, 15 C.W.N. 524, 7 I.C. 427, 15 C.L.J. 97; *Bapayya* v. *Akamma*, 36 I.C. 355 (Mad.); *Bangan* v. *Mahbub*, 55 P.R. 1897.

119. To obtain a declaration that an adoption is valid.	Six years.	When the rights of the adopted son, as such, are interfered with.

494. Suit for declaration, not for possession:—This Article, like the previous one, applies only to a suit for a bare declaration as to the validity of an adoption; it does not apply to a suit for *possession*, even though the plaintiff may have to establish the validity of the adoption as the basis of his claim to possession—*Jagannath* v. *Runjit*, 25 Cal. 354 (359); *Chandania* v. *Salig Ram*, 26 All. 40 (48); *Lali* v. *Murlidhar*, 24 All. 195; *Padajirav* v. *Ramrav*, 13 Bom. 160 (165); *Arjan Singh* v. *Lachhman Singh*, 81 P.R. 1914 (F.B.), 25 I.C. 429 (overruling *Ram Narain* v. *Maharaj Narain*, 3 P.R. 1904 and *Bhupa* v. *Nigahia*, 68 P.R. 1903); *Ratnasami* v. *Akhilandammal*, 26 Mad. 291 (*per Bhashyam Ayyanger*, J.). A suit under sec. 42, Specific Relief Act, for a declaratory decree that an adoption is valid or did take place is governed by Art. 119, but the Article applicable to a suit by an adoptee for possession of immoveable property on the death of a Hindu female who was in possession as the adoptive mother under an agreement, is Art. 141, even if it is necessary to decide in the suit whether an adoption is or is not valid—*Bhagirathibai* v. *Appa Dada*, 58 Bom. 280, 149 I.C. 674, A.I.R. 1934 Bom. 110. This view is in consonance with the Privy Council decision in *Kalyandappa* v. *Chanbasappa*, 48 Bom. 411, and in *Padmalav* v. *Fakira*, 12 P.L.T. 653 (P.C.), cited *ante*.

But it has been held in a Madras case that where plaintiff cannot obtain a decree for possession without a decision that an adoption is valid, the suit for possession is governed by Art. 119—*Ratnamasari* v. *Akilandammal*, 26 Mad. 291 (*per* Moore and Benson JJ.; Bhashyam Ayyanger J. dissenting). But this decision cannot stand as good law in view of the Privy Council rulings in 48 Bom. 411, and 12 P.L.T. 563, referred to above.

A suit by an adopted son for a declaration that a decree which was passed on the basis that there was no adoption is not binding on him, is virtually a suit for a declaration that his adoption is valid, under this Article, because the plaintiff cannot get the declaration he asks for, without establishing the validity of his adoption. The suit cannot be treated as one for possession governed by the 12 years' rule—*Bharma* v *Balaram*, 43 Bom. 63 (65).

495. Factum and validity of adoption:—This Article applies to all suits, in which either the factum or the validity of the adoption is denied; and the plaintiff will have to prove the factum as well as the validity of the adoption, *i.e.*, he must show, not only that the adoption *in fact took place*, but also that the adoption is valid—*Laxmana* v. *Ramapa*, 32 Bom. 7 (dissenting from *Ningava* v. *Ramappa*, 28

Bom. 94, and *Shivram* v. *Krishnabai*, 31 Bom. 80, in which it has been held that this Article is restricted to suits in which only the *validity*, and not the factum, of the adoption is questioned). "Unlike Article 118, Article 119 does not separately provide for a suit to obtain a declaration that an adoption *in fact took place*, for the simple reason that the mere *factum* of adoption will not entitle one to a legal character unless the adoption is also *valid*. A plaintiff therefore will have to sue for a declaration that his adoption is valid, whether the factum itself is denied by the defendant or the factum is admitted but the validity is challenged"—*per* Bhashyam Ayyanger J. in *Ratnamasari* v *Akilandammal*, 26 Mad. 291.

496. Interference:—The interference mentioned in the third column of this Article is an interference which must amount to an absolute denial of the status of adoption, and an unconditional exclusion from the enjoyment of rights in virtue of that status. This Article can have no application where the interference was of no greater effect than that of merely *postponing* the right of the adopted son to succeed to the property of his adoptive father—*Ningava* v. *Ramappa*, 28 Bom. 94 (101); *Maung Gyi* v. *Maung Gaing*, 1 Rang. 186, 74 I.C. 970.

The interference need not necessarily be in relation to the very property sought to be recoverd in the suit; an interference in relation to property other than that sued for would set time running—*Akliandammal* v. *Ratnamasari*, 13 M.L.J. 145.

The interference contemplated by this Article is an interference caused by the defendant in the suit, and not an interference by some third party who was in no way connected with the defendant (*e.g.*, an interference by the adoptive father of the plaintiff)—*Chandania* v. *Salig Ram*, 26 All. 40 (49).

Alienation, by means of a gift by the adoptive mother in favour of the daughter, is an interference with the rights of the adopted son—*Ponnamal* v. *Ratnamasari*, 13 M.L.J. 144.

120.	Suit for which no period of limitation is provided elsewhere in this Schedule.	Six years.	When the right to sue accrues.

497. This is called the 'omnibus' Article of the Limitation Act.

This Article is final and residuary, and the Court ought not to regard a case as coming under this Article unless clearly satisfied that it does not come under any of the other Articles dealing with specific cases—*Lala Gobind* v. *Chairman*, 6 C.L.J. 535; *Sharoop* v. *Joggeshur*, 26 Cal. 564 (F.B.); *Mahomed Wahib* v. *Mahomed Ameer*, 32 Cal. 527; *Murlidhar* v. *Ram Saran*, I.L.R. (1946) All. 633, 1947 A.L.J. 170, A.I.R. 1947 All. 256.

498. DECLARATORY SUITS:—

Where the plaintiffs (Digambari Jains) used to worship certain *Charans* (foot-prints) on a hill, and the defendants removed those *Charans* and replaced them by *Charans* of a different type obnoxious to the plaintiffs, a suit by the plaintiffs claiming relief by way of injunction and declaration is governed by Art. 120—*Hukum Chand* v. *Maharaj Bahadur*, 12 Pat. 681 (P.C.), 14 P.L.T. 556, 37 C.W.N. 1021 (1028), A.I.R. 1933 P.C. 193, 144 I.C. 346.

A suit by the purchasers of certain land who have obtained possession of the land, for a declaration of their right to have the land registered in their name in the

revenue records, is governed by this Article, not by Art. 144—*Bhikaji* v. *Pandu*, 19 Bom. 43 (45). A suit for a declaration that the defendant whose name appeared as lessee in a lease-deed had no interest in the lease and that he was only a benamidar for the plaintiff, is not one to cancel or set aside the instrument of lease under Art. 91, but one to which Art. 120 applies, and the cause of action accrues when the plaintiff's position as lessee is challenged—*Basant* v. *Chiddammi*, 35 All. 149. (See this case cited under Article 91).

The plaintiff alleged that he was the proprietor of certain land which one of the defendants had wrongfully mortgaged to the others, and prayed that, the mortgage-deed being set aside, the land might be protected from illegal foreclosure by cancelment of the foreclosure proceedings which had been instituted by the mortgagee. It was held that this was not a suit strictly for cancelling or setting aside the instrument of mortgage to which Art. 91 applied, but was rather a suit for a declaratory decree and governed by this Article—*Sobha* v. *Sahodra*, 5 All. 322. So also, where the plaintiff sued for maintenance of possession in a certain joint-family property by cancelment, so far as his interest was concerned, of a certain deed of sale by which another co-partner in the same property had purported to convey the whole to a stranger, it was held that the limitation applicable to such a suit was that prescribed by this Article and not that prescribed by Art. 91—*Din Dayal* v. *Hur Narain*, 16 All. 73. A land belonging to defendant No. 1 was mortgaged by him to defendant No. 5, and afterwards the plaintiff purchased it at a sale in execution of a certain decree against defendant No. 1; the plaintiff thereupon brought a suit for a declaration that the mortgage was fraudulent and without consideration. *Held* that the suit fell under Article 120 and not under Article 91—*Pachamuthu* v. *Chinnappan*, 10 Mad. 213. (See these cases cited under Art. 91).

A suit for a declaration by a stranger to a decree that his interest can not be affected by the decree, which is a collusive one, is governed by this Article and not by Art. 95—*Saburdas* v. *Gopalji*, 45 Bom.L.R. 526, A.I.R. 1943 Bom. 283. So also a suit for a declaration that a decree passed is null and void is governed by this article and not by Art. 91—*Mt. Sadiqa* v. *Mir Farsand*, A.I.R. 1949 Ajmer 8.

A suit for a declaration that a decree purchased in the name of the defendant who had wrongfully taken out execution of the same, had been really purchased by the plaintiff for his own benefit, and that the defendant was merely a benamdar, is not a suit for relief on the ground of fraud under Art 95 (as no question of fraud arises in the case) but is governed by this Article—*Gour Mohun* v. *Dinonath*, 25 Cal. 49 (51). A suit for a declaration that a decree passed against the plaintiff is invalid on the ground that it was passed against him when he was a minor, and that the guardian *ad litem* was grossly negligent in not properly defending the suit in which the decree wass passed, falls under this Article and time runs not from the date of the decree but from the time when the gross negligence of the guardian became known to the plaintiff —*Basavayya* v. *Bapanna*. 58 M.L.J. 349, A I.R. 1930 Mad. 173 (174), 120 I.C. 880. A suit by the heir of the founder of a *wakf* for a declaration that an alienation of the *wakf* properties by the *mutwalli* is void, brought during the lifetime of the alienor, is governed by this Article, and must be brought within six years from the date of the alienation—*Muhammad Fahimul Haq* v. *Jagat Ballabh*, 2 Pat. 391, 4 P.L.T. 675, 74 I.C. 403, A.I.R. 1923 Pat. 475. A suit for a declaration that an alienation of trust property is invalid and not binding on the trust falls under this Article and not under Article 134 which applies to a suit *for recovery of possession* of trust properties. Time runs from the date of execution of the sale-deed and not from the time when the plaintiff comes to know of the transfer—*Venkatachella* v. *Collector*, 38 Mad. 1064 (1070). But where the suit is for possession of property alienated by the trustee this Article

has no application. Such a suit is governed either by Art. 134 or by Art. 144—*Ramabai* v. *Raghunath*, 53 Bom.L.R. 883, A.I.R. 1952 Bom. 106.

A suit for a declaration that an alienation made by the karnavan of a tarwad property is not binding on the tarward, is governed by Art. 120. Time runs from the date of the alienation, and not when the plaintiff obtains knowledge of the alienation —*Ottapurakal Thazhati* v. *Pallikal*, 33 Mad. 31 (33). A suit by the plaintiffs to follow the estate of their debtor in the hands of the defendant and for a declaration that a mortgage executed by the debtor in favour of the defendant is void as against the creditors of the debtor, is governed by this Article and not by section 10—*Greender* v. *Mackintosh*, 4 Cal. 897. A suit for declaration that an alienation made by a Hindu father is not binding on the son as the same was not for legal necessity is governed by this Article—*Ram Chandra* v. *Bhagwan*, 48 Bom.L.R. 594, A.L.R. 1947 Bom. 82; *Sheo Nandan* v. *Maida*, A.I.R. 1950 Pat. 447; *Behari* v. *Dalchand*, A.I.R. 1951 Punj. 341. A suit by a Mahomedan widow against the brother of her deceased husband for a declaration of her right to inherit and possess the entire estate of her husband (in accordance with a proved local custom) falls under this Article: it is not a suit for a distributive share of property within the meaning of Art. 123—*Mahomed Riasat* v *Hasin Banu*, 21 Cal. 157 (163) (P.C.).

A suit for a declaration that water collected on the land of the plaintiff belongs to him is governed by this article and is within time if filed within six years of the date of the act of the defendant, which is the subject matter of the dispute, to avoid which the declaration is asked for. More over in such a case, so long as the defendant continues to dispute there is a recurring cause of action—*Amir* v. *Kadtu*, I.L.R. (1945) Nag. 273, 1945 N.L.J. 80, A.I.R. 1945 Nag. 106.

In a suit for ejectment in a Court of Revenue against H, he pleaded that he was entitled to remain in possession under a certain zur-i-peshgi lease, the term of which had not yet expired. The Court of Revenue treated the question thus raised as falling under sec. 199 of the Agra Tenancy Act, 1901, and directed H to file a suit in the Civil Court within three months to vindicate his right. H instituted the suit in the Civil Court after more than three months. *Held* that sec. 199 was not applicable and H was not bound to file his suit in the Civil Court within three months from the date of the order of the Court of Revenue. This was a suit for a declaration, and could be brought within six years of the accrual of the cause of action—*Suraj* v. *Hira*, 37 All. 94 (96).

A suit for a declaration that a certificate issued under the Bengal Public Demands Recovery Act is a nullity and not binding on the plaintiff is governed by this article—*Satya* v. *Province of Besgal*, A.I.R 1950 Cal. 467.

Where the suit was in substance a suit for a declaration of the proprietary title of the plaintiff to the land claimed, as well as for correction of the settlement record, *held* that the plaintiff was entitled to a declaration of his proprietary right, even if his right to demand a correction of the settlement record was lost by lapse of time; *held* also that Art. 96 was not applicable to the suit but Art. 120—*Taja* v. *Gulam*, 35 P.R. 1880; *Nathu* v. *Buta*, 27 P.R. 1881.

A suit for declaration that the defendant has no right to use the land for a purpose like starting a sugar mill as he is entitled to use the land as a *sehan darwaza* and for injunction is governed by this article and not by Art. 32—*Ram Narain* v. *Shripal*, 1937 A.L.J. 1231, A.I.R. 1938 All. 20.

A suit for a declaration that a decree in previous suit related to the present suit land and that the plaintiff has acquired title to it by that decree is governed by this Article—*Abhoy* v. *Gopinath*, 76 C.L.J. 183, A.I.R. 1943 Cal. 460.

499. Declaration of title and possession:—A suit for a declaration of title to, and of possession in, immoveable property of which the *plaintiff is in possession*, is governed by this Article and not by Article 144—*Rajani* v. *Monaram*, 23 C.W.N. 883, 53 I.C. 968; *Legge* v. *Rambaran*, 20 All. 35 (F.B.). In the Full Bench case their Lordships said (at p. 36)—"There is the widest possible difference between a suit for a declaration such as is asked for in this suit, and a suit for actual possession of immoveable property. In a suit to which Art. 144 would apply, there must be a prayer, express or implied, for the dispossession of some one from the property or from the interest in it which the suit claims. In the present suit the plaintiffs have most distinctly asserted that they are and have all along been in possession of the property. There is no one to be dispossessed from it or from any interest in it. All that they want to be removed is a cloud, which was cast upon their title." See also *Mahabharat* v. *Abdul Hamid*, 1 C.L.J. 73. A suit which is confined to a mere declaration of title and is neither in form or substance a suit for possession of immoveable property is governed by this Article and not by Art. 142 or Art. 144—*Jagajit* v. *Partab*, 1942 O.W.N. 508, 44 Bom.L.R. 868, 47 C.W.N. 38, A.I.R. 1942 P.C. 47, (1942) 2 M.L.J. 384 (P.C.),

Where the Zemindars brought a suit against the patnidars for a declaration that they were entitled to and were in possession of the underground rights in a certain mouza, and the suit was brought more than 12 years after the patnidars had worked on the minerals on a large scale *held* that the suit, taken as a declaratory one, was barred as more than 6 years had elapsed since the right to sue for the declaration accrued; and viewed as a possessory suit, the suit was also barred under Article 144 —*Satya Niranjan* v. *Ram Lal*, 4 Pat. 244 (P.C.), 6 P.L.T. 42, A.I.R. 1925 P.C. 42, 86 I.C. 289.

An order under the Land Registration Act refusing to register the applicant's name does not amount to a dispossession of the applicant and delivery of possession to the opposite party. When therefore the applicant *continues in possession*, no suit for recovery of possession lies at his instance, and a suit to have his title declared is governed by Art. 120—*Chowdhury Shamanund* v. *Rajnarain*, 11 C.W.N. 186; *Kali* v. *Bhagaban*, 1 I.C. 810. Even though in the suit for declaration there be a prayer to set aside the order of the Revenue Officer, the suit will still be governed by this Article, and not by Art. 14, because such prayer is merely a surplusage, as the Civil Court has no power to set aside an order passed under the Land Registration Act—*Luchmon* v. *Kanchun*, 10 Cal. 525 (527). Where the plaintiff does not ask to set aside any act or order of an officer of Government in his official capacity but only seeks a declaration, the suit is governed by this Article and not by Art. 14—*Abdul* v. *Secy. of State*, 19 Luck. 163, 1943 O.W.N. 118, A.I.R. 1943 Oudh 368. But where in a suit of declaration that the tenancy is not of the same nature as recorded by the Revenue Officer the real object is to get rid of the decision of the Revenue Court, this Article will not apply as it is not open to the Civil Courts to give directions to the Revenue Officers and to give a mere declaration as to the nature of the tenancy—*Gopaldas* v. *Satindra*, A.I.R. 1939 Cal. 749.

The starting point of limitation for a suit praying for a declaration of title is the date when the plaintiff's title was disputed—*Sukhdev* v. *Mathra*, 34 P.L.R. 115, 142 I.C. 606, A.I.R. 1933 Lah. 412.

The weight of authority seems to be in favour of the view that a suit for declaration of right cannot be held to be barred so long as the plaintiff has a subsisting title to the property. In such a case each invasion of right gives a fresh cause of action—*Partab Bahadur Singh* v. *Jagatjit Singh*, A.I.R. 1936 Oudh (394), 164 I.C. 118; *Midnapur Zamindary Co.* v. *Secy. of State*, I.L.R. (1939) 1 Cal. 349, 69 C.L.J. 51, 43

C.W.N. 57, A.I.R. 1938 Cal. 804; *Mohamad Bibi* v. *Shahabuddin*, I.L.R. (1940) Lah. 180, 42 P.L.R. 702, A.I.R. 1939 Lah. 428; *Rura* v. *Banta*, 40 P.L.R. 600, A.I.R. 1938 Lah. 227 (the distinction between a fresh invasion and a repetition of previous invasion is a distinction without a difference). Thus where a person interferes with the performance of duties of a lawful holder of Office in possession thereof, each interference gives rise to fresh cause of action—*Annasami* v. *Adivarachari*, I.L.R. (1941) Mad. 275, (1940) 2 M.L.J. 990, A.I.R. 1941 Mad. 81 (F.B.); *Province of Orissa* v. *Durjodhan*, A.I.R. 1951 Orissa 342. The mere act of forbearance of a previous action on the part of a person in possession cannot debar him from instituting a suit later on when a fresh invasion is made against his title which gives him an independent cause of action—*Bhairo v. Ambika*, 17 Luck. 805, 1942 O.W.N. 225, A.I.R. 1942 Oudh 374. A suit brought within six years from the last invasion of right is therefore, within time—*Dasondhi* v. *Jan Mohammad*, A.I.R. 1938 Lah. 318. Thus a suit by the plaintiff in possession for declaration of occupancy right in the land is governed by this Article and any denial of his title furnishes a fresh cause of action—*Intizamia Committee* v. *Mani Ram*, 42 P.L.R. 180, A.I.R. 1940 Lah. 154.

If however the plaintiff is not in possession and he brings a suit for declaration of title long after the same was disputed, his suit is barred—*Mehar* v. *Mehar*, 40 P.L.R. 940, A.I.R. 1938 Lah. 671.

Attachment by Magistrate:—A suit for declaration of title to property attached by the Magistrate under section 146, Cr. P. Code falls under this Article—*Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (415); and a fresh period of limitation under section 23 begins to run at every moment of the time during which the attachment continues—*Brojendra* v. *Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242; *Panna Lal* v. *Panchu*, 49 Cal. 544, 26 C.W.N. 432, 65 I.C. 200; *Jurawan* v. *Ram Sarekh*, 12 Pat. 261, A.I.R. 1933 Pat. 224 (233). But see *Yeknath* v. *Bahia*, 20 N.L.R. 195, A.I.R. 1925, Nag. 236, and *Raja of Venkatagiri* v. *Isakapalli*, supra, where it was held that the period of limitation ran from the date of attachment, and that there was no continuing wrong.

A suit to set aside an order passed under sec. 147 Cr. P. Code directing that no organised procession of certain communities should pass along certain streets until a Civil Court had declared that there was a right to do so, is governed by Art. 120. There is no continuing wrong caused by the defendants—*Punnu Nadar* v. *Kumaru*, A.I.R. 1933 Mad. 967, 69 M.L.J. 739, 42 L.W. 599.

Declaration that forfeiture is illegal:—A suit for a declaration that an order of forfeiture under section 153 of the Bombay Land Revenue Code (Act V of 1879) is illegal, is governed by this Article—*Samaldas* v. *Secretary of State*, 16 Bom. 455.

Declaration of periodically recurring right:—A suit not only to establish a periodically recurring right (*viz.*, a right to receive malikana annually pure and simple), but also to establish a right to the property itself, is governed by Article 120, not by Art. 131—*Gopi Nath* v. *Ghugwat*, 10 Cal. 697 (708). A suit by the holder of the office of mutawalli or katheeb of a mosque against the Secretary of State for India for a declaration that he was entitled to the *yeomiah* allowance as the lawful holder of office is a suit to establish a periodically recurring right attached to the office of mutawalli and is governed by Art 131 and not by this Article. The fact that the allowance does not vary from year to year does not make any difference as to the limitation applicable—*Batcha* v. *Secy. of State*, I.L.R. (1941) Mad. 587, (1941) 1 M.L.J. 374, A.I.R. 1941 Mad. 428. A suit for declaration of a right to a share in Toda Giras allowance is a suit to establish a periodically recurring right and is governed by Art. 131 and not by this article—*Narendra* v. *Ude Singji*, 49 Bom.L.R.

318, A.I.R. 1947 Bom. 451. This article applies to a suit by a jagirdar for the fixed yearly payment due to him from muafidar, inferior holder—*Ashan* v. *Durga*, 1942 A.M.L.J. 40. A perpetual right to receive year after year a particular sum of money is not a periodically recurring right, the quantum of the right is defined once for all and not varying according to the circumstances each time it accrues. So a suit to recover arrears of such sum is governed by this Article—*Kaliammai* v. *Shanmuga*, (1944) 2 M.L.J. 250, A.I.R. 1945 Mad. 20. Where the right to receive an annual allowance is not disputed but the amount only, a suit for recovery of the allowance is governed by this article—*Bhalchandra* v. *Dattatraya*, I.L.R. (1948) Nag. 401, A.I.R. 1948 Nag. 397. A suit for a declaration that the sand in the bed of a certain river was the property of the plaintiff and for compensation for removal of sand on two specified dates would be within limitation under Articles 48 and 49 if brought within three years of the wrongful taking. Even if Article 120 applies by reason of the declaration asked for by the plaintiff, the right to sue will accrue on every fresh invasion and a fresh cause of action will arise when a particular portion of sand is removed by the defendant—*Jagadish* v. *Indian Copper Corporation*, 32 Pat. 555, A.I.R. 1953 Pat. 283.

Declaration of heirship:—A suit for a declaration that the plaintiff was the daughter and heiress of the last vatandar would be governed by this Article; and the plaintiff's cause of action accrues not on the death of her predecessor but on the denial of her status by the defendant—*Tukabai* v. *Vinayak*, 15 Bom. 422.

Declaration of right to conduct festival in temple:—A suit for a declaration that the plaintiffs have the right to conduct festival in the temple and for declaration that an order passed under sec. 144, Cr. P. Code is illegal, is governed by this article—*Srinivasa* v. *Ramanuyacharyar*, I.L.R. (1941) Mad. 544, (1941) 1 M.L.J. 322, A.I.R. 1941 Mad. 498.

Declaration of invalidity of marriage:—A suit by a Parsi woman for a declaration of the invalidity of her marriage celebrated in her infancy is governed by this Article, and limitation runs from the date of her attaining majority—*Bai Shirinbai* v. *Kharshedji*, 22 Bom. 430. The right to sue accrues as soon as the wedding ceremony is performed, or at all events, as soon as defendant claims martial rights. The fact that the plaintiff came to know that the marriage was void only within six years before the institution of the suit, does not extend the period of limitation, when there is no suggestion that she was kept out of knowledge by any fraud on the part of the defendant. The exception in sec. 29 of the Act regarding matrimonial matters, refers only to suits under the Divorce Act—*Sophy* v. *Shivaprasad*, 49 C.W.N. 570, A.I.R. 1945 Cal. 484; I.L.R. (1946) 1 Cal. 32.

Declaration on behalf of community:—There is a difference of opinion as to whether this Article applies to a suit for a declaration for a community in a representative suit. According to the Lahore High Court it does: Thus where certain Mahomedan residents bring a suit on behalf of all the Mahomedan residents for a declaration that certain property is a graveyard, the suit is governed by this Article as the acts of the defendants amount to ouster of the plaintiffs from the use of the common land reserved for graveyard—*Mohomed* v. *Mahomed*, A.I.R. 1938 Lah. 254, 178 I.C. 125. According to the Nagpur High Court it does not. The reason is that the community can not be said to have any knowledge before the institution of the suit that their title was in jeopardy, although some members thereof learnt about the assertion of the adverse title by the defendant—*Abdul* v. *Fakir*, I.L.R. (1946) Nag. 518, 1946 N.L.J. 511, A.I.R. 1946 Nag. 401.

500. Suit by reversioners:—A suit by the reversionary heirs of a *stanom* for a declaration that a *kanom*, executed by the person in possession of the *stanom*

in favour of the defendant, is not binding on the plaintiffs or on the *stanam*, is governed by this Article, and not by Art. 91—*Puraken* v. *Parvathi*, 16 Mad. 138 (139).

Where a fraudulent decree is passed against a person in possession with a limited interest, the reversioner is not bound to sue for a declaration of the invalidity of the decree. It is open to him to wait until the succession falls in, and if anything is done thereafter constituting an actual injury to his vested right, then to pursue his remedy. Therefore, where a fraudulent and collusive decree was passed against the widow, and after the widow's death, the decree-holder sought to execute the decree by proceeding to attach the property in the hands of the reversioner (plaintiff), who thereupon sued for a declaration of the invalidity of the attachment, *held* that the suit was governed by Article 120, and was in time if brought within six years from the date of attachment of the property in execution of the fraudulent decree, though more than six years after the passing of the decree itself, because the injury in respect of which it was necessary for the plaintiff to obtain redress was the attachment and sot the passing of the decree—*Tallapragada* v. *Boorugapalli*, 30 Mad. 402 (404, 405), dissenting from *Parekh* v. *Bai Vakhat*, 11 Bom. 119.

A suit by the reversioner for a declaration of his title to property sold in execution of a decree against the widow, which decree was alleged to be collusive and fraudulent, is governed by this Article—*Chhaganram* v. *Bai Motigavri*, 14 Bom. 512 (514).

A suit brought by the reversioner during the life-time of the widow for a declaration that he is entitled to succeed, on the death of the widow, to property alleged to form part of her husband's estate, which property is in the possession of persons who claim it as their own adversely to the widow, is a suit governed by Article 120 and not by Art. 125, and time ran from the date when the defendants set up their own right—*Ramaswami* v. *Thayammal*, 26 Mad. 488 (490).

A suit by a reversioner for a declaration that an alienation made by a female is not binding on him is governed by this article and not by Art. 125—*Kuppusami* v. *Thangavelu*, (1946) 2 M.L.J. 214, 1946 M.W.N. 605; *Aruna* v. *Sandhuran*, 49 P.L.R. 167, A.I.R. 1947 Lah. 290 (F.B.); *Bishwanath* v. *Bachni*, A.I.R. 1950 Pat. 218.

A suit brought by a remote reversioner, and not by the nearest reversioner, for a declaration that an allenation made by a female is valid only during her life-time, is governed by Art. 120, and not by Art. 125—*Bhagwanta* v. *Sukhi*, 22 All. 33 (F.B.); *Kunwar* v. *Bindraban*, 37 All. 195; *Venkata* v. *Tuljaram*, 1917 M.W.N. 30, 38 I.C. 270; *Kalvathal* v. *Thirupathi*, 10 M.L.J. 229; *Devraj* v. *Shiv Ram*, 70 P.R. 1914, 25 I.C. 463; *Thakar* v. *Ganeshi*, 15 P.R. 1916, 33 I.C. 161; *Guntupalli* v. *Guntupalli*, 24 M.L.J. 183, 18 I.C. 710; *Suman Singh* v. *Uttam Chand*, 1 Lah. 69, 55 I.C. 924, 91 P.L.R. 1920; *Anandi* v. *Ram Sahai*, 27 O.C. 173, A.I.R. 1924 Oudh 381, 83 I.C. 1055, 1 O.W.N. 24. So also a suit by the remote reversioner for a declaration that a surrender executed by the widow in favour of her daughter's son with the consent of the daughter is governed by this article—*Janaki* v. *Jyotish*, 45 C.W.N. 141, 72 C.L.J. 208, A.I.R. 1941 Cal. 41. See also *Venkayamma* v. *Veerayya*, A.I.R. 1957 Andhra 280. As regards the time from which limitation runs, see Note 509A, *infra*, under heading "Suit by remote reversioner."

An alienation made by the transferee from a Hindu female in possession with a limited estate, or by a stranger in possession holding under her, may furnish the nearest reversioner with a cause of action for a declaratory suit equally with an alienation made by the Hindu female herself. To such a suit the limitation applicable is that prescribed by Article 120 and not that prescribed by Article 125; and

the cause of action arises on the alienation made by the transferee of the female, and not on the transfer by the female herself—*Balbhaddar* v. *Prag Dat*, 41 All. 492 (502).

After the death of the widow of a Hindu testator, the reversioners may sue for construction of the testator's will and for a declaration of their reversionary rights. Such a suit may be brought, under this Article, within six years from the death of the widow when they became entitled to possession. A suit for *possession* would be governed by Article 141—*Chukkun* v. *Lolit*, 20 Cal. 906 (925). A suit by a reversioner to restrain waste of moveable properties by the widow and praying that the properties be handed over to a receiver appointed for the purpose of preventing further waste of the properties, and that the donees from the widow be directed to replace any part of the property that can be traced in their hands, is governed by this Article, and time runs from the date of transfer by the widow—*Venkanna* v. *Narasimuham*, 44 Mad. 984 (987).

A suit by the reversioner to recover immoveable property on the death of a Hindu female is governed by Article 141, and a like suit in respect of *moveable* property is governed by Art. 120—*Runchordas* v. *Parvatibai*, 23 Bom. 725 (736) (P.C.); *Pramatha Nath* v. *Bhuban Mohan*, 49 Cal. 45, 25 C.W.N. 585, 64 I.C. 980; *Aurabindo* v. *Monorama*, 55 Cal. 903, 32 C.W.N. 913 (921), A.I.R. 1928 Cal. 670. The right to sue accrues on the death of the widow—*Runchordas* v. *Parvatibai*, supra. But if the moveable property *never reached the hands* of the widow, but was all along held adversely to her by a stranger, the right to sue accrues to the reversioner from the date of such adverse possession—*Aurabindo* v. *Monorama*, supra.

A suit which has been instituted by the plaintiff after the death of widow whose alienation is challenged in the suit is governed by Art. 120 and not by Art. 125. And where the plaintiff is a minor on the date of the alienation by a widow or is born subsequently during the life of the widow he is entitled to the benefit of sec. 6, Limitation Act—*Sital Raut* v. *Adalat Raut*, A.I.R. 1935 Pat. 256, 16 P.L.T. 484.

501. Suits for pre-emption:—Where the property is not capable of physical possession, and there is no registered deed of sale, a suit for pre-emption is governed by Article 120, and not by Art. 10—*Ali Gauhur* v. *Jawahir*, 30 P.R. 1892. A mortgagor selling the right of redemption to the mortgagee in possession does not sell any property which is capable of physical possession within the meaning of sec. 30 (3) of the Punjab Pre-emption Act, 1913. Hence neither the said section nor Art. 10 of the Limitation Act applies. The only article applicable is Art. 120—*Kharati* v. *Ram Lal*, A.I.R. 1951 Punj. 45 (F.B.); *Gaffar* v. *Sattar*, 160 P.R. 1889. The Allahabad High Court has taken a contrary view in *Sahadeo* v. *Kuber*, 1950 A.L.J. 467, A.I.R. 1950 All. 632 and has held that Art. 10 of the Limitation Act applies to a suit for pre-emption on sale of equity of redemption of usufructuary mortgage. The reason given is that though there are qualifications in column 3 but there is none in column 1 of Art. 10 and it is column 1 which decides to what suits the period of limitation mentioned in column 2 applies. Where the pre-emptor is already in possession of the land, and there is no registered deed of sale, a suit for pre-emption is governed by Art. 120 and not by Art. 10, and time runs not from the date of sale but when the plaintiff becomes aware of the sale and of the terms of the sale—*Mammali* v. *Kunhipakki*, 38 Mad. 67 (70), 23 M.L.J. 607. Where a mortgage by conditional sale had been duly foreclosed under Reg. XVII of 1806, a suit for pre-emption of the mortgaged property did not fall under Article 10 because the property was already in the possession of the vendee-mortgagee and there was no registered deed of *sale;* Article 120 applied, and the plaintiff's right of pre-emption accrued on the expiration of the year of grace and not

from the date of the order of foreclosure—*Attar Singh* v. *Ralla Ram*, 103 P.R. 1901 (F.B.); *Sheoji Singh* v. *Sheoji Singh*, 129 P.R. 1906; *Bahadur* v. *Alia*, 30 P.R. 1907; *Ali Abbas* v. *Kalka*, 14 All. 405 (412) (F.B.). In cases of pre-emption on foreclosure this article is applicable—*Ganesh* v. *Mahadeo*, A.I.R. 1950 All. 647. A suit to declare a right of pre-emption against the heir of a mortgagee by conditional sale who has foreclosed under Reg. XVII of 1806 is governed by this Article, where the subject of sale does not admit of physical possession and there is no registered deed of sale. Neither Article 10 nor Art. 144 applies to the case. Limitation begins to run from the date of expiry of the year of grace, that being the date when the mortgagee's right becomes mature—*Batul* v. *Mansur*, 20 All. 315 (F.B.), affirmed by the Privy Council in 24 All. 17 (26). Where a mortgage by conditional sale of a share in an undivided zamindary village (which is not capable of physical possession), is foreclosed by proceedings taken under the Transfer of Property Act, the period of limitation for a suit for pre-emption runs under this Article from the date when the mortgagee obtains an order absolute for foreclosure and not when the mortgagee makes his application for an order absolute nor from the date fixed in the preliminary decree for payment by the mortgagor—*Raham Ilahi* v. *Ghasita*, 20 All. 375 (377, 378); *Anwarul-Huq* v. *Jwala Prasad*, 20 All. 358 (361).

A suit by one pre-emptor against another for the determination of the question as to whether the plaintiff or the defendant has the better right to pre-empt the property, is governed by Art. 120, and not by Art. 10—*Durga* v. *Haider*, 7 All. 167; *Ilahi* v. *Md. Rab*, 80 P.R. 1912, 14 I.C. 328; *Ram Pershad* v. *Ganga*, 20 P.R. 1908. A suit for pre-emption against a *transferee* of the vendee (the transferee being impleaded during the course of the suit against the vendee) falls under Article 120 and not under Art. 10 (which applies to a suit against the *vendee himself*), for the suit against the vendee's purchaser is in effect a suit for a *declaration* that the pre-emptor plaintiff is not affected by the second sale, and that the second purchaser shall be bound by the decree which would ultimately be passed between the original parties to the suit. Time runs from the date of the transfer made by the vendee—*Karamdad* v. *Ali Md.*, 31 P.R 1931 (F.B.), 18 I.C. 70, 61 P.L.R. 1913; *Fazal Husain* v. *Malik*, 49 P.R. 1914, 252 P.L.R. 1914, 25 I.C. 443; *Hari Ram* v. *Allah Ditta*, 17 P.R. 1915, 186 P.L.R. 1915, 28 I.C. 695; *Razawand* v. *Dukchhar*, 1 O.L.J. 196, 24 I.C. 116 (117).

This article and not Article 10, applies to a suit for pre-emption under secs. 177 and 183 of the Berar Land Revenue Code—*Govardhan* v. *Mukharam*, I.L.R. (1949) Nag. 465, 1949 N.L.J. 290, 4 D.L.R. (Nag.) 157. But where the transfer is a mortgage by conditional sale and a final decree is eventually passed on the basis of that transfer and the sale becomes absolute, Art. 10 applies in view of the language of sec. 174 (1), Berar Land Revenue Code—*Zamu* v. *Ishwardas*, I.L.R. (1950) Nag. 745, 1951 N.L.J. 165. A.I.R. 1950 Nag. 295. But see *Jorawarkhan* v. *Mukhram*, A.I.R. 1952 Nag. 40, I.L.R. (1949) Nag. 465, 1949 N.L.J. 290, where it has been held that sec. 174 (1) of Berar Land Revenue Code does not exclude the operation of this Article to cases which do not otherwise fall under Art. 10.

502. Suit on an award:—A suit by the plaintiff to recover money awarded to him against the defendant by an award is not a suit for money governed by the three years' rule, nor a suit for specific performance of a contract under Art. 113 (as an award is not a contract), but is a suit to enforce an award, governed by Article 120, as there is no other Article specially provided for the case—*Rajmal* v. *Maruti*, 45 Bom. 329 (335), 22 Bom.L.R. 1377, 59 I.C. 755; *Nandalal* v. *Chhotalal*, 49 Bom. 693, A.I.R. 1925 Bom. 519; *Kuldip* v. *Mahant*, 34 All. 43; *Sornavalli* v. *Muthayya*, 23 Mad. 593; *Bhajahari* v. *Behary*, 33 Cal. 881; *Radha Kishen* v. *Delhi Cloth Mills*, 32 P.R. 1913,

16 I.C. 804. See Note 471 under Art. 113. A suit to enforce an award, whether the same is signed by the parties or not, is governed by Art. 120. It cannot be treated as a suit on a contract. The fact that the award is signed by the parties makes no difference; the award is none the less an award, and does not become a contract when signed by the parties, and Art. 113 or 115 would not apply—*Harbhag Mal* v. *Diwanchand*, 102 P.R. 1915, 32 I.C. 88 (89). But a suit for possession of immoveable property based upon an award creating an interest in such property is governed by Art. 144 and not by this article—*Kurbanhussain* v. *Mahomedali*, 49 Bom.L.R. 731, A.I.R. 1948 Bom. 101. It is not a suit to enforce an award and hence this article does not apply—*Kurbanhussain* v. *Husseinbhai*, 50 Bom. L.R. 604; I.L.R. (1948) Bom. 610, A.I.R. 1949 Bom. 64.

Suit on compromise decree:—A compromise has got the feature and characteristics both of a cimpromise and of a decree. It must be decided from the circumstances of each case whether the present suit is based on the declaration contained in the previous compromise *decree* or is a suit based on the *contract* contained in the compromise. If the compromise decree has declared the right of a party to obtain money found due to him on taking accounts, a suit to recover the monies so found due is a suit based on the *decree* and does not fall under Art. 115 or 64, but falls under Art. 120—*Arunnachlam* v. *Raja Rajeswari*, 22 L.W. 195, A.I.R. 1925 Mad. 1260, 91 I.C. 338 (341). On the other hand, if the suit is one for compensation for breach of the term of a *compromise* which has been merged in a decree, the suit falls under Art. 115, and not under Art. 120—*Gopal Saran* v. *Chhakauri*, 12 Pat. 792, 15 P. L.T. 197, A.I.R. 1934 Pat. 7 (9), 148 I.C. 375.

Decree against minor through gross negligence of guardian:—Where through the gross negligence of the *guardian ad litem* an adverse decree is passed against a minor, a suit by the minor for a declaration that the decree is not binding on him is governed by Art. 120, and the period of limitation commences to run not from the date of the decree but from the date when the gross negligence of the minor's guardian became known to the minor—*Swami Kone* v. *Sankaravalia*, A.I.R. 1936 Mad. 804.

A suit by a minor to declare that an *ex parte* decree passed against him is null and void on the ground that the *guardian ad litem* was guilty of gross negligence, is governed by Art. 120. Art. 95 which refers to a suit for setting aside a decree obtained by fraud is not applicable to such a suit. The cause of action for the suit arises only when the gross negligence which entitles the minor to have the decree set aside becomes known to him—*Mathura Singh* v. *Ram Rudra*, 14 Pat. 824, 16 P.L.T. 484.

503. Suit for injunction:—A suit for a perpetual injunction to restrain the defendant from preventing the plaintiff from entering a certain house falls under this Article; therefore, if it is found that the defendant has been in exclusive possession of the house for more than six years, the suit is barred—*Konakasabai* v. *Muttu*, 13 Mad. 445.

A suit by the lessor for an injunction to restrain the lessee from interfering with the lessor's rights under a covenant in the lease to enter upon the land demised and to cut and take away certain trees, is governed by this Article, and not by Article 113, 142 or 144, as none of those articles applies to a suit for injunction—*Waziran* v. *Babu Lal*, 26 All. 391 (393).

Where a purchaser of certain trees desires to exercise his right of ownership by cutting them and other party interferes with it, the purchaser's suit for injunction for preventing the other party from interfering with the exercise of his right is governed by this article as no other Article prescribes a period of limitation for such a suit and

the cause of action arises when the right sought to be exercised is first interfered with. There is no question of possession of trees involved in the suit and hence Art. 144 can have no application—*Ganga* v. *Nihal*, A.I.R. 1952 All. 310.

A suit for an injunction directing the defendants to close some windows newly opened by them on a partition wall, falls under this Article, and must be brought within six years from the date of opening of the windows—*Imambhai* v. *Rahim Bhai*, 49 Bom. 586, 27 Bom.L.R. 503, A.I.R. 1925 Bom. 373, 87 I C. 977.

An encroachment made by a joint owner by building a chabutra on land reserved for common purposes, claiming it as his own is a wrong complete at the time the construction is put and a suit for injunction is governed by this Article—*Khair* v. *Mt. Jannet*, A.I.R. 1940 Lah. 359, 191 I C. 42.

A suit for injunction restraining the Government from levying penal assessment under the Madras Land Encroachment Act, 1905 is governed by this Article and not by sec. 14 of the said Act. The word "levied" in the explanation to sec. 14 means "collected" and therefore the mere sending of the notice does not attract the operation of the section—*Subramania* v. *Province of Madras*, (1942) 2 M.L.J. 223, 1942 M.W.N. 633, A.I.R. 1942 Mad. 660.

This article has no application to a suit brought by the owner of the land on whose land the gallery of another person encroaches for injunction coupled with a claim for possession of land beneath the gallery to which the person making the encroachment has asserted his title—*Raju* v. *Malak*, I.L.R. (1939) Nag. 580, 1939 N.L.J. 297, A.I.R. 1939 Nag. 197. So also this article does not apply to a suit for injunction to restrain the person from interfering with the performance of duties of the lawful holder of an office, such as that of mantrapushpam of a temple. He has a right to bring a suit at any time when the performance of his duties is interfered—*Annasami* v. *Adivarachari*, I.L.R. (1941) Mad. 275, (1940) 2 M.L.J. 990, A.I.R. 1941 Mad. 81 (F.B.); *Province of Orissa* v. *Durjodhan*, A.I.R. 1951 Orissa 342.

504. Suit for compensation money:—Where a land was acquired under the Land Acquisition Act, but the Collector refused to award any compensation, a suit to recover compensation would be governed by this Article and the right to sue accrued either from the date of the acquisition or the refusal by the Collector to award compensation. Art. 17 or 18 had no application to the case—*Remeshwar* v. *Secretary of State*, 34 Cal. 470; *Mantharavadi* v. *Secretary of State*, 27 Mad. 535. See notes under Arts. 17 and 18. Where it is admitted that the act was performed under the powers given by the statute and the cause of action alleged is a failure to allot the statutory compensation, this article governs the case—*Amar* v. *Secy. of State*, A.I.R. 1939 Lah. 583.

505. Suit by principal against agent or his representatives:—A suit by principal against agent for account and for recovery of any money found due on taking accounts is governed by Art. 89; but so far as it seeks to obtain account papers from the agent, the suit is governed by Art. 120, the cause of action arising from the date when such papers are to be submitted according to the contract between them—*Madhub* v. *Debendra*, 1 C.L.J. 147.

A suit by the principal to recover money from the legal representatives of the agent is governed not by Article 89 but by this Article—*Kumeda* v. *Ashutosh*, 17 C.W.N. 5, 16 I.C. 742; *Rao Giraj* v. *Raghubir*, 31 All. 429; *Seth Chand Mal.* v. *Kalian Mal.* 96 P.R. 1886; *Fatima* v. *Intiazi*, 1 P.R. 1912, 13 I.C. 930. Where in a suit for recovery of certain sums from the sons of the deceased agent, it was found that the agent was under no liability to pay over the sums received by him to the principal

directly on receipt, the proper article applicable is either this article or Art. 89—*Sadhu* v. *Krishnamani*, 23 Pat.L.T. 457, A.I.R. 1942 Pat. 181. This Article has no application to a suit brought against the legal representative after the death of the agent when there is a demand and refusal to render account by the agent. Such a suit is governed by Art. 89—*Ashutosh* v. *Arun*, A.I.R. 1950 Dac. 13; (*Bindraban* v. *Jamuna*, 25 All. 55 and *Rao Girraj* v. *Rani Raghuber*, 31 All. 429 holding this Article will apply to such a suit dissented from).

A suit under sec. 79 of the Lunacy Act against the legal representative of the manager appointed under that Act is governed by this Article—*Must. Piari* v. *Kashi*, 1947 O.W.N. 530.

505A. Suit for accounts by agent against principal:—While there is a specific Article for a suit by a principal against his agent, there is no such Article for the converse case. But a suit for accounts not covered by any specific Article falls under Article 120, and hence a suit for accounts by an agent against his principal would be governed by this Article. When a plaintiff is claiming commission to which he would be entitled on an account being taken and not compensation in lieu of what he was entitled to under the contract, it is a suit for an account and not a suit for compensation for breach of contract So Article 115 has no application to the case—*Basant Kumar* v. *Roshanlal*, I.L.R. 1954 Nag. 435, A.I.R. 1954 Nag. 300.

506. Suit in respect of trusts:—A suit for enforcement of the plaintiff's *personal* right to manage the trust properties is not a suit to recover the properties for the purposes of the trust; consequently section 10 cannot apply and the suit is governed by this Article—*Balwant* v. *Puran*, 6 All. 1 (P.C.). So also a suit for declaration that certain properties are public, religious, trust properties is governed by this Article and not by sec. 10—*Shamdas* v. *Gurmukh*, I.L.R. (1945) Kar. 40, A.I.R. 1945 Sind. 57. A suit to recover property settled on *invalid trust* would fall under this Article and not under section 10. The period of limitation commences from the time when the property was transferred to the trustees; because, in the case of invalid trusts, a resulting trust in favour of the donor accrues immediately the subject of the trust is transferred to the trustees, and the right to sue for it arises at once. It cannot be said that the right to sue arises only when the trustees refuse to recognise the resulting trust—*Cowasji* v. *Rustomji*, 20 Bom. 511. So also where a trust fails or comes to an end, a resulting trust arises in favour of the contributors or subscribers or in case of their death, their legal representatives. A suit by a contributor to recover his share is governed by this Article and the limitation commences to run from the date when there is a failure of the purpose whereupon the resulting trust arises—*Lakshmanan* v. *Ramaswamy*, (1938) 1 M.L.J. 616, A.I.R. 1938 Mad. 641.

A suit by a trustee to recover the advances made by him to meet the expenses of the trust, during his trusteeship, is governed by Art. 120, and not by Art. 132, and the period of limitation runs from the time when he ceases to be the trustee, *i.e.*, when he is judicially declared to be no longer the trustee or when he is dispossessed of the trust estate in pursuance of the judicial declaration. Limitation cannot run until there is a successor whom the plaintiff can sue; unless he can sue his successor, there can be no right of suit and therefore limitation cannot start running—*Abkan Saheb* v. *Saran*, 38 Mad. 260 (264, 265), 28 M.L.J. 347, 28 I.C. 190. So also, a suit by a trustee against the beneficiaries to recover certain moveable property belonging to the trust for the trust is governed by this Article and not by Art. 48 or Art. 49 and the time for limitation begins to run from refusal of the beneficiaries to return the property—*Jogodeb* v. *Sibkanto*, A.I.R. 1949 Assam. 10.

A suit against the banker by a co-trustee to recover trust moneys wrongly applied by the banker in reduction of the private debts owed by the other co-trustees is governed by this article and the right to sue accrues when the trust funds are wrongly transferred or misapplied. But if the plaintiff co-trustee is kept in ignorance of a breach of trust the right to sue does not accrue until the trustee becomes aware of the fact—*Nagappa* v. *O. Rm. Firm*, I.L.R. (1939) Mad. 121, (1939) 1 M.L.J. 625, A.I.R. 1938 Mad. 999, affirmed on appeal by the Privy Council in *O. Rm. Firm* v. *Nagappa*, 67 I.A. 448, I.L.R. (1941) Mad. 175, 45 C.W.N. 385, 73 C.L.J. 166, 43 Bom.L.R. 440, A.I.R. 1941 P.C. 1, 1941 P.W.N. 299, (1941) 1. M.L.J. 393 (P.C)

A suit by the deceased shebait's son to recover the advances made by the deceased shebait to meet the expenses of the uebuttor estate at a time when he had been wrongfully kept out of the office by the defendant is governed by this Article. The cause of action accrued when the plaintiff's father died, and not when the advances were made—*Pedry* v. *Narendra*, 37 Cal. 229 (234) (P.C.).

Suit for improper management of trust funds:—The defendant neglected to purchase properties with the surplus income of a mosque as required by the trust deed. A suit was brought by the Advocate-General (under section 92 of the Civil Procedure Code, 1908), and it was claimed in that suit that the defendant should be charged with interest on the uninvested funds, so as to make up for the loss of rent which would have been recovered if properties had been purchased. It was held that the claim fell within this Article and was barred except as to six years prior to the filing of the suit—*Advocate-General* v. *Moulavi Abdul Kadir*, 18 Bom. 401 (424). This article is the proper article applicable to a suit filed against a trustee or ex-trustee, by a co-trustee or a succeeding trustee of a public trust to make good the loss sustained by the trust by reason of the defendant's omission to collect monies due to the trust. The starting point of limitation will depend upon the circumstances of the case. If the breach is committed by the sole trustee, the right to sue arises when a new trustee is appointed. But in case of several trustees the limitation will run immediately the loss is occasioned when some of them are not themselves liable. But the position will be the same as in the case of defaulting sole trustee when all the trustees are liable for the breach of the trust. In case of a private trust the *cesti que trust* will ordinarily have the right to sue from the date of the breach of the trust—*Subbiah* v. *Samiappa*, I.L.R. (1938) Mad. 586, (1938) 1 M.L.J. 334, A.I.R. 1938 Mad. 353 (F.B.).

507. Suit against son to recover father's debts:—A suit against the son to enforce the liability under the Mitakshara Law to pay the father's debt, on the ground of the pious obligation of the son under the Hindu law to pay the debt due by the father, is governed by this Article, whether the debt is based on a bond—*Narsingh* v. *Lalji*, 23 All. 206 (208); or on a mortgage—*Brijnandan* v. *Bidya Prasad*, 42 Cal. 1068 (1092) (F.B.); *Mahdraj* v. *Balwant*, 28 All. 508 (516); or on a surety bond—*Jivram* v. *Kantilal*, 52 Bom.L R. 104, A.I.R. 1950 Bom. 247 or on a decree obtained against the father—*Periasami* v. *Seetharama*, 27 Mad. 243 (246, 254) (F.B.); *Ramayya* v. *Venkataratnam*, 17 Mad. 122 (129); *Natasayyam* v. *Ponusami*, 16 Mad. 99 (101). In the Madras Full Bench case, the Judges expressed the opinion that if the suit were brought upon the original cause of action *i.e.*, upon the original debt due by the father, the Article of limitation applicable would have been the same as against the father, and not Article 120, but the Article applicable to a suit brought against the son on the cause of action arising from the *decree* against the father is Article 120—*Periasami* v. *Seetharama*, 27 Mad. 243 (246, 254).

In case of a bond executed by the father, time ran when the bond became payable—*Narsingh* v. *Lalji*, supra; in case of a mortgage executed by the father, the

period ran from the due date of payment of the mortgage money or from the date of the father's death—*Maharaj* v. *Balwant*, supra; in the case of the surety bond executed by the father the cause of action against the sons for a suit in respect of the debt is the same as the cause of action which the creditor has against the father, *i.e.*, upon the failure of the persons for whom the father executes the surety bond to pay—*Jivram* v. *Kantilal*, supra; and in case of a suit to enforce against the sons the decree-debt due by the father, time runs from the date of the father's death—*Natasayyan* v. *Ponnusami*, 16 Mad. 99 (102); but in another Madras case it has been held that time runs from the date of the original debt, and not from the date of the father's death because the creditor does not obtain a fresh right to sue the son for his father's debt on the death of the father. There are not two causes of action in such a case—*Mallesam* v. *Jugala Panda*, 23 Mad. 292 (F.B.) (dissenting from 16 Mad. 99). If the decree passed against the father had provided for payment of the money by instalments, time begins to run (in the suit against the sons) from the date on which each instalment becomes due—*Ramayya* v. *Venkataratnam*, 17 Mad. 122, (129). Where the creditor obtains a decree against the father alone on the surety bond executed by him after a partition between the family, the creditor cannot contend that he is entitled to sue for a declaration that in execution of the decree the son's interest is liable to be brought to sale although at the time when the suit for declaration is filed the creditor's claim for debt against the sons on the basis of the pious obligation is barred by time—*Jivram* v. *Kantilal*, *supra*.

A suit by the principal to recover money from the sons and grandsons of the agent on the ground of their pious liability is governed by this Article and the cause of action accrues on the death of the agent—*Rao Girraj* v. *Raghubir*, 31 All. 429 (438). See Note 414 under Art. 89.

508. Other suits:—*Right to worship idol*:—A suit for declaration of an *exclusive* right to worship an idol is not a suit to establish a periodically *recurring right* under Article 131 but is governed by this Article—*Eshan Chunder* v. *Monmohini*, 4 Cal. 683 (685).

Value of goods misappropriated:—Certain goods of the plaintiff which remained with the defendant's brother, had been appropriated by the latter to his own use. After his brother's death, the defendant sold the goods and held the proceeds as the agent of the widow of his deceased brother. Plaintiff brought the suit to recover the money from the defendant. *Held* that neither Article 48 nor 62 applied to this suit; the suit was one to enforce an equitable claim on the part of the plaintiff to follow the proceeds of his goods in the hands of the defendants and that Article 120 applied, there being no other Article applicable to the case—*Gurudas* v. *Ramnarain*, 10 Cal. 860 (P.C.). So also where before a decree for specific performance is passed in respect of an agreement to assign a particular decree, the defendant withdraws the money deposited in respect of the said decree and the plaintiff files a suit to recover it, it is a suit to enforce an equitable claim to follow the money withdrawn by the defendant contrary to agreement and comes under this article and not Art. 62, the starting point being the date of the conveyance of the decree—*Fakir Chand* v. *Shamrao*, 1941 N.L.J. 665. The claim against a *benamdar* in respect of monies received and held by him for the benefit of the real owner is an equitable one and a suit to realise the money realised is governed by this article—*Debarajulu* v. *Jayalakshmi*, (1941) 2 M.L.J. 222, A.I.R. 1941 Mad. 767; *Karamamurthi* v. *Ramanatha*, I.L.R. (1946) Mad. 306, (1946) 1 M.L.J. 140,, A I.R. 1946 Mad. 248. The application to the Insolvency Court by an Official Assignee on behalf of the general body of creditors of the insolvent for recovery of property acquired by the insolvent after adjudication and entrusted to a third party is governed by this Article. The reason being that such an application

is a proceeding to enforce an equitable claim and follow the property in the hands of the third party. Time begins to run from the date of knowledge of the Official Assignee as to his rights—*Official Assignee* v. *Munuswamy*, A.I.R. 1952 Mad. 26. The same principle applies to a suit for realisation of the share of the sale proceeds of the property purchased by two persons in the name of one on sale of the property by the other. Such a suit is governed by this Article—*Venkataseshayya* v. *Subramaniyam*, (1950) 2 M L J. 611, A.I.R. 1951 Mad. 547. A suit for recovery of share of money spent for purchase of stamp for a sale certificate issued in the names of joint purchasers is governed by this article and the cause of action arises not at the date of purchase of stamps but when they are actually utilised for the purpose, *viz.*, the date of sale certificate—*Meyappa* v. *Ramaswami*, (1940) 2 M.L.J. 494, 1940 M.W.N. 982. Where a suit is for profits of property entrusted to the defendant for safe custody and management, this article applies and not Art. 62—*Mahadeoji* v. *Baldeo*, I.L.R. (1942) Nag. 92, 1941 N.L.J. 184, A.I.R. 1941 Nag. 181.

Recovery of security deposit:—Where A made a deposit as security for the discharge of his duties as manager of an estate, which deposit was liable for all sums not accounted for by him, and a suit was, after his dismissal from appointment, brought by him for the recovery of the deposit, it was held that this Article applied to the case, and time began to run not from the date of his dismissal, but from the time when the account of charges due against the deposit was made and sent in to him—*Upendra Lal* v. *Collector*, 12 Cal. 113 (115).

Ousting a shebait:—A suit to oust a shebait or mutwalli from his office, the appointment to which is not hereditary but has been made by nomination, is one for which no period of limitation is specially provided and is therefore governed by this Article—*Jagannath* v. *Birbhadra*, 19 Cal. 776 (779); *Debendra* v. *Sefatulla*, 31 C.W.N. 184 (191), A.I.R. 1927 Cal. 130. So also, where the office of the shebait is not hereditary, a suit in which the main relief asked for is that a person is not the shebait and that the deed appointing him as such is invalid is governed by this article. Such a suit is therefore time barred if not brought within six years from the date of the deed. Art. 124 has no application to such a suit—*Nirmal* v. *Jyoti*, 42 C.W.N. 1138, 68 C.L.J. 230, A.I.R. 1938 Cal. 709.

Enforcing charge against moveable property pledged:—In a suit on a pledge of certain moveable property given by the defendant as security for a loan of money, the plaintiff prayed for a decree for the money against the defendant personally, and also prayed that the charge might be enforced against the property pledged. It was held that the prayer for a personal decree was governed by Art. 57, but so far as the plaintiff sought to enforce his charge against the property pledged, the suit fell under Article 120—*Nimchand* v. *Jagabundhu*, 22 Cal. 21 (24); *Madan* v. *Kanhai*, 17 All 284; *Mahalinga* v. *Ganapathi*, 27 Mad. 528 (530) (F.B.). Thus, where a plaintiff who had lent money on the security of eight black buffaloes, sought by his suit to enforce payment of the money charged upon the buffaloes and did not seek to get a personal decree against the debtor, the suit fell under this Article—*Deokinandan* v. *Popua*, 16 A.L.J. 449, 40 All. 142.

A decree is a moveable property; and a hypothecation of a decree is therefore a hypothecation of moveable property, governed by Art. 120. But where the decree is converted into immoveable property, that is, where the mortgagor decree-holder purchases certain immoveable property of his judgment-debtor in satisfaction of the decree, the mortgagee becomes entitled to the substituted security and also the larger period of limitation provided by Art. 132—*Jamna Dei* v. *Lala Ram*, 39 All. 74 (78).

Suit by alienee from co-parcener:—The only right which the purchaser from a member of a Hindu joint family acquires is the right to sue for partition. To a suit

for partition by him this article applies and not Art. 142 or Art. 144—*Shevantbai* v. *Janardan*, 41 Bom.L.R. 631, A.I.R. 1939 Bom. 322. But where in execution of a decree obtained by a creditor against the manager of a Hindu family, the property is sold and described with boundaries in the sale certificate, the auction purchaser has the right to bring a suit for possession and such a suit is governed by Art. 144 and not this article—*Vishnu* v. *Vishvanath*, I.L.R. (1946) Bom. 106, 47 Bom.L.R. 1102, A.I.R. 1946 Bom. 192. The view expressed in *Shevantbai* v. *Janardan*, supra, was dissented from in *Thani Chettiar* v. *Dakshinamurthy*, A.I.R. 1955 Mad. 288, and it has been held in the latter case that a suit by an alienee of an undivided share from a coparcener of a Hindu joint family will fall under Article 144 so long as the property concerned is immovable property. The suit is a suit for possession of immovable property or an interest therein.

Apportionment of rent:—A suit by a tenant against his landlord for apportionment of the rent payable to such landlord for the portion of land obtained by the landlord on partition with his co-sharers, is not a suit for abatement of rent, but for apportionment of rent and for a declaration that after the partition the share of the rent which the plaintiff is liable to pay to the defendant is as it is stated in the plaint; there being no special provisions for a suit of this description, it is governed by this Article —*Durga* v. *Ghosita*, 11 Cal. 284 (286). But a suit by the holder of one share against the holders of other shares in an inam land included in a single *patta* and assessed in an entire sum, for apportionment of the assessment, cannot be barred by this Article or by any other Article of the Limitation Act. So long as the joint liability lasts, each is entitled to claim an apportionment, and such claim can no more be time-barred than a claim for rent so long as the title to the land is not extinct. The suit is not therefore barred even if it is brought more than six years after the date of an order of a revenue officer making a previous apportionment of the assessment, as such order cannot be treated as conclusive—*Anand* v. *Viyyanna*, 15 Mad. 492 (493, 494).

Suit under Or. 21, r. 63 by unsuccessful claimant before judgment:—This article applies to a suit brought by an unsuccessful claimant whose claim to property attached before judgment had been preferred and rejected before the decree has been passed—*Dhan Bibi* v. *Mrinalini*, 49 C.W.N. 111, 79 C.L.J. 181, A.I.R. 1945 Cal. 449, I.L.R. (1945) 1 Cal. 547. See, however, *Durga Dei* v. *Sadananda*, A I.R. 1952 Orissa 182.

Suit under O. 21, r. 93 for recovery of purchase-money—No special period of limitation was fixed for suits brought under sec. 315, C.P.C., 1882 (O. XXI, r. 93, C. P. Code, 1908), for recovery of the purchase money paid by the plaintiff, on the ground that the judgment-debtor possessed no saleable interest in the property in question; and therefore this Article applied to those suits—*Nilkanta* v. *Imamsahib*, 16 Mad. 361. But according to the Calcutta High Court, the suit was held to be governed by Article 62—*Ram Kumar* v. *Ram Gour*, 37 Cal. 67 (70). Under the Code of 1908, the law has been materially altered, and the remedy of the auction-purchaser who seeks to recover purchase money under O. 21, r. 93, on the ground that the judgment-debtor had no saleable interest in the property, is not by a *suit*, but by an *application*, and such application is governed by Article 181—*Makar Ali* v. *Sarfuddin*, 27 C.W.N. 183, 50 Cal. 115 (122). But where the execution sale took place and was confirmed before the new C. P. Code of 1908 came into operation, and the auction purchaser brought a suit, after the passing of the C. P. Code of 1908, to recover the purchase money, *held* that the right of the purchaser to maintain the present suit must be determined with reference to the Code of 1882 when the sale took place and confirmed, and that right was not extinguished by the promulgation of the Code of 1908. The suit was therefore governed by Article 120 of the Limitation Act of 1877 —*Ibid.*

Where upon a sale being set aside at the instance of the judgment-debtor under sec. 311, C. P. Code (1882), a suit is brought under sec. 315, C. P. Code, by the auction purchaser for recovery of a sum of money from the person who had, after the sale and the deposit of the money in Court, attached that sum in execution of his decree against the judgment-debtor, as representing the surplus sale proceeds belonging to the original judgment-debtor after satisfaction of the decree obtained against the debtor by the decree-holder, the suit is governed by this Article—*Amrita Lal* v. *Jogendra*, 40 Cal. 187 (191). So also where the sale is set aside at the instance of a third party, a suit for recovery of purchase money deposited in Court by the auction purchaser from persons who were rateably paid is governed by this Article and not by Art. 62 or Art. 97—*Sharmchand* v. *Anjuman Imdad*, 228 I.C. 479.

Suit for profits of share of intestate's property:—A suit by an heir of an intestate to recover the share of profits accruing after the death of the intestate, from another heir who was in possession of the property, falls under this Article, and not under Article 109, because the occupation of a co-heir cannot be said to be 'wrongful'; Art 123 cannot apply, as the claim is not as regards the corpus of the estate—*Maung Po* v. *Maung Shwe*, 1 Rang 405, A.I.R. 1924 Rang. 155, 76 I.C. 855; *U. Aung* v. *Daw Mya*, A.I.R. 1938 Rang. 416; *Daw Ein* v. *Daw Chan*, 1940 Rang.L.R. 136, A.I.R. 1939 Rang. 365.

Customary dues:—A suit to recover *merais* or customary dues payable by the defendants for the benefit of a chattram on account of lands held by them is governed by this Article and not by Art. 110, because the dues are not rent claimed by the plaintiff as landlord but as due to the chattram by custom—*Venkatagava* v. *District Board*, 16 Mad. 305 (307).

A suit by a landlord to recover from his tenant *haq-i-chharum* (*i.e.*, one-fourth of the purchase-money due to the proprietor of a *mohalla* on the sale of a house situated in it) on the ground of local custom, is governed by this Article—*Kiratha* v *Ganesh*, 2 All. 358; *Sham* v. *Bahadur*, 18 All. 430. Article 62 does not apply; moreover, it is not a suit to enforce any charge on the property; therefore Art. 132 does not apply—*Ibid.*

A suit to recover a sum of money on account of marriage dues, due to the plaintiff by custom as an emolument of a hereditary office held by him in a temple, is not one for the possession of an interest in immoveable property. Consequently, Article 144 cannot apply; the suit is governed by this Article—*Rathna* v. *Tiruvenkata*, 22 Mad. 351 (353).

Suit for recovery of provident fund:—A suit by a servant of the Calcutta Corporation for the recovery of provident fund amount standing to his credit is governed by this article—*Jatindra* v. *Corporation of Calcutta*, I.L.R. (1944) 1 Cal. 463, A.I.R. 1945 Cal. 144.

Right to establish a market:—A suit against a Municipal Committee for a declaration of the plaintiff's right to establish a market on their own land and for a perpetual injunction restraining the Collector as the President of the Municipal Committee from interfering with their so doing, falls under this Article, and must be brought within 6 years from the date on which the Municipality refused permission—*Biraj Mohun* v. *Collector*, 4 All. 102 (106), affirmed on appeal, 4 All. 339 (F.B.).

Suit for share of profits in a ferry:—A suit by some of the co-sharers of a ferry against the other co-sharers for recovery of their share of the profits of the ferry is governed by this Article and not by Art. 36 or 115. Article 36 cannot apply because it is not the plaintiff's case that the defendant dispossessed them or committed any

tort; Article 115 cannot apply because there is no proof of any express or implied contract on the part of the defendants to pay to the plaintiffs their share—*Kishun Dayal* v. *Kishen Deo*, 1 P.L.J. 69 (70), 35 I.C. 430.

Damages for use and occupation:—Some of the joint tenants of certain lands took the use and occupation of part of the joint lands, to the exclusion of the other joint tenants, who afterwards brought a suit for compensation for such use and occupation. It was held that the period of limitation for such a suit was governed by this Article (and not by Article 110, because the suit was not one for rent); and that, therefore, the plaintiffs were entitled to recover compensation for six years—*Watson* v. *Ramchand*, 23 Cal. 799; *Madar* v. *Kader Moideen*, 39 Mad. 54 (56). So also, a suit against a co-sharer landlord under sec. 22 (2) of the Bengal Tenancy Act for a fair and equitable sum for the use and occupation of land held by him to the exclusion of the other co-sharers, is governed by this Article—*Suresh* v. *Kumud*, 41 C.W.N. 1090, 67 C.L.J. 74. A suit for damages for use and occupation of a shop after notice to quit is governed by this article—*Sukhdei* v. *Lachmi*, 1946 A.L.J. 305. This article applies to a suit by a purchaser at a revenue sale against the under tenure-holder for use and occupation from the date of sale upto the date of annulment of the under tenure —*Bibhuti* v. *Promoda*, 43 C.W.N. 469, 69 C.L J. 220, A.I.R. 1939 Cal. 468.

Suit for possession by non-occupancy raiyat:—If a non-occupancy raiyat has been dispossessed from his holding (either by the landlord or by a trespasser) otherwise than by execution of a decree, then if his tenancy has not yet been determined, he has a title to the land, *viz.*, the title of a tenant, and his suit to recover possession of the holding on the basis of title is not a suit under sec. 9 of the Specific Relief Act, and is not therefore governed by Article 3, but falls under this Article or Art. 142—*Tamizuddin* v. *Ashrub*, 31 Cal. 647 (651) (F.B.).

Suit for arrears of assessment:—A suit by an inamdar for arrears of *assessment* against a person who was not let into possession by the plaintiff under any agreement but who held the lands in the village, is not a suit for *rent* under Article 110 (because there is no relationship of landlord and tenant) but is governed by Art. 120—*Sadasiv* v. *Ramkrishna*, 25 Bom. 556; see also *Kasturi* v. *Anantaram*, 26 Mad. 730. So also a suit for assessment of fair and equitable rent and compensation for use and occupation is governed by this article when the only dispute is the amount payable and not the liability to pay—*Manindra* v. *Baramdi*, A.I.R. 1940 Cal. 400.

Suit for mutation of name in share register:—This Article applies to a suit for declaration of title in respect of shares purchased in execution sale after execution of share transfer deed by the Court in terms of Or. 21, r. 80, C. P. Code, for mutation of name in share register, for recovery of dividends and for perpetual injunction—*Mahadeo* v. *New Darjeeling Union Tea Co.*, 55 C.W.N. 408, A.I.R. 1952 Cal. 58.

Suit by share-holder for dividends:—A suit by shareholders of a limited company for arrears of dividends is governed by Article 120 (and not by Art. 116)—*Rama Seshayya* v. *Tripurasundari Cotton Press*, 49 Mad. 468 (F B.). The Calcutta High Court has held that such a suit is governed either by this Article or by Art. 116—*Hariseswar* v. *Khorooriah Majojil Zemindary Syndicate*, 48 C.W.N. 693. The Bombay High Court has held that such a suit is governed by Art. 116 and not by this Article—*Lalita* v. *Tata Iron and Steel Co., Ltd.*, I.L.R. (1940) Bom. 165, 42 Bom.L.R. 57, A.I.R. 1940 Bom. 97 (F.B.). The reason given is that the words "writing registered" in Art. 116 includes a document registered with the Registrar of joint stock companies under the Indian Companies Act. See Note 480 under Article 116. The company does not, by the mere declaration of a dividend, become a trustee of the dividend for the share-holder; on the other hand, upon the declaration of the dividend by a company,

the dividend becomes at once a debt. Banning, p. 35. In a suit by a share-holder for dividend, time runs from the declaration of the dividend—*In re Severn Ry. Co.*, [1896] 1 Ch. 559; *Re Artisans' Land Corporation*, [1904] 1 Ch. 796. The starting point is the breach of contract which gives the right to sue—*Lalita* v. *Tata Iron and Steel Co., Ltd.*, supra.

Suit by official liquidator for calls:—A suit by the liquidator of a company, after winding up, against a shareholder for the amount of calls on the shares taken by him, is governed by Art. 120; if the suit was brought by the company itself, Art. 112 would have applied—*Parell S. & W. Co.* v. *Manekji*, 10 Bom. 483. The same High Court has taken a contrary view in *Md. Akbar* v. *Associated Banking Corp. Ltd.*, 52 Bom.L.R. 559, A.I.R. 1950 Bom. 386 and has held that such a suit is governed by Art. 112 and not by this article. Their Lordships have held that the case reported in 10 Bom. 483 must be held to have been overruled or at least erroneous in view of the observation of their Lordships of the Judicial Committee in *Hansraj* v. *Dehra Dun M. E. T. Co.*, 35 Bom.L.R. 319, A.I.R. 1933 P.C. 63. But the view expressed in *Md. Akbar* v. *Associated Banking Corp. Ltd.*, supra, was dissented from recently by the Nagpur High Court in—*L. Gupta* v. *Sarvate*, A.I.R. 1956 Nag. 204, where it was held that a suit by the liquidator of a company for the recovery of calls is governed by Article 120. An order made by a liquidation Court is not a decree though it is enforceable in the same manner as if it were a decree. A suit on a call order passed by a liquidation Court in Baroda being not a suit on a foreign judgment is governed by Art. 120, and not by Art 117—*Modern Chemical Works Ld.* v. *Manmohan Nath Dar*, A.I.R. 1935 Lah. 975.

Suit against directors of a company:—A suit by the official liquidator under sec. 235 of the Indian Companies Act (1913) calling upon the directors and the auditor to make good a large sum of money of the company which they have allowed to be mis-spent, is governed by this Article, and not by Article 36, 115 or 116—*In re Union Bank*, 47 All. 669, 23 A.L.J. 473, A.I.R. 1925 All. 519. A suit against the directors for misapplication of the company's funds in *ultra vires* transactions falls under this Article, and time runs from the date on which the balance-sheet showing the losses ascertained was laid before the company at its general meeting—*Govind* v. *Rangnath*, 54 Bom. 226, 32 Bom.L.R. 232, A.I.R. 1930 Bom. 572 (584). See also *Narasimha* v. *Official Assignee*, 54 Mad. 153, A.I.R. 1931 Mad. 58, 128 I.C. 477.

This article has no application to a suit for compensation for loss suffered as a result of misleading prospectus against the directors of the company—*Dwarkadoss* v. *Manavedan*, I.L.R. (1945) Mad. 325, (1944) 2 M.L.J. 286, A.I.R. 1945 Mad. 5; *Rajah of Nilambar* v. *Amirchand*, A.I.R. 1944 Mad. 431, 57 L.W. 312. Such a suit is governed by Article 36—*Ibid.*

Suit for rectification of register of company:—An action under sec. 38 of the Companies Act for rectification of the register is governed by this article and not by Article 48 or 49 as such an action is not for detunue or trover—*Jawahar Mills Ltd.* v. *Official Receiver*, (1949) 2 M.L.J. 88, 1949 M.W.N. 424.

Suit by company:—A suit by a company for the recovery of money due to it, but which had been realised by a decree-holder against the company during the pendency of an application for winding up of the company is governed by this article and not by Art. 62. As the company could not have claimed refund of the amount realised by the decree-holder before the order for winding up the cause of action arises only on that date and not the date of payment to the decree-holder—*Gorakpur Electric Supply Co. Ltd.*, v. *Nariman & Co.*, I.L.R. (1947) All. 203, 1947 A.L.J. 319.

Suit for mesne profits:—A suit for recovery of the profits of immoveable property received by the defendant during the period he was in possession of the property by virtue of a decree of Court (which was afterwards set aside) is governed by this Article and not by Art. 109, because the receipt of profits during that period under a decree which was valid at the time cannot be said to be 'wrongful' within the meaning of Art. 109. The cause of action arises when the decree by virtue of which the defendant obtained possession is set aside—*Holloway* v. *Ghaneshwar*, 3 C.L.J. 182 The right to sue for the profits of the entire period between the date of the sale and the date of its confirmation accrues only on the date of confirmation and Art. 120 and not Art. 109 applies. So also a suit for recovery of rents and profits received by the defendant during the period he was in possession as land-holder recognised by the Collector under the Madras Estates Land Act (which was subsequently cancelled in view of Order in Council in a Civil suit) is governed by this article and not by Art. 109 and the right to sue accrues each time the defendant realised rents and profits and claim for profits received more than six years before the suit fails—*Krishnayya* v. *Maharaja of Pithapuram*, I.L.R. (1942) Mad. 562, (1942) 1 M.L.J. 472, A.I.R. 1942 Mad. 487. A suit by a revenue sale purchaser for mesne profits after the date of annulment of the under tenure is governed by this article—*Bibhuti* v. *Promoda*, 43 C.W.N. 469, 69 C.L.J. 220, A.I.R. 1939 Cal. 468.

Suit on a pro-note:—A suit on a pro-note payable at any time within six years on demand from the date of its execution was held to be governed by this Article, as it is a special form of note not contemplated by Art. 73, and time ran from the date of the note—*Sanjivi* v. *Errappa*, 6 Mad. 290. Mr. Rustomji has rightly criticised this ruling on the ground that Article 80 which is the residuary Article in respect of pro-note ought to have been applied, and not the most residuary Article 120; and that the cause of action arose on the expiry of six years from the date of execution of the pro-note. the pro-note being taken as one payable after six years from its date. See Rustomji, 3rd Edn., p. 353.

Suit to recover money drawn out of Court by defendant:—Where the defendant under colour of a decree, since reversed, has intercepted the money which the plaintiff has realised by summary process under sec. 583, C. P. C., and the latter sues to recover by way of restitution the money so intercepted, his suit is governed by this Article—*Narayana* v. *Narayana*, 13 Mad. 437 (442). A suit for the recovery of money wrongfully withdrawn by the defendant from Court by setting up an adverse title to the claim of the plaintiff is governed by this article—*Kanji* v. *Kalidas*, 69 C.L.J. 108, A.I.R. 1939 Cal. 413.

Suit for possession of office:—A suit for possession of the office of *Dharmakarta* of a temple based on a right by prescription and not on a hereditary right to it, and for possession of the property attached to it, is governed by this Article and not by Art. 124; Art. 144 also does not apply as the right to the land was only secondary and dependent upon the right to the office—*Kidambi Raghavacharlu* v. *Tiru Malai*. 26 Mad. 113 (115); *Gajanan* v. *Ram Rao*, I.L.R. 1954 Nag. 302, A.I.R. 1954 Nag. 212. So also a suit filed under sec. 36, proviso (3) of the Bombay Hereditary Offices Act for a declaration that the plaintiff is the nearest heir of the last holder of a watan is governed by this article—*Basangowda* v. *Fakirgowda*, I.L.R. (1939) Bom. 123, 40 Bom.L.R. 1288, A.I.R. 1939 Bom. 56.

Suit for removal of defacto mutwalli:—This article applies to a suit to remove an unauthorised mutwalli. If no suit is brought within six years, the *defacto* mutwalli acquires an indefeasible title—*Mst. Kamon* v. *Allah Bakhsh*, 41 P.L.R. 166.

Suit by contributors to a common fund for distribution:—Plaintiffs, who had contributed to a common fund to be utilised for family requirements, brought a suit

in which they claimed that their shares in the said fund should be determined and paid. *Held* that the suit was neither a partnership suit under Article 106 nor a suit based on contract under Article 113 or 115, that the claim was one which must be dealt with on equitable principles apart from any question of partnership or of contract, and that Article 120 applied and the cause of action accrued from the date on which the defendants refused to recognise the rights of the plaintiffs—*Commercial Bank* v. *Allavoodeen*, 23 Mad. 583 (592).

Suit for reimbursement against minor:—A suit by a person who has supplied a minor with necessaries such as maintainance and litigation expenses to reimburse himself from the minor's property is governed by this article—*Rajarathna* v. *Shaiek Mahboob*, I.L.R. (1940) Mad. 27, 1939 M.W.N. 798, A.I.R. 1940 Mad. 106.

Suit for recoupment of loss against receiver:—A suit against a receiver appointed under Or. 40, r. 1, C. P. Code for recoupment of the loss alleged to have been caused by his negligent management with leave of the Court appointing the receiver at the time of dealing with objections to the receiver's accounts is governed by this Article —*Ram Chandra* v. *Baidyanath*, 46 C.W.N. 294, I.L.R. (1942) 1 Cal. 577, 75 C.L.J. 1, A.I.R. 1942 Cal. 483.

Suit for accounts:—Under the previous Act, following the English law, a suit for accounts against a *trustee* was governed by six years' rule under Article 120. See *Saroda Pershad* v. *Brojo Nauth*, 5 Cal. 910; *Advocate-General* v. *Bai Punjabai*, 18 Bom. 551 (566, 567). But after the words "or for an account of such property or proceeds" have been added to section 10 in the Act of 1908 such a suit falls under section 10, and is never barred. See Note 117A under sec. 10. But a suit for accounts against a person *who is not a trustee* is governed by Article 120. Thus, the *karta* of a family cannot be said to be a person in whom the property of the family is 'vested' for a specific purpose; he is not therefore a trustee; a suit against him for accounts is not governed by sec. 10 but by this Article—*Biswambhar* v. *Giribala*, 25 C.W.N. 356, A.I.R. 1921 Cal. 571, 58 I.C. 877; *Benoy* v. *Amarendra*, 44 C.W.N. 93, I.L.R. (1940) 1 Cal. 183, 70 C.L.J. 572, A.I.R. 1940 Cal. 51. A suit by a minor on attaining majority for accounts against his guardian is governed by this article and not by Art. 89—*Mani* v. *Anpurna*, 22 Pat. 114, A.I.R. 1943 Pat. 218; *Ahmed* v. *Yehiya*, A.I.R. 1950 Hyder. 52. Where the relationship between the plaintiff and the defendant is one of a fiduciary nature involving liability to account more akin to that of a trustee and not that of a principal and agent, a suit for accounts is governed by this article and not by Art. 89—*Palaniaipa* v. *Ramanatha*, 1939 M.W.N. 360, A.I.R. 1939 Mad. 671. See also, *Peria* v. *Varalakshmi*, (1942) 1 M.L.J. 274, A.I.R. 1942 Mad. 386; *Raoji* v. *Bavachekar*, 52 Bom.L.R. 606, A.I.R. 1950 Bom 399 (transferee from insolvent). This article applies to a suit for accounts by a co-tenant against another co-tenant—*Vidya* v. *Shahdev*, A.I.R. 1938 Lah. 139, 182 I.C. 426. A suit for accounts brought by a legatee against the executors of a will falls under this Article; even if the plaintiff claims to recover a legacy and also claims an account of the property, the claim to legacy will be governed by the 12 years' rule of Article 123, but the claim for account will not be extended to 12 years but will be limited to only six years before suit—*Gajanan* v. *Waman*, 12 Bom.L.R. 881, 8 I.C. 189 (190).

This article does not apply to a suit for accounts and share of profits of dissolved partnership. Such a suit is governed by Art. 106—*Meera* v. *Yegnanerayane*, A.I.R. 1951 Tra-Co. 177.

But though the plaintiff, in any suit for accounts, is not entitled to claim accounts for any period earlier than six years from the date of institution of the

suit, this does not mean that the earlier accounts cannot be required for any purpose whatever. When a person is liable to make good moneys which have come into hands,, the action is maintainable in respect of the balance in his hands six years ago, and the moneys received since, and what that balance was is a question with regard to which the earlier accounts are material. In other words, accounts previous to the six years are only material as evidence of what the defendant actually had in hand at the date from which the account now to be taken is to run. Lightwood, pp. 284-285.

Suit by creditor to set aside alienation by debtor:—A suit under sec. 53, Transfer of Property Act, to set aside an alienation made by a debtor, is governed by Article 120, Limitation Act—*Narasimham* v. *Narayana*, 22 L.W. 592, A.I.R. 1926 Mad. 66, 92 I.C. 405; *Venkateswara* v. *Somasundaram*, 7 L.W. 280, 44 I.C. 551. And time begins to run from the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him, and not from the date of alienation—*per* Philips, J. in *Venkateswara* v. *Somasundaram* supra; *Narasimha* v. *Narayana*, supra (*per* Madhavan Nair, J.). In the latter case, Venkatasubba Rao. J. is however, of opinion that since the alienation is 'voidable at the option of the creditor' (sec. 53, T. P. Act), the creditor may avoid it at any time at his pleasure, and the period of limitation runs from the date on which the plaintiff decides to exercise his option of avoiding the transfer. Madhavan Nair, J. disapproves of this view on the ground that the result of holding that the starting point for limitation is the exercise of option by the creditor would be that the creditor will be entitled to wait any number of years he pleases before bringing the suit, which would mean in effect that there would be no period of limitation at all for the suit. So also a suit by a creditor under sec. 53, Transfer of Property Act for a declaration that a transfer by a debtor is intended to defeat or delay him and other creditors and is therefore, not binding on them is governed by this Article and not by Art. 91 and for such a suit limitation starts against the plaintiff when he is fixed with the knowledge about the fraudulent character of the transaction which he seeks to impeach in his suit. The burden of proof is on the defendant to show that the plaintiff had clear and definite knowledge of the fraud for more than the period of limitation and the fact that the plaintiff knew some facts such as would raise a bare suspicion is not enough evidence to discharge this onus—*Abdallakhan* v. *Purshottam*, 49 Bom.L.R. 875, A.I.R. 1948 Bom. 265 (on appeal from *Abdalla Khan* v. *Purshottam*, 46 Bom.L.R. 613, A.I.R. 1944 Bom. 267); *Marthandu* v. *Chenna*, (1950) 2 M.L.J. 653,, A.I.R. 1951 Mad. 388; *Official Receiver* v. *Alagappa*, I.L.R. (1946) Mad. 777, (1946) 1 M.L.J. 113, A.I.R. 1946 Mad. 236; *Chinnaturai* v. *Official Receiver*, (1943) 1 M.L.J. 125, A.I.R. 1943 Mad. 252.

Suit by Official Receiver to set aside alienation by insolvent:—A suit filed by the Official Receiver for a declaration that the mortgage executed by the insolvent was sham and nominal is governed by this Article—*Official Receiver* v. *Alagappa*, supra; *Chinnaturai* v. *Official Receiver*, supra.

Suit for recovery of money under sec. 68, Transfer of Property Act:—In a suit for recovery of money, under sec. 68, Transfer of Property Act, limitation is governed by Art. 116 or Art. 120, Limitation Act. Art. 62 has no application—*Ma Pwa Thein* v. *Ma Me Tha*, A.I.R. 1936 Rang. 80, 161 I.C. 461. The Calcutta High Court has held that such a suit is governed by this Article and the starting point of limitation is the date when the mortgagee is deprived of his security—*Rai Mohan Commilla Union Bank*, I.L.R. (1945) 2 Cal. 473, A.I.R. 1949 Cal. 530.

Suit for recovery of charges under sec. 44, Sale of Goods Act:—The liability of a buyer for reasonable charges for care and custody of the goods arises under

sec. 44, Sale of Goods Act. As the liability arises under the statute, apart from any contract between the parties, this article is applicable to a suit for realisation of the same and not Art. 110 or Art. 115—*Kamruddin* v. *The Municipal Committee*, 1950 N.L.J. 363, A.I.R. 1951 Nag. 148.

Suit for recovery of purchase money:—This article applies to a suit for recovery of purchase money under the statutory provisions of sec. 93, Punjab Land Revenue Act—*Punjab Govt.* v. *Baij Nath*, 47 P.L.R. 122, A.I.R. 1945 Lah. 164.

Suit for recovery of cess.—A suit for recovery of cess from intermediate land-holder under sec. 88, Madras Local Boards Act, is not one for rent nor is it based on any contract express or implied. It is a suit to enforce a liability created by statute. Such a suit is governed by Art. 120, Limitation Act—*Rajah of Vizianagram* v. *Dindi China Thammanna*, A.I.R. 1937 Mad. 217 (F.B.); *Mahomed Jiffri* v. *Ayidross*, I.L.R. (1940) Mad. 50, (1939) 2 M.L.J. 579, A I.R. 1939 Mad. 877.

Suit for recovery of license fee and tax:—A suit to recover license fee assessed under sec. 180, Bihar Municipal Act, in respect of a platform erected, is governed by this Article and not by Art. 115 as the liability is a statutory liability—*Mathura* v. *Gaya Municipality*, A.I.R. 1938 Pat. 192. So also this article applies to suits by the District Board to realise tax on circumstances and property—*District Board* v. *Babu Ram*, I.L.R. (1941) All. 276, 1941 A.L.J. 28, A.I R. 1941 All. 152; or for recovery of terminal tax—*Larkana Municipality* v. *Kaloomal*, A.I.R. 1938 Sind. 48. But a suit to recover license fee and profession tax alleged to have been wrongly levied by the Municipality is not governed by this article but by Art. 62—*India Sugars and Refineries Ltd.* v. *Municipal Council*, I.L.R. (1942) Mad. 521, (1942) 2 M.L.J. 663, A.I.R. 1943 Mad. 191.

Suit for declaration of invalidity of sale:—Where property is sold in execution on the basis of a mortgage, even though a suit for declaration that the mortgage is barred by limitation, the sale held under the mortgage gives a fresh right to sue against the purchaser of the property in the execution sale. The right to sue accrues on the date of purchase—*Kanhayalal* v. *Mt. Hira Bibi*, A.I.R. 1936 Pat. 332, 15 Pat. 151, 17 P.L.J. 131, 163 I.C. 940 (*Bolo* v. *Koklam*, 11 Lah. 657 (P.C.) folld.).

Suit for cancellation of deed:—A suit by the executant of a deed of gift for cancellation of the same and for declaration that the interest of the executant is not affected by the said deed of gift is governed by this article and not by Art. 91—*Mt. Sewti* v. *Rattan*, A.I.R. 1951 Him. Pra. 54.

Suit by beneficiary against trustee:—A suit by a beneficiary against the trustee calling upon the latter to convey the property to the plaintiff is governed by Art. 120 and not by Art. 144—*Chhatra Kumari* v. *Mohan Bikram*, 10 Pat. 851 (P.C.). 35 C.W.N. 953, A.I.R. 1931 P.C. 196, 133 I.C. 705.

Suits under secs. 104H, 111A, 111B of Bengal Tenancy Act:—Suits which fall within the scope of sec. 104H of the Bengal Tenancy Act are governed by the special rule of limitation provided in that section; but suits which fall outside the scope of sec. 104H, the right to maintain which under certain conditions is expressly given by the proviso to sec. 111A, are governed by Art. 120. Thus, in a proceeding under Chapter X of the Bengal Tenancy Act, the plaintiffs claimed that they were occupancy raiyats in respect of the lands described in schedule *cha* of the *plaint*, but the Revenue Officer held that the plaintiffs were tenure holders and only in respect of schedule *ga* land, and settled the lands deducting 30 per cent. for their allowance as such and recorded their sub-tenants as occupancy raiyats, and wrongly excluded *gha* and *una* schedules altogether from their lands. Thereupon the plaintiffs instituted the present suit. *Held* that so far as the plaintiffs are aggrieved by the rent

settled as payable by them as tenure-holders in respect of land of schedule *ga* and desire to have the entry corrected, the suit falls within the scope of sec. 104H of the Bengal Tenancy Act and is governed by the special period of limitation prescribed therein; but in respect of the other relief, the suit falls within the scope of sec. 111A, and is one under sec. 42 of the Specific Relief Act, to which the limitation applicable is that provided by Article 120, Limitation Act—*Rajani* v. *Secretary of State*, 45 Cal. 645 (652). A suit for a declaration that the entry in the Record-of-Rights that a person is a tenureholder is erroneous and that he should be declared a raiyat, is within the proviso to sec. 111A, Bengal Tenancy Act, and the period of limitation is that provided by Art. 120, and not by sec. 104H, B. T. Act—*Midnapore Zemindary Co.* v. *Secy. of State*, 34 C.W.N. 1 (P.C.), 51 C.L.J. 1, A.I.R. 1929 P.C. 286, 120 I.C. 56. A suit under sec. 111B, Bengal Tenancy Act falls under Art. 120, and the right to sue accrues from the date of final publication of the Record-of-Rights, but the plaintiff is entitled to an extended period of limitation by three (now four) months because sub-sec. (4) of that section provides that limitation is suspended for that period from the date of the certificate—*Asutosh* v. *Radhika*, 56 Cal. 407, 119 I.C. 121, A.I.R. 1929 Cal. 481; *Bhabadas* v. *Karpur*, 42 C.W.N. 96.

Suit by Muhammadan heir to recover moveable property:—A suit by the heir of a deceased Muhammadan to recover moveable property left by the deceased is governed by Art. 120; but if the property be immoveable, the suit will fall under Art. 144—*Mariam Beeviammal* v. *Kadir Meera Saheb*, 29 I.C. 275; *Khadersa* v. *Ayissa*, 34 Mad. 511 (513); *Joti Pershad* v. *Sant Lal*, 34 P.R. 1914, 21 I.C. 919, 13 P.L.R. 1914.

A suit by one of several Muhammadan heirs for a share of the intestate's moveable property in the possession of another heir is governed by Art. 120, and not by Art. 49—*Bashirunnissa* v. *Abdur Rahim*, 44 All. 244 (246), 20 A.L.J. 71, 64 I.C. 974.

A suit to establish a right to inherit the property even though moveable of a deceased person is governed by this Article—*Sharifa* v. *Court of Wards*, I.L.R. (1941) Lah. 843, A.I.R. 1940 Lah. 475.

Suit for administration by Mahomedan heir:—To a suit for administration against certain Mahomedan co-heirs by person entitled to a part of this interest of an heir, this article applies so far as moveables are concerned and Art. 144 applies so far as immoveable property is concerned. The heirs of a Mahomedan succeed to his estate in specific shares as tenants in common—*Mahomedally* v. *Safiabai*, 67 I.A. 406, L.L.R. (1941) Bom. 8, 45 C.W.N. 226, 43 P.L.R. 63, (1941) 1 M.L.J. 694, A.I.R. 1940 P.C. 215, 1941 P.W.N. 316 (P.C.).

Suit against Muhammadan widow by other heirs:—Where the mortgage-debt due to a deceased Muhammadan had been realised by his widow, and the other heirs of the deceased sued to recover the money from her, *held* that this Article applied; Art. 123 did not apply, because the widow was not an executor or administrator representing the estate of the deceased person. Article 62 might also apply to the suit—*Umardaraj* v. *Wilayat*, 19 All. 169 (172, 174).

Suit by adopted son to recover moveable property:—A suit by the adopted son to recover immovable property alienated by the widow before the adoption, is governed by Art. 144; if this property is moveable, Art. 120 applies, and limitation runs from the date of adoption—*Venkataratnam* v. *Venkataramiah*, 27 M.L.J. 569, 25 I.C. 692.

Suit for settlement of rent:—Where the Revenue Officer directed that the lands

in question be recorded as liable to payment of rent, and it was then too late for the proprietor to apply under sec. 105, Bengal Tenancy Act for settlement of rent, a suit instituted in the Civil Court by the proprietor to have fair rent settled in respect of the lands is governed by this Article, and time begins to run from the date of the order of the Revenue Officer—*Berhamdat* v. *Krishna*, 18 C.W.N. 466, 20 I.C. 910.

Suit to set aside municipal election:—A suit by a defeated candidate to set aside the election of members of a Municipal Board is a suit of a civil nature and maintainable in a Civil Court; and Art. 120 governs the suit—*Raghunandan* v. *Sheo Prashad*, 35 All. 308.

Suit by one co-owner against another for recovery of income:—A suit by one co-owner of a *jaghir* to recover his share of the net income from another co-owner who was appointed by the Government as the manager of the *jaghir*, is really a suit for accounts governed by Art. 120, and not one under Art. 62 because the suit is not for a *definite* sum of money received by the defendant for the plaintiff—*Subba Row* v. *Rama Row*, 40 Mad. 291 (293). See this case cited in Note 370 under Article 62. A suit between two co-sharers for a share of profits realized by the co-sharer in possession is not governed by Art. 89 but by Art. 120—*Charan Singh* v. *Diwan Singh*, A.I.R. 1936 All. 706, 1936 A.L.J. 984, 165 I.C. 266. See also *Sankara* v. *Ramachandra*, A.I.R. 1954 T.C. 302, where reference is made to *Midnapore Zemindary Co.* v. *Naresh Narayan, reported* in A.I.R. 1924 P.C. 144 and A.I.R. 1925 P.C. 93. The same principle applies to such a suit by one co-heir against another and the proper article applicable is this article—*U. Aung* v. *Daw Mya*, A.I.R. 1938 Rang. 416; *Daw Ein* v. *Daw Chan*, 1940 Rang.L.R. 136, A.I.R. 1939 Rang. 365; *Visalakshi* v. *Madhava*, (1942) 1 M.L.J. 408, A.I.R. 1942 Mad. 514; *Pazhukkath* v. *Veluthan*, (1955) 2 M.L.J. 224, A.I.R. 1956 Mad. 108, 1955 M.W.N. 497. The appropriate remedy in such a case is an action for an account and either Art. 89 or this article applies. That depends upon the facts of each case. Where the suit is not for accounts of agency, Art. 89 will not not apply and this Article is the proper article to apply—*Sitaram* v. *Narayan*, 45 Bom.L.R. 424, A.I.R. 1943 Bom. 216. A suit by some of the members of a joint Hindu family against a purchaser in execution of a mortgage decree against another member for their share of the profits during the period they were kept out of possession by him is governed by Art. 120, and not by Art. 109. The first column of Art. 109 speaks of property belonging to the plaintiffs and also of the profits thereof having been "wrongfully" received by the defendant. Neither of the conditions assumed here can properly apply as between co-owners—*Siddalingana Gowd* v. *Bhimana Goud*, A.I.R. 1935 Mad.. 731, 68 M.L.J. 487, 1935 M.W.N. 107, 41 L.W. 138, 156 I.C. 640.

Money due to tenants-in-common which has been received by one or more tenants in exclusion of the rest is not money had and received within the meaning of Art. 62. Moreover, as the liability in such case is neither *ex contractu* nor *ex delicto*, Arts. 115 and 36 have no application. Again, Art. 109 cannot be applied as the profits were not wrongfully received by the parties being co-sharers. Hence a suit by co-sharer for accounts against other co-sharers must fall within the residuary Art. 120—*Ayub Khan* v. *Akram and others*, A.I.R. 1937 Pesh. 28; *Abu Sahid* v. *Abdul*, I.L.R. (1940) 1 Cal. 110, A.I.R. 1940 Cal. 363. A suit for accounts by the widow of a deceased co-parcener against one of the surviving co-parceners is governed by this article and not by Arts. 48, 49 and 62—*Vidya* v. *Sahadev*, A.I.R. 1938 Lah. 139, 182 I.C. 426. The right to use accrues only where there is a demand for accounts

and a refusal to render them. Where there has been no demand for accounts or a refusal to render them the plaintiff would be entitled to an account for the entire period of the defendant's management when he was in sole possession and in sole receipts of rents and profits—*Khem Chand* v. *Dayaram*, I.L.R. (1940) Kar. 534, A.I.R. 1941 Sind. 50.

A person who is excluded from the enjoyment of his rights as a coparcener by the other members of the family is entitled to a declaration of his rights and a decree for joint possession. Such a suit is not one to enforce a right to share in the joint family property, and is governed by Art. 120, and not Art. 127—*Moti Ram* v. *Devi Das*, A.I.R. 1935 Pesh. 95, 157 I.C. 345.

A suit for account and recovery of share of profits derived from property accreted to the joint family property and recovered after partition is governed by this Article and not by Art. 62 and and time begins to run from the date of denial of claim to account—*Naganna* v. *Venkatarayulu*, (1950) 2 M.L.J. 459, A.I.R. 1951 Mad. 234.

Suit to set aside order of Government:—In 1903 the Government officials marked off the lands in suit and issued to the plaintiff a rough patta showing the lands to which Government admitted his right to obtain a grant subject to the usual conditions. The plaintiff preferred objection to the exclusion from the rough patta of the lands in suit. His objections were rejected in 1905. In 1913, the plaintiffs brought a suit to set aside the order of dismissal of objection and for a declaration of his right. *Held* that Article 120 governed the suit, which was therefore barred—*Ambu Nair* v. *Secretary of State*, 47 Mad. 572 (P.C.), 80 I.C. 835, A.I.R. 1924 P.C. 150, 29 C.W.N. 365.

Suit on administration bond:—A suit against an administrator on an administration surety bond has been held to be governed by this Article, and the cause of action arises on failure by the administrator to comply with any of the conditions of the bond or on the administrator putting it out of his power to comply with them. The fact that no action is taken on the breach of one or more of the various conditions of the bond would not bar a suit on a subsequent breach—*Kopu* v. *Ma Thein*, 12 Bur.L.T. 225, 56 I.C. 968. But in *Ramanathan* v. *Rangammal*, 17 M.L.T. 61 27 I.C. 849; *Ahmed* v. *Fatima*, 8 Bur.L.T. 59, 26 I.C. 505, and *Maung San* v. *Maung Kyaw*, 1 Rang. 463, A.I.R. 1924 Rang. 68 ,76 I.C. 802, the suit was held to be governed by Art. 68.

A suit for declaration that the plaintiffs are the under-proprietors and not *qabzadars* of the lands in suit brought within six years of the order of the Revenue Court made in the proceedings for enhancement of rent is not barred—*Ram Khelwan* v. *Raja Rampal*, A.I.R. 1937 Oudh 47; *Chhabraj* v. *Ram Deo*, 18 Luck. 38, 1942 O.W.N. 217. A.I.R. 1942 Oudh 346.

One E. Martin died intestate leaving some next-of-kin. Letters of administration were obtained to her estate by her daughter. That daughter died, and her son, the defendant, obtained probate of her will. His mother had put aside a sum of money as the share of one of the brothers of E. Martin, one T. Jones, whose whereabouts were not known. The defendant deposited this money in a bank on interest. The plaintiff obtained letters of administration *de bonis non* to the estate of E. Martin. The defendant paid over to her the sum which was put aside as share of T. Jones. The plaintiff applied on an originating summons in which she sought to make the defendant account for all interest obtained or which might be deemed to have been earned by the amount and for inquiry as to what moneys came into his hands. *Held*, the claim was governed by Art. 130, Limitation Act. Clearly,

the defendant was not holding under an express trust, but the claim against him is an equitable claim, and by taking charge of a fund as executor to his mother, in respect of which the mother was clearly a trustee, although not holding on an express trust, the defendant although he is not a derivative executor rendered himself liable in equity to account for the fund, and therefore this claim is within Art. 120; and as there has been no denial or infringement of the right claimed, the claim is not barred by limitation—*In re Mrs. E. Martin*, A.I R. 1935 Cal. 511.

Suit under section 36, Bengal Moneylenders Act:—To such a suit Article 120 applies, and if it is brought more than six years after 1.9.40, the suit will be barred—*Indu Bhushan* v. *Sudhakar*, A.I.R 1957 Cal. 106.

509. "When the right to sue accrues"—There can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted—*Bolo* v. *Koklan*, 11 Lah. 657 (P.C.), 34 C.W.N. 1169 (1175); *Annamalai* v. *Muthukaruppa*, 8 Rang. 645 (P.C.), 35 C W.N. 145, 130 I.C. 609, A.I.R. 1931 P.C. 9; *Radha Madhab* v. *Rajendra*, 12 Pat. 727, A.I.R. 1933 Pat. 250. 14 P.L.T. 258. The right to sue accrues only when a cause of action arises. And for a cause of action to arise it must be clear that the averments in a plaint if held correct should lead to a successful issue—*Harindar* v. *Anant*, 41 P.L.R. 321, A.I.R. 1939 Lah. 6. The passing of the resolution by the company allowing mutation of the name of a third person cannot be said to constitute a clear and unequivocal threat to the plaintiff's right in the absence of anything to show that the plaintiff was aware of the resolution. But if the resolution is communicated, the period of limitation begins to run from the date of communication—*Mahadeo* v. *New Darjeeling Union Tea Co.*, 55 C.W.N. 408, A.I.R. 1952 Cal. 58. So also where the cause of action alleged in the plaint is nothing more than an assertion that the defendant was intending to transfer the property of which the plaintiff was in possession and that the defendant had declined to admit plaintiff's title, it cannot be said that this was an invasion of plaintiff's right or even that it amounts to a clear threat to invade that right. There is no cause of action giving rise to a right to sue—*Nanak* v. *Faquira*, 1940 A.L.J. 459, A.I.R. 1940 All. 424. Thus, a Hindu died leaving a will by which he directed that his property would go to his widow K and minor son T jointly and that in case the son died before his mother K, then the latter should be the owner of the property. The son T died during the lifetime of his mother K leaving a widow B, and a minor son M; B brought a suit against K claiming half the property on behalf of M, but this suit was withdrawn. Then K brought the present suit for a declaration of her right to the whole property under the will. *Held* that the suit was governed by this Article (or by Art. 123 or 127), and that although K's right arose on T's death, still the period of limitation for this suit ran not from the date of T's death, but from the date of the suit brought by B, when the right of K was actually infringed or threatened to be infringed—*Balo* v. *Koklan*, 11 Lah. 657 (P.C.), 34 C.W.N. 1169 (1175), A.I.R. 1930 P.C. 270. The interpretation to be put upon the expression "when the right to sue accrues" to a large extent depends upon the particular facts of the case and to the relief sought. Where a mortgage had been effected with regard to a property and a suit had been brought on its basis which resulted in a decree, whereupon the plaintiff sued for a declaration that the property was *wakf* property and that the decree was null and void and could not be enforced against the property, it was held that the starting point of limitation was the date when the plaintiff came to know of the mortgage, *i.e.*, the date on which the mortgage was sought to be enforced, and not the date when the mortgage had been effected—*Mohammad Umar* v. *Mohammad Ibrahim*, 34 P.L.R. 598, 143 I.C. 725.

A.I.R. 1933 Lah. 270 (271); *Kandasami* v. *Sunisami*, 35 L.W. 350, 137 I.C. 707, A.I.R. 1932 Mad. 589 (591). The plaintiff cannot be debarred of his remedy unless with knowledge of his rights, he has been guilty of delay. Therefore when an action is brought on the ground of fraud, misconduct or mistake on the part of the defendant, the right to sue is deemed to accrue at the time when the plaintiff comes to know of the fraud, misconduct or mistake in question and time will begin to run against him only from the date of knowledge—*O. R. M.* v. *Nagappa*, 67 I.A. 448, I.L.R. (1941) Mad. 175, 45 C.W.N. 385, 73 C.L.J. 166, 43 Bom.L.R. 440, 1941 P.W.N. 299, A.I.R. 1941 P.C. 1, (1941) 1 M.L.J. 393 (P.C.); *Mt. Sadiqa* v. *Mir Frazand*, A.I.R. 1949 Ajmer, 8. It is not obligatory on a man to bring a perfectly vain litigation with the natural result that it would be met either by a perfect defence or that the suit would be held in suspense and await the decision of the appeal in another suit. Hence the right to sue accrues only on the decision of the appeal in another suit—*Harindar* v. *Anant*, 41 P.L.R. 321, A.I.R. 1939 Lah. 6.

In a suit to have an order of withdrawal of a suit vacated and to prosecute the suit further, the plaintiff's cause of action arises as from the date of the withdrawal of the suit from which date he will get six years under this article—*Banwari* v. *Ajit*, 67 C.L.J. 320, A.I.R. 1938 Cal. 874.

Trespass:—In a suit for declaration that the defendants are not entitled to open a door in their wall and to commit trespass upon the platform of the plaintiff's well, it was held that each act of trespass continued a fresh cause of action, and the suit brought more than nine years after the defendants opened the door, was not barred —*Sheo Prasad* v. *Mangar*, 12 A.L.J. 1150, 25 I.C. 185.

Entry in Revenue Records:—The plaintiffs brought a suit for a declaration that an entry in the record of rights to the effect that the defendants have permanent occupancy rights in the suit lands is not correct. *Held* that the period of limitation ran from the date of the publication of the entry in the record of rights, and not from any previous date when the defendants had set up rights of permanent occupancy in a written statement filed by them in a previous suit. The entry in the record of rights afforded a fresh cause of action to the plaintiffs—*Suryanarayana* v. *Bullayya*, 52 M.L.J. 323, A.I.R. 1927 Mad. 568, 101 I.C. 85. But the mere entry of the defendant's name as owner of a property in the revenue papers does not give rise to a cause of action for the plaintiff in respect of a declaration of his title to the property, and time does not begin to run against the plaintiff until an *actual claim* is made by the defendant on the strength of the entry in the papers—*Dina* v. *Rama*, 23 C.L.J. 561, 34 I.C. 702; *Sukhdasi* v. *Fateh Bahadur*, 10 O.W.N. 366, 144 I.C. 316, A.I.R. 1933 Oudh 283; or until the defendant attempts to dispossess the plaintiff—*Suraj Kumar* v. *Umed Ali*, 25 C.W.N. 1022, A.I.R. 1922 Cal. 251, 63 I.C. 954. The principle is, that if the owner is in possession of the property, it is not obligatory on him to file a suit for a declaration of his title because of an adverse entry in the Khewat, unless and until his title to the property is denied by the defendant and the denial has the effect of disturbing his possession or doing him some other injury that is not capable of being remedied otherwise than by a suit for declaration. A cause of action for such a suit accrues when his right is substantially denied on the basis of that incorrect entry, and not when he has merely the knowledge of the adverse entry—*Faujdar* v. *Baldeo*, A.I.R. 1927 All. 597, 102 I.C. 172. Thus, where the defendant's name was entered in the Revenue papers in 1899, in respect of the plaintiff's property, and then the defendant instituted a suit in 1903 for profits of the share of that property, *held* that the plaintiff's cause of action accrued on the latter date—*Skinner* v. *Shankar*, 31 All. 10 (Note). Plaintiffs having purchased certain lands in 1867 brought a suit in 1890 to obtain a

declaration of their right to have the lands registered in their name in the Revenue records. It was held that the right to be placed on the register is a right which does not give rise to a cause of action until it is asserted or denied, and a suit for a declaratory decree in respect of it must be brought within six years from the time when the right was disputed. In the present case the right had not been asserted or denied until the present suit was filed, and the defendant denied the right in his written statement; the suit was therefore not barred—*Bhikaji* v. *Pandu*, 19 Bom. 43 (45). In 1888, the plaintiffs were wrongly recorded as ex-proprietary tenants of certain lands of which they were proprietors, and the defendants were recorded as proprietors. In 1903, the plaintiffs applied to have record corrected, but their application was refused in 1903 and they were told to go to the Civil Court. In 1910 the defendants applied to have the rent assessed on the lands and obtained an order in their favour. The plaintiffs thereupon brought the present suit in 1912 for a declaration that they were the proprietors. *Held* that the cause of action arose in 1910 and not in 1904, because notwithstanding the order of 1904, the plaintiffs had remained in possession of the land without liability to pay rent therefor and it was not until rent was assessed in the proceedings of 1910 that they became liable to pay rent. The order of 1910 gave the plaintiff an entirely *fresh* cause of action—*Allah Jilai* v. *Umrao*, 36 All. 492 (495). An adverse entry in the record of rights even if allowed to remain unchallenged does not necessarily extinguish the rights of the party against whom such entry has been made, and *a fortiori*, an order to alter the entry to the prejudice of the party without the actual alteration of the entry cannot by itself entinguish the right unless the other party can prove adverse possession for the statutory period or some similar reason in support of his plea of such extinction —*Fateh Ali* v. *Muhammad Baksh*, 9 Lah. 428, A.I.R. 1928 Lah. 516 (522)

The defendant who was shown in the revenue records as a *takarraridar* entitled to one-third share of the produce, issued a notice of ejectment in 1912 to the plaintiff who was shown in the revenue records to be the owner of the lands in suit. The plaintiff brought a suit in the Revenue Court to contest the notice but was defeated. Thereupon proceedings in execution of the notice took place; but the proceedings were purely formal, and in fact the plaintiff retained physical possession of the land in suit. In other words, so far as the plaintiff was concerned, the ejectment proceedings of 1912 in no way affected his possession. A further notice of ejectment was then issued against him. *Held* that the fresh notice constituted a fresh invasion of his title and that therefore limitation for his suit for declaration of title began to run from the date of the fresh notice—*Bela Singh* v. *Lakshmi Das*, 6 Lah. 132, 26 P.L.R. 326, A.I.R. 1925 Lah. 391, 89 I.C. 299. The Revenue authorities had entered the names of the defendants as owners, and the names of the plaintiffs as in possession. Subsequently the defendants applied for partition, which was allowed by the Revenue authorities, whereupon the plaintiffs sued for a declaration of their title. *Held* that it was not obligatory on the plaintiffs to bring a suit after the first revenue proceedings in as much as they were not disturbed in their possession, and that the plaintiffs had a fresh cause of action from the date of the order of the Revenue Officer in the partition proceedings—*Hakim Singh* v. *Waryaman*, 140 P.R. 1907; *Jahana* v. *Wali*, 98 P.R. 1919, 53 I.C. 595; *Smail* v. *Bahab*, 8 Lah. 22, 100 I.C. 732, A.I.R. 1927 Lah. 119. The principle deducible from these and the following cases is that if a plaintiff is in possession or enjoyment of the property in suit, he is not obliged to sue for a declaration of title on the first or each succeeding denial of his title by the defendant. He may look upon such denial with complacency or at his option may institute a suit to falsify the assertions of the other side. But when he finds that his rights are being actually jeopardised by the actions or assertions of the defendant, then he must take proceedings within six years from the date of such

actions or assertions—*Fateh Ali* v. *Md. Bakhsh*, supra. It is always open to a person in respect of whom a wrong entry in the revenue papers is made or upon whose title some cloud is cast to ignore that entry or that cloud if he does not consider it worth while to get the entry corrected or to remove the cloud. If, however he bases his cause of action upon that wrong entry or upon the casting of that cloud then he must bring the suit within six years of his knowledge of the wrong entry or of the cloud that has been cast upon his title—*Ram Samujh* v. *Kirpa*, A.I.R. 1951 All. 408; *S Piara* v. *Kallu*, 1942 O.W.N. 744, 205 I.C. 520; *Rattam* v. *Darshan*, A.I.R. 1950 Him. Pra. 15. But where the plaintiff is not in possession and he brings a suit for a declaration that the mutation order is erroneous and for possession, which is the main relief, the suit will fail if not brought within six years of the order—*Kishen Lal* v. *Mohan*, A.I.R. 1951 Ajmer. 1.

A certain plot of land was recorded as the separate property of the defendants in the settlement records of 1887. In 1914 the defendants made an application for partition, claiming the plot as their separate property. In a suit brought by the plaintiffs in 1915 for a declaration that they were joint owners of the land with the defendants, it was held that although a cause of action might have arisen by reason of the settlement entry in 1887, still a fresh cause of action arose in 1914 when the plaintiffs found themselves in danger of being actually deprived of their joint ownership. The suit was therefore not barred—*Kali Prasad* v. *Harbans*, 14 All. 509 (512), 17 A.L.J. 588, 50 I.C. 767. Where there is a definite challenge to the plaintiff's rights, by an entry made in the Record of Rights, and where the fact is patent that the plaintiff must have been aware of that challenge to his rights, the suit if brought upon that challenge must be brought in accordance with the six years' rule of limitation; but if the plaintiff continues possession in spite of the entry, he is not required to institute any suit for declaration upon that challenge but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights—*Ramji* v. *Lala Sadhusaram*, 2 P.L.J. 493 (495), 41 I.C. 11; *Sheopher* v. *Deonarain*, 10 A.L.J. 413, 17 I.C. 675; *Alauddin* v. *Bibi Saibunnissa*, 2 P.L.J. 557, 41 I.C. 199. There must be some attempt by the defendant to oust the plaintiff in order that the plaintiff should get a fresh start by preparation of each jamabondi. The cause of action accrues when for the first time the entry is made in the jamabondi—*Mahomed* v. *Mir. Zuman*, A.I.R. 1943 Pesh. 83, 210 I.C. 385.

In the following cases it has been held that time runs from the date of entry in the revenue record: Thus, where the settlement officer had expunged the name of the plaintiff from the Revenue papers and had wrongfully caused the name of the defendant to be entered, but the plaintiffs had all along remained in possession, notwithstanding the settlement record, and then sued for a declaratory decree, *held* that the period of limitation ran from the date of the entry in the revenue papers; it was further held that the wrong entry in the village papers was a wrong committed once for all and not a continuing wrong within the meaning of sec. 23—*Legg* v. *Ram Baran*, 20 All. 35 (37) (F.B.). (It should be noted that in this case there was no fresh invasion of the plaintiff's rights by the defendant, and consequently time ran from the date of entry in the records, and there was no fresh cause of action). The plaintiff's father had applied in 1903 for entry of his name in the Revenue-register as the jenmi of certain land, but the Revenue authorities refused to do so. In 1917, the plaintiff again applied to have the land registered in his name, but on the objection of the defendants the Revenue authorities refused to change the registry. He then brought a suit for a declaration that he was the jenmi of the land. *Held* that the suit was barred, as the cause of action arose in 1903 and the plaintiff did not acquire a fresh cause of action in 1917. If the defendants had attempted to disturb the plaintiff's possession or claim any right to

the property in derogation of the plaintiff's right, such an act would have given a fresh cause of action—*Perambath Chathu* v. *Neela Kandhan*, 42 M.L.J. 457, A.I.R. 1922 Mad. 194. Where the defendant's name was entered in the Revenue papers in 1895, and the plaintiff in 1903 applied for correction of those papers, when the defendant again asserted his title, and the Revenue Court refused to make the correction, whereupon the plaintiff instituted a suit for declaration of title in 1904, it was held that the plaintiff's cause of action arose in 1895, and no *fresh* cause of action accrued in 1903; the refusal to correct the entry in 1903 was merely a continuation of the original cause of action—*Akbar* v. *Turoban*, 31 All. 9. Where the defendant (landlord) in 1905 caused the name of the plaintiff to be entered in the Record of Rights as a tenant liable to pay rent, and on the strength of that entry he obtained a rent decree against the plaintiff in 1912, and then the plaintiff brought a suit in 1912 for a declaration that he was a *lakheraj* tenant and not liable to pay rent, it was held that the suit was substantially a suit under sec. 111A of the Bengal Tenancy Act for getting a declaratory relief in respect of Record of Rights, although the plaint made no mention of the Record of Rights, and therefore the cause of action for the plaintiff's suit accrued on the date of the publication of the Record-of-Rights in 1905 and not from the date of the rent decree of 1912—*Sheikh Amiruddin* v. *Sheikh Saidur*, 1 P.L.J. 73 (76); 35 I.C. 433.

But the mere entry of the defendant's name in the village papers would not of itself give the plaintiff a cause of action if such entry was made without his knowledge. His right to sue would accrue when he became for the first time *aware of the fact* that the name of the defendant was entered in the revenue papers—*Gopal Das* v. *Shri Thakur Ganga*, 20 A.L.J. 231, A.I.R. 1922 All. 115, 66 I.C. 148. That is, time would run from the date of publication of the record of rights—*Abdul Fajur* v. *Abdul Jabbar*, 97 I.C. 635, A.I.R. 1927 Cal. 60. Where a wrong entry has been made in the revenue registers at the plaintiff's own instance, but the plaintiff has been in possession and he seeks by a declaratory suit for the removal of the cloud which has been thus thrown upon his title, limitation runs from the date of the entry—*Mahabir* v. *Jageshar*, 3 O.W.N. 896, A.I.R. 1927 Oudh 21.

Where a person continues in possession of proprietary rights in spite of an adverse entry appearing in the revenue papers no question of limitation arises—*Ghulam Md.* v. *Samundar*, A.I.R. 1936 Lah. 37, (54 I.C. 317 foll.).

A suit for declaration that the settlement record is erroneous and fraudulent,—without there being any prayer for consequential relief at all, is barred by the six years rule of limitation, commencing from the final publication of the record—*Sudhakar* v. *Nilkantha*, A.I.R. 1936 Pat. 131, 161 I.C. 465. In this case the plaintiff alleged that he was in possession. So also where the purchaser of the landlord's interest at a sale in execution brings a suit for declaration that the entry in the record of rights regarding the rent payable by the tenant is incorrect time begins to run from the date of the final publication of the record of rights. The fact that the plaintiff is not the original landlord but a purchaser of the landlord's interest at a sale in execution does not give him any new cause of action from the date of execution sale—*Gadadhar* v. *Bholanath*, 20 Pat.L.T. 303, A.I.R. 1939 Pat. 548.

Declaratory suit:—The Calcutta High Court has said that except in the cases specifically provided for in the Limitation Act (Arts. 118, 124) a suit for a declaration of right cannot be held to be barred as long as the right to the property in respect of which the declaration is sought for is a continuing and subsisting right; and the period of limitation will be counted from the time when the plaintiff becomes entitled to the consequential relief (*possession*)—*Chukkan Lal* v. *Lalit Mohan*, 20 Cal. 906

(925). In this case, their Lordships applied the principle of sec. 23. But the Madras, Bombay and Patna High Courts have dissented from this ruling and observed that the plaintiff's cause of action for a declaratory suit arises as soon as his title is denied, and that there is no recurring cause of action—*Maulvi Md. Fahimul* v. *Jagat Ballabh*, 2 Pat. 391 (403), A.I.R. 1923 Pat. 475, 74 I.C. 403; *Krishnaji* v. *Annaji*, 52 Bom. 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom. 61 (63); *Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (416). The same view has been taken in *Abid* v. *Secy. of State*, I.L.R. (1950) Nag. 633, A.I.R. 1951 Nag. 327; *Central India Spinning Co.* v. *Provincial Government*, I.L.R. (1945) Nag. 300, 1945 N.L.J. 183, A.I.R. 1945 Nag. 129. In a subsequent case the Madras High Court has held that there is nothing in law which says that the moment a person's right is denied he is bound at his peril to bring a suit for declaration It would be most unreasonable to hold that a bare repudiation of a person's title without even an overt act, would make it incumbent on him to bring a declaratory suit. A party surely has a right to elect as to when he may bring a suit for vindicating his right, when there are successive or several denials—*Appa* v. *Secy. of State*, (1938) 2 M L.J. 434, A.I.R. 1938 Mad. 193. The same view has been taken in *Malku* v. *Abdur*, 230 I.C. 451, A.I.R. 1947 Pesh. 15. The Lahore High Court has held that a suit for declaration does not lie for setting aside a mere assertion. So a mere assertion by a trustee that he is the full owner does not amount to an overt act which would start limitation running against the beneficiaries—*Afzal* v. *Din Mahomed*, I.L.R. (1946) Lah. 309, A.I.R. 1947 Lah. 117.

A mortgaged a property to B. C brought a suit for possession of the property and obtained a decree. B then brought a suit on the mortgage, obtained a decree and applied for sale of the property. C claimed the property and brought his suit for a declaration that the property was not liable to sale in execution of B's decree. It was held that the fact of the mortgage did not affect the plaintiff's right so long as no effort was made to sell the property in enforcement of the mortgage, and that the cause of action arose when the defendant attempted to sell the property—*Imambandi* v. *Puran*, 17 A.L.J. 973, 52 I.C. 646.

It is open to a Hindu son to sue for a declaration that a mrotgage executed by his father is bad as not being for legal necessity, as soon as the mortgage is executed; but he is not bound to do so, when the mortgagee does not go into possession of the property but merely gets a document of mortgage. When the mortgagee after obtaining a decree on his mortgage, starts execution proceedings, a cause of action accrues to the son; a suit filed within six years of the starting of execution proceedings will be in time, though beyond six years of the date of alienation—*Ram Chandra* v. *Bhagwan*, 48 Bom.L.R. 594, A.I.R. 1947 Bom. 82. The Patna High Court has left the question whether cause of action arises from the date of alienation or from date of knowledge of alienation open in *Sheonandan* v. *Maida*, A.I.R. 1950 Pat. 447.

In a suit by a Zamindar for a declaration that the mineral rights in certain lands are reserved to himself and have not been granted to the tenant (defendant), a fresh cause of action arises whenever any particular portion of minerals is removed by the defendant—*Kumar Pramath Nath* v. *A. J. Meik*, 5 P.L.J. 273 (285), 1 P.L.T. 360, 56 I.C. 184. Although the attachment of the person's land as if it belonged to another gives the owner a cause of action for bringing a suit to set aside the attachment, yet he is not bound to do so, and he can, after the execution sale, bring a suit for a declaration of the invalidity of the sale; because the execution sale affects the title of the owner to the property in a different and greater degree than that in which an attachment affects him, and the sale gives him a fresh cause of action—*Anantharaju* v. *Narayanaraju*, 36 Mad. 383 (384, 385). In a suit for a declaration that the Zemindar was not entitled to recover more than a stated sum from the plaintiff for quit rent,

the plaintiff's right to sue accrued on each occasion when the Zemindar collected the excess amount of rent, as each illegal exaction is a separate injury giving rise to a fresh cause of action—*Sriman Madhabushi* v. *Gopisetti Narayanasawmy*, 33 Mad. 171 (172). So also the collection by a Zamindar of rent from an inamdar (entitled to enjoy the land free from rent) however long continued will be wrongful and every time the Zamindar demanded rent which was not legally payable by the inamdar, the demand gave rise to a fresh cause of action to the inamdar—*Maharajah of Pittapuram* v. *Venkataraju*, (1948) 2 M.L.J. 631, A.I.R. 1949 Mad. 542.

Where a suit for declaration is barred, other reliefs claimed in the suit cannot have longer period of limitation than a suit for declaration of plaintiff's title. Thus where a suit is brought against Government for declaration of plaintiff's right to collect taxes in respect of plaint properties as also for recovery of taxes already collected and the suit for the main relief of declaration fails as time-barred the other reliefs also become time-barred as the relief for recovery of taxes already collected is ancillary to or consequential upon the relief of declaration—*State* v. *Ganapathi*, A.I.R 1951 Tra-Co. 232 (F.B.). But where the suit is not a purely declaratory suit but is one in which it is necessary for the Court to come to a finding as to title as a preliminary to a decree for consequential relief and the claim for consequential relief is not barred, the claim for determination of title is also not barred—*Radha Gobinda* v. *Nilkantha*, 30 Pat. 406, A.I.R. 1951 Pat. 556 (a case of declaration of title and recovery of rent).

Certain lands belonging to a talukdar were for a long time shown in the village accounts as rent-free lands. In 1872, on a reference about them by the Revenue Authorities, the Government held that these lands were improperly shown as not liable to assessment. But no correction was in fact made in the village accounts until about 1918, when a revision survey was introduced. In a suit by the talukdar in 1920 for a declaration that the lands were rent-free, *held* that time ran from 1918, and not from 1872, because the proceedings of 1872 could not, in the absence of proof that notice was given to the talukdar to the effect that the lands were liable to assessment, be treated as giving rise to any cause of action to the plaintiff—*Sursingji* v. *Secretary of State*, 28 Bom.L.R. 1213, A.I.R. 1926 Bom. 590, 99 I.C. 293. In a suit for declaration that the property in suit was joint property and the mutation entry in favour of the widow of deceased brother was made for her consolation, the right to sue accrued not from the mutation entry but from the date of the institution of the suit by the widow for profits of the propery as she asserted a title to the property by filing the suit—*Piara* v. *Kallu*, 1942 O.W N. 744, 205 I.C. 520. Where in such a case a decree is passed in the suit for profits the period of limitation starts from the date of the decree—*Kamta* v. *Chhatarpal*, 15 Luck. 487, 1940 O.W.N. 327, A.I.R. 1940 Oudh 283. Similarly in such a suit the mere entry in the mutation paper does not create any cause of action unless possession is taken by the person in whose favour the entry is made—*Rattam* v. *Darshan*, A.I.R 1950 Him. Pra 15. Where during a partition proceeding in 1895 the defendant denied the plaintiff's title, but both the plaintiff and the defendant remained in joint possession, and the plaintiff's enjoyment was not interfered with, but during fresh partition proceedings in 1914 the defendant again denied the plaintiff's title to a share, *held* that the fresh invasion of the plaintiff's title gave him a fresh cause of action, and his suit for a declaration of title brought in 1918 was not barred—*Muhammad Hanif* v. *Ratan Chand*, 3 Lah. 43 (46), A.I.R. 1922 Lah. 94, 97 P.L.R. 1922, 67 I.C. 990.

509A. Limitation for suit by remote reversioner:—It has been already stated in Note 500 above that a suit by a remote reversioner for a declaration that the alienation made by the widow is not binding on the estate, falls under this Article

and not under Article 125. The period of limitation for such a suit is to be counted from the time when "the right to sue accrues" under this Article. The right of suit of the remote reversioner accrues when the nearest reversioner precludes himself or herself from maintaining a declaratory action by omitting to sue within the statutory period (Art. 125), and thus practically concurs in the improper alienation, *i.e.*, it accrues after the lapse of 12 years from the date of alienation—*Abinash* v. *Harinath*, 32 Cal. 62 (70); *Soman* v. *Uttam*, 1 Lah. 69 (72), 91 P.L.R. 1920, 55 I.C. 924. In a Bombay case, a Hindu died leaving his widow and daughter. The widow made an alienation in 1869, but the daughter (who was then the immediate reversioner) did not impeach the alienation, and after the death of the daughter in 1879, the plaintiffs, who are her sons, brought a declaratory suit in 1883. It was held that the suit was barred, as the cause of action arose when the property was sold in 1869, during the lifetime of the plaintiff's mother who was then the nearest presumptive reversioner, and no fresh cause of action accrued to the plaintiffs on their mother's death; it could not have been intention of the Legislature, in giving a right to sue for a declaration within six years from the accrual of the right, to give successive rights to a series of successive reversioners to harass the alienees of an estate with repeated suits in respect of the same alienation—*Chhaganram* v. *Bai Motigavri*, 14 Bom. 512 (515). But this ruling was given under the Act of 1859 and should not be taken as good law now, because substantial changes have been made in the Acts of 1871, 1877 and 1908. Under Article 120 of the present Limitation Act, the question is not when the *cause of action* arises, but when the plaintiff's *right to sue accrues*.

The Allahabad High Court is of opinion (virtually dissenting from the above Calcutta ruling in 32 Cal. 62) that the failure on the part of the nearest reversioners to bring a suit for a declaration under Art. 125 within 12 years of the date of alienation does not create any new cause of action for the next reversioner to bring a suit within a further period of six years under Article 120. A remote reversioner is not entitled to sit still and wait for limitation to run out against every reversioner nearer in degree than himself. An improper alienation by a Hindu widow is a wrong to the entire body of reversioners, and it affords an immediate cause of action to all of them. In other words, the starting point of limitation for a declaratory suit by a remote reversioner is the date of alienation and the suit is governed by Article 120—*Kunwar* v. *Bindraban*, 37 All. 195 (202); *Anandi* v. *Ram Sahai*, 27 O.C. 173, A.I.R. 1924 Oudh 381. The same view has also been expressed in *Chiruvolu* v. *Chiruvolu*, 29 Mad. 390 (411), and *Narayana* v. *Rama*, 38 Mad. 396 (401); *Janaki* v. *Jyotish*, 45 C.W.N. 141, 72 C.L.J. 208, A.I.R. 1941 Cal 41. See also *Venkayamma* v. *Veerayya*, A.I.R. 1957 Andhra 280.

If the nearest reversioner is found to have colluded with the widow in the matter of alienation, the remote reversioner is entitled to bring a suit for declaration, and the cause of action arises as soon as the fact of collusion becomes known to him—*Kunwar* v *Bindraban*, 37 All. 195 (200).

Suit by reversioner born after alienation:—An entirely different case arises when the suit is brought by a remote reversioner who was born after the date of alienation. It is a well known principle of law that one reversioner does not derive his title through another, (even though that other happens to be his father), but all of them claim from the last full owner; consequently the right of a remote reversioner to sue is not derived from the right of the nearer one. If therefore the right of the nearest reversioner for the time being to contest an alienation by the widow is allowed to become barred by limitation as against him, this will not bar the similar rights of the subsequent reversioner who was born after the date of the alienation. The subsequent reversioner's right to sue accrues only *on his birth*, and if he brings the suit while he is still a minor, or

within three years after attaining majority, it is not barred, although more than twelve years have elapsed after the date of alienation—*Bhagwanta* v. *Sukhi*, 22 All. 33 (47), (F.B.); *Abinash* v. *Harinath*, 32 Cal. 62 (72); *Janaki* v. *Jyotish*, 45 C.W.N. 141, 72 C.L.J. 208, A.I.R. 1941 Cal. 41. This was also the view of the Madras High Court in *Govinda* v. *Thayammal*, 28 Mad. 57 (60) and *Narayana Aiyar* v. *Rama Aiyar*, 38 Mad. 396 (400, 405). But these cases have been overruled by the Full Bench case of *Varamma* v. *Gopala Dasaya*, 41 Mad. 659 (F.B.). In this case it has been laid down that the cause of action for a suit for a declaration that an alienation by a widow is not binding on the estate, arises on the date of alienation jointly and simultaneously for the entire body of reversioners. If, therefore, the alienation is not impeached by a declaratory suit within 12 years under Article 125 by the nearest reversioner, a remote reversioner born after the lapse of 12 years from the date of the alienation will be debarred from bringing a suit for declaration. The correctness of this ruling has been doubted in *Das Ram* v. *Tirthanath*, 51 Cal. 101 (at p. 108); but it has been followed by the Lahore High Court in *Chiragh Din* v. *Abdulla*, 6 Lah. 405, 90 I.C. 1022, A.I.R. 1925 Lah. 654. This subject has been fully discussed at pp. 84-85, *ante*.

The property of a Hindu female who was the daughter of the last male holder, and who was entitled to a limited estate, was during her minority sold by her guardian in 1891. The plaintiff (the last male holder's daughter's son) who is her reversioner, and who was not *born* at the date of the alienation, brought a suit in 1916 for a declaration that the sale was ineffective as against him. *Held* that the suit was governed by this Article and not by Article 125, as the alienation was not made by the female herself but by her guardian, and that the right of action accrued to the plaintiff when he was born (in 1896), and the suit was in time as it was brought within three years of his attaining majority (secs. 6, 8)—*Das Ram*, v. *Tirthanath*, 51 Cal. 101 (108), 81 I.C. 522, A.I.R. 1924 Cal. 481.

PART VIII—*Twelve years.*

121.	To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a patni taluk or other saleable tenure sold for arrears of rent.	Twelve years.	When the sale becomes final and conclusive.

510. Scope:—This Article applies not only to a suit brought by the auction-purchaser at a revenue sale, but also to a suit brought by a transferee from such auction-purchaser who is entitled to the same rights as his assignor—*Koylash* v. *Jubur Ali*, 22 W.R. 29; *Wahid Ali* v. *Rahat Ali*, 12 C.W.N. 1029; see also *Shosi Bhushan* v *Kramtulla*, 10 C.W.N. 148; *Narayan* v. *Kasiswar*, 1 C.L.J. 579.

511. Incumbrance:—It has been held in a large number of cases that adverse possession is an incumbrance within the meaning of this Article or within the meaning of the Patni Taluq Regulation (VIII of 1819) or of Bengal Revenue Sale Act (XI of 1859)—*Nuffar Chandra* v. *Rajendra*, 25 Cal. 167 (171); *Karmi Khan* v. *Brojo Nath*, 22 Cal. 244 (251); or under the Assam Land and Revenue Regulation—*Prasanna* v. *Jnanendra*, 43 Cal. 779 (782). But it should be noted that whether the estate is sold *subject to incumbrances*, the adverse possession of the defendant for the statutory period before the date of sale is not an incumbrance and a suit to recover possession is not a suit to avoid an incumbrance within the meaning of this Article, and is barred even though brought within 12 years from the date of sale. This view is deducible from *Kumar Kalanand* v. *Syed Sarafat*, 12 C.W.N. 528, and *Raimuddi* v. *Nalini Kanta*, 13 C.W.N. 407, 1 I.C. 81.

Thus, where the estate is sold (for arrears of revenue) subject to incumbrances and it appears that the adverse possession of the defendant had commenced before the estate was sold for arrears of revenue, (*i.e.*, if the defendant had been holding adversely to the old proprietor) and the adverse possession was sufficiently long, *i.e.*, for more than twelve years before the institution of the suit to avoid the incumbrance, the suit would be barred by limitation even though brought within 12 years from the date of the revenue sale. Such a suit is not governed by Article 121 but by Article 144—*Karmi Khan* v. *Brojonath*, 22 Cal. 244 (251).

Where the plaintiff purchased the estate with right to avoid incumbrances, but it was found that the adverse possession of the defendants and their predecessors commenced even *before the creation of the patni*, such adverse possession was not an incumbrance which the plaintiff was entitled to avoid within the meaning of this Article, and therefore this Article did not apply to a suit to recover possession from the defendants. (The suit fell under Article 144 and was consequently barred)—*Kalikanand* v. *Biprodas*, 19 C.W.N. 18, 26 I.C. 436. The reason is, that an incumbrance, in order to be so, must be one which accrued upon the tenure by the act or inaction of the defaulting patnidar himself; and therefore an adverse possession, in order to be an incumbrance, must be a possession which has commenced *after*

the creation of the *patni* tenure—*Ibid.* Therefore, where the defendants had been holding adversely for a period greatly exceeding 12 years, and the evidence did not establish whether the defendants had commenced so to hold after the creation of the *patni*, the plaintiff's suit would fail, because in order to bring the case under this Article the onus would be upon the plaintiff to show that the adverse possession of the defendants commenced after the *patni* was created—*Biprodas* v. *Kamini Kumar*, 48 I.A. 499, 49 Cal. 27 (34) (P.C.), 26 C.W.N. 465, 41 M.L.J. 638.

If the land is sold with *power to avoid incumbrances*, then a suit to recover possession of the land from the adverse possessor is a suit to avoid incumbrances within the meaning of this Article, and the period of limitation runs from the date when the sale becomes final, and not from the time when the adverse possession commenced. Even if it is regarded as a suit under Article 144, still the period of limitation would run when the sale becomes final, the possession of the defendant being regarded as becoming adverse to the plaintiff only from the date of the auction-purchase—*Nuffur Chandra* v. *Rajendra*, 25 Cal. 167 (171); *Prosanna* v. *Jnanendra*, 43 Cal. 779 (782).

The period of limitation runs when the sale becomes final and not from the date when possession was formally given to the purchaser at the sale—*Prosanna* v. *Jnanendra*, 43 Cal. 779 (782), 31 I.C. 801.

A person who had been in possession of a portion of a revenue paying estate adversely to the owner for more than 12 years before the estate was sold for arrears of revenue under the Assam Land and Revenue Regulation, would be considered as a joint proprietor liable to pay the revenue under sec. 63 of that Regulation, and therefore a 'defaulter' within the meaning of sec. 67; he held no 'incumbrance' which the auction-purchaser was called upon to annul by a suit within the period prescribed by this Article. Being a defaulter, his interest was sold away by the revenue sale, and the suit brought by the purchaser to recover possession of his share would be a suit for possession under Art. 142—*Mahim Chandra* v. *Piyari*, 44 Cal. 412 (423, 424), 21 C.W.N. 537, 39 I.C. 213.

If the patni came to an end, not by reason of *sale* for arrears of rent, but by voluntary *relinquishment* by the patnidar in favour of the Zamindar, a suit by the latter to recover possession of the land from the persons who had taken possession of it adversely to the patnidar was governed by Art. 144 and not by this Article, and time ran from the date when the defendants took possession and not from the date of relinquishment—*Gobinda* v. *Suraj Kanta*, 26 Cal. 460 (463).

512. Under-tenure:—This Article refers to under-tenures which are not avoided *per se* by the sale but which are voidable at the option of the purchaser, such as a *durpatni* tenure which is voidable on the sale of a patni tenure. On a sale of a tenure for arrears of rent under Act. VIII of 1869 or Reg. VIII of 1819 the under-tenures are not avoided *ipso facto*, but are voidable at the option of the purchaser; consequently this Article applies to a suit brought by the purchaser for that purpose—*Titu* v. *Mohesh Chandra*, 9 Cal. 683 (687) (F.B.) (overruling *Unnoda* v. *Mothooranath*, 4 Cal. 860).

122. Upon a judgment obtained in India or a recognisance.	Twelve years.	The date of the judgment or recognisance.

The word India was substituted for the words "the States" by Act 3 of 1951.

513. This Article does not enable suits to be brought upon all judgments obtained in India, but only provides a period of limitation for suits upon such judgments as can be sued upon—*Jivi* v. *Ramji*, 3 Bom. 207 (209). Thus, no suit can be brought upon a decree, the execution of which is barred by limitation—*Fakirapa* v. *Pandurangapa*, 6 Bom. 7 (9); *Dhanraj* v. *Lakhrani*, 38 All. 509 (516). An action is allowed to be maintained on a judgment only where the judgment cannot be enforced in any other way—*Kalicharan* v. *Sukhoda*, 20 C.W.N. 58, 30 I.C. 824.

An order of the High Court in its insolvency jurisdiction is a judgment of the High Court, and a suit based upon such order is maintainable. Such a suit is governed by this Article—*Annoda* v. *Nobo*, 33 Cal. 560 (564).

Where the plaintiffs obtained a decree against the defendants' father and after his death the execution of that decree was refused as against the family property in the possession of the defendants, and thereupon the plaintiffs brought the present suit against the defendants to enforce the decree-debt, it was held that the suit was not governed by Article 122, because the sons not being parties to the judgment obtained against their father, it was not binding upon them and they could not therefore be sued upon a judgment obtained against the father. It is a suit brought to enforce against the sons their pious obligation to discharge their father's debt, and falls under the residuary Article 120—*Periasami* v. *Seetharama*, 27 Mad. 243 (249) (F.B.). In another Madras case, under similar facts, it was held that the suit against the son was not a suit upon a judgment, because under the Civil Procedure Code no second suit would lie upon a previous judgment, the remedy provided being its execution in the manner provided in the Code—*Ramayya* v. *Venkataratnam*, 17 Mad. 122 (129).

The Calcutta High Court holds that a suit may be instituted in the High Court on a decree of the High Court itself—*Attarmoney* v. *Hurry Doss*, 7 Cal. 74 (75). But the Bombay High Court dissents from this view in *Merwanji* v. *Ashabai*, 8 Bom. 1 (13).

According to the Calcutta High Court, an action does not lie in that Court upon a judgment of the Calcutta Court of Small Causes—*Moonshi Golam* v. *Curreem Bux*, 5 Cal. 294. But the Bombay High Court holds that such suit is maintainable, if there is not sufficient moveable property of the defendant within the jurisdiction of the Small Cause Court, and there is sufficient immoveable property within the jurisdiction of the High Court—*Fakirappa* v. *Pandurangapa*, 6 Bom. 7 (10).

Where a suit on a judgment is barred, that judgment cannot be made the basis of a suit for the administration of the estate of the judgment-debtor. Thus, an application was made to the High Court for an order absolute for sale of the mortgaged property in execution of a mortgage-decree transferred to it for execution by a mofussil Court, but the application was refused on the ground that the mortgaged properties were outside the jurisdiction of the High Court; a suit was then brought by the decree-holder for the administration of the estate of the mortgagor (who had died already) and for sale of the mortgaged properties, more than twelve years after either the date of the original debt or the date of the *mortgage-decree*. *Held* that the suit was barred by limitation—*Jogemaya* v. *Thackomoni*, 24 Cal 473 (488).

123. For a legacy or for a share of a residue bequeathed by a testator, or for a distributive	Twelve years.	When the legacy or share becomes payable or deliverable.

share of the property of an intestate.

514. Application of Article:—It has been authoritatively laid down by the Privy Council that this Article applies only where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate—*Ghulam Mohammad* v. *Ghulam Husain*, 54 All. 93 (P.C.), 59 I.A. 74, 1932 A.L.J. 245, 36 C.W.N. 310 (322), 136 I.C. 454, A.I.R. 1932 P.C, 81; *Issur Chunder* v. *Juggul Chunder*, 9 Cal. 79; *Azizul Huq* v. *Maryam*, 17 O.C. 157, 24 I.C. 45; *Khadirsha* v. *Ayissa*, 34 *Mad.* 511 (512); *Hemangini* v. *Anil*, 17 Pat. 350, 19 Pat.L.T. 202, A.I.R. 1938 Pat. 600; *Meenakshi* v. *Subramania*, A.I.R. 1955 Mad. 369. Therefore, where a Mahomedan dies intestate, the estate vests in the heirs and no one is bound by law to distribute the property; a suit by one of the heirs against the others to recover possession of his share is governed by Art. 144; Article 123 does not apply to the case—*Ghulam Mohammad* v. *Ghulam Hussain*, supra; *Khadirsha* v. *Ayissa*, 34 Mad. 511 (513); *Marian Beeviammal* v. *Kadir Meera Sahib*, 29 I.C. 275 (278); *Zainab* v. *Ghulam Rasul*, 4 Lah. 402 (404), A.I.R. 1923 Lah. 519, 73 I.C. 425; *Azizul* v. *Maryam* (supra). A suit by the heirs of the deceased owner for recovery of possession of the property from the defendants who are in possession of the property without any colour of title and not claiming under the original owner is not governed by this Article—*Mahomed Chotoo* v. *Abdul Hamid Khan*, 10 Rang. 82, 137 I.C. 200, A.I.R. 1932 Rang. 55. Similarly, a suit by the plaintiff to recover possession of certain G. P. Notes in accordance with the terms of a will, against the defendant alleged to have the Notes in his custody contrary to the terms of the will does not fall under this Article, as the defendant is not charged with the duty of distributing the estate of the testator—*Swarnamoyee* v. *Probodh*, 36 C.W.N. 758, 55 C.L.J. 420, 143 I.C. 402, A.I.R. 1933 Cal. 253. So also, where the amount of a mortgage-debt due to a deceased Mahomedan was realised by the widow, and the other heirs brought a suit to recover the money from her, *held* that the suit fell under Article 120 and not under this Article, because the widow was not an executor or administrator representing the estate of the deceased and was not bound to distribute the shares of the plaintiffs—*Umardaraz* v. *Wilayat*, 19 All. 169 (172). An executor *de son tort*, though he can be treated as incurring the liability of an executor for certain purposes, yet cannot be taken to represent the estate of the deceased. A suit to recover certain moveable properties of the deceased from such person does not fall under this Article but under Article 120—*Sithamma* v. *Narayana*, 12 Mad. 487 (488). This case, though overruled by the Full Bench in 46 Mad. 190 (cited below will now stand as good law, in view of the Privy Council decision in 54 All. 93 cited above. A person who obtains a succession certificate is not a person who either as executor or administrator represents the estate of the deceased, and he is not under any obligation to distribute the share in the property of the deceased among those entitled to them. Article 123 does not apply to a suit brought against him by the other heirs of the deceased for the recovery of money collected by him—*Ahidannessa* v. *Isuf Ali Khan*, 50 Cal. 610 (614), A.I.R. 1924 Cal. 142, 27 C.W.N. 941. So also, where on the death of a Mahomedan, a portion of his estate was sold with the consent of the majority of his heirs and the sale proceeds were handed over to a person to distribute the shares amongst the heirs, a suit to recover his share of money by one of the heirs is not governed by this Article as the suit is not against a person legally charged with the duty of distributing any portion of the estate—*Hussain* v. *Baquir*, (1945) 2 M.L.J. 422, A.I.R. 1946 Mad. 116, 1945 M.W.N. 671.

A contrary view was taken in some other cases. Thus, in a Madras case, it was held that this Article applied to a suit against a person who was rightly or wrongly in possession of the estate under such circumstances that he was bound to deal with it as the estate of the deceased, and that this Article was not confined to a suit against the executors or administrators only. "The wording of Article 123 is general; it refers to a suit for a legacy or for a share of a residue bequeathed by a testator, and if the legatee has a cause of action against the person in possession of the assets of the testator, I do not see why there should be a further qualification that the person in possession of the assets should be an executor or administrator. I think it will be reading into the Article words which are not there, namely that the suit should be for a legacy or a share of a residue against an executor or administrator." And so, a suit to recover a legacy against an executor *de son tort* was held to fall under this Article—*Rajah Parthasarathy* v. *Rajah Venkatadri*, 46 Mad. 190 (206, 246, 247) (F.B.), 43 M.L.J. 486, A.I.R. 1922 Mad. 457. A suit for accounts by an heir of an intestate person against an executor *de son tort* was held to be governed by Art. 123, and he was liable to account for mesne profits for a period of 12 years before suit—*Robson* v. *Administrator-General*, 30 P.L.R. 503, A.I.R. 1929 Lah. 753 (758); *Gopala Chetty* v. *Narayana Swami*, 23 L.W. 528, A.I.R. 1926 Mad. 681, 95 I.C. 33. The Bombay High Court also held that this Article applied to every suit where the plaintiff sought to recover a distributive share of the property of an intestate, irrespective of whether the defendant was under a legal obligation to distribute it or not—*Shirinbai* v. *Ratanbai*, 43 Bom. 845 (860). The Calcutta High Court also applied this Article to a case in which the suit was brought not against the executor but against the legal representative of an executor who was in possession of the assets—*Khetramoni* v. *Dhirendra*, 41 Cal. 271 (274). The Calcutta High Court has further held that it is not necessary that the persons liable to pay must be executors or administrators. They must be persons in possession of the estate and legally bound to pay the legacy or hand over the distributive shares. Hence, where a testator has in his will directed that the person in possession of his estate would pay maintenance allowance to certain lady, a suit to recover that allowance is governed by this Article—*Bhola Nath* v. *Sarbamangala*, 44 C.W.N. 221, A.I.R. 1940 Cal. 93. All these cases must now be deemed as overruled by the Privy Council, in view of the recent decision in *Ghulam Mohammad* v. *Ghulam Husain*, 54 All. 93 (*supra*). In one case, the Judicial Committee of the Privy Council applied this Article to a suit brought by a co-sharer of an estate to recover his share from the other co-heirs in possession of the estate, in case of intestacy—*Maung Tun* v. *Ma Thit*, 44 Cal. 379 (P.C.), 21 C.W.N. 527, 10 Bur.L.T. 138, 38 I.C. 809, A.I.R. 1916 P.C. 145. But this view must be treated merely as an *obiter*, because in the trial Court no issue was raised as to limitation, and the main question for decision was not one of limitation. This case has been distinguished in 54 All. 93 (P.C.).

A certificate of administration granted under Reg. VIII of 1827 only indicates the person who for the time being is in the legal management of the property, but does not constitute the holder of the certificate a *representative* of the estate for the purpose of distributing it among his co-sharers. Therefore, a suit by certain co-sharers of a *deshpande vatan* to recover their allowance from a person who manages the estate under a certificate of administration does not fall under this Article but under Article 131—*Keshav* v. *Narayana*, 14 Bom. 236 (241).

This Article does not apply to the claims of profits in the estate of a deceased in respect of moveable property—*Aung Myint* v. *Daw Mya*, 178 I.C. 475, A.I.R. 1938 Rang. 416.

Where the right to receive an annuity under a will is repudiated, this Article

does not apply but Article 131 applies—*Ramranbijoy* v. *M. P. L. Singh*, 25 Pat. 311, A.I.R. 1947 Pat. 47, 229 I.C. 348.

515. Suit for legacy:—This Article applies where the substantial claim is to recover a legacy, even though the legacy be not assented to by the executor, and whether or not the suit involves the administration of the whole estate—*Salebhai* v. *Bai Safiabu*, 36 Bom. 111 (113).

A suit for arrears of maintenance brought on the allegation that under the terms of the will of the plaintiff's father, the plaintiff is entitled to get a certain sum annually from the defendants who are the executors of the will and are in possession of the testator's property, i a suit for legacy, and governed by this Article and not Art. 62—*Hari Charan* v. *Kamal Kumari*, 35 C.W.N. 307 (308), 132 I.C. 684, A.I.R. 1931 Cal. 670. Where the legacy is an annual allowance, and the plaintiff is receiving that allowance annually, a suit *not to recover the legacy* but to have it defined what the amount of the legacy is, does not fall under this Article—*Hemangini* v. *Nobin Chand*, 8 Cal. 788 (802).

The mere fact that in a suit for legacy there is a prayer for administration of the estate, as ancillary to the claim for legacy, will not take the case out of this Article and bring it under Art. 129– *Rajamannar* v. *Venkatakrishnaya*, 25 Mad. 361 (364).

Where a person has received a large portion of the legacy but he is not satisfied that he has received the whole of it, and brings a suit for account against the executors, the suit falls under Article 120 and the plaintiff is entitled to accounts for six years before the date of suit. The fact that the principal object of the suit is to be put in possession of the legacy does not bring the claim for accounts under Article 123 so as to extend the taking of accounts for a period of 12 years—*Gajanan* v. *Waman*, 12 Bom.L.R. 881, 8 I.C. 189 (190). But if the suit is in effect a suit for a legacy, a mere prayer for accounts will not oust the operation of Art. 123. And if a suit is brought by a person who is entitled under a will to a legacy and to a share of the residuary estate, but he does not ask for payment of the legacy nor for the ascertainment of the share of the residue but sets forth certain alleged acts of misconduct on the part of the defendants (who are administrators) with respect to their dealings with the property, and asks for an account and for damages, *held* that the suit must be treated as a suit for recovery of legacy under this Article (and the plaint should be amended accordingly), and not as a suit for accounts—*Cursetjee* v. *Dadabhai*, 19 Mad. 425 (432).

Limitation:—A legacy is payable one year after the testator's death. Consequently, a suit for legacy is in time if brought within thirteen years after the testator's death—*Cursetji* v. *Dadabhai*, 19 Mad. 425 (432); *Rajah Parthasarathy* v. *Rajah Venkatadri*, 46 Mad. 190 (F.B.), 43 M.L.J. 486. A.I.R. 1922 Mad. 457 (476).

Moreover, the legacies, are not payable until there are available assets to pay them, and therefore time under the statute does not begin to run until the executor or other person liable to pay it has in his hands money with which it could be paid—*Rajah Parthasarathy* v. *Rajah Venkatadri Appa Rao* (supra); affirmed on appeal, *Rajah Venkatadri* v. *Parthasarathy*, 48 Mad. 312 (P.C.), 48 M.L.J. 627, 29 C.W.N. 989, 87 I.C. 324, A.I.R. 1925 P.C. 105. Thus, a Hindu widow claimed certain property as the heir of her deceased son. She bequeathed by will the income of the property before her death. Her title was disputed by another lady who claimed to be the adoptive mother of the deceased son. The validity of the adoption was challenged by the natural mother (testatrix) and litigation followed. After her death,

suits were filed by the beneficiaries under the will for the payment of the legacies. *Held* that the legacies did not become payable until the executor or other person liable to pay them had assets in their hands out of which to pay them, and no one could have had in his possession any fund representing the income of the estate until it had been finally decided by the Court that the adoption was invalid. And the suits to obtain the legacies, instituted within 12 years from the final decision of the Court declaring the adoption to be invalid were not barred by limitation—*Rajah Venkatadri* v. *Parthasarathy* (supra). So also, where by a will a bequest of land subject to mortgage is made with a direction to the executor to discharge the mortgage and to convey the bequest, it becomes payable after the discharge of the mortgage and not before that—*Mangamma* v. *Chettiar Firm*, I.L.R. (1943) Mad. 477, (1943) 1 M.L.J. 36, A.I.R. 1943 Mad. 276.

516. Suit for share of residue:—This Article applies to a suit by a residuary legatee to recover his legacy or a share of residue under a will and for an account for the purpose of ascertaining what that share is—*Khetramani* v. *Dhirendra*, 41 Cal. 271 (274, 275), 25 I.C. 370.

Where a will makes certain illegal dispositions of property, a suit by the heir of the testator for setting aside the will and for recovery of the property so disposed as undisposed of residue, falls under this Article, and must be brought within twelve years from the date of the testator's death, that being the date on which the residue becomes payable—*Hemangini* v. *Nobin*, 8 Cal. 788 (805).

This Article also applies where the claim is for the *whole* of the residue—*Kherodemoney* v. *Doorgamoney*, 2 C.L.R. 118; on appeal, 4 Cal. 455. See also *Bolo* v. *Koklan*, 11 Lah. 657 (P.C.), 34 C.W.N. 1169 (1175), A.I.R. 1930 P.C. 270.

517. Suit for distributive share:—A suit by a Mahomedan (Mapilla) widow for her share in her husband's property is one for a distributive share of the property of an intestate, and is governed by this Article—*Kasmi* v. *Ayishamma*, 15 Mad. 60 (61).

A suit not to recover a distributive share in the corpus of the estate but to recover the share of the profits which accrued after the death of the intestate falls under Article 120, and not under Article 123—*Maung Po* v. *Maung Shwe*, 1 Rang. 405, A I.R. 1924 Rang. 155, 76 I.C. 855.

A suit by a Mahomedan widow to recover possession of the *entire* estate of her deceased husband, on the ground that according to custom and entries made in the *wazib-ul-arz* she was entitled to succession and to inherit the entire property left by her husband, is not a suit for a *distributive share* of psoperty; consequently Article 123 cannot apply. Article 120 governs the suit as it is not provided for elsewhere—*Mahomed Riasat* v. *Hasin Banu*, 21 Cal. 157 (163) (P.C.), 20 I.A. 155.

Where, after the death of her mother, a Muhammadan woman and the defendants have enjoyed the property in common and she is afterwards excluded by the defendants, a suit by her to recover possession is not a suit for distributive share under this Article because the cause of action is not based on the fact of inheritance from the original owner but on the fact of dispossession, and the suit is a suit for possession under Art 144—*Abdul Kader* v. *Aishamma*, 16 Mad. 61 (63) (F.B.). This Article does not apply to the case of Mahomedans who succeeded to the property of a deceased relative and by agreement amongst themselves continue to own as tenants-in-common instead of dividing it. To such a case the ordinary law (Art. 144) applies and time begins to run against one tenant-in-common when the other tenant-in-common does some act the effect of which is either to exclude his co-tenant

from the joint-property or deny his rights to share—*Kallangowda* v. *Bibishaya*, 44 Bom. 943, 22 Bom.L.R. 936; *Nurdin* v. *Bu Umrao*, 45 Bom. 519 (521) A.I.R. 1921 Bom. 56. The word "distributive share" has a peculiar meaning of distribution of an estate which has vested in an executor or administrator; Article 123 therefore cannot apply to a suit to recover a share by a Mahomedan co-heir from another co-heir in management of the property—*Nurdin* v. *Bu Umrao*, supra; *Bai Jibi* v. *Bai Bibamboo*, 31 Bom.L.R. 199, A.I.R. 1929 Bom. 141 (142), 118 I.C. 785. It is well known that in the case of an estate of a Hindu, Buddhist or Mahomedan, the heirs of a deceased person very often leave the estate undivided and either enjoy the profits jointly, living in commensality, or divide the profits among themselves. In such cases Article 123 is inapplicable, for the reason that the heirs have taken their shares but instead of dividing the property and enjoying their shares separately, they have agreed to enjoy the whole property jointly. There is, therefore, no property of the intestate left to distribute and Article 123 cannot apply. When under such circumstances one of the heirs is excluded from joint enjoyment, he sues to recover not a share in the estate of the deceased, but his share in joint property. The suit is one for partition and Article 142 or 144 will apply—*Ma Nan* v. *Ma Shwe*, 4 Bur.L.J. 76, A.I.R. 1925 Rang, 233, 88 I.C. 609; *Maung Po* v. *Maung Shwe*, 1 *Rang.* 405, A.I.R. 1924 Rang. 155, 76 I.C. 855; *Ma San* v. *Mg. Maung*, 5 Bur.L.J. 4, 95 I.C. 514, A.I.R. 1926 Rang. 95; *Moung Shwe An* v. *Maung Tok Pyn*, 5 Rang. 582, A.I.R. 128 Rang. 6, 106 I.C. 828; *Bholanath* v. *Sarbamangala*, 44 C.W.N. 221, A.I.R. 1940 Cal. 93. If a Mahomedan co-owner is in exclusive possession of the entire property, his possession is on behalf of all the other co-owners. If the co-owner in possession dispossesses any one of the other co-owners, the suit that is brought for recovery of possession is not a suit for a distributive share, but is a suit to recover possession of his defined, though undivided, share of the property. Such a suit is not covered by Art. 123 at all, but must fall under the general Article 144—*Rustam Khan* v. *Janki*, 51 All. 101 (F.B.), 26 A.L.J. 1041, A.I.R. 1928 All. 467 (469), 111 I.C. 809 (reversing *Janki* v. *Rustam*, A.I.R. 1926 All. 748, 97 I.C. 139); *Ma Bi* v. *Ma Khatoon*, 7 Rang. 744, A.I.R. 1930 Rang. 72 (73), 121 I.C. 785.

Commencement of period of limitation:—The plaintiff sued the defendant for her distributive share of the property of her intestate husband. The defendant applied for letters of administration and obtained the order in 1902. The suit was brought within six years from that date. It was held that the suit was within time; that until the right to obtain letters of administration was determined, the person entitled to represent the estate was unknown, and time began to run from the date of the judgment directing the issue of the letters of administration of the defendant—*Sayed Fayez* v. *Sitara*, 15 C.W.N. 107, 13 C.L.J. 239, 7. I.C. 704.

A similar interpretation must be given to the words 'payable' and 'deliverable', as used in this Article; a share in the property of an estate would not be deliverable until the administrator to whom letters of administration had been granted had in his hands the share to be delivered, and similarly a legacy or a share in a legacy also does not become payable until the executor or other person liable to pay it has in his hands money with which it could be paid—*Rajah Venkatadri* v. *Parathasarathy*, 48 Mad. 312 (P.C.), 29 C.W.N. 989, 87 I.C. 324, A.I.R. 1925 P.C. 105; *Mangamma* v. *Chettiar Firm*, I.L.R. (1943) Mad. 477, (1943) 1 M.L.J. 36, A.I.R. 1943 Mad. 276.

518. Effect of bar of limitation:—The widow of a Parsi, who died in 1837 leaving two sons surviving him, took out letters of administration to the estate in 1838, and then solely possessed and enjoyed the property till her death in 1897, although she was entitled by law to a widow's share therein, and the sons were

entitled to the remainder. A suit was instituted by the sons in 1897 to recover their share of the property. *Held* that their claim had become barred by this Article, and their right to such shares had been extinguished under section 28—*Navroji* v. *Perozebai*, 23 Bom. 80.

124. For possession of an hereditary office.	Twelve years.	When the defendant takes possession of the office adversely to the plaintiff. *Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usualy performed.

519. Hereditary office:—This Article applies only where the appointment to the office is by succession through inheritance. If the office is *not hereditary*, and the appointment is maqe by nomination, this Article would not apply—*Jagannath* v. *Birbhadra*, 19 Cal. 776 (779). Where succession is by nomination, by the holder in office, of his successor, it is not a case of hereditary succession. Hereditary succession is succession by the heir to the deceased under the law; the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood-relationship between the deceased and his successor, but the right of the latter should not depend upon the *choice* of any individual. If the rule were that the senior chela of the Guru should succeed to his office on his death, that might be a case of hereditary succession, even if the Guru nominated him as his successor, when no rights flowed from such nomination. But where the right to succession is based solely on nomination, the succession cannot be treated as hereditary—*Mahant Paramananda Das* v. *Radhakrishna*, 51 M.L.J. 258, A.I.R. 1926 Mad. 1012, 97 I.C. 437. *Election* stands on the same footing as nomination—*Ibid.* A suit to recover possession of the office of Dharmakarta of a temple, based on a right by *prescription* and not on a hereditary right to the office, is governed by Article 120 and not by this Article—*Kidambi Ragavachariar* v. *Tirumalai*, 26 Mad. 113 (115).

Where a *shebait* does not appoint his or her successor as provided in the will of the founder and where there is no other provision for the appointment of a *shebait*, the management of the endowment must revert to the heirs of the founder, and the office of *shebait* henceforth must be hereditary in the founder's family; a suit for possession of such an office falls under this Article—*Jagannath* v. *Runjit*, 25 Cal. 354 (364); *Dharam* v. *Suraj*, 1940 A.L.J. 705, I.L.R. (1940) All. 815, A.I.R. 1941 All. 1, 193 I.C. 693. Where the testator appointed his wife as trustee and the plaintiff as joint trustee, and directed that the succession thereafter should be hereditary, *held* that the office was hereditary. A hereditary office subject to a temporary incumbency by a person not in the direct line of succession is still an hereditary office—*Narayana* v. *Nagappa*, 22 L.W. 870. A.I.R. 1926 Mad. 245, 93 I.C. 923.

The plaintiffs sued for a declaration that they were hereditary *Khadims* of a certain Mahomedan *darga* and as such entitled to perform the duties attached to

the office for 21 days in each month, and during that period to receive the offerings made by the worshippers at the *darga;* it was held that the suit fell under this Article —*Sarkum Abu Torab* v. *Rahaman Buksh,* 24 Cal. 83 (90).

520. Suit for possession of property:—A suit to recover the hereditary managership of a temple and for possession of the properties of the temple is governed by this Article. There is no distinction as regards limitation between a claim to an office and a claim to the property of an endowment—*Gnanasambanda* v. *Velu Pandaram,* 23 Mad. 271 (279) (P.C.); *Ram Piari* v. *Nand Lal,* 39 All. 636 (640); *Dharam* v. *Suraj,* supra; see *Kalipada* v. *Palani,* 1953 S.C.R. 503, (1953) S.C.J. 208, A.I.R. 1953 S.C. 125. A suit to recover possession of a choultry building belonging to a charity by one alleging himself to be its hereditary trustee is governed by this Article—*Singaravelu* v. *Chokkalinga,* 46 Mad. 525 (527), 43 M.L.J. 737, A.I.R. 1923 Mad. 88, 70 I.C. 994.

Therefore where the suit to recover the office of the trustee of a temple is barred, a suit to recover possession of the property of the endowment is also barred. At the same time the right to the property is also extinguished (sec. 28)—*Gobindasami* v. *Dakshinamurthi,* 35 Mad. 92 (94); *Gnanasambanda* v. *Velu Pandaram,* 23 Mad. 271 (279) (P.C.); *Ramanathan* v. *Murugappa,* 27 Mad. 192 (196); *Ram Piari* v. *Nand Lal,* 39 All. 636 (640); *Alagirswami* v. *Sundareswar,* 21 Mad. 278 (287).

Where a person is in possession of the office of the shebait which was held by another for more than 12 years before the institution of the suit, and adversely to such person, Art. 124 applies, and the plaintiff's claim to the office of the shebait is barred by limitation. The right to the *pala* is attached to the office of the shebait, and as the right to the office was extinguished by adverse possession of the defendant the right to claim the *pala* must share the same fate—*Haripada Roy* v. *Gopinath Roy,* A.I.R. 1936 Cal. 291.

521. Other suits:—A suit to assert the plaintiff's personal right to manage or control the management of the fund of a temple, by right of inheritance may fall under this Article—*Balwant* v. *Puran Mal,* 6 All. 1 (10) (P.C.). A suit for emoluments and honours of the office of *Adhyapaka* is governed by this Article—*Raghunathachariar* v. *Tiruvengada,* 8 I.C. 883.

An alienation of the management of a temple by the hereditary trustee is void and does not require to be set aside. Article 91, therefore, does not apply to a suit brought by the succeeding trustee to recover the estate from the alienee. This Article will govern the suit—*Narayanan* v. *Lakshman,* 39 Mad. 456 (459). A suit by existing *karnams* for a declaration that the appointment of another person as *karnam* jointly with them is void, is not a suit for possession of the office of *karnam* (since the plaintiffs are already in possession) and this Article does not apply—*Lakshminarayanappa* v. *Venkataratnan,* 17 Mad. 395 (396). A suit by a *shebait* to have the conduct of the worship of a *thakur* and the custody of his image placed in proper hands would fall under this Article or Article 144—*Gossami Sri Gridhariji* v. *Romanlalji,* 17 Cal. 3 (22) (P.C.). The nature of the suit intended to be covered by this Article must be a suit filed by a plaintiff who claims the office from a person who at that time holds the office himself. Where the plaintiff has not alleged that the office is now held adversely to him by any other person, and the suit is only against the trustees of the Devasthanam for the recovery of the emoluments, and incidentally it is a suit for a declaration of his right to the office, Article 124 does not apply, and no other Article applies—*Chinnaswami* v. *S. Singaracharlar,* A.I.R. 1928 Mad. 377 (378), 109 I.C. 771.

Where several co-trustees or co-managers of a public religious office hold it in rotation, the possession by one trustee is neither exclusive nor adverse to the other trustees. But where there are two distinct branches of trustees, and one of the branches as a whole body holds and possesses the office and the properties of the institution to the exclusion of the other branch, such possession is adverse to the latter —Mitra, Vol. 2, Ed. 6; Art. 124 relied on in *Motiram Danaji* v. *Shenu*, A.I.R. 1937 Nag. 84. A co-shebaiti claim in respect of a family idol will be barred by 12 years' adverse possession under this Article or Art. 144 respectively whether the claim is regarded as one to a share in the office or as one to a share in the endowed property—*Lachhmi* v. *Ram Rup*, 48 C.W.N. 304, I.L.R. (1944) Kar. (P.C.) 170, 1944 A.L.J. 143, A.I.R. 1944 P.C. 24, (1944) 1 M.L.J. 844 (P.C.).

522. Limitation:—Limitation runs when the defendant takes possession of the office adversely to the person entitled to it, and not when the plaintiff becomes entitled to the office. Thus, where a *stanom*-holder purported to transfer absolutely his right of management of the *devaswom* properties, and his successor in the *stanom* brought a suit for recovery of the properties within 12 years of his succession to the office but more than 12 years after the date of the transfer by the preceding *stanom*-holder, *held* that the suit was barred by this Article. The possession which had become adverse to the previous *stanom*-holder became adverse to the present *stanom*-holder also, as he derived his right to sue from the previous holder, within the meaning of the word 'plaintiff' as defined in sec. 2—*Raja of Palghat* v. *Raman Unni*, 41 Mad. 4 (10), 33 M.L.J. 26, 42 I.C. 22. The word 'plaintiff' in the third column includes a person from or through whom the plaintiff derives his right to sue. Therefore where the defendant had held possession of the hereditary office adversely to the plaintiff's predecessor more than 12 years, the plaintiff's title to the office was extinguished by sec. 28—*Gnanasambandha* v. *Velu Pandaram*, 23 Mad. 271 (279) (P.C.); *Ram Piari* v. *Nand Lal*, 39 All. 636 (640); *Jagannadha* v. *Rama Dass*, 28 Mad. 197 (201); *Kumaraswami* v. *Subbaraya*, 1931 M.W.N. 8, A.I.R. 1931 Mad. 505, 133 I.C. 193. See *Kalipada* v. *Palani*, 1953 S.C.R. 503, (1953) S.C.J. 208, A.I.R. 1953 S.C. 125.

If the plaintiff is barred by lapse of time from claiming the office of Mahanta, his right to recover the immoveable properties of the *Muth* is also barred, as those properties go with the Mahantship—*Mahant Paramananda* v. *Radhakrishna*, 51 M.L.J. 258, A.I.R. 1926 Mad. 1012, 97 I.C. 437; *Givindasami* v. *Dakshinamurthi*, 35 Mad. 92; *Ram Piari* v. *Nand Lal*, 39 All. 636; *Kassim Hassan* v. *Hazra Begum*, 32 C.L.J. 151, 60 I.C. 165. See also *Lakshmana* v. *Emakalaperumal*, A.I.R. 1956 Mad. 399, (1956) 2 M.L.J. 109.

523. Adverse possession:—There can be no adverse possession so long as there is no lawful trustee who could claim to recover the office from the person who claims to hold it adversely—*Palaniyandi* v. *Vadamalai*, 18 I.C. 373; on appeal 2 L.W. 723, 28 I.C. 956; *Umayurubhugam* v. *Vaithinathasami*, 9 M.L.T. 485, 10 I.C. 95. Where the office of trustee was vacant for 24 years from 1883 to 1907, and the plaintiff was appointed trustee in 1907, and the defendant had been in possession of the office before 1907, it was held that the defendant's adverse possession commenced only from 1907, when the plaintiff was appointed—*Palaniyandi* v. *Vadamalai*, supra.

There can be no adverse possession as between co-owners. Thus, where the right to a religious office devolved on three sons, but the office was held by one of them and his heirs, the possession of the office by these persons cannot be adverse to the other members of the family (the other two sons and their descendants)—*Panchanan* v. *Surendra*, 50 C.L.J. 382, A.I.R. 1930 Cal. 180. Where the shebaiti of

a family idol descends by inheritance like secular property, the possession of a co-sharer shebait must be considered to be the possession of all, until something is done which amounts to an ouster. The fact that the elder brother who managed the property saw to the *debsheba*, collected the income and defrayed the expenses is very far from being cogent proof of ouster—*Lachhmi* v. *Ram Rup*, 48 C.W.N. 304, I.L.R. (1944) Kar. (P.C.) 170, 1944 A.L.J. 143, A.I.R. 1944 P.C. 24, (1944) 1 M.L.J. 844 (P.C.).

There can be no adverse possession of an office where the person holding it adversely was utterly incompetent to hold the office. Thus, the office of the shebait of a temple must be held by a Brahmin; if a non-Brahmin takes possession of the office, such possession cannot be adverse to the claimant, for a non-Brahmin is not competent to hold the office of shebait or to perform the duties of that office. Possession by him for any length of time will not constitute adverse possession. A suit against him will not be barred, because every act of appropriation of the income of the temple property will constitute a fresh actionable wrong—*Jalandhar* v. *Jharula*, 42 Cal. 244 (252) (P.C.) (reversing *Jharula* v. *Jalandhar*, 39 Cal. 887).

Where the right of trusteeship together with the temple and its endowments was alienated by a Hindu widow (who was the trustee) in favour of the defendant, a suit by the reversioners for a declaration of the invalidity of the alienation made by the widow and for possession of the temple properties, brought more than twelve years after the alienation but within twelve years after the widow's death is barred, in as much as it is one for recovery of an hereditary office and governed by Art. 124, not by Art. 141. There is no distinction between an alienation made by a female trustee and that made by a male trustee; the plaintiffs derived their title through the widow, and the possession of the defendant against her became adverse to the plaintiffs also —*Jagannadha* v. *Rama Dass*, 28 Mad. 197 (200, 201). But it has been recently held by the Supreme Court that limitation runs only from the date of the widow's death and not from the date of alienation—*Kalipada* v. *Palani*, 1953 S.C.R. 503, (1953) S.C.J. 208, A.I.R. 1953 S.C. 125.

Where after the death of the last trustee of a public religious institution, the office devolved by inheritance on his male descendants by his two wives, and the management was for a time conducted by the two branches respectively in rotation, but afterwards the members of the junior branch had discontinued possession of the immoveable properties belonging to the trust, as also the performance of the duties appertaining to the office, and the members of the senior branch had been in turns successively in possession of the properties and had performed the duties to the exclusion of and adversely to the members of the junior branch for more than 12 years, *held* that the right of the members of the junior branch *as a body* had been extinguished, and not the right of this or that individual member only, and the members of the senior branch *as a body* had acquired the sole management of the trust—*Ramanathan* v. *Murugappa*, 27 Mad. 192 (196, 197).

Adverse possession by the defendant may be tacked on to the previous adverse possession of his predecessors-in-office. Therefore, where in a suit under this Article it was found that the defendant was in adverse possession of the office of *archaka* for three years, but his predecessors were successively in adverse possession for over sixty years, the suit was held to be barred—*Krishnaswami* v. *Veeraswami*, 36 M.L.J. 93, 49 I.C. 393.

For other notes on the subject, see Notes 618, 619 under Article 144.

125. Suit during the life of a Hindu or Muham-	Twelve years.	The date of the alienation.

madan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her remarriage.

524. Scope of Article:—The right to sue under this Article belongs only to the *nearest* reversioner, even though such reversioner be a female entitled only to a woman's estate in the property—*Bhagwant* v. *Sukhi*, 22 All. 33 (41) (F.B.); *Soman Singh* v. *Uttam Chand*, 1 Lah. 69 (70), 91 P.L.R. 1920, 55 I.C. 924.

A suit by the remote reversioner is governed by Art. 120, not by Art. 125—*Anandi* v. *Ram Sahai*, 27 O.C. 173, A.I.R. 1924 Oudh 381, 83 I.C. 1055; *Devraj* v. *Shivram*, 70 P.R. 1914, 25 I.C. 463; *Thakur* v. *Ganeshi*, 15 P.R. 1916, 33 I.C. 161; *Soman Singh* v *Uttam Chand*, 1 Lah. 69 (70); *Abisash* v. *Harinath*, 32 Cal. 62 (71); *Kunwar* v. *Bindraban*, 37 All. 195 (202); *Bhagwant* v. *Sukhi*, 22 All. 33 (F.B.).

The Madras High Court holds in two Full Bench cases that the first column of Article 125 may be so construed as to comprehend a remote reversioner allowed by law to sue in place of the nearest reversioner, and that a suit by a nearest reversioner contemplated by Article 125 is a representative suit brought on behalf of all the reversioners, immediate or remote; in other words, a suit by a remote reversioner is also governed by this Article—*Chiruvolu* v. *Chiruvolu*, 29 Mad. 390 (409, 411) (F.B.); *Varamma* v. *Gopaladasayya*, 41 Mad. 659 (F.B.). The Patna High Court has held that only a presumptive reversioner has a right to bring a suit for declaration during the lifetime of a limited owner, who is in possession of the properties by inheritance, challenging an alienation made by her. That suit by a reversioner has to be brought in a representative capacity for the benefit of the actual reversioner when the reversion opens—*Sheonandan* v. *Mt. Maida*, A.I.R. 1950 Pat. 447.

The Lahore High Court has held that the word "reversioner" should not be imported into this Article. This Article is not restricted to suit by reversioners. A suit by certain members of the proprietory body of the village to declare that an alienation by a widow shall not affect their reversionary rights is governed by this Article—*Nagina* v. *Bishni*, 40 P.L.R. 786, A.I.R. 1938 Lah. 457, 178 I.C. 270.

This Article would apply where the suit is brought by a person who was a remote reversioner at the time of the alienation, but who is the immediate reversioner at the time of institution of the suit; cf. the words of the Article: "who if the female died *at the date of instituting the suit*, would be entitled to possession." Thus, where the alienation was made by a female (the daughter of the plaintiff's uncle) in 1896, when the plaintiff's father was the immediate reversioner, and then his father died without questioning the alienation, and thereupon the plaintiff instituted the suit in 1909, *held* that the suit fell under Article 125, because the plaintiff was

a person who would be entitled to the possession of the land if the female died at the date of institution of the suit—*Veerayya* v. *Gangamma*, 36 Mad. 570 (572).

This Article applies only to a suit by a reversioner for a declaration that an alienation made by the widow is not binding on the reversioner; but a suit by a reversioner for a declaration that an adverse possession set up by the defendants (who were originally tenants) in respect of certain properties is not binding on the reversioner, and that he is entitled to succeed to the properties on the death of the widow, is not a suit under Art. 125 but is governed by Art. 120—*Ramaswami* v. *Thayyammal*, 26 Mad. 488 (490).

Article 125 provides for the case of a reversioner who seeks to challenge the alienation made by a Hindu female or other limited owner; it does not apply where the alienation was made by a transferee from a Hindu female limited owner or by a stranger holding under her—*Balbhaddar* v. *Prag Dat*, 41 All. 492 (502).

Moreover, this Article applies to a suit brought during the life time of the female *who made the alienation*. If the alienation was made by the plaintiffs' maternal grandmother, and the plaintiffs bring the suit after the death of the maternal grandmother, and during the lifetime of their mother, the suit does not fall under this Article, but under Article 120—*Bhagwanta* v. *Sukhi*, 22 All. 33 (41) (F.B.); *Narayana* v *Rama*, 38 Mad. 396 (399).

This Article does not apply where the alienation was not made by the female herself, but was made during her minority by her guardian. A declaratory suit in respect of such alienation falls under Article 120—*Dam Ram* v. *Tirtha Nath*, 51 Cal. 101 (108), 81 I.C. 522, A.I.R. 1924 Cal. 481. But where a mortgage was made by the guardian of the female during her minority, and the female after attaining majority executed a mortgage in renewal of the previous mortgage, and the reversioner brought a suit for a declaration that this mortgage would not be binding on him after her death, this Article was held to apply—*Adeyya* v. *Govindu*, 58 M.L.J. 417, A.I.R. 1931 Mad. 274 (275), 131 I.C. 609. See this case cited in Note 525A below.

Article 125 applies to every case where the female making the alienation is a Hindu or a Mahomedan, and the immediate reversioners, who bring the suit, also belong to the same faith. But it is not necessary that the female making the alienation should be actually governed by the Hindu or Mahomedan Law. If it were so, the Article would be rendered superfluous in so far as it refers to Mahomedans, because under the Mahomedan law, a female never succeeds to a life-estate—*Nandan* v. *Wazira*, 8 Lah. 215, 100 I.C. 84, A.I.R. 1927 Lah. 198, 28 P.L.R. 341. In this case, this Article has been applied to Jats.

Article 125 applies when the possession is that of a Hindu or Mahomedan female as such, that is to say, by virtue of her being a Hindu or Mahomedan, and does not apply if her possession is by virtue of a grant or transfer made *inter vivos* or by virtue of a bequest, or, in other words, when her possession is irrespective of her being a Hindu or Mahomedan female. It is inconceivable that the legislature would have provided periods of limitation depending solely upon the sex of the parties or upon the religious persuasions irrespective of the nature of the property involved in the suit or of the nature of the possession—*Kanhayalal* v. *Mt. Hira Bibi*, A.I.R. 1936 Pat. 331, 15 Pat. 151, 17 P.L.T. 131, 163 I.C. 940 (23 Cal. 645 followed; 8 Lah. 215 dissented from); *Sheonanda* v. *Mt. Maida*, A.I.R. 1950 Pat. 447. If however by the transfer *inter vivos* or by virtue of a bequest the female heirs do not get a higher status than the women's limited estate in the property, to which they are entitled even under the Hindu Law, a suit by the reversioners for declaration

that the alienations made by these female heirs are not binding on them, is governed by this Article—*Bishwanath* v. *Bachni*, A.I.R. 1950 Pat. 218.

This Article contemplates a case where an alienation has to be declared void except for the lifetime of the widow. It must be presumed, therefore, that the applicability of this Article is limited to cases where an alienation is good so long as that alienor is alive or so long she does not remarry, *a fortiori*, this Article cannot apply to cases where the alienation is *ab initio* void, i.e., is bad from its very inception, or in other words, a nullity—*Arura* v. *Sandhuram*, 49 P.L.R. 167, A.I.R. 1947 Lah. 290 (F.B.); *Bishwanath* v. *Bachni*, A.I.R. 1950 Pat. 218.

Where the female heirs after inheriting the property, make some sort of division between them and one of them alienates her share, a suit by the son of the other heir as reversioner for a declaration that the alienation is not binding on him is not governed by this Article but by Art. 120—*Kuppuswami* v. *Thangavelu*, (1946) 2 M.L.J. 214, 1946 M.W.N. 605, 59 L.W. 504.

525. Alienation:—Where a creditor of the deceased male holder brought a suit against the widow for recovery of the debt, and in execution of the decree in that suit brought certain properties to sale, *held* that this did not amount to an *alienation* by the widow—*Chhaganram* v. *Bai Motigavri*, 14 Bom. 512 (515).

But it is not necessary that the 'alienation' should be made by a written document. It is sufficient if the act of the female necessarily resulted in the transfer of the estate to the transferee. Therefore, the action of a Hindu widow, in causing a collusive suit to be brought against her and confessing judgment therein, whereby the plaintiff in that suit got a decree for possession of a property of which the widow was in possession holding a Hindu widow's estate, amounted to an "alienation" of such property—*Sheo Singh* v. *Jeoni*,, 19 All. 524 (526). Similarly, the widow's act of allowing a decree to be passed on a fictious award by which the whole property of her husband was divided among certain female members of the family who thereby took absolute estate in the shares allotted to them, amounted to an "alienation" of the property—*Ram Sarup* v. *Ram Dei*, 29 All. 239 (242, 243). The creation of occupancy rights by a widow is an alienation, and is invalid as against the right of the reversioner, and the cause of action accrues when the occupancy rights are created—*Hira* v. *Chathu*, 1915 P.L.R. 115, 29 I.C. 789. The word 'alienation' in this Article has not been used in the restricted sense of a transfer by means of a registered instrument. The article applies to all cases in which the widow has directly or indirectly parted with her proprietary right in the estate and passed the same to some third person. Thus the entry of the names of her illegitimate sons in the revenue papers followed by their possession of the property is enough to constitute an alienation of the estate by the widow—*Anant* v. *Tirathraj*, A.I R. 1939 All. 526, 184 I.C. 169. See also *Inderdeo Rai* v. *Deokaran Rai*, A.I.R. 1955 Pat. 292.

A compromise made by a Hindu widow in respect of her deceased husband's estate by which certain moveable and immoveable properties of her husband are partitioned amounts to an alienation, and is not binding on the reversioner even though it has been followed by a decree of the Court—*Sohan Bibi* v. *Hiran Bibi*, 1 I.C. 180 (All.). To see whether a compromise amounts to an alienation, the test is to find out whether the property is claimed by the opposite party by a title before the compromise, or whether he has first derived his title thereto by virtue of and under the compromise—*Gadiraja* v. *Venkiah*, 26 M.L.T. 180, 52 I.C. 271. Thus, a widow alienated the property, and after her death the daughter sued to set aside the alienation but subsequently compromised the suit by an agreement by which she acknowledged the validity of

the widow's alienation and relinquished her claim. In a declaratory suit brought by the daughter's sons, it was held that the compromise by the daughter did not amount to a fresh alienation—*Ibid.*

Where a suit on a mortgage having been brought against a widow, she at first contested the suit, but later on abandoned her defence, whereupon a decree was obtained in that suit, and the mortgaged property was sold in execution of that decree, *held* that the widow's act of withdrawing the defence could not be said to amount to an alienation. To constitute alienation, it must be clearly proved that the widow had done an act which necessarily result in the transfer of the property. Moreover, the Court sale could not be treated as a private sale, unless it was the result of some collusive arrangement—*Ranga Row* v. *Ranganayaki*, 35 M.L.J. 364, 47 I.C. 578. But the widow's act in allowing the mortgaged property to be redeemed by a person who is not a reversioner, amounts to an alienation—*Kanshi Ram* v. *Chet Kuar*, 10 Lah. 237, 29 P.L.R. 584, A.I.R. 1928 Lah. 932, 111 I.C. 203.

525A. Starting point of limitation:—The period of limitation runs from the date of the alienation—*Birendranath* v. *Shibaram*, A.I.R. 1952 Cal. 473. If the reversioner was a minor at the date of the alienation, then, by the application of secs. 6 and 8, he is entitled to institute the suit within three years after he attains majority, even though more than 12 years after the date of the alienation—*Veerayya* v. *Gangamma*, 36 Mad. 570 (572).

Where a mortgage was executed by the widow's *de facto* guardian during her minority, and the widow after attaining majority executed a mortgage of the same property in renewal of the previous mortgage, the period of limitation for a declaratory suit by the reversioners ran from the date of the original mortgage executed by the widow's guardian, as though it had been executed by the widow herself. No fresh cause of action was given by the mortgage executed by the widow herself—*Adeyya* v. *Govindu*, 58 M L.J. 417, A.I.R. 1931 Mad. 274 (275). But where a Hindu widow executes a mortgage and subsequently sells the property mortgaged to pay off the mortgage debt, the limitation under this Article in a suit by a reversioner for a declaration that the sale is not binding on him after the widow's lifetime runs from the date of the sale and not from the date of mortgage—*Baljit* v. *Chand Kiran*, A.I.R. 1950 All 7. In this case the decision reported in A.I.R. 1931 Mad. 274 was distinguished on the ground that there was only one alienation viz., mortgage, the execution sale was not an alienation. Therefore there was no fresh alienation. But in the present case there were two alienations, viz., mortgage and sale. So the starting point will be from the second alienation viz., the sale. A Hindu widow alienated her husband's properties in 1874; her daughters sued in 1892 to set aside the alienation but withdrew the suit on the ground that the alienation was valid. The daughter's son sued in 1895 for a declaration that neither the alienation nor the withdrawal of the suit affected their rights. *Held* that the withdrawal of the suit was a confirmation of the alienation of 1874 and gave the plaintiffs a fresh cause of action, so that the present suit was not barred—*Mullapudi Ratnam* v. *Mullapudi Ramayya*, 25 Mad. 731. But in 35 M.L.J. 364 cited in Note 525 above, the withdrawal of a suit was held not to amount to an alienation or to give a fresh cause of action. Similarly, in *Gadiraja* v. *Venkiah*, 26 M.L.T. 180, 52 I.C. 171, (Note 525 above) a compromise of a suit did not give a fresh starting point for limitation.

526. Effect of bar of limitation:—Although the nearest reversioner may be debarred by lapse of time from bringing a suit under this Article, the remote reversioner

will not necessarily be barred likewise. The principle is that one reversioner does not derive his title through another, but all of them claim from the last full owner; therefore limitation against a nearer reversioner does not operate as a bar against a remote reversioner. Therefore a remote reversioner who was a minor at the date of alienation or who was born after the date of the alienation can bring a suit within three years after attaining majority—*Abinash* v. *Harinath*, 32 Cal. 62 (71); *Bhagwanta* v. *Sukhi*, 22 All. 33 (F.B.). The Madras High Court however holds that a suit by a reversioner to set aside an alienation by a Hindu widow is a representative suit on behalf of all the reversioners, then existing or thereafter to be born, and all of them have but one cause of action, which arises on the date of the alienation. Hence, if by failing to sue within 12 years allowed by Article 125, the existing reversioners became barred by limitation, the reversioners who were born after the date of alienation or who were minors at the date of alienation are equally barred—*Baramma* v. *Gopaladasayya*, 41 Mad. 659 (F.B.); *Neela Kantamier* v. *Chinnu Ammal*. 52 M.L.J. 13, 99 I.C. 668, A.I R. 1927 Mad. 216. A similar view has been expressed in *Chiruvolu* v. *Chiruvolu*, 29 Mad. 390 (F.B.). The Judicial Committee also have expressed the view that the reversioner's suit in such cases is a representative suit in which he represents not only himself but the whole body of possible reversioners—*Venkatanarayana* v. *Subbammal*, 38 Mad. 634 (P.C.).

Further, it should be noted that this Article applies only to suits filed during the *lifetime* of a female for obtaining a *declaratory* decree. If, however, no suit is filed during her lifetime by the presumptive heir, a separate right, *viz.*, the right to immediate *possession*, arises on the *death* of a female (Art. 141)—*Prosanna* v. *Afzoolonnessa*, 4 Cal. 523 (525). In other words, where a reversioner neglects to sue for a declaration that an alienation made by the widow is invalid and not binding on him, within the time allowed by this Article, he does not thereby lose his right to question the alienation on the death of the widow by instituting a suit for possession under Art. 141—*Bapayya* v. *Akamma*, 36 I.C. 255 (Mad.); *Chiruvolu* v. *Chiruvolu*, 29 Mad. 390, 408 (F.B.); *Mesraw* v. *Girijanundan*, 12 C.W.N. 857 (859).

126. By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	Twelve years.	When the alienee takes possession of the property.

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council (in 34 All. 296) have taken advantage of the texts relating to the father's power of alienation for antecedent debts, to mitigate the inconvenience of that doctrine, and the legislature has provided by a special Article 126 for the perfection of the title of an alienee from the father when a Hindu son who wants to take advantage of the antiquated Mitakshara law seeks to set aside such an alienation—*Munia Goundan* v. *Ramasami*, 41 Mad. 650 (656).

527. Scope of Article:—The word "alienation" in this Article includes a mortgage as well as a sale—*Chokhey Singh* v. *Hardeo*, 24 O.C. 330, A.I.R. 1921 Oudh 196 (198), 64 I.C. 757. It includes a gift as well; this Article does not say that the alienation should be for consideration—*Munia Goundan* v. *Ramasami*, 41 Mad. 650 (652).

This Article applies to suits to 'set aside' a father's alienation, *i.e.*, to cases where immediate relief is sought; it does not apply to a suit for a mere declaration that an

alienation made by the plaintiff's father and the widow of his father's divided brother would not affect his reversionary rights—*Dev Raj* v. *Shivram*, 70 P.R. 1914, 25 I.C. 463. Such a suit falls under Article 120.

A suit not for a *declaration* of the invalidity of the alienation but for *annulment* of the sale, is governed by this Article and not by Article 120; and it is not necessary for a suit under this Article that the plaintiff should pray for *possession* of the property, along with the prayer for annulment—*Gokha Ram* v. *Sham Lal*, 3 Lah. 426 (430), 77 I.C. 174, A.I.R. 1923 Lah. 268. Even if the plaintiff claims possession, the suit falls under this Article; the words "to set aside a father's alienation" include also a suit in which possession is claimed—*Munia* v. *Ramasami*, 41 Mad. 650 (655). The Privy Council have applied this Article to a case in which the plaintiff sought to recover possession from the alienee—*Ranodip* v. *Parmeshwar*, 47 All. 165 (P.C.), 52 I.A. 69, A.I.R. 1925 P.C. 33, 29 C.W.N. 666 (669), 86 I.C. 249. See also *Chokhey Singh* v. *Hardeo*, supra. A suit to set aside the alienation *as well as* to recover possession falls under this Article—*Chintaman* v. *Bhagvan*, 30 Bom.L.R. 1095, A.I.R. 1928 Bom. 383, 113 I.C. 378.

A suit for redemption of a mortgage executed by the father is not a suit to *set aside* an alienation, because its object is to obtain relief *under* the alienation and *not inspite* of it. The allegation that any term embodied in the deed of mortgage was *ultra vires* of the father as the manager of the family does not change the character of the suit—*Suraj Bakhsh* v. *Kedar Nath*, 7 Luck. 505, 8 O.W.N. 1090, A.I.R. 1932 Oudh 66 (68), 135 I.C. 379.

Article 126 is based upon the principle that a son's knowledge of the alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the *alienee never gets possession* no limitation can arise under Art. 126. In such cases the right of the son would be merely to obtain a declaration that the deed is invalid. The limitation prescribed for such a suit is six years under Article 120—*Bindeshri* v. *Sital*, 50 All. 163, 25 A.L.J. 734, 106 I.C. 377, A.I.R. 1927 All. 702; *Angad* v. *Bahadur*, 1929 A.L.J. 1131, A.I.R. 1929 All. 750 (751), 119 I.C. 90; *Chitaman* v. *Bhagwan*, supra; *Behari* v. *Dal Chand*, A.I.R. 1951 Punjab 341.

This Article which provides for a suit by a Hindu to set aside his father's alienation of ancestral property, applies also to a suit where the alienation was made by the father in conjunction with an uncle—*Deonandan* v. *Musafir*, A.I.R. 1927 All. 54, 97 I.C. 591. But if the alienation is made by the grand-father, a suit by the grandson to set aside the alienation is not governed by this Article as this Article applies only to cases of alienation by a father—*Jiwaji* v. *Venkateshkrishna*, I.L.R. (1940) Bom. 109, 42 Bom.L.R. 208. A.I.R. 1940 Bom. 136, 187 I.C. 663.

A suit by an *adopted* son (governed by Mitakshara) to set aside an alienation made by his adoptive father falls under this Article—*Milap* v. *Mohni*, 5 O.W.N. 515, A.I.R. 1928 Oudh 348 (351), 110 I.C. 180. This Article would apply even though the father alienated the ancestral property as the manager and *guardian* of his minor sons. Art. 44 would not apply to such a case as there can be no guardian of coparcenary property—*Ganesh* v. *Amrithsami*, 1918 M.W.N. 892, 44 I.C. 605; *Basave* v. *Basave*, A.I.R. 1952 Mysore 1. But where a father alienated the property of his son which the son acquired from his mother and which was the son's *exclusive* and *separate* property, this Article cannot apply, because the property was not ancestral property—*Arumugam* v. *Pandiyam*, 40 M.L.J. 475, 13 L W. 416, 62 I.C. 630, A.I.R. 1921 Mad. 425. This Article only applies where the property dealt with by the father is the joint ancestral property of himself and his son. And so, where the grandfather devised property to his son and minor grandson *not jointly* but exclusively to each separately, the property thus acquired

by the father and son was not ancestral property, and an alienation by the father of the son's property would not be governed by Art. 126. As the alienation was made by the father during his son's minority, Art. 44 applied—*Ramaswami* v. *Govindammal*, 56 M.L.J. 332, A.I.R. 1929 Mad. 313 (316), 118 I.C. 481.

A suit by a son to obtain a share by partition of joint family property under the Mithila Law, the father's share having been sold in execution of a decree, is not a suit to set aside an alienation (for execution sale is not alienation), but one to which Art. 127 would apply—*Issuridutt* v. *Ibrahim*, 8 Cal. 653 (655).

This Article does not apply to a *Jaina* governed by a tribal custom—*Milap Chand* v *Mohni*, 5 O.W.N. 515, A.I.R. 1928 Oudh 348 (351), 110 I.C. 180.

528. Moveable property:—A suit to set aside a sale of *brit jajmani bahis* purchased with ancestral funds, would be governed by Art. 126. This Article refers to both moveable and immoveable property belonging to a joint family—*Kishen* v. *Shib*, 6 A.L.J. 614, 3 I.C. 505.

529. When time runs:—The Legislature has clearly fixed an overt and patent fact, namely the taking of possession of the property by the alienee as the event from which the period has to be calculated, so as to avoid as far as possible the difficult question as to notice—*Munia Goundan* v. *Ramasami*, 41 Mad. 650 (656). The cause of action accrues when the alienee takes possession, and no new cause of action arises on the death of the plaintiff's father—*Ramasami* v. *Vanamamalai*, 26 I.C. 873. If the father at first executes a mortgage of the property in 1905, without possession, and afterwards he sells the property to the mortgagee in 1918 and gives possession, and then the son brings a suit in 1924 to set aside the alienation, the suit is not barred, as time runs only when the alienee takes possession in 1918, and not from 1905. Before 1918, the plaintiff had merely a right to sue for a declaration under Article 120 that the mortgage was not binding upon him. That suit was no doubt barred in 1924 (as more than six years had elapsed since 1905), but the fact that such a suit for declaration brought in 1924 in respect of the previous transaction (mortgage) might have been too late, does not suffice to make the present suit time-barred—*Chintaman* v. *Bhagvan*, 30 Bom.L.R. 1095, A.I.R. 1928 Bom. 383 (384), 113 I.C. 378.

A family property owned by a father and his undivided son A was mortgaged with possession by them both to B in 1892. In 1897, the equity of redemption in the entire property was sold to C by the father as though it were his self-acquired property. In April 1898, C paid up the mortgage amount and obtained possession of the property from the mortgagee. On his father's death, A sold his half share to D, who then brought a suit in August 1912 against A, B and C for possession of A's half-share on payment of half the mortgage-debt. *Held* that the suit was governed by this Article, being in effect a suit by the son's transferee against the father's transferee to set aside the transfer by the father, and was barred, having been brought more than 12 years after C took possession (April 1898). Even if Article 126 did not apply, Article 144 did, and the suit was equally barred because when C took possession in 1898, he took possession as the sole owner of the equity of redemption of the entire property and not of the half share of the father only; consequently his possession became adverse from that date—*Munia Goundan* v. *Ramasami*, 41 Mad. 650 (652, 658).

If the plaintiff was a minor when his father alienated the property, the provisions of secs. 6 and 8 will apply. If the plaintiff fails to bring the suit within 3 years of his attaining majority (sec. 8), it will be barred, and his right to the property will be extinguished—*Lachmi Narain* v. *Kishan Kishore*, 38 All. 126 (130).

If the son fails to bring a suit to set aside his father's alienation within the period prescribed by this Article, his right becomes extinct, and the property becomes the property of the purchaser and ceases to be joint family property. Consequently, any other son or grandson of the alienor, born after the expiry of the period of limitation can no longer question the alienation, because the property having passed absolutely to the purchaser, these sons or grandsons do not acquire any interest in the property and consequently no suit by them is maintainable—*Lachmi Narain* v. *Kishan Kishore* (supra).

530. Suit by son born after date of sale:—Where a coparcenary property was alienated by all the adult male members living at the time, and their sons, who were born after the date of alienation, brought a suit to challenge the sale more than 12 years after the date of alienation, though within three years after attaining majority, it was held that the suit was barred. Section 6 could be pleaded by persons who were *minors* at the date of alienation but not by persons who were *not in existence* at that date but were born *afterwards*—*Dhanraj* v. *Ram Naresh*, 79 I.C. 1019, A.I.R. 1924 All. 912 (914); *Sankat Narayan* v. *Ram Bharos*, 79 I.C. 1010, A.I.R. 1924 All. 677 (678); *Chokhey Singh* v. *Hardeo*, 24 O.C. 330, A.I.R. 1921 Oudh 196 (199), 64 I.C. 757; *Ram Kishen* v. *Baldeo*, 86 I.C. 704, A.I.R. 1925 All. 247. This view is supported by the Privy Council in their decision in *Ranodip* v. *Parmeshwar*, 47 All. 165 (P.C.).

If there are two plaintiffs, one of whom (1st plaintiff) had been in existence at the date of the alienation and the other was born after that date, and the suit is brought more than 3 years (sec. 8) after the 1st plaintiff attains majority, the suit is barred in respect of both the plaintiffs, inspite of the fact that 3 years have not elapsed from the attainment of majority by the 2nd plaintiff. There is but one cause of action in favour of both. Successive causes of action cannot arise as new members are born year after year—*Sita Ram* v. *Cheddi*, 46 All. 882 (883), 22 A.L.J. 809, A.I.R. 1924 All. 798. See Note 78 under sec. 6.

Plaintiff's father sold away all the family properties in 1885; the alienees eventually obtained possession in 1899. The plaintiff, who has born in 1901, brought a suit in 1910 to recover his share in the property. It was held that as the entire family property was sold away in 1885, there was no joint family property in which the plaintiff had an interest by birth, and therefore he could not question the sale—*Soundarajan* v. *Saravana*, 30 M.L.J. 592, 34 I.C. 794 (796).

127. By a person excluded from joint family property to enforce a right to share therein.	Twelve years.	When the exclusion becomes known to the plaintiff.

530A. Scope:—A suit to *enforce a right* to a share means a suit to obtain actual possession of a share. Where the suit is for a *declaration* that the plaintiff is entitled to a share at some future date in the property the suit does not fall under this Article but under Art. 120. A suit to enforce a right is something different from a suit to establish a right—*Krishnajee* v. *Annajee*, 54 Bom. 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom. 61 (63), 124 I.C. 773.

A suit to obtain a share by partition of a joint family property is a suit to enforce a right to a share in the property, and falls under this Article—*Issuridutt* v. *Ibrahim*, 8 Cal. 653 (655).

If the property is joint family property, the suit for possession of a share in such property falls under this Article, and not under the general Article 142—*Umesh Chandra* v *Jagadish*, 1 C.W.N. 543 (544).

Where one of the daughters who take as joint tenants excludes the other from the possession and enjoyment of the property, and then alienates some of the properties, and afterwards dies, a suit by the surviving sister against her deceased sister's son and the alienees to recover possession of the property by right of survivorship is not governed by this Article, but by Art. 144. Article 127 cannot apply, as the suit cannot be said to be one *to enforce a right to share* in the property, because the plaintiff is not suing to recover a *share* but to recover the whole property by right of survivorship—*Atchamma* v. *Papiah*, 44 Mad. 131 (138).

531. Joint family property:—In order to bring a suit within this Article it will have to be shown that there had been a joint-family property, and that the plaintiff had been excluded from the enjoyment of such property and therefore desires to enforce his right to share therein. The word "excluded" in this Article implies previous inclusion, and a suit contemplated by this Article cannot be maintained by a person who had never before had any portion of the joint property—*Saroda Soondury* v. *Doyamoyee*, 5 Cal. 938 (940). Consequently, this Article only applies to persons who are members of a joint family and claim a right to share in joint-family property, upon the ground that they are members of the family to which the property belongs —*Kartik* v. *Saroda*, 18 Cal. 642 (645). Therefore, the provisions of this Article do not apply to a suit by a person who claims to inherit property as a daughter's son (who is not a member of the joint-family)—*Mothura* v. *Borkant*, 11 C.L.R. 312; or to a suit by a daughter who after her father's death left her father's family and had lived in her husband's house and never in her paternal residence with the members of the joint family; to such a suit Article 142 or 144 would apply—*Kartik* v. *Saroda* (supra). So also, Art. 127 does not apply where the plaintiff is a stranger who had purchased a share in the joint-family property from one of the members thereof who has been excluded from possession—*Harendra* v. *Anuoardi*, 14 Cal. 544 (545); *Rom Lakhi* v. *Durga Charan*, 11 Cal. 680 (682); *Bhavrao* v. *Rakhmin*, 23 Bom. 137 (140) (F.B.); *Muttusami* v. *Ramakrishna*, 12 Mad. 292. To such a case, the rule of limitation in Art. 136 or 144 applies—*Ram Lakhi* v. *Durga Charan* (supra); *Bhavrao* v. *Rakhmin*, supra. So also, this article does not apply to a suit by a co-parcener against a stranger who has purchased the share of another co-parcener; because the stranger is not to be deemed a person who has "excluded his co-parceners from the joint family property"; the stranger does not step into the shoes of the co-parcener from whom he has purchased. Art. 144 applies to the case, and time begins to run from the date of his purchase and entry into possession, because at that date his possession becomes adverse to the other members of the family—*Fakirappa* v. *Rudrappa*, 34 Bom.L.R. 354, 137 I.C. 367, A.I.R. 1932 Bom. 255 (256), following *Bhavrao* v. *Rakhmin*, 23 Bom. 137 (141, 142) (F.B.).

A suit brought by the plaintiffs for a declaration that they and the defendants are the members of an undivided Aliyasantana family, and that the plaintiff No. 1 as the senior member of the family is entitled to have the lands registered in his name, falls under this Article. The words 'to enforce a right to share therein' show that under this Article it is not necessary that the plaintiff should be able to claim a definite share and enforce partition; all that is necessary is that he should claim to be entitled to a share to the joint property, although that may be, as under the Aliyasantana law, indivisible—*Muttakki* v. *Thimmappa*, 15 Mad. 186 (191). A Buddhist father, on his remarriage, made over the land in suit to his four children

by his first wife, by a registered deed, towards their mother's share of the inheritance in full satisfaction. He continued to be in possession but managed the land for the joint benefit of the children. One of the daughters died and her husband sued for her share and mesne profits, more than 12 years after the execution of the deed. *Held* that this Article did not apply, as it is doubtful whether the property in suit can be called a joint family property, and there was no evidence that the plaintiff was excluded from the property. Article 144 governed the suit, and it was not barred, as the possession of the father was not adverse to his children—*Maung Aung* v. *Maung San*, 5 Rang. 576, A.I.R. 1928 Rang. 13, 105 I.C. 598.

In order to bring a case under this Article, the plaintiff must prove that *at the time* he was excluded from the property in dispute it was the joint-property of an existing joint family. It is not enough that the property in dispute had been a joint family property at some previous period—*Gajraj* v. *Sadho*, 15 O.C. 397. 16 I.C. 882 (883).

The expression "joint family property" must be read as property appertaining to a *joint family*. This Article does not apply to a suit for possession of immoveable property by one member of a family against another who is *separate* from him. Such a suit is governed by Art. 144. Even property which has continued undivided after a division between brothers is not *joint* family property—*Govindrao* v. *Rajabai*, 27 N.L.R. 131 (P.C.), 58 I.A. 106, 35 C.W.N. 438, A.I.R. 1931 P.C 48, 130 I.C. 673. Where at the date of the suit the family has been *divided* in status, and the property has ceased to be joint family property and is held by the sharers as tenants-in-common, Art. 127 is inapplicable—*Yerukola* v. *Yeruk*ola, 45 Mad. 648 (F.B.), 42 M.L.J. 507, A.I.R. 1922 Mad. 150; *Krishnajee* v. *Annajee*, 54 Bom. 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom. 61 (62), 124 I.C. 773. Where a member of a Hindu family is divided in status from others, and is in enjoyment of some portion of the family properties, while others enjoy other portions, he is not in law excluded or ousted from those other portions. In such a case, Article 127 cannot apply because the plaintiff is not a person excluded from joint family property, but only a tenant-in-common excluded from the common property—*Kumarappa* v. *Saminatha*, 42 Mad. 431 (439). Thus where a member of joint family treats the property in his possession, which is a share of the entire property, as his separate property and the other member has acquiesced throughout in such treatment, there is a severance of status between the two members and this Article does not apply as there is no existence of joint family—*Ratneshwari* v. *Bhagwati*, 1949 F.C.R. 715, A.I.R. 1950 F.C. 142. Where a joint-family property is actually divided, and one of the co-sharers subsequently deposits money which he has received for his share with another co-sharer, that money is no longer joint-family property, and a suit to recover it does not fall under this Article—*Ahmed Ali* v. *Hussain Ali*, 10 All. 109 (114). Where the greater portion of the properties has been divided and the parties live separately, (*i.e.*, where the family has been divided in status), and then a member recovers a debt due to the family (which was left undivided at the time of partition), the debt so recovered is not the property of a *joint* family and a suit to recover a share therein is not governed by this Article—*Vaidyanatha* v. *Aiyasamy*, 32 Mad. 191 (194); *Thakur* v. *Partab*, 6 All. 442; *Banoo* v. *Doona*, 24 Cal. 309 (312); *Yerukola* v. *Yerukola*, 45 Mad. 648; *Gajraj* v. *Sadho*, 15 O.C. 397, 16 I.C. 882 (883). Where, however, at the time of partition, one of the members is a minor and continues undivided from and under the guardianship of another, who afterwards collects certain debts due to the family, it will not be open to the guardian to say that he did not realise the minor's share of the debt on his behalf, as it was his duty to protect the minor's interests and he would have been guilty of dereliction of duty if he had omitted to do so. Where, therefore, he collects any such debts, he will be considered to have recovered the minor's

share on behalf of such minor, and the minor can recover his share within the period provided by Art. 127—*Vaidyanatha* v. *Aiyasamy*, 32 Mad. 191 (199).

Where money belonging to the joint family was realised by one member of the family, to the exclusion of the other members, while the family was joint, and then a partition was effected by the members, a suit for recovery of the money, brought *after partition* is not governed by Article 127 because it is no longer joint family property. The suit ought to be instituted within three years from the date of separation or partition—*Jagat Singh* v. *Achhaibar*, 26 O.C. 191, A.I.R. 1922 Oudh 15 (following *Gajraj* v. *Sadhu*, 15 O.C. 397, 16 I.C. 882). The members of a joint-family made a partition of family property, reserving certain land and the capital and assets of their family businesses, which remained under the control and in the possession of one of the members for future partition. The plaintiff who was a member of the family demanded his share in the undivided property but the person in possession refused to give effect to his claim. He thereupon sued for his share. *Held* that the property in question was undivided coparcenary property notwithstanding the partition, and the suit fell under this Article and time ran from the date of refusal and not from the date of the previous partition—*Muthusami* v. *Nallakulantha*, 18 Mad. 418 (419). See also *Ramachandar* v. *Narayana*, 11 Bom. 216 (219). But a suit by a divided coparcener to recover his share in property left undivided at a prior partition through fraud is not governed by this Article as such property, after severance of status, cannot be styled "joint family property." The same principle applies where property is left undivided at a prior partition through inadvertence, ignorance or mistake—*Siddappa* v. *Vishvanathsa*, 45 Bom.L.R. 825, A.I.R. 1943 Bom. 419, 214 I.C. 273.

532. Muhammadan family property:—The words "joint family property" in this Article means the property of a joint-family and not property which, although it may not have been divided, yet belong to a family which is not joint, and hence this Article does not apply to the undivided property of a family governed by the Mahomedan law, because each member thereof holds his share in severalty—*Amme Raham* v. *Zia Ahmed*, 13 All. 282 (F.B.). So also, in *Mohideen* v. *Syed Meer Saheb*, 38 Mad. 1099, *Patcha* v. *Mohidin*, 15 Mad. 57, *Commercial Bank* v. *Allavoodeen*, 23 Mad. 583 (589) and *Imbichi* v. *Syed Ali*, 1912 M.W.N. 45, 13 I.C. 791, it has been held that this Article refers to "joint-family property" in the Hindu sense of the term and is inapplicable to Mahomedans. If the members of a Muhammadan family succeed to the property on the death of a relation, each of them takes a share of each item of the property, and Art. 127 would not apply to a suit for possession of shares in such property—*Mahomed Akram* v. *Anarbi*, 22 Cal. 594; *Poyram Bibi* v. *Lakhu Khan*, 7 C.W.N. 155.

The Bombay High Court in an earlier case (*Bavasha* v. *Masumsha*, 14 Bom. 70) held that this Article applied to a suit by a Mahomedan for partition of joint-family property; but now it adopts the view that this Article does not apply to the property of a Muhammadan, or any other person not being a Hindu, and not having been proved to have adopted as a custom the Hindu law of joint family—*Ishop Ahmed* v. *Abhramji*, 41 Bom. 588 (F.B.) (Shah, J. dissenting); *Jan Mahomed* v. *Dutta Jaffer*, 38 *Bom.* 449, 22 I.C. 195.

533. "Excluded":—The word 'excluded' has not been defined in this Act, and the question whether a person has been excluded from the joint family must depend upon the facts of the particular case. An *intention* to exclude is an essential element, and it is necessary for the Court to be satisfied that there was an intention on the part of those in control and possession of the joint family property to exclude the person, and the exclusion was to his knowledge—*Parbhu* v. *Jitendra*, 22 Luck. 522, 1947

O.W.N. 421, A.I.R. 1948 Oudh 307. Thus, one N, a member of a joint Hindu family, after the death of his father and mother, at the age of 12 went to live with his maternal uncle voluntarily. He was not turned out, but went away to avoid his hostile step-mother, and with the consent of the eldest male member of the joint family. He was helped by his maternal uncle but was not educated in the same way as the other members of the joint family. *Held* that the mere fact that the other members of the joint family did not subscribe towards his education and marriage expenses and allowed him to be poorly maintained by his maternal uncle did not prove that N was excluded from his share of the joint family property, when there was nothing to indicate to N or to anyone else that they *intended* to exclude him from his share—*Radhoba* v. *Aburao*, 53 Bom. 699 (P.C.), 31 Bom.L.R. 1030, 33 C.W.N 1006 (1013, 1014), A.I.R. 1929 P.C. 231, 118 I.C. 1.

The sole occupation of the joint property by some of the members will not amount to ouster of the rest of the members or adverse possession against them, until there has been a disclaimer of the plaintiff's title by the assertion of a hostile title, and notice thereof to the plaintiff, either direct or to be inferred from notorious acts and circumstances—*Ittapan* v. *Manavikrama*, 21 Mad. 153 (166); *Ujalbi* v. *Umakanta*, 31 Cal. 970 (973); *Barada Sundari* v. *Annada Sundari*, 3 C.W.N. 774; *Hari* v. *Maruti*, 6 Bom. 741. In order to constitute exclusion, there must be something to indicate that the plaintiff abandoned his claims to enjoy the family property or that the defendants to his knodledge excluded him from enjoyment. Oral renunciation by the plaintiff of his share is not valid enough to operate as exclusion against him—*Dhoorjeti* v. *Dhoorjeti*, 30 Mad. 201 (202).

Mere exclusion from commensality is not sufficient—*Jeolal* v. *Loke Narayan*, 16 C. W.N. 466 (P.C.), 15 I.C. 184. As between brothers in a joint family, where no partition is proved, the mere fact that one of the brothers went to live in a neighbouring village would not make the possession of the other brothers, who continued to live in the family house, necessarily adverse to him—*Jagjivanandas* v. *Bai Amba*, 25 Bom. 362 (365). Mere non-participation in the profits by one and exclusive occupation by another would not constitute the exclusion of the former by the latter—*Ittappan* v. *Manavikrama*, 21 Mad. 153 (159). Where one of the two brothers forming a joint-family is in possession of the property, though the other never actually joined in cultivation with his brother he must be held to have been in possession through his brother and there is no exclusion from the property—*Aparna* v. *Chandra Shekhar*, 18 Luck 439, A.I.R. 1943 Oudh 177, 206 I.C. 94. The plaintiff was in Government service and was obliged to leave his native village entrusting the entire family property to the management of his undivided brother, the defendant. Later on, the defendant wrote to the plaintiff, requesting him to take up the management of his share, but the plaintiff refused to do so. It was held under the circumstances that the possession by the defendant had not been as his own to the exclusion of the plaintiff, and the mere fact that the plaintiff who lived apart from the village and did not participate in the profits of the property, did not justify the inference of an exclusion from the property—*Dinkar* v. *Bhikaji*, 11 Bom. 365 (368). In the case of a Hindu widow, the mere fact that she did not participate in the profits of her husband's family property for more than twelve years, or that she refused to live with her co-widows (defendants) did not amount to ouster or exclusion by the defendants—*Shellam* v. *Chinnammal*, 24 Mad. 441 (443).

A person who on his application for mutation of names is put upon the registry as sole occupier, cannot be deemed to hold the land as sole proprietor to the exclusion of the claims of the other members of the family as co-owners or of the claims for maintenance; because proceedings for the mutation of names are not judicial proceed-

ings in which the title to and the proprietary rights in immoveable property are determined, as revenue authorities have no jurisdiction to pronounce upon such right of title. A *fortiori*, where a co-sharer in possession of the property makes gifts of lands to other co-sharers, in the shape of maintenance, it is a strong evidence that those co-sharers are not excluded from the estate—*Nirman Singh* v. *Rudra Partab*, 48 All. 529 (P.C.), 29 O.C. 316, 1 Luck. 389, A.I.R. 1926 P.C. 100, overruling *Rudra Partab* v. *Nirman Singh*, 9 O.L.J. 552, 74 I.C. 225, A.I.R. 1923 Oudh 61. But repeated unsuccessful attempts to get one's name entered as against joint family property during settlement proceedings amount to exclusion from joint family property within his knowledge—*Kishenlal* v. *Satya Prakash*, A.I.R. 1952 All. 105. Where a co-parcener is not in possession of any joint property, and does not receive any of the proceeds of the property, he may be said to be excluded from joint property; but if he is living on the property with the other joint owners and is supported in the family by the proceeds of the family property, that is sufficient to negative his exclusion and save limitation—*Jagannatha* v. *Ramabhadra*, 11 Mad. 380 (affirmed by the Privy Council in *Jagannatha* v. *Ramabhadra*, 14 Mad. 237).

When one of two co-mortgagors redeems the entire property and retains possession of it, that in itself is not sufficient to constitute adverse possession against the other co-mortgagor—*Moidin* v. *Oothumanganni*, 11 Mad. 416 (417); *Ram Chandra* v. *Sada-Shiv*, 11 Bom. 422 (424); *Chandbhai* v. *Hasanbhai*, 46 Bom. 213 (215); *Wazihuddin* v. *Ahmad*, 2 Luck. 618. The possession by a Mahomedan co-sharer of property which he has redeemed from the mortgagee does not become adverse to the other co-sharers until some exclusive title adversely to their proprietary rights is set up—*Faki Abas* v. *Faki Nurudin*, 16 Bom. 191 (196).

The fact that the plaintiffs were not excluded from their share in one part of the joint property does not prevent this Article from operating in respect of another part from which they had been excluded to their knowledge—*Vishnu* v. *Gonesh*, 21 Bom. 325 (328). But this case has been dissented from in *Kumarappa* v. *Saminatha*, 42 Mad. 431 (439), in which it has been held that in order to constitute an exclusion under this Article there must be exclusion from the *whole* of the joint family property; mere exclusion from specific items of the joint property will not suffice.

When a member of the joint Hindu family becomes a convert to Islam, his very conversion is a proof of his exclusion from the membership—*Ganga* v. *Begum*, 57 P.R. 1916, 4 P.L.R. 1917, 35 I.C. 549.

Where the Court of Wards took possession of an estate in 1898 purporting to act solely on behalf of the defendant and treating him as the sole heir thereto, and since 1898 it refused distinctly and repeatedly to recognise the plaintiffs' mother as the lawfully wedded wife of the late proprietor and the plaintiffs as his legitimate children, it was held that the possession by the Court of Wards was one on behalf of the defendant alone and it excluded the plaintiffs from any share or possession of the estate since 1898. A suit brought in 1916 is therefore barred—*Narasimha* v. *Krishnachandra*, 37 M.L.J. 256, 52 I.C. 725.

Where a portion of a property was left undivided at a general partition and one of the co-sharers remained in sole possession of it for 35 years, that is a cogent evidence from which exclusion of the other co-sharers may be inferred—*Ram Chunder* v. *Narayana*, 11 Bom. 216; *Vithoba* v. *Narayan*, 11 Bom. 221 (Note). Two co-sharers executed a deed of partition, in the absence of a third co-sharer (plaintiff's father), but the deed contained a clause to the effect that the plaintiff's father being absent from the village the other co-sharers (defendants) would manage his share during his absence, and on his return hand over the share to him. *Held* that although the plaintiff's father

and the plaintiff had been admittedly out of possession for more than 12 years, still as the possession of the share in question by the defendants had not been a possession of it *as their own property* to the exclusion of the plaintiff or his father, no question of limitation arises—*Nilo* v. *Govind*, 10 Bom. 24 (27).

To entitle a person or a branch of an Aliyasantana family to participate in the property of the family, the connection with the family must be kept up either by exercise of the right to share in the joint family property by joining in the *sacra*, by intermarriage or otherwise. But when they have kept themselves completely separate from the family more than 12 years, that will amount to evidence that they were excluded from the joint family and consequently their right to share therein is barred —*Muttakke* v. *Thimmappa*, 15 Mad. 186 (192).

534. When time runs:—Time would not run against the plaintiff until his exclusion from the property had become *known* to him, *i.e.*, until there has been a disclaimer of the plaintiff's title by the open assertion of a hostile title by the defendant with *notice* to the plaintiff—*Ittappan* v. *Manavikrama*, 21 Mad. 153; *Ujalbi* v. *Umakanta*, 31 Cal. 970; *Barada Sundari* v. *Sarada Sundari*, 3 C.W.N. 774; *Hari* v. *Maruti*, 6 Bom. 741; *i.e.*, unless the plaintiff had *intimation* that the defendant intended to exclude him—*Malkappa* v. *Madkappa*, 37 Bom. 84; *Umrao* v. *Lachmi*, 1917 P.L.R. 25, 39 I.C. 762. Thus, the mere fact that the defendant had been in possession of the property in dispute for more than fifteen years, without any claim having been made by the plaintiff would not make the defendant's possession adverse, and time would not run against the plaintiff until he demanded a share of the property and was refused—*Hari* v. *Maruti*, 6 Bom. 741 (742). Where there is no allegation by the defendant that the plaintiff ever claimed and was refused his share in the family property, a suit by the plaintiff to establish his right to a share in the joint family property cannot be barred by any lapse of time—*Hansji* v. *Balabh*, 7 Bom. 297 (299).

In case of a *minor*, time would run from the date of his attaining majority, because at the most it can be held that he became aware of his exclusion when he became a major—*Niranjan* v. *Behari*, 1929 A.L.J. 324, A.I.R. 1929 All. 302 (305), 116 I.C. 849. See also *Kishenlal* v. *Satya*, A.I.R. 1952 All. 105. In *Janardan* v. *Nilkantha*, A.I.R. 1952 Orissa 31 it has been held that knowledge of a guardian can be imputed to the minor as well and time runs from the date of the knowledge of the guardian.

535. Burden of proof:—In a suit under this Article, it is necessary for the plaintiff to prove title, *i.e.*, to prove that the property is joint and that he has a share in it—*Jibanbhai* v. *Anibhai*, 22 Bom. 259 (260). The burden lies on the plaintiff to prove that the property in which he seeks to recover a share is a *joint family property*. It is not enough for him merely to call it joint family property and to show that 30, 50 or 100 years ago his ancestors and the defendant's ancestors were joint, leaving the Court to presume that any property of which the defendant may be possessed at the time of suit is joint family property—*Obhoy* v. *Gobin*, 9 Cal. 237 (241); *Gajraj* v. *Sadho*, 15 O.C. 397, 16 I.C. 882 (883).

The point of time at which the status of the joint family broke and the members became separated is very material, and the onus lies on the plaintiff to show that the partition at which the shares of the members of the family were determined and in consequence of which the plaintiff became entitled to possession of his share, took place within 12 years preceding the institution of the suit—*Sarjoo Prasad* v. *Deodat*, 4 O.W.N. 958, A.I.R. 1927 Oudh 499, 105 I.C. 410.

As regards *exclusion*, the burden lies on the defendant to show that partition was demanded by the plaintiff and refused by the defendant more than twelve years before

suit, or that the plaintiff was to his knowledge excluded from all participation in the family property more than twelve years before suit—*Krishnabai* v. *Khangowda*, 18 Bom. 197 (202); *Hansji* v. *Valabh*, 7 Bom. 297; *Sellam* v. *Chinnammal*, 24 Mad. 441 (443). It would not be sufficient to prove merely that the plaintiff was excluded; it must also be proved that the exclusion *was known to the plaintiff* more than twelve years before suit—*Jibanbhat* v. *Anibhat*, 22 Bom. 259 (261); *Umesh* v. *Jagadis*, 1 C.W.N. 543 (544).

536. Effect of fraud:—Where a Court finds that a partition effected between the co-parceners of a joint family was unfair and inequitable, or one of the co-parcerners had been deceived, the case is reduced to one of fraudulent partition, and the cause of action for a suit for partition is then in substance to set aside that partition on ground of fraud and to treat the family as joint and to seek for a fresh partition of the family estate. For the purpose of limitation such a case is taken out of this Article—*Vithapa* v. *Basagowda*, 14 Bom.L.R. 771, 17 I.C. 10.

128. By a Hindu for arrears of maintenance.	Twelve years.	When the arrears are payable.

537. This Article and the next apply only to cases in which the right of maintenance is based upon the Hindu Law, and not to cases in which the right is based entirely upon a *contract*, though the persons claiming under the contract are Hindus; and the application of these two Articles depends not upon the nationality of the plaintiff but upon the nature of his right, and the words "by a Hindu" used in the Article must be taken to mean "by a person claiming under the Hindu Law"—*Girijanund* v. *Sailajanand*, 23 Cal. 645. Therefore where the plaintiff's claim to maintenance was based upon a contract evidenced by a compromise decree, her case was not governed by Article 120 but by Art. 115—*Narendra* v. *Nalini*, 26 I.C. 939 (Cal.).

The word "Hindu" in Arts. 128 and 129 does not refer to the religious persuasions of the plaintiff. Those two articles apply where the maintenance is claimed not on the basis of contract, but on the basis of status of the plaintiff under the Hindu law—*Babu Ramji Das* v. *Rai Mahamayaprasad Singh Bahadur*, A.I.R. 1936 Pat. 158. A suit for maintenance even by a Hindu under contract is governed by Art. 115 (*ibid*, 23 Cal. 645 followed).

Where maintenance was charged upon immoveable property, a suit to recover the arrears of maintenance would be governed by Article 132—*Ahmed Hossain* v. *Nihaluddin*, 9 Cal. 945 (951) (P.C.).

The right to maintenance is one accruing from time to time according to the wants and exigencies of the person claiming it—*Narayanarao* v. *Ramabai*, 3 Bom. 415 (P.C.). It is a constantly recurring right and therefore arrears can be claimed for 12 years before suit although arrears for previous years may be barred—*Jivi* v. *Ramji*, 3 Bom. 207.

129. By a Hindu for a declaration of his right to maintenance.	Twelve years.	When the right is denied.

538. A suit for maintenance by a junior member of an *Aliyasantana* family is one that falls under Article 127, because it is a suit to enforce a right to share in joint family property (the right of maintenance being the mode in which the right of

ownership is enforced); it does not fall under Article 129 because this Article applies to suits which are strictly for a right of maintenance in property *belonging to another*—*Maradevi* v. *Pammakka*, 36 Mad. 203 (206); *Achutan* v. *Kunjunni*, 13 M.L.J. 499.

So long as there is no denial of the right, limitation does not run in respect of a suit to establish the right, although there may have been no payment or claim made —*Ramanamma* v. *Sambayya*, 12 Mad. 347.

Reading Articles 128 and 129 together, it is obvious that though the right to maintenance may have been denied long before twelve years of the date of suit (Art. 129), a suit for recovery of arrears of maintenance for 12 years preceding the suit can be maintained (Art. 128)—*Ratnamacari* v. *Akilandammal*, 26 Mad. 291 (313).

In a suit under this Article, the *onus* of proving the denial of the plaintiff's right to maintenance more than twelve years prior to suit lies on the defendant—*Rangappa* v. *Kulandai*, 26 M.L.J. 205, 23 I.C. 831.

130. For the resumption or assessment of rent-free land.	Twelve years.	When the right to resume or assess the land first accrues.

539. A suit for assessment of rent-free land is governed by Article 130; but a suit to establish a right to assessment of rent is governed by Article 131—*Devendra* v. *Jhumur*, 43 C.L.J. 387, A.I.R. 1926 Cal. 883, 95 I.C. 622. The period of limitation for a suit for resumption of a jaghir granted for life commences from the death of the grantee—*Mahadev* v. *Jagatraj*, A.I.R. 1924 Pat. 298, 71 I.C. 929.

The period of limitation for a suit for assessment of rent runs from the time when a complete hostile right to hold the land rent-free has been claimed by the defendant to the knowledge of the plaintiff—*Birendra* v. *Roshan*, 39 Cal. 453; *Devendra* v. *Jhumur*, supra. Thus, where in a suit to recover khas possession or in the alternative for assessment of rent it appeared that the defendant had, in a settlement proceeding, more than 12 years before the suit, set up a claim to hold the land rent-free in virtue of his ancestral title, *held* that this was a clear claim of *nishkar* title unqualified by any reference to a document; a complete hostile right had been claimed to the knowledge of the plaintiff, and the present suit was therefore barred—*Birendra Kishore* v. *Roshan Ali*, 39 Cal. 453 (456).

As between the raiyats of an estate and the landlords of an estate, when a raiyat holds land of an estate without payment of rent, limitation against the landlord will only arise 12 years after the landlord has come to know that the defendant possesses the land without payment of rent—*Chandra Kumar* v. *K. C. Mukherjee, Official Receiver*, A.I.R. 1936 Cal. 289.

If the right to resume or assess the land first accrued to the plaintiff, who had purchased the estate at a revenue-sale, on the date of the revenue sale, a suit by the plaintiff to resume the land from the *lakhirajdar* or for asseshment of the land falls under Art. 130, and must be brought within twelve years of the revenue sale, that being the date on which the right to resume or assess the land accrues. But if the defendant had been claiming to hold the land as lakhiraj adversely against the old proprietors, for more than twelve years before the institution of the plaintiff's suit, the plaintiff would be barred by limitation—*Karmi* v. *Brojo*, 22 *Cal.* 244 (251). In a suit to assess rent on a land granted rent rent-free to the tenants for excavating a tank

therein, time begins to run when the right to assess the rent accrues, *i.e.*, when there is a clear and unequivocal assertion of adverse possession by the tenant, or when the tank becomes silted up and is no longer used for the purpose for which the land was granted—*Birendra* v. *Akram*, 39 Cal. 439 (445). Moreover, as the obligation to pay rent is a recurring obligation, the landlord cannot be barred by Article 130—*Ibid* (at p. 446). If the right to assess the land is created by a decree declaring the land to be liable to assessment, a suit to recover assessment of the land must be brought within 12 years of the date of the decree; otherwise it will be barred—*Bir Chunder* v. *Raj Mohun*, 16 Cal. 449 (456); *Nil Komal* v. *Bir Chunder*, 16 Cal. 450 (Note).

Article 130 can have no application unless and until the land is found to be rent-free; the mere non-payment of rent for a period does not bar the landlord's right to have the rent assessed and to recover rent from his tenant. Where the suit is not for resumption or assessment of rent-free land, but for assessment of *mal* land presumably liable to be assessed, the circumstance that rent has not in fact been paid for more than 12 years before suit is not a sufficient ground for dismissal of the suit, because the right to have the rent assessed continues as long as the relationship of landlord and tenant continues in respect of the land liable to be assessed—*Akbar* v. *Ramesh Chandra*, 38 C.L.J. 207, A.I.R. 1923 Cal. 392, 72 I.C. 329; *Kamini Sundari* v. *Abdul Halim*, 28 C.L.J. 254, 47 I.C. 420; *Dhananjoy* v. *Upendra*, 22 C.W.N. 685, 46 I.C. 428.

There is a difference between a case where the tenant asserts that the land encroached upon is a part of an admitted tenancy, and a case where the tenant sets up a rent-free title to the encroached land. The difference is that in one case the assertion means that rent is being already paid for and so more rent is not payable, and in the other that no rent is payable because the landlord is not entitled to realise any rent from the land. In the former case, the plaintiff, notwithstanding the defendant's assertion to hold the land encroached upon as part of the admitted tenancy, may still have a right to have fair rent assessed for the land. But in the latter case, that is, if the land is found as not included in the admitted tenancy, it must be a case of an encroachment or *trespass* by the tenant. In such a case, if the tenant is in adverse possession of the absolute interest for over twelve years, then the landlord's right should be held to be completely extinguished. If the tenant is in adverse possession for such a period in respect of only a limited interest as tenant, then whatever may be the effect of it on the question of the landlord's right to khas possession, a claim for assessment of rent will not be barred—*Debendra* v. *Jhumur*, 43 C.L.J. 387, A.I.R. 1926 Cal. 883 (885, 886), 95 I.C. 622.

Where a tenant has for over twelve years asserted to the knowledge of the landlord that he is under no obligation to pay rent, the claim to assessment of rent is barred—*Birendra Kishore* v. *Lakshmi*, 22 C.L.J. 129, 30 I.C. 896; *Kali Mohan* v. *Birendra Kishore*, 22 C.L.J. 309, 31 I.C. 391.

A suit to levy assessment on rent-free lands being virtually a suit for possession of those lands, if a suit for assessment of the lands is barred by Art. 130, the right to receive rent in respect of the lands is extinguished by operation of sec. 28, and the tenant's title to hold the lands rent-free is complete—*Sakharam* v. *Trimbakrao*, 45 Bom. 694 (708); *Abhoy Churn* v. *Kally Pershad*, 5 Cal. 949 (952); *Madhav Rao* v. *Anusuyabai*, 40 Bom. 606 (613); *Birendra* v. *Dilwar*, 13 I.C. 517 (Cal.); *Keval Kuver* v. *Taluqdari Settlement Officer*, 1 Bom. 586 (590).

Twelve years' adverse possession against one holder of *saranjam* would operate to bar a claim on the part of a successor—*Madhavrao* v. *Anusuyabai*, 40 Bom. 606.

131. To establish a periodically recurring right.	Twelve years.	When the plaintiff is first refused the enjoyment of the right.	

540. Scope of Article:—This Article contemplates a case where the plaintiff's right to property has not already been extinguished by adverse possession of the defendants—*Jogesh* v. *Chandi*, 75 C.L.J. 400.

According to the Madras High Court, a suit to *recover money* due by reason of a periodically recurring right falls under this Article, as there is no other Article specifically providing for such a suit. The use of the word 'establish' and the fact that there is only one Article in the case of a suit with reference to a periodically recurring right, and not two, as in the case of suits based on rights to maintenance (see Arts 128 and 129) indicate that the Legislature intended that this Article would govern suits to obtain an adjudication as to the existence of a periodically recurring right as well as suits to recover money due under that right. If the Legislature had intended to confine the Article to the former kinds of suits only, it would have used the words "for a declaration of" (*cf.* Article 129) and not the word 'establish' —*Zamorin of Calicut* v. *Achutha*, 38 Mad. 916 (921) (F.B.). See also *Thangaraja* v. *Veeraraghava*, A.I.R. 1958 Mad. 319. In another Madras case, *Ratnamasari* v. *Akilandammal*, 26 Mad. 291 (313, 314) although the scope of Article 131 was not in issue, still Bhashyam Ayyangar, J., in the course of his judgment remarked that Article 131 was not confined to a declaratory suit but would also include a suit for arrears due in respect of a periodically recurring right. In this case also it was pointed out that the expression used in this Article was not "for a declaration" but "to establish" which term would include a suit for a declaration as well as a suit to recover arrears of amount due. So also, in another case, where the suit was not for a declaration of a recurring right but for recovery of the actual amount payable thereunder, it was held that the plaintiff was entitled to recover twelve years' arrears up to the date of suit, under Article 131—*Alubi* v. *Kunhi Bi*, 10 Mad. 115 (117). The above Full Bench decision overrules the case of *Balkrishna* v. *Secretary of State*, 16 Mad. 294 (295), in which it was laid down that this Article applied only to cases in which a decree for some *consequential relief* was sought for by virtue of the periodically recurring right, and that if only a declaration of the right was prayed for, the suit fell not under this Article but under Art. 120. In *Ramnad Zamindar* v. *Dorasami*, 7 Mad. 341 (343), where the suit was only for a declaratory decree, and not for any consequential relief, it was held that Article 131 applied.

,But it has been held by the Allahabad High Court and the Punjab Chief Court that the words "to establish" do not extend and cannot be extended to cases in which the plaintiff seeks to *recover specific sums of* money due to him in respect of a periodically recurring right—*Luchmi* v. *Tarabulnissa*, 34 All. 246 (248); *Dost Muhammad* v. *Sohan*, 83 P.R. 1906. The Patna High Court also agrees with the view of the Allahabad High Court, *viz.*, that 'to establish' means 'to obtain a declaration of' and lay down that there is a vast distinction between a suit brought to *establish* a periodically recurring right and a suit brought to enforce *payments* due as remuneration for the performance of services arising out of that right. From a perusal of Articles 128 and 129, one of which applies to a suit for arrears of maintenance and the other by a Hindu for a declaration of his right to maintenance, it is clear that the framers of this Act had in their minds the distinction between a suit for a declaration of a right and a suit claiming arrears of remuneration arising out of that right, and had it been the intention to include both classes of suits under Article

131, the legislature would have used words appropriate to that effect. Article 131 has been intentionally drafted so as to include merely a suit to establish (*i.e.*, to obtain a declaration of) a right—*Sri Sri Baidyanath Jiu* v. *Har Datt*, 5 Pat. 249, 7 P.L.T. 465, 94 I.C. 826, A.I.R. 1926 Pat. 205. There is a distinction between a suit to establish a periodically recurring right and a suit for realisation of sums of money due on the basis of that right, and the latter claim is not governed by Art. 131—*Babu Rabji Das* v. *Rai Mahamaya Prasad Singh Bahadur*, A.I.R. 1936 Pat. 158; (*Baidyanath* v. *Hardutt*, A.I.R. 1926 Pat. followed). See also *Manmohan* v. *Bahauddin*, A.I.R. 1957 All. 575.

This Article does not refer to a periodically recurring *liability*, but is concerned with a periodically recurring *right* only—*Khanderao* v. *Ravji*, 1 Bom.L.R. 373.

Where the essence of the claim in a suit is the establishment of the title of the plaintiff, as against a rival claimant, to the office to which a remuneration periodically payable by Government is attached, and not the establishment of the liability of the Government to make recurring payment in question, this Article does not apply even though the Government is a party to the suit—*Hussain* v. *Secy. of State*, (1939) 1 M L.J. 476, 1939 M.W.N. 298, A.I.R. 1939 Mad. 570.

Where a right to receive an annuity under a will is repudiated, this Article will apply to recover such annuity, even if the annuity is in the nature of a legacy—*Ramranbijoy* v. *M. Singh*, 25 Pat. 311.

Where the suit is purely for recovery of arrears of rent, Art. 110 would be applicable and a claim for more than three years would be barred by time. On the other hand, if the suit is brought merely for a declaration that the plaintiff possesses a periodically recurring right to get rent from the defendant, then the suit would certainly be governed by Art. 131 and would be barred by time if there had been a refusal of the enjoyment of the right more than 12 years before the suit. In the latter case the plaintiff cannot be allowed to evade the provisions of Art. 131 by merely not asking for an express relief for a declaration of right. A plaintiff is not entitled to recover arrears of rent without in the first place establishing his right to recover it, if such right is denied. Therefore, where such a right is denied, a claim for recovery of rent necessarily involves as a condition precedent the establishment of the plaintiff's right to recover rent, irrespective of the question whether an express relief for such a declaration is asked for or not. If a suit brought for the establishment of the plaintiff's right would be barred by time, then by merely not asking for such a relief the plaintiff cannot evade the law of limitation and recover the amount due. If in one and the same suit both the reliefs for the establishment of a periodically recurring right as well as for the recovery of the arrears as a consequence of such a right is claimed then Art. 131 would apply to the first relief and the appropriate Article like 100 or 62 or failing any such Article, Art. 120 may apply to the second relief—*Hakim Hedayat Ullah and others* v. *B. Gokul Chand*, A.I.R. 1937 All. 57, 1936 A.L.J. 1384—*per* Sulaiman, C.J. This Article only applies when the suit is to enforce a right to receive an annual allowance. Where the right is not denied, and what is disputed is only the amount payable under the right, this Article does not apply. In such a suit either Art. 62 or Art. 120 applies—*Bhalchandra* v. *Dattatraya*, I.L.R. (1948) Nag. 401, A.I.R. 1948 Nag. 297, 1948 N.L.J. 551.

It has been held by the Federal Court in *Province of Punjab* v. *Tara Chand*, 1947 F.L.J. 56, 49 Bom.L.R. 697, A.I.R. 1947 F.C. 23, (1947) 2 M.L.J. 389 (F.C.) that claim to recover arrears of pay by a Government servant is not one to establish a periodically recurring right and this Article does not apply to such a suit.

541. Periodically recurring right—Instances:—

(1) A right to receive burial fees whenever a corpse is brought to the burial ground for burial—*Bahar* v. *Pero*, 24 W.R. 385;

(2) a right to *palla* or turn of worship of an idol for a certain period during the year—*Gopeekishen* v. *Thacoordas*, 8 Cal. 807; *Eshan* v. *Monmohini*, 4 Cal. 683;

(3) a right to receive a monthly allowance from a Zemindary—*Ramnad Zemindar* v. *Doraisami*, 7 Mad. 341;

(4) a right to a share in an annual allowance from the Government—*Raoji* v. *Bala*, 15 Bom. 135.

(5) a right to receive a yearly payment out of the income of certain immoveable property, which right has been settled by arbitration in the course of a suit—*Gajpat* v *Chiman*, 16 All. 189 (190) following *Chagan Lal* v. *Bapubhai*, 5 Bom. 68;

(6) a right to recover rent—*Mohammad Husaini* v. *Mohammad Bibi*, 13 A.L.J. 333; *Jagannatha* v. *Muthia*, 14 M.L.J. 477; *Alubi* v. *Kunhi*, 10 Mad. 115;

(7) a right to recover additional rent for increased area—*Jatindra* v. *Chandra*, 6 C.W.N. 360;

(8) a right to a share in a pension—*Sahibunnissa* v. *Hafiza*, 9 All. 213;

(9) a right to a *tasdik* allowance due to the plaintiff's temple from the defendants' temple from year to year—*Sakharam* v. *Laxmipriya*, 34 Bom. 349;

(10) a right to a share in an allowance attached to a *deshpande vatan*—*Keshab* v. *Narayan*, 14 Bom. 236;

(11) a right to receive certain sums in perpetuity as *dasturat*—*Hem Chandra* v. *Atul Chandra*, 19 C.W.N. 386, 21 I.C. 179; 19 C.L.J. 118;

(12) a right to payment of *dhara* or assessment of customary rent—*Ganesh* v. *Sitabai*, 41 Bom. 159;

(13) a right to certain shares in the offerings of a temple—*Jagdeo* v. *Mathura Prasad*, 22 O.C. 346;

(14) a right to enhanced rent—*Briji Behari* v. *Sheo Shankar*, 2 P.L.J. 124, 39 I.C. 85;

(15) a right to receive *lawajama* allowance—*Nazur Ali* v. *Akaji*, 109 I.C. 85, 11 N.L.J. 62; *Bhalchandra* v. *Dattatraya*, I.L.R. (1948) Nag. 401, 1948 N.L.J. 551, A.I.R. 1948 Nag. 397.

(16) a right to a share in Toda Giras allowance—*Narendra* v. *Ude Singji*, 49 Bom. L.R. 318, A.I.R. 1947 Bom. 451;

(17) a right to receive *Yeomiah* allowance as holder of the office of mutawalli or Katheeb of a mosque—*Batcha* v. *Secy. of State*, I.L.R. (1941) Mad. 587, (1941) 1 M.L.J. 374, A.I.R. 1941 Mad. 428. Contra *Gulam Ghouse* v. *Janni*, 39 M.L.J. 492, 58 I.C. 788.

A right to receive *malikana* annually is a periodically recurring right, and a suit to establish the periodically recurring right, pure and simple, falls under this Article; if it is treated as a suit for possession of an interest in immoveable property, the proper Article applicable would be Article 144. But where in the suit to establish a right to receive malikana annually, there is involved a further claim, because that right carries with it a right to the property itself, it cannot be said that it is purely a suit to establish a periodically recurring right. It may fall under Article 120—*Gopi Nath* v. *Bhugwat*, 10 Cal. 697 (708). The claim to get an annual allowance from and out of the revenue collections is a periodically recurring right, and a suit to recover such an allowance is governed by Art. 131—*Senthattikalai* v. *Rama Iyer*, A.I.R. 1936 Mad. 704.

A *perpetual right is* not the same thing as a periodically recurring right, the reason being that the quantum of right is defined once for all and does not vary according to circumstances each time it accrues. Thus where the right is to recover a fixed sum

which is not dependent upon the income of the property and the payment of which is an obligation cast upon the person, who is the holder of the property for the time being to pay that particular sum every year, it cannot be said to be a periodically recurring right—*Kaliammal* v. *Shanmmga*, (1944) 2 M.L.J. 250, A.I.R. 1945 Mad. 20. A claim that the plaintiff is the *mutwali* of a mosque and as such is entitled to *all* yeomiah allowances received by a rival claimant, amounts to a perpetual right to receive the allowances, and the fact that the sums of money are paid periodically does not make the right a periodically recurring right. Where the right is always vested in some persons to receive periodically payments, and being vested in one person at one time passes away at another time to some body else, such a right is a periodically recurring right in the true sense of the term—*Gulam Ghouse* v. *Janni*, 39 M.L.J. 492, 58 I.C. 788. A suit by the holder of the office of mutwalli or katheeb of a mosque against the Secretary of State for India for a declaration that he was entitled to the *yeomiah* allowance as the lawful holder of the office is a suit to establish a periodically recurring right attached to the office of mutwalli. The fact that the allowance does not vary from year to year but is fixed does not make any difference as to the limitation applicable—*Batcha* v. *Secy of State*, I.L.R. (1941) Mad. 587, (1941) 1 M.L.J. 374, A.I.R. 1941 Mad. 428. A right to worship an idol for a sixth part of every year is a periodically recurring right governed by this Article but an *exclusive* right to worship an idol is not a periodically recurring right but falls under Article 120—*Eshan* v. *Monmohini*, 4 Cal. 683 (685).

A suit for a declaration that the Zemindar is not entitled to recover from the tenant (plaintiff) any amount in excess of a stated sum by way of quit rent, is not a suit to establish a periodically recurring right—*Sriman Madhabusi* v. *Gopisetti*, 33 Mad. 171 (172).

The right of a mortgagor in the case of a usufructuary mortgage to get back possession under sec. 26G (8), Bengal Tenancy Act, 1885, is not one which comes within the words "periodically recurring right" in this Article. There is nothing periodic about it, nor is it of that kind of recurring right as in the case of nuisance etc.—*Abinash* v. *Gour*, 55 C.W.N. 489, A.I.R. 1952 Cal. 76.

542. Arts. 62 and 131:—In a suit to recover the arrears, the important question is—who is the person sued? There is a distinction between the person originally liable to pay and a co-sharer of the plaintiff who has actually received payment from that person. If the defendant is the person originally liable to pay, Article 131 applies; if, however, the money is sought to be recovered from a co-sharer who has received the payment, then it is a suit for money received by the defendant for the plaintiff's use, and Art. 62 applies—*Sakharam* v. *Laxmipriya*, 34 Bom. 349, 5 I.C. 869, 12 Bom.L.R. 157; *Janardan* v. *Dinkar*, 55 Bom. 193, 131 I.C. 465, A.I.R. 1931 Bom. 189 (191); *Harmukhgauri* v. *Harisukhprasad*, 7 Bom. 191 (193); *Desai Maneklal* v *Shivlal*, 8 Bom. 426 (432); *Dulabh* v. *Bansidhar*, 9 Bom. 111; *Raoji* v. *Bala*, 15 Bom. 135; *Chamanlal* v. *Bapubhai*, 22 Bom. 669. This principle was overlooked in *Chaganlal* v *Bapubhai* 5 Bom. 68.

If the suit claims both reliefs, the claim for establishment of the periodically recurring right is governed by Article 131, and the claim for arrears due falls under Art. 62—*Janardan* v. *Dinkar*, 55 Bom. 1930, 131 I.C. 465, A.I.R. 1931 Bom. 189 (190).

543. Demand and refusal:—There must be definite demand and refusal. When there is no evidence of demand of rent from the tenant or refusal by latter, plaintiff's suit for rent is not barred under this Article—*Manohar* v. *Charu*, 54 C.W.N. 706, A.I.R. 1951 Cal. 385. See, however, *Haripada* v. *Ramkrishna*, 60 C.W.N. 257.

The mere omission on the part of the person having the right to exercise it will not start a period of adverse possession under this Article—*Ganesh* v. *Sitabhai*, 41 Bom. 159 (162), 38 I.C. 54, 18 Bom.L.R. 950. The mere fact of the plaintiff's exclusion from enjoyment of his right for 12 years before suit would not bar his claim, unless it were shown that such exclusion was the result of refusal made upon a demand—*Raoji* v. *Bala*, 15 Bom. 135; *Devendra* v. *Jhumur*, 43 C.L.J. 387, A.I.R. 1926 Cal. 883 (885), 95 I.C. 622; *Hem Chandra* v. *Atul*, 19 C.W.N. 386, 21 I.C. 179, 19 C.L.J. 118. A mere refraining of the plaintiffs from demanding the right does not give a start to the period of limitation; it will run from the time when they were first refused the enjoyment of the right—*Kamman* v. *Budh Singh*, 146 P.R. 1882; *Zinat* v. *Martana Khan*, 108 P.R. 1901. Mere non-collection of the *Kattubadi* for a period of 12 years does not amount to a denial of the landlord's right to collect the same—*Jalasutram* v. *Bommadevara*, 29 Mad. 42 (43). Where the right to the revenue of a certain land had been granted to the trustees of a temple, the fact that no revenue was thereafter paid to the trustees by the owners of the land would not bar the suit of the trustees to recover arrears of revenue, when it was found that the owners of the land *did not deny* that they were liable to payment of revenue to the persons entitled to claim it. The trustees could recover 12 years' arrears under the Article—*Alubi* v. *Kunhi*, 10 Mad. 115 (117). Mere nonpayment of rent or assessment does not amount to a denial of the landlord's right to recover assessment. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Bhimabai* v. *Swami Rao*, 45 Bom. 638 (646); *Akbar* v. *Ramesh Chandra*, 38 C.L.J. 207, 72 I.C. 329, A.I.R. 1923 Cal. 392. The entry in the record of rights that the tenant has acquired the rent free title by adverse possession for more than twenty years means there was demand and refusal more than twenty years before the record of rights—*Monmotha* v. *Sreedhar*, 54 C.W.N. 973, A.I.R. 1951 Cal. 330. The open assertion by the tenant to hold the land rent free in the presence of the landlord in a rent suit amounts to a refusal to the plaintiff of the enjoyment of the right—*Jagannath* v. *Bipan*, 21 Pat.L.T. 838, A.I.R. 1941 Pat. 116, 190 I.C. 840. So also where during the revisional survey operations the defendant denied the plaintiff's right to recover rent for the land and the settlement officer passed the order upholding the defendant's objection, the plaintiff was "first refused the enjoyment of the right" to realise rent—*Abdul* v. *Harikrishun*, A.I.R. 1941 Pat. 201, 191 I.C. 878.

The refusal must be distinct and made against the plaintiff himself. Where in answer to a demand made by a member of the class to which the plaintiff belonged, a member of the class to which the defendant belonged made a *general denial* of the right of the plaintiff's class, such denial did not amount to a refusal of the right of the plaintiff—*Ramnad Zemindar* v. *Dorasami*, 7 Mad. 341 (343).

A mere omission, on the part of a person having a right to assess the land, to exercise that right, will not start a period of adverse possession. So that, if an inamdar continues to receive per annum certain fixed rent from his tenants for 60 years, and has made no demand for the actual assessment in excess of the amount which the tenants had all along paid, that fact would not debar him from claiming assessment if he chose to do so; but once he claims assessment and the right to claim assessment is *denied* by the tenant, limitation begins to run against the inambar—*Shri Bala* v. *Sakharam*, 28 Bom. L.R. 633, A.I.R. 1926 Bom. 345, 95 I.C. 851.

A person who has taken no action for more than 12 years since the denial or repudiation of the right to receive annuity under a will can not claim to enforce his right after the lapse of the period mentioned under this Article—*Ramranbijay* v. *M. Singh*, 25 Pat. 311.

Where the plaintiff asserts that there has been no demand and refusal within 12

years before suit, the *onus* is on the defendant to prove that the plantiff has made a demand and that the defendant has refused—*Hemchandra* v. *Atul*, 19 C.W.N. 386, 21 I.C. 179, 19 C.L.J. 118. Where the plaintiff is one of a family upon the members of which in turn devolves the performance of the duties of an office, it must be shown that the plaintiff's turn to perform the duties and receive the emoluments of the office occurred with 12 years before the suit was brought, and that he was then refused the enjoyment of his right—*Sinde* v. *Sinde*, 4 B.H.C.R., A.C. 51.

The above rule, *viz.*, that the period of limitation would run only where there has been a definite *demand* and refusal, should be limited to cases where the circumstances are such that the mere non-compliance with the right does not amount to a refusal. Thus, in 1874, the defendant purchased at a Court sale the title and interest of the then inamdar, and since then had been in possession of the property; and no attempt was made by the inamdar or his successors to levy assessment or to recover possession until 1916, when the plaintiff as inamdar sued to recover assessment from the defendant. *Held* that the suit was barred. In such a case it was not necessary that there should be a definite demand before the period of limitation would begin to run, because the circumstances were such that the non-payment of any rent or assessment by the defendant to the plaintiff necessarily constituted a refusal within the meaning of the Article. If the relationship of landlord and tenant had ever existed between the parties, a demand would have been necessary before the period of limitation could run. But no such relationship ever existed in this case. Therefore, the plaintiff was first refused the enjoyment of his right in 1874, and the suit was barred. It should be noted that under the 3rd column, limitation runs from the time when the enjoyment of the right is first 'refused,' and not when the enjoyment of the right is first 'demanded and refused,' as in Articles 88, 89 and 103. The word 'demanded' has been deliberately omitted, so that where the defendant's act of non-payment of assessment amounts to a refusal irrespective of demand, limitation runs from the non-payment—*Bhimabai* v. *Swamirao*, 45 Bom. 638 (647, 648), 23 Bom.L.R. 100, A.I.R. 1921 Bom. 175, 60 I.C. 892. It is not necessary under this Article that there should be a demand and refusal before limitation begins to run—*Jagannath* v. *Bipan*, 21 Pat. L.T.838, A.I.R. 1941 Pat. 116, 190 I.C. 840.

The right to levy assessment as a recurring right would accrue when there has been a demand and a refusal, only in those cases where the relationship of landlord and tenant or landlord and occupant had ever existed. Once that right is established, then the non-payment of rent or assessment would not be sufficient to enable the tenant to begin to set up a title by adverse possession. There must be some overt act, such as refusal to pay the rent or assessment, before time begins to run—*Akbar* v. *Ramesh Chandra*, 38 C.L.J. 207, A.I.R. 1923 Cal. 392, 72 I.C. 329.

544. Effect of bar of limitation:—A suit to establish a periodically recurring right must be brought within 12 years from the time when the plaintiff is first refused the enjoyment of right; and if it is not brought within that time, not only is the right itself barred, but any cause of action, the plaintiff may have, to recover arrears which rests on such right is also barred. If a plaintiff recovers in a suit arrears of periodical payments but apparently without a declaration that he has a right to such payments for the future, and then makes no claim for more than 12 years, any subsequent suit for the arrears of such periodical payments would be barred—*Shivram* v. *Secretary of State*, 11 Bom. 222 (233).

132. To enforce payment of money charged upon immoveable property.	Twelve years.	When the money sued for becomes due.

Explanation.—For the purposes of this Article—

(*a*) the allowance and fees respectively called *malikana* and haqqs, and

(*b*) the value of any agricultural or other produce the right to receive which is secured by a charge upon immoveable property, and

(*c*) advances secured by mortgage by deposit of title-deeds

shall be deemed to be money charged upon immoveable property.

Change:—Clause (b) of the Explanation was substituted by sec. 4 of the Indian Limitation (Amendment) Act 1927 (Act I of 1927). The effect of this amendment has been noticed in Note 545 below.

Clause (c) has been added by sec. 9 of the Transfer of Property (Amendment) Supplementary Act (XXI of 1929). See Note 558 below.

545. Money—agricultural produce:—Where loan was taken of paddy and promised to be returned in *money* (as the price of paddy) and the mortgage-bond provided that on the expiry of the period mentioned in the bond the creditor would be entitled to recover the price of paddy with interest by sale of a property given as security for the repayment of the loan, *held* that *money* was charged upon immoveable property, in as much as the mortgagee was entitled to recover *money* and not specific paddy; and to such a case Art. 132 applies—*Indra Narain* v. *Dwijabar*, 47 Cal. 125, 23 C.W.N. 949; *Jogendra* v. *Mohan Lal*, 23 C.W.N. 951; *Mohesh* v. *Umesh*, 51 I.C. 241 (Cal.); *Sridhar* v. *Ram Gobinda*, 29 C.L.J. 368; *Dinabandhu* v. *Bishnu*, 32 C.L.J. 221; *Sripati* v. *Sarat*, 22 C.W.N. 790; *Ramchand* v. *Iswarchandra*, 48 Cal. 625, 632 (F.B.), 25 C.W.N. 57, 32 C.L.J. 278. In *Joy Narain* v. *Mangobinda*, 64 I.C. 210 (Cal.) and *Shamlal* v. *Dhanwa*, 18 N.L.R. 111, A.I.R. 1922 Nag. 23, it has been held that even where loan is taken of paddy and promised to be returned in *paddy* (with an additional quantity of paddy as interest), the suit to enforce the security falls under this Article, because the mortgagee is entitled to claim the *value* of the grain in case of its non-payment, and the mortgagor is entitled to pay the value of the grain, instead of the grain itself; the mortgagee is not entitled to claim, nor is the mortgagor bound to deliver, grain; consequently it is the money value of the grain debt that is really charged upon immoveable property.

But in another case, where loan was taken of paddy and was promised to be returned with interest in *paddy*, a suit to realise the value of the paddy due by sale of the immoveable properties given as security for the repayment of the loan, was held not to be governed by Art. 132 (but by either Art. 116 or Art. 120) as the suit could not be treated as a suit to enforce payment of *money* charged upon immoveable property—*Rashbehari* v. *Kunjabehari*, 24 C.L.J. 348. The case is no longer good law; vide clause (b) of Explanation.

This clause has been added on the recommendation of the Civil Justice Committee: "Article 132 has not been applied by some Judges to cases in which not *money* specifically, but something which can be valued in money, such as grain, is charged on the immoveable property. Not infrequently in Hindu families, maintenance is allotted to female members in the shape of grain from a particular parcel of land, and the maintenance is charged on that land. Money-lending cases are not uncommon in which

money is repayable in grain and the obligation is charged upon property described in the instrument. There has been difference of opinion whether Article 132 applies to these cases, and after some conflict of opinion it has now been held in Calcutta, that a suit to recover the value of paddy charged upon immoveable property comes within Article 132 (see 25 C.W.N. 57, F.B.). The matter is one which should be made clear by the amendment of the statute itself"—*Civil Justice Committee Report*, p. 495.

A case for the recovery by the plaintiff of a legacy from persons who are in possession of the estate and who are legally bound to pay the same is governed by Art. 132—*Sri Nathji* v. *Mt. Panna Kunwar*, A.I.R. 1935 All. 239.

546. Immoveable property:—A tree, for the purpose of limitation, comes within the meaning of immoveable property as used in Art. 132, though for the purpose of registration it does not—*Kangal* v. *Naoli*, 9 I.C. 478; *Ram Gulam* v. *Monohar Das*, 1887 A.W.N. 59.

A decree is moveable property, and a suit to enforce the hypothecation of a decree is governed by Art. 120. But where the decree is converted into immoveable property, that is, where the mortgage-decree-holder purchases certain immoveable property of his judgment-debtor in satisfaction of the decree, the mortgagee is entitled to the substituted security and also to the larger period of limitation provided by this Article—*Jamna Dei* v. *Lala Ram*, 39 All. 74 (78).

Money charged upon rents and profits of an estate is money charged upon 'immoveable property'; the rents and profits, which in English law are classed as incorporeal hereditaments, are by the law in India included in immoveable property—*Muhammad Zaki* v. *Chatku*, 7 All. 120.

A *nankur* allowance payable out of the profits of a particular village is treated as money charged upon the village, and is therefore money charged upon immoveable property within the meaning of this Article—*Ram Jiwan* v. *Jadu Nath*, 18 O.C. 380, 33 I.C. 555; *Deputy Commissioner* v. *Jagjiwan*, 19 O.C. 49, 33 I.C. 461.

A hypothecation of *jaghir* income is a charge upon immoveable property, because the *jaghir* income is a benefit to arise out of land within the terms of the definition of immoveable property as given in the General Clauses Act—*Ram Pershad* v. *Kishen*, 4 P.R. 1894.

A *pala* or turn of worship is *moveable* and not immoveable property; consequently a suit to enforce a mortgage of a *pala* is not governed by this Article but by Article 120—*Narasingha* v. *Prolhadman*, 46 Cal. 455 (457).

547. To enforce a charge:—This Article applies to suits to recover money charged on immoveable property, *by sale of that property*; it is inapplicable to a suit to recover money *personally* from the defendant, even though the money be charged on the property—*Ram Din* v. *Kalka*, 7 All. 502, 506 (P.C.); *Miller* v. *Runga Nath*, 12 Cal. 389; *Chunilal* v. *Bai Jethi*, 22 Bom. 846; *Lachmi Narain* v. *Turabunnissa*, 34 All. 246 (248); *Rathnasami* v. *Subramania*, 11 Mad. 56; *Khub Lal* v. *Pudmanund*, 15 Cal. 542; *Sitab Chand* v. *Hyder*, 24 Cal. 281 (282); *Seshayya* v. *Amanna*, 10 Mad. 100; *Maharaja of Vzianagram* v. *Sitaram*, 19 Mad. 101 (103); *Devi Das* v. *Ishar Das*, 55 P.R. 1884; *Chattar Mal* v. *Thakuri*, 20 All. 512 (516)). [In view of the Privy Council decision in 7 All. 502, the ruling in *Lallubhai* v. *Naran*, 6 Bom. 719 (F.B.) is no longer good law. In this Bombay case it was held that a suit by the mortgagee to recover, by a *personal* decree against the mortgagor, the money secured by the mortgage, was a suit to enforce payment of money charged upon immoveable property, and the period of limitation was 12 years.] Art. 132 applies to a case where the plaintiff seeks to enforce payment of money by enforcing his charge upon an immoveable

property. The Article has no application to a case where the plaintiff asks for a money decree only—*Sri Nathji* v. *Mt. Panna*, A.I.R. 1935 All. 239.

In this respect the law in India differs from the English law; for according to the law in England (under sec. 8 of the Real Property Limitation Act) the limitation of 12 years applies equally to actions for the recovery of money charged on the land by a personal remedy against the mortgagor, as well as to suits to recover the money by the remedy against the land—*Sutton* v. *Sutton*, (1882) 22 Ch. D. 511.

548. Simple mortgage:—A suit on a simple mortgage-bond to enforce payment of the money due on the bond by sale of the mortgaged property is governed by this Article and not by Article 147—*Vasudev* v. *Srinivasa*, 30 Mad. 426 (P.C.); *Girwar Singh* v. *Thakur Narain*, 14 Cal. 730 (F.B.); *Nilcomal* v. *Kamani*, 20 Cal. 269; *Sitab Chand* v. *Hyder*, 24 Cal 281; *Balaram* v. *Mangta*, 34 Cal. 941 (945); *Ramchandra* v. *Madhupadhi*, 21 Mad. 326 (F.B.); *Rangaswami* v. *Muthukumarappa*, 10 Mad. 509 (F.B.); *Ramsaran* v. *Mehtab*, 112 P.R. 1890 (F.B.). [The following decisions have been overruled by the Privy Council case;—*Shiblal* v. *Ganga Prosad*, 6 All. 551; *Motiram* v. *Vithal*, 13 Bom. 90; *Onkar Ramshet* v. *Govardhan*, 14 Bom. 557; *Venkatesh* v. *Narayana*, 15 Bom. 183; *Datto Dudheswar* v. *Vithu*, 20 Bom. 408; *Khurshed Ali* v. *Ram Dayal*, 3 O.C. 156; *Ghasiram* v. *Dunichand*, 2 C.P.L.R. 57.] It is well established by authorities that suits brought by simple mortgagees against mortgagors or persons claiming under mortgagors, to enforce the mortgage by sale are suits governed by Art. 132—*Sambasiva Ayyar* v. *Subramania Oillai*, A.I.R. 1936 Mad. 70, 59 Mad. 312.

English mortgage:—An English mortgage was held to be governed by Art. 147; that Article applied to that one class of mortgage in which a suit could be, and always was, brought for *foreclosure or sale;* and an English mortgage was the only class of mortgage in which such suit could be brought—*Vasudeva* v. *Srinivasa*, 30 Mad. 426 (P.C.). The fact that under a mortgage which fulfils all the requirements of an English mortgage under sec. 58 of the Transfer of Property Act, in a certain event the date of payment is changed and the mortgagor has agreed to pay the cost of insurance and other charges would not detract from the absolute transfer to the mortgagee, and would not make it the less an English mortgage falling within the definition in sec. 58 T. P. Act Art. 147 and not this Article governs a suit on such a mortgage—*Rajagopala* v. *Ramachandra*, I.L.R. (1942) Mad. 851, (1942) 2 M.L.J. 406, A.I.R. 1942 Mad. 628. But under clause (a) of sec. 67 of the Transfer of Property Act, as recently amended in 1929, the remedy of foreclosure has been taken away from an English mortgage. Consequently a suit for *sale only* is now allowed under an English mortgage, and such suit falls under Art. 132. The above decision of the Privy Council is no longer good law. But English mortgages executed prior to 1st April, 1930 are outside the scope of amendment made by substitution of new clause (a) of sec. 67 of the Transfer of Property Act—*Saradindu* v. *Jaharlal*, I.L.R. (1942) 1 Cal. 326, 74 C.L.J. 61, 46 C.W.N. 33, A.I.R. 1942 Cal. 153.

Anamalous Mortgage:—Where a usufructuary mortgage contains also a covenant by the mortgagor to repay the mortgage money or the balance remaining due at a certain date, and also contains an agreement, express or implied, that in default the mortgagee will be entitled to bring the mortgaged property to sale, it is open to the mortgagee to select his remedy. A covenant by the mortgagor to repay the mortgage-money, in a deed of mortgage otherwise usufructuary, gives the mortgagee the right to sue for sale of the mortgaged property on failure of the mortgagor to make payment on the agreed date. The cause of action for a suit for sale arises on the date fixed for payment and not on the date of dispossession of the mortgagee, when

such dispossession is before the date fixed for payment—*Hundaldas* v. *Balukhan*, I.L.R. (1942) Kar. 452, A.I.R. 1943 Sind 59, 204 I.C. 574.

549. Mortgage by conditional sale:—A suit to recover money due under a mortgage by conditional sale or for foreclosure is governed by Article 132 and not by Article 147—*Sheoram Singh* v. *Babu Singh*, 48 All. 302, 24 A.L.J. 295, A.I.R. 1926 All. 493; *Balaram* v. *Mangta*, 34 Cal. 941 (945) (S.B.); *Rupomal* v. *Mt. Janat*, I.L.R. (1941) Kar. 124, A.I.R. 1941 Sind 158, 196 I.C. 565.

550. Charge:—The word "charge" is used in a very general sense in Article 132. The mere fact that a charge does not come within the meaning of sec. 100 of the Transfer of Property Act, does not necessarily imply that it is not a charge under Art. 132—*Kotayya* v. *Kotappa*, 49 M.L.J. 117, 90 I.C. 551, A.I.R. 1926 Mad. 341.

The debt must be effectively charged on the immoveable property, *i.e.*, the charge must be one that is binding upon it. If the mortgage is not bindng on the property, the period of six years (Art. 116) and not that of 12 years, would apply - *Kameshwar* v. *Raj Kumari*, 20 Cal. 79 (84) (P.C.).

A will devising immoveable properties and directing the devisee to pay a certain debt of the testator from these properties creates a charge upon the properties in respect of the debt, and a suit brought by the auction purchaser of the creditor's claim to recover the abovementioned debt falls within Article 132, and is not a suit for money lent under Article 57—*Girish Chunder* v. *Annundamoyi*, 15 Cal. 66 (69) (P.C.). Where a testator charged all his real estate with payment of his debts, a claim against the testator's estate on a simple contract debt would be governed by the 12 years' rule—*Warburton* v. *Stephens*, (1889) 43 Ch. D. 39.

Where by a bond the debtor hypothecated all his properties ("my wealth and property") without specification, *held* that the bond created a charge upon the immoveable property of the debtor although no particular property was specified in the bond, and a suit to enforce payment of the amount due out of an immoveable property belonging to the debtor was governed by this Article—*Ramsidh* v. *Balgobind*, 9 All. 158 (164). But in another Allahabad case, where the debtor stipulated that if the principal and interest were not paid up at the stipulated period, the creditor would be at liberty to recover the money, by institution of a suit, from "my moveable and immoveable properties, my own *milk*" it was held that the language of the bond was too vague to warrant the inference that the bond contemplated the creation of a mortgage of a definite estate, and that a suit upon the bond was governed by Art. 66, or 116, and not by this Article—*Collector of Etawah* v. *Beti Maharani*, 14 All. 162 (164). A mortgage of "the entire mukarrari rent of Rs. 100 per year payable..... under a Kabuliyat of June 1913 in respect of 11.34 acres of lakhiraj jagir, *naqdi* kasht land and manhunda rice" is a mortgage of the landlord's right together with the landlord's charge, and therefore a mortgage of interest in immoveable property and a suit to enforce such a mortgage falls within this Article—*Ramzan* v. *Lal Singh*, 18 Pat.L.T. 801. 1937 P.W.N. 826, A.I.R. 1938 Pat. 16.

Ordinarily, a Hindu widow's maintenance is not a charge upon immoveable property, and a suit to recover arrears of maintenance is not governed by this Article—*Baruhi Saraswati* v. *Bahuria Sheoratan*, 12 Pat. 869. But where maintenance is expressly *charged* upon immoveable property, a suit to recover arrears of maintenance is governed by Art. 132—*Ahmed Hossein* v. *Nihaluddin*, 9 Cal. 945 (951) (P.C.).

Where immoveable properties were hypothecated to the principal by the agent as security for the proper discharge of his duty, a suit for accounts by the principal would be governed by Art. 132 in as much as it is by implication a suit to enforce a

charge—*Madhusudhan* v. *Rakhal*, 43 Cal. 248 (following *Hafezuddin* v. *Jadu*, 35 Cal. 298, and dissenting from *Jogesh* v. *Benode*, 14 C.W.N. 122); *Troilokhya* v. *Abinash*, 21 C.L.J. 459, 24 I.C. 18. So also a suit by a principal to enforce a charge on immoveable property created by an agent to secure monies which might be found to have been defalcated by him, is governed by this Article—*Mohini* v. *Bir Bikram*, 44 C.W.N. 793, 72 C.L.J. 480, A.I.R. 1941 Cal. 257. See Note 411 under Art. 89.

Where a guardian gave certain immoveable property as security for the due fulfilment of his duties to his ward, a suit by the latter to recover monies which might be found due on account being taken from the guardian, out of the property charged, falls under this Article—*Fazul Nishan* v. *Muhammadji*, 33 P.R. 1897.

Where a mortgage document expressly made the mortgaged properties liable not only for repayment of principal, but also for interest, the interest was held to be charged upon the property—*Vasudevan* v. *Konurupettamanna*, 2 L.W. 853, 30 I.C. 818; *Davani* v. *Ratna*, 6 Mad. 417. As for interest after due date of mortgage, see Note 483 under Art. 116.

Where several properties are liable for the payment of an annuity, which has been discharged by the owner of one of such properties, a suit for contribution by such owner against the owners of the other properties is a suit to enforce a charge on the properties and is governed by this Article and not by Art. 99—*Yakub* v. *Kishen*, 28 All. 743 (746).

A mortgage bond executed by the father in a Mitakshara family for the benefit or necessity of the family, and not being shown to have been effected for any immoral purpose, is valid and binding on the sons, and a suit to enforce that mortgage against the sons is governed by this Article—*Prankrishna* v. *Jadu*, 2 C.W.N. 603; *Maheshwar* v. *Kisen*, 34 Cal. 184 (190); *Sheo Narain* v. *Mokshoda*, 17 C.W.N. 1022, 19 I.C. 878; *Ram Singh* v. *Sobha*, 29 All. 544 (551); *Jaleswar* v. *Anrut*, 35 All. 302; *Aribudra* v. *Dorasami*, 11 Mad. 413 (415). But where the mortgage is executed by the father to discharge a debt which is neither antecedent nor one for family purposes, the mortgage is not binding on the sons and does not create a charge upon the entire family property but upon his individual share only; and a suit brought after the death of the father, so far as it claims to affect the shares of the sons, is governed by Art. 120, and not by Art. 132 as there is no charge on immoveable property enforceable against the sons—*Brijnandan* v. *Bidya Prosad*, 42 Cal. 1068 (1092) (F.B.), 19 C.W.N. 849.

A claim for the balance of money due to a builder who undertook the erection of a building on the express stipulation that he would have a lien on the building for all sums due to him until paid, is a claim for money charged upon immoveable property under this Article—*Daulat Ram* v. *Woollen Mills*, 95 P.R. 1908, 165 P.W.R. 1908.

If a pro-note is first passed for a certain debt, and subsequently immoveable property is hypothecated for the same debt, a suit to recover the loan due under the pro-note by enforcing the charge created by the hypothecation bond is governed by Article 132, and may be brought within 12 years from the date when the money became due, although the creditor's remedy for enforcing the personal obligation (under the pro-note) in respect of the loan may be barred—*Behari Lal* v. *Beni Madho*, 27 O.C. 268, A.I.R. 1925 Oudh 92, 79 I.C. 942.

L purchased an oil-well subject to a mortgage in favour of B and to a right of pre-emption in favour of N. He made payments to the mortgagee B in part satisfaction of the mortgage-decree on the oil-well, such payments being necessary to save the oil-well. *Held* that L had a charge on the oil-well for the amount paid as against N who exercised his right of pre-emption, as well as against persons claiming through

N, and a suit to recover the amounts by enforcing the charge fell under Article 132—*Ma Lon* v. *Ma Nya*, 1 Rang. 714, 79 I.C. 766, A.I.R. 1924 Rang. 204.

A trustee of a mosque making advances out of his own pocket to meet the expenses of the mosque no doubt acquires a charge upon the trust property, but this charge is not like an ordinary charge which entitles a man to bring the charged property unconditionally to sale. It is a charge which enables him to take the amount out of the rents and profits of the trust property or through raising monies by the creation of a similar charge. Article 132 was not intended to recover such a qualified charge, and the suit by the plaintiff for recovery of the money is governed by Art. 120—*Abkan Saheb* v. *Soran*, 38 Mad. 260 (267, 269), following *Peary* v. *Narendra*, 37 Cal. 229 (P.C.).

Where a portion of the mortgaged property is acquired under the Land Acquisition Act and the mortgagor withdraws the compensation money, a suit filed by the mortgagee to enforce his security and claiming a simple money-decree in respect of the compensation money withdrawn is a suit to enforce payment of money charged upon immoveable property within the meaning of this Article. The cause of action is not the withdrawal of the compensation money, but the non-payment of mortgage money—*Girdharlal* v. *Aley Hasan*, I.L.R. (1938) All. 513, 1938 A.L.J. 313, A.I.R. 1938 All. 221 (F.B.).

An application under sec. 44 of the Madras Hindu Religious Endowments Act (2 of 1927) to enforce charge created in favour of a temple by a deed is governed by this Article—*Sankaralingam* v. *Thenpalaniyandavar Temple*, (1947) 2 M.L.J. 258, 1947 M.W.N. 519, A.I.R. 1948 Mad. 199.

Charge on moveable property:—A suit to enforce a charge on *moveable property* is governed by Art. 120—*Nim Chand* v. *Jagabandhu*, 22 Cal. 21. See Note 508 under Article 120.

Contribution whether a charge:—Some cases have laid down that where Government revenue is paid by one of the co-sharers of the estate to save the entire estate from sale, such payment does not create a charge in his favour upon the estate; and a suit to recover such amount is merely a suit for contribution governed by Art. 99, and not a suit to enforce a charge within the meaning of this Article—*Kinu Ram* v. *Muzaffar*, 14 Cal. 809 (F.B.); *Khub Lal* v. *Pudmamund*, 15 Cal. 542; *Shivrao* v. *Pundlick*, 26 Bom. 437. But in several other cases it has been held that such payment creates a charge—*Raja of Vizianagram* v. *Raja Setrucherla*, 26 Mad. 686 (F.B.); *Alayakammal* v. *Subbaraya*, 28 Mad. 493 (494); *Kotayya* v. *Kotappa*, 49 M.L.J. 117, 90 I.C. 551, A.I.R. 1926 Mad. 151; *Achut* v. *Hari*, 11 Bom. 313; *Venkata* v. *Mulibai*, A.I.R. 1955 Andhra 274. See Note 443 under Article 99. Where, however, a person not in possession of property, but believing that the title to the property rests in him pays the Government revenue, he cannot, on discovering that the title rests in another person, claim a charge on it for the payment so made—*Saraswathi* v. *Rama*, (1949) 2 M.L.J. 419, 1949 M.W.N. 577, A.I.R. 1950 Mad. 39.

But if the revenue is paid not by a *co-sharer* but by the lessee in order to protect his interest in the estate, who thereafter brings a suit for the recovery of the amount, the suit does not fall under Article 99, which applies only to a co-sharer, but is governed by this Article—*Ram Dutt* v. *Horakh*, 6 Cal. 549.

When a person makes a payment on account of a decree for rent of a tenure or holding, under sec. 170 (3), Bengal Tenancy Act, he is, under sec. 171 (1) (c) entitled as a mortgagee to the possession of the tenure or holding in respect of which the payment has been made and to retain possession of the same until the debt due to him has been discharged, and has a right under sec. 171 (2) to sue for the enforcement

of such charge. Such a suit is governed by Article 132 and not by Art. 61, 99 or 120—*Rajeswar* v. *Rajani*, 35 C.W.N. 678 (681), 134 I.C. 75, A.I.R. 1931 Cal. 493.

Discharge of decree:—If one of several joint judgment-debtors pays off the decretal amount, a suit by him for contribution falls under Art. 99. If, however, the decretal amount is paid by a person other than a judgment-debtor, the proper Article applicable to a suit for recovery of the amount so paid is Article 61. But Article 132 cannot apply, as such payment does not create any charge on the property of the judgment-debtor; the fact that the decree might have been realised in execution by the sale of the immoveable properties of the judgment-debtor does not give the person making the payment a charge—*Muthuswami* v. *Ponnayya*, 51 Mad. 815, A.I.R. 1928 Mad. 820 (822), 110 I.C. 613, 55 M.L.J. 436.

Suit against a surety:—A suit against a surety on a simple money-bond for the payment of a mortgage-debt by the mortgagor, is not a suit to enforce payment of money charged on immoveable property, and Article 132 cannot apply. The period of limitation is six years from the expiry of the mortgage period—*Muthu Chettiar* v. *Rangappa*, 53 M.L.J. 453, 105 I.C. 168, A.I.R. 1927 Mad. 945.

Suit for recovery of property-tax:—A suit by a municipality for recovery of property-tax made a first charge on the property under sec. 85 of the Madras District Municipalities Act, 1920, must, under sec. 345 of the same Act, be brought within three years from the date of the cause of action. Art. 132 of the Limitation Act has no application—*Municipal Council of Trichinopoly* v. *Ratnam Pillai*, A.I.R. 1935 Mad. 378, 1935 M.W.N. 379, 41 L.W. 457.

House tax:—A claim to house tax is a rate on lands or buildings or on both, and, therefore, under sec. 87 of the Bombay District Municipal Act, the sums due on account of the house tax is a first charge upon the building or land in respect of which it is leviable. So also the general sanitary tax, when it is made a tax imposed in the form of a rate on lands or buildings or both is a first charge on the lands or buildings. Hence a suit to recover arrears of house tax and sanitary cess which is made a rate on land or buildings, is governed by this Article—*Shidrao* v. *Municipality of Athria*, 44 Bom.L.R. 849, A.I.R. 1943 Bom. 21, 204 I.C. 352. Though the Municipality is in the position of a first mortgagee, a sale in pursuance of the charge has not the effect of annulling prior encumbrances. So a mortgagee purchaser in execution of the decree on the earlier mortgage, not impleaded in the suit by the Municipality is not debarred from proceeding with a suit to enforce the right of redemption against the purchaser of the property in execution of the *charge* decree. Such a suit will be governed by Art. 148. This Article has no application to such a suit as it is not for payment of money—*A. M. A. Firm* v. *Marudachalam*, (1948) 1 M.L.J. 284, 1948 M.W.N. 238, A.I.R. 1948 Mad. 412.

551. Vendor's lien:—Unpaid purchase money creates a charge in favour of the vendor on the property in the hands of the vendee, by virtue of the provision of sec. 55 (4) (b) of the Transfer of Property Act, and a suit by the vendor to recover it by enforcement of such lien or charge falls under Art. 132; but where a *personal* remedy against the vendee is sought, Art. 111 applies—*Virchand* v. *Kumaji*, 18 Bom. 48; *Chunilal* v. *Bai Jethi*, 22 Bom. 846; *Har Lal* v. *Muhamdi*, 21 All. 454; *Munirunnissa* v. *Akbar*, 30 All. 172 (174); *Rama Krishna* v. *Subramania*, 29 Mad. 305 (F.B.); *Rukan Din* v. *Hasan Din*, 72 I.C. 897, A.I.R. 1923 Lah. 23. See Notes under Art. 111. Time runs from the date of the sale-deed or within a very short but reasonable period therefrom—*Kallu* v. *Ramdas*, 26 A.L.J. 53, A.I.R. 1929 All. 121 (123), 107 I.C. 679. The statutory period of 12 years fixed by this Article for enforcement of the charge can be extended by the agreement of the parties such as payments towards the debt and a

suit can be brought within 12 years of the last payment made and is not barred on the ground that more than 12 years have elapsed from the date of the sale—*Syed Abdul* v. *Raj Muhammad*, I.L.R. (1943) Mad. 405, (1942) 2 M.L.J. 482, A.I.R. 1943 Mad. 28.

551A. Co-vendee's charge:—Where a payment has been made by one of the several vendees of a mortgaged property to save the property from sale under the mortgage which affects the rights of all the vendees, an equitable charge would certainly arise against the whole property on behalf of which payment is made. The right to enforce the charge as against the co-vendees accrues on the date of payment—*Brij Bhukan* v. *Bhagwan*, 1938 O.W.N. 290 (approved in Full Bench case—*Brij Bhukan* v. *Bhagwan*, 19 Luck. 70, A.I.R. 1942 Oudh 449, 1942 O.W.N. 672).

552. Co-mortgagor's charge:—See secs. 82, 92 and 95 of the Transfer of Property Act (as amended in 1929).

Where several properties belonging to several owners are mortgaged to secure the same debt, the owner of the property that has been made liable for more than its rateable proportion of the debt can claim contribution proportionately against the owners of other properties, and has a charge on the other properties under sec. 82 of the Transfer of Property Act; and a suit to enforce the charge falls under this Article and not under Article 99—*Bhagwan* v. *Karam Husain*, 33 All. 708 (716) (F.B.); *Ibn Husain* v. *Ramdai*, 12 All. 110 (114).

Where a mortgagor redeems the mortgaged property, he acquires a charge, under sec. 95 (now 92) of the Transfer of Property Act, on the share of each of the other co-mortgagors, for his proportion of the mortgage-money; and a suit to enforce the share is governed by this Article—*Bhagwan Das* v. *Hardei*, 26 All. 227; *Kotayya* v. *Kotappa*, 49 M.L.J. 117, A.I.R. 1926 Mad. 141; *Rajkumari* v. *Mukunda*, 25 C.W.N. 283, 57 I.C. 868. Where there had been several payments in part satisfaction of a mortgage, the payment of the balance due is as much a redemption as the payment of the whole sum due in the case in which there has been no previous part payment. A co-mortgagor who pays the *balance* of the mortgage-money and redeems the mortgage acquires a charge on the property under sec. 95 (92) of the Transfer of Property Act, and his suit to enforce the charge falls under this Article—*Hira Kuer* v. *Palku*, 3 P.L.J. 490 (491), 46 I.C. 479.

It was held in a Calcutta case that the co-mortgagor could get a charge under section 95, T. P. Act only when he *redeemed*, and there could be redemption only so long as the mortgage subsisted. Where a decree on the mortgage was obtained by the mortgagee, and an order absolute for sale was passed under sec. 89 (old) of the T. P. Act, the security as well as the mortgagor's right to redeem were both extinguished, and any payment made thereafter by a co-mortgagor could not be taken as payment by way of redemption'; consequently no charge was created in favour of the person who made such payment. His suit to recover the money was governed by Article 61 or 99 and not by Article 132—*Nawab Jahanara* v. *Mirza Shujauddin*, 9 C.W.N. 865 (867). But the Bombay High Court holds that a *charge* is created in such a case—*Danappa* v. *Yamnappa*, 26 Bom. 379, and this is also view of the Allahabad High Court—*Ibn Hussain* v. *Ramdai*, 12 All. 110, where the mortgage was satisfied by a co-owner of the property *after decree*. It should be noted that the words "and thereby the defendant's right to redeem and the security shall both be extinguished" which occurred at the end of sec. 89 of the Transfer of Property Act have been omitted, after that section has been transferred to O. 34, r. 5 of the C. P. Code. Consequently the mortgagor (and therefore any co-mortgagor) can redeem the mortgage even after a final decree for sale has been passed; and recently, by the further amendment of

O. 34, r. 5 by the T. P. Amendment Supplementary Act, XXI of 1929, the mortgagor has been given power to redeem "at any time before the confirmation of sale." The ruling in 9 C.W.N. 865 is no longer good law.

The right of subrogation under sec. 92 as well as rights accruing to a co-mortgagor under sec. 95 of the Transfer of Property Act arise only on redemption of the mortgage and not on payment of a portion of the mortgage money to the mortgagee. And the cause of action in favour of the redeeming co-mortgagor arises only when the mortgage debt is completely liquidated and a suit instituted within 12 years from that date is within time. Such a suit is not governed by Art. 61 or Art. 83 of the Act—*Nisar Ahmad* v. *Manzur Ahmad*, A.I.R. 1935 Oudh 245, 1935 O.W.N. 278, 154 I.C. 267. The period of limitation is 12 years from the date of payment and not from the date when the original mortgage money becomes payable—*Rameswar* v. *Ramnath*, A.I.R. 1950 Pat. 174 dissenting from *Sadhuprasad* v. *Hari Krishna*, A.I.R. 1929 Pat. 94, 115 I.C. 552. The same principle applies even if the suit is brought by one of several heirs of the mortgagor or by one of the several subsequent transferees against the other heirs of the mortgagor or transferees of the mortgaged property—*Brij Bhukan* v. *Bhagwan*, 19 Luck. 70, 1942 O.W.N. 672, A.I.R. 1942 Oudh 449 (F.B.).

Where a person who has taken a subsequent mortgage satisfies the decree on the basis of a prior mortgage, a claim by such mortgagee to be subrogated to the position of the mortgagee under the first mortgage as against the intermediate mortgagee will not be barred by reason of the suit on the basis of the prior mortgage having become time barred—*Ram Dhan* v. *Mt. Chunni Kunwari*, A.I.R. 1936 All. 578 (F.B.).

553. Mortgagee's charge:—*Surplus sale-proceeds*:—Where a mortgaged property is sold for arrears of revenue, free from all incumbrances, the mortgage is invalid as against the purchaser; but the mortgagee is entitled to a charge on the surplus sale-proceeds (sec. 73, Transfer of Property Act), and a suit to enforce such charge is governed by this Article and not by Article 120—*Upendra* v. *Mohiri Lal*, 31 Cal. 745 (751); *Kamala Kanta* v. *Abdul Barkat*, 27 Cal. 180 (184); *Umatara* v. *Umacharan*, 3 C.L.J. 52; *Jogeshwar* v. *Ghanashyam*, 5 C.W.N. 356 (359). But *quære*, is it still a 'charge' after the amendment of sec. 73, T. P. Act?

When a property is sold under a decree obtained by a first mortgagee in a suit in which the puisne incumbrancers were parties, it passes into the hands of the purchaser discharged from all incumbrances. But the rights of the puisne incumbrancers are not extinguished or discharged by the sale, but transferred thereby to the surplus sale-proceeds. A suit brought by a second mortgagee to enforce his lien on those sale-proceeds in the hands of a third mortgagee who has notice of the second mortgage, and who has taken away the sale proceeds in execution of a decree obtained upon his mortgage, is governed by this Article and not by Article 120—*Berhamdeo* v. *Tara Chand*, 33 Cal. 92 (111, 112), affirmed on appeal to the Privy Council in 41 Cal. 654 (661) (P.C.). Similarly, a suit by a prior mortgagee, for payment of his mortgage-money out of the sale-proceeds remaining in the hands of a subsequent mortgagee who has foreclosed the mortgage and sold the property to a third person, is governed by this Article—*Viswanath* v. *Shankerlal*, 12 N.L.R. 90, 34 I.C. 704.

Suit by a puisne mortgagee.—If a first mortgagee brings a suit on his mortgage without impleading the puisne mortgagee, and in execution of his decree purchases the mortgaged property, and then the puisne mortgagee also brings a suit on his mortgage, without impeading the prior mortgagee, and similarly purchases the property in execution of his decree, and afterwards the puisne mortgagee brings a suit for redemption of the prior mortgage, *held* that the right of the puisne mortgagee to redeem the prior mortgage is only ancillary to his right to work out his remedy against the mort-

gaged estate (Fisher, p. 741). He is only permitted to redeem for the purpose of working out his own security—*Ramsbotham* v. *Wallis*, (1836) 5 L.J.N.S. Ch. 92. The right of a puisne mortgagee to redeem the prior mortgage in a case where he has not been joined in a suit on the first mortgage is a right to redeem the first mortgage with the view of enforcing his own mortgage; it is only a means of securing the object of enforcing his own mortgage by sale. The proper Article applicable to the case is Article 132 and not 148. Time runs from the due date of his mortgage, and no fresh period runs from the date of his purchase—*Lakshmanan* v. *Sella Muthu*, 47 M.L.J. 602, A.I.R. 1925 Mad. 76 (77), 84 I.C. 301; *Nilmadhab* v. *Joygopal*, A.I.R. 1926 Cal. 560, 91 I.C. 719; *Nidhiram* v. *Sarbessur*, 14 C.W.N. 439 (442, 443), 5 I.C. 877; *Appaya* v. *Venkatramayya*, 20 L.W. 620, A.I.R. 1925 Mad. 150 (151), 82 I.C. 864 (following 14 C.W.N. 439).

But the Patna High Court dissents from this view and holds that the second mortgagee's right of redemption cannot be considered as a right to enforce payment of money charged upon immoveable property, because the second mortgagee in a suit for redemption does not seek to recover the money due to him upon his second mortgage. Consequently, Article 132 cannot apply to his suit, but Art. 148—*Ramjhari* v. *Kashinath*, 5 Pat. 513, A.I.R. 1926 Pat. 337 (339), 94 I.C. 284. The same view has been expressed by the Lahore High Court—*Sundar Das* v. *Beli Ram*, 14 Lah. 596, 142 I.C. 805, A.I.R. 1933 Lah. 503.

But if the contrary happened, i.e., where the puisne mortgagee at first sued on his mortgage without impleading the prior mortgagee, obtained a decree for sale and purchased the property in execution of his decree, and then the prior mortgagee similarly brought a suit on his mortgage without impleading the puisne mortgagee and purchased the property in execution of his decree, and afterwards the puisne mortgagee sued the prior mortgagee to redeem the prior mortgage, *held* that the puisne mortgagee not having been impleaded in the prior mortgagee's suit, the decree in that suit was not binding on the puisne mortgagee, that the right to redeem the prior mortgage had not ceased to exist and the relationship of a puisne mortgagee and prior mortgagee still subsisted between the parties, and as such the plaintiff was entitled to redeem the prior mortgage and thus to remove the defect in his title to the property. The suit was governed by Art. 148 and not by Art. 132—*Priya Lal* v. *Bohra Champa Ram*, 45 All. 268 (270), A.I.R. 1923 All. 271, 79 I.C. 498. The distinction between the two sets of cases has been thus explained: where it was that the *puisne mortgagee first sued* on his mortgage and in execution of his decree was put in possession of the property, he subsequently brings a suit merely for redemption, being in possession of the property, the suit falls under Art. 148; but where the *prior mortgagee had first sued* on his mortgage, and obtained possession in excution of his mortgage decree, the puisne mortgagee's suit for redemption is not merely a suit for redemption but also for recovery of possession; and in suing for recovery of possession, he is not seeking to recover possession as against the mortgagee, since the defendent to this suit is in possession of the property not by virtue of his mortgage but by virtue of his purchase of the property at the sale in execution of his decree. The suit is really to enforce the puisne mortgagee's mortgage against the defendant (prior mortgagee)—*Nilmadhab* v. *Joy Gopal*, A.I.R. 1926 Cal. 560, 91 I.C. 719.

But where the prior mortgagee brings a suit on his mortgage without impleading the puisne mortgagee and obtains a decree for sale, but before he executes the decree, the puisne mortgagee brings a suit on his mortgage impleading the prior mortgagee but obtains a decree for sale against the mortgagor only (the prior mortgagee being dismissed from the suit on his setting up a prior title), and then the prior mortgagee purchases the property in execution of his decree, and thereafter the puisne mortgagee

similarly purchases it in execution of his decree, and then brings a suit to redeem the prior mortgage, *held* that the Article applicable to the puisne mortgagee's suit for redemption in such circumstances is Art. 148, and not Art. 132. Whenever a suit for redemption is brought by a person entitled to redeem against a mortgagee, Art. 148 and no other Article applies to it; and by no straining of language can a suit for redemption fall under Article 132, as it is not a suit to enforce payment of money —*Sayamali* v. *Anisuddin*, 57 Cal. 704 (F.B.), 33 C.W.N. 1067 (1074, 1075), 50 C.L.J. 152, 119 I.C. 135, A.I.R. 1929 Cal. 609 (F.B.) (distinguishing *Nidhiram* v. *Surbessur*, 14 C.W.N. 439; *Nagu Tukaram* v. *Gopal Ganesh*, 55 Bom. L.R. 458, A.I.R. 1953 Bom. 405; *Kuran Chandra* v. *Mohan Lal*, 57 C.W.N. 947. A suit by the representatives of a puisne mortgagee to redeem the property from the representatives of a prior mortgagee falls within Art. 132—*Ram Adhar* v. *Shankar Baksh*, A.I.R. 1935 Oudh 139, 1935 O.W.N. 40, 153 I.C. 808. The period of limitation under Art. 132 for a suit against the second mortgagee by the purchaser of the equity of redemption in a suit by the first mortgagee, who did not know of the existence of the second mortgage and therefore could not implead him in his suit, for enforcing his rights, is to be calculated from the date of the purchase by him, and a suit within 12 years from the date of the sale certificate is not barred by limitation—*Gopalan Nair* v. *Moideen Madar*, A.I.R. 1935 Mad. 680, 157 I.C. 1050.

554. When money becomes due:—The period of limitation for a suit under Art. 132 begins to run "when the money becomes due", and the money does not become due until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued—*Lasa Din* v. *Gulab Kunwar*, 7 Luck. 442 (P.C.), 9 O.W.N. 638, 36 C.W.N. 1017 (1023), 138 I.C. 779, A.I.R. 1932 P.C. 207; *Abdul Rahman* v. *Seo Dayal*, 56 All. 496, 1934 A.L.J. 371, 151 I.C. 900, A.I.R. 1934 All. 152.

The expression "due date" in this Article can only mean the date fixed in the mortgage bond as the date by which the mortgage amount should be repaid, irrespective of the fact that the mortgagor has transferred his interest to another. The due date is not extended merely because of the transfer by the mortgagor to another of his interest in the property—*Pushkar* v. *Suraj*, A.I.R. 1948 Pat. 420.

The starting point of limitation under this Article for a suit for contribution by a co-mortgagor is the date on which he pays off the mortgage-debt and not the date on which the debt fell due—*Kenchappa* v. *Nagappa*, A.I.R. 1957 Mysore 1 (F.B.), I.L.R. (1956) Mys. 129.

Where a mortgage deed fixes no time for payment, time runs from the date of the bond; if there have been any previous payments of money to the mortgagee, time runs from the date of the last payment (section 20)—*Nilcomal* v. *Kamini Kumar*, 20 Cal. 269 (272). In case of a mortgage bond executed to secure a loan payable *on demand*, the words "on demand" should be construed as merely technical words meaning "forthwith" or "immediately"; no actual demand is necessary in order to establish a starting point for limitation under Article 132, and time runs from the date of the bond—*Perianna* v. *Muthuvira*, 21 Mad. 139 (149); *Barkatunnissa* v. *Madhub Ali*, 42 All. 70 (73); *Perumal* v. *Alagiraswami*, 20 Mad. 245 (248); *T. C. Bose* v. *Obedur*, 6 Rang. 297, A.I.R. 1928 Rang. 189 (191), 111 I.C. 132. But if the bond provided that upon default of payment of interest annually, the principal would become due with interest at an enhanced rate from the date of the bond, whenever the creditor would make the demand, it was held that the cause of action did not arise upon the first default in the payment of interest, but the liability of the defendant was made dependent on a preceding demand actually made by the plaintiff; till such demand was made, the defendant could not have considered the action as accruing against him; in such a case, the words "on

demand" imported a condition, and were not merely technical words—*Nettakaruppa* v. *Kumarasami*, 22 Mad. 20 (22).

Where, under the terms of a mortgage bond, the mortgagee is to take possession of the mortgaged property and to restore possession to the mortgagor when the latter repays the money within five years, but the mortgagor fails to deliver up possession to the mortgagee, the mortgage debt becomes payable forthwith. The fact that the mortgage money is to be paid within 5 years when the mortgagee is to restore possession to the mortgagor does not postpone the accrual of the cause of action—*Dnynoba* v. *Dattoba*, 48 Bom.L.R. 629, A.I.R. 1947 Bom. 152. But this view was expressly overruled by the same High Court in *Sidramaya* v. *Danava*, *A.I.R.* 1954 Bom. 407.

In the case of a mortgage falling under Bombay Regulation V of 1827, in which there was no specific time fixed for payment, the Judicial Committee observed that the money did not become due and the cause of action did not arise until demand for the payment of the mortgage-debt was made by the mortgagee and was refused by the mortgagor—*Nil Kanth* v. *Vidya Narasing Bharathi*, 54 Bom. 495 (P.C.), 32 Bom.L.R. 1527, 126 I.C. 417, A.I.R. 1930 P.C. 188 (192), reversing *Nil Kanth* v. *Vidyashankar*, 26 Bom L.R. 455, 80 I.C. 393, A.I.R. 1924 Bom. 387.

If a mortgage bond is payable within a certain period, *e.g.*, in one year, time runs from the expiry of the period (one year). A mortgage bond stipulated that the money was to be repaid in one year, that the interest, was to be paid every six months, and that on default at the end of six months interest would be added to the principal. There was a default in payment of interest at the end of the first six months. It was held that the stipulation as regards default in payment of interest did not cut down the stipulated period of one year to six months; and hence the period of limitation ran at the expiry of one year after the date of the mortgage—*Ram Dayal* v. *Aminuddin*, 1931 A.L.J. 29, 133 I.C. 311, A.I.R. 1931 All. 203 (204). Where it is clear from the document that there was no intention that the mortgagee should be given the right to recover the entire amount of the mortgage debt simply on the occurence of a default of payment of the annual interest, the right to sue for the entire amount cannot arise till the expiry of the term fixed—*Sarju* v. *Badri*, I.L.R. (1939) Nag. 515, 1939 N.L.J. 333, A.I.R. 1939 Nag. 242. Where a mortgage bond executed in May 1909 was payable in three years, but it was provided that if the mortgagor transferred the mortgaged property, the creditors should, before the expiry of the term, be at liberty to sue for the recovery of the mortgage-money, and in March 1911 the mortgagor hypothecated a portion of the mortgaged property to another by a registered bond, but the mortgagee had *no notice* of his hypothecation, *held* that a suit instituted on the mortgage in March 1924 was not barred, as time ran from May 1912 and not from March 1911—*Ashiq Husain* v. *Chaturbhuj*, 50 All. 328, A.I.R. 1928 All 159 (161), 108 I.C. 152, 26 A.L.J. 4. Although under sec. 3, Transfer of Property Act (as amended in 1929), *registration itself amounts to notice*, still that provision cannot apply to the present case, because registration would not amount to notice *for the purposes of limitation*.

Where a person pays off two previous mortgages and a subsequent mortgagee brings a suit for foreclosure impleading that person as a defendant and a preliminary decree for foreclosure is passed subject to a charge in favour of the person who has paid off the previous mortgages, a suit by the charge holder within 12 years of the foreclosure decree is within time though after 12 years from date of payment or due dates of mortgages paid off as the foreclosure decree not merely declared but created the charge—*—Batey Krishna* v. *Pursotam*, 71 I.A. 149, 48 C.W.N. 830, (1944) 2 M.L.J. 330, 1944 A.L.J. 463, A.I.R. 1944 P.C. 85; *Ramasubha* v. *Arunachalam*, (1946) 1 M.L.J. 379, 1946 M.W.N. 366, A.I.R. 1946 Mad. 423.

An assignee from the mortgagee (whether by private sale or by execution sale) is in the same position as the mortgagee himself, and he must sue within the same period as is allowed to the mortgagee; he cannot claim a greater right than the mortgagee himself had in the matter, and the mere fact that a particular right has changed hands by assignment does not operate to cause a fresh period of limitation to run from the date of assignment—*T. C. Bose* v. *Obedur Rahman*, 6 Rang. 297, A.I.R. 1928 Rang. 189 (190), 111 I.C. 132.

Where a second mortgagee discharges a decree obtained by the first mortgagee, he does not become an assignee of the decree and is not entitled to execute the decree; but he acquires a charge on the mortgaged property; and in a suit by him to enforce the charge, time runs from the *date on which he made the payment* in satisfaction of the decree, and not from the date when the cause of action accrued to the prior mortgagee. The puisne mortgagee is not an assignee of the prior mortgagee; and the right of the puisne mortgagee cannot accrue before he made any payment at all—*Shib Lal* v. *Munni Lal*, 44 All. 67 (69, 70), A.I.R. 1922 All. 153, 63 I.C. 604. Where a property was sold in execution of a mortgage decree, but before confirmation of the sale, it was hypothecated to another person who paid up the decretal amount and released the property, he was subrogated to the *decree*-charge held by the prior mortgagee, and could bring a suit to enforce that charge as if he had obtained a mortgage on the date of his payment, and would not be bound to enforce his right within the period of limitation of the original mortgage—*Parvati Ammal* v. *Venkkatarama*, 47 M.L.J. 316 (319, 320). 81 I.C. 771. A.I.R. 1925 Mad. 80 (82). But the Patna High Court, and in a subsequent case, the Madras High Court also, dissent from this view and are of opinion that a puisne mortgagee paying off the decree obtained by the prior mortgagee becomes entitled only to the security held by the prior mortgagee; and the period of limitation for his suit to enforce the prior mortgage is to be counted from the due date of that mortgage That is, he is bound to enforce his right within the period of limitation allowed to the first mortgagee. He does not acquire any fresh charge on the property from the date of his payment; consequently time does not run from the date on which he paid off the decree on the prior mortgage—*Sibanand* v. *Jagmoham*, 1 Pat. 780 (785, 786), 3 P.L.T. 533, 68 I.C. 707, A.I.R. 1922 Pat. 499; *Kotappa* v. *Raghavayaya*, 50 Mad. 626, 102 I.C. 316, A.I.R. 1927 Mad. 631 (635) (distinguishing, but virtually dissenting from *Parvati Ammal* v. *Venkatarama*, 47 M.L.J. 316, cited above); *Palaniswami* v. *Ramasami*, (1949) 2 M.L.J. 829, 1949 M.W.N. 792, A.I.R. 1951 Mad. 802. But in a subsequent case the Patna High Court has held that limitation for *such a suit* runs not from the date when the cause of action on the original mortgage arose because the cause of action is extinct but from the date when the money was payable under the decree—*Babu Lal* v. *Bindhachal*, 22 Pat. 187, A.I.R. 1943 Pat. 305. In this case their Lordships have drawn a distinction between a case where the prior mortgage in respect of which subrogation is claimed has not been sued upon and the case where the mortgage has been sued upon and subrogation is claimed by paying off the mortgage-decree. In the first case limitation will run from the date when the cause of action of the original mortgage arose. The same High Court, however, in a recent case. *Mt. Parwati* v. *Manna Lal*, A.I.R. 1956 Pat. 414 (F.B.) has held that the puisne mortgagee who pays off a prior mortgage decree is not subrogated to the position of a decree-holder and the puisne mortgagee does not get a fresh starting point of limitation for enforcing his charge from the date of payment fixed in the mortgage decree and that the period of limitation would begin from the date of payment of the original mortgage bond under Article 132. The Nagpur J. C. Court takes the same view as the Allahabad High Court, *viz.*, that the period of limitation runs from the date when the puisne mortgagee made the payment and became entitled (under sec. 74, now 92 of the Transfer of Property Act) to the right created by the decree

on the prior mortgage—*Suryabhan* v. *Renuka*, 8 N.L.J. 232 (F.B.), 92 I.C. 118, A.I.R. 1926 Nog. 84, overruling *Nathuram* v. *Sheolal*, 13 N.L.R. 217, 42 I.C. 796, (where it was held that the period of limitation ran from the due date of the prior mortgage). The Calcutta High Court has held that the starting point of limitation in such suits is not the date of payment of the decretal dues by the puisne mortgagee but the date of payment specified in the preliminary decree—*Shamsuddin* v. *Asadulla*, 49 C.W.N. 104, A.I.R. 1945 Cal. 194.

A mortgage bond dated 1911 after providing for half yearly payment of interest, provided that the mortgagor could redeem the property only in 1920, and not before, that the mortgagee was not to bring the property to sale on account of default until 1920, that the mortgagee might at his wish recover, either by mutual consent or by suit, the mortgage-money with interest even before 1920 but that the mortagee was not entitled to sell up the property till 1920. *Held* on a construction of the terms of the deed, that a suit to enforce the mortgage *by sale* of the property could not be brought before 1920, and that the suit filed in 1926 was not barred—*Ram Koer* v. *Patraj Koer*, 3 Luck. 439 (F.B.), 5 O.W.N. 385, 112 I.C. 130, A.I.R. 1928 Oudh 289 (290).

Where the surety of a mortgagor pays up the mortgage-money he cannot be in a better position than the original mortgagee. And so in a suit brought by the surety to recover the money from the mortgagor, time runs from the same date as it would have run had he been the original mortgagee, *i.e.*, from the date of the mortgage bond, and not from the date when the surety paid off the mortgage—*Barkatunnissa* v. *Mohbub Ali*, 42 All. 70 (74).

Before sec. 95 of the Transfer of Property Act was amended by the T. P. Amendment Act, XX of 1929, the law was that if a co-mortgagor redeemed the mortgage, his position was the same as if a new mortgage was created in his favour, and the period of limitation for his suit to enforce his charge against the other co-mortgagors ran from the date of his payment, and was not the same within which the original mortgagee could have brought his suit on his mortgage—*Umar Ali* v. *Asmat Ali*, 58 Cal. 1167 (F.B), 35 C.W.N. 409, 130 I.C. 889, A.I.R. 1931 Cal. 251 (overruling *Rajkumari* v. *Mukunda*, 25 C.W.N. 283, 57 I.C. 868); *Qamar Jahan* v. *Munney Mirza*, 12 O.L.J. 313, 2 O.W.N. 413, 92 I.C. 559, A.I.R. 1925 Oudh 613; *Rameshwar* v. *Sheorani*, 2 Luck. 686, A.I.R. 1927 Oudh 552, 4 O.W.N. 783, 105 I.C. 302; *Aziz Ahmad* v. *Chhote Lal*, 50 All. 569, A.I.R. 1928 All 241 (245), 109 I.C. 38. But after the amendment of sec. 95, Transfer of Property Act, and in view of the amended sec. 92 also, the right of a redeeming co-mortgagor is the same right as that of the mortgagee whom he redeems (as he is *subrogated* to the rights of the mortgagee, under sec. 92); the amendment provides for the redeeming co-mortgagor the same security as a proper conveyance would have provided; and the period of limitation in respect of his suit against the other co-mortgagors is the same within which the original mortgagee could have brought his suit on the mortgage. As a result of this amendment, the decision in *Rajkumari* v. *Mukunda*, 25 C.W N. 283 will now stand as good law.

554A. Instalment mortgage bond:—Three important features are found almost invariably in instalment mortgage-bonds : (1) a time is generally fixed by which the entire principal money and interest due thereon are to be paid up; this time is either expressly stated or can be inferred from such terms as "the mortgage-money is to be paid off in four annual instalments, or eight six-monthly instalments" (which mean that the money is to be paid off in 4 years); (2) a stipulation is made for payment of interest, quarterly, six-monthly or annually; and (3) a clause is inserted for the benefit of the mortgagee that if any of the instalments (principal or interest) is not paid in time, the mortgagee would be at liberty to call in the entire money.

There was a divergence of opinion among the High Courts as to whether time ran from the date of the first default, or from the expiry of the due date of the bond.

It has now been authoritatively held by the Privy Council that in such a case, the penal clause being inserted into the bond exclusively for the benefit of the mortgagee, it gives him an *option* either to enforce his security *at once* as soon as any default is made, *or to wait* till the expiry of the full term. Therefore, where such a default has occurred, a suit brought within 12 years from the expiry of the full term is within time if the mortgagee has chosen not to exercise his option to enforce his security on the default occurring. The mortgage-money does not become due until both the mortgagor's right to redeem and the mortgagee's right to enforce his security have accrued. Applying this principle to the case of an instalment mortgage-bond, it is clear that the mortgagor cannot redeem upon a default being made, because he cannot take advantage of his own default; consequently he cannot contend that the mortgagee must bring his suit within 12 years from the date of the first default. It is left to the mortgagee to exercise the option reserved to him, and his suit is not barred if he exercises his option by bringing a suit within 12 years from the expiry of the full term of the bond and the mortgagee's right to enforce his security have accrued—*Lasa Din* v. *Gulab Kunwar*, 7 Luck. 442 (P.C.), 9 O.W.N. 638, 36 C.W.N. 1017 (1023), 138 I.C. 779, A.I.R. 1932 P.C. 207. See also *Pancham* v. *Anwar Hussain*, 48 All. 457 (P.C.), 24 A.L.J. 736, 31 C.W.N. 324, A.I.R. 1926 P.C. 85, 99 I.C. 650; *Mukhdeo* v. *Harokh Narain*, 11 Pat. 112, 12 P.L.T. 755, 134 I.C. 609, A.I.R. 1931 Pat. 285 (290, 291); *Parvati* v. *Mohammad Abrahim*, 8 Luck. 240 (F.B.), A.I.R. 1933 Oudh 66 (67), 9 O.W.N. 1202; *Gokhul* v. *Sheo Prasad*, 18 Pat. 459, 20 Pat.L.T. 443, A.I.R. 1939 Pat. 433 (F.B.). When in the event of the happening of a certain contingency option is given to the mortgagee to enforce his security at once without waiting for the full term of the mortgage, the option is exclusively for the benefit of the mortgagee, and if the mortgagee does not avail himself of the option the mortgage money does not become due till after the expiry of the full term of the mortgage—*Bohra Hotilal* v. *Mithullal*, A.I.R. 1935 All. 421, 1935 A.L.J. 515, 157 I.C. 675, 7 Luck. 442 (P.C.) Foll; *Thirthagiri Udayan* v. *Venkatarama Chetty*, A.I.R. 1935 Mad. 884, 1933 M.W.N. 995, 159 I.C. 172; *Bahadur Singh* v. *Abdul*, 43 C.W.N. 38, A.I.R. 1939 Cal. 26, 181 I.C. 141; *Meghnath* v. *Collector, Cawnpur*, 1946 A.L.J. 315, A.I.R. 1947 All. 7. Where, however the mortgagee decides to exercise his option to exercise the exigibility clause and definitely treats the cause of action as arising on an earlier date in the plaint, he must abide by it and will not be allowed to amend the palint so as to show the cause of action arising on the later date—*Bhabutmal* v. *Syed Abdul*, I.L.R. (1948) Nag. 370, 1948 N.L.J. 546, A.I.R. 1949 Nag. 103.

The following cases are overruled in view of the above Privy Council decision—*Sitab Chand* v. *Hyder*, 24 Cal. 281; *Gaya Din* v. *Jumman*, 37 All. 400 (F.B.); *Shib Dayal* v. *Meherban*, 45 All. 27 (F.B.); *Ganpati* v. *Bhiku*, 32 Bom. L.R. 683, A.I.R. 1930 Bom. 297, 125 I.C. 701; *Shrinives* v. *Chanbasapagowda*, 25 Bom.L.R. 203, 72 I.C. 290, A.I.R. 1923 Bom. 201; *Pancham* v. *Anwar Hussain*, 43 All. 596; *Sheoram* v. *Babu*, 48 All. 302, 94 I.C. 849, A.I.R. 1926 All. 493; *Nathi* v. *Tursi*, 43 All. 671; *Collector of Jaunpur* v. *Jamna Prasad*, 44 All. 360.

A mortgage provided that interest was to be paid every six months and that any interest remaining unpaid would at the close of the year be treated as principal and would thereafter carry interest at the bond rate. It further provided that in the event of non-payment of interest for two consecutive half-years, the mortgagee would have the power to benefit himself by charging the compound interest aforesaid, or to realise at once the whole of the principal and interest due. It was held that the mortgagee was given three options, and if he did not choose to exercise his option of suing for

the whole amount due on the occurrence of a default but chose instead the option of letting the interest go at compound rate, it could not be said that time began to run against him from the date of the default—*Girdhari* v. *Gobind Ram*, 19 A.L.J. 456, 63 I.C. 25. A mortgage contained the stipulation that the mortgagee would be entitled to realise interest every year and in case of three years' default, the entire amount would become due. No interest was paid and after a few years the payment of interest was made by execution of a bond for interest due. The mortgagee instituted a suit, after 12 years from the date of the execution of the bond, it was held that the suit was barred as the subsequent payment of interest merely gave the mortgagee a fresh start but the *terminus a quo* could not be altered from what it was provided in sec. 20 of the Limitation Act as a fresh period of limitation was to be computed from the time when the payment was made by execution of the bond—*Bhagat Ram* v. *Ralla Ram*, 40 P.L.R. 571, A.I.R. 1938 Lah. 570, 178 I.C. 597.

The principle of *waiver* indicated in Article 75 may be applied in determining the time when the money sued for becomes due within the meaning of Article 132. Thus, a mortgage bond provided for payment of the debt in 12 instalments, the first falling due in Pous 1308 B.S., and others in the month of Pous of each of the next 11 years ending with 1319. It was further provided that upon default in the payment of any one instalment the creditor would be entitled to recover the entire amount due, without waiting for the future instalments falling due. The plaintiff alleged that the first instalment was duly paid, and the instalments for 1309 to 1311 were paid and accepted although the payments were made out of time, and the suit was brought in 1326 B.S., for the subsequent instalments. *Held* that the suit was not barred, because the payment and acceptance of the overdue instalments constituted a waiver applying the principle of Article 75, and that the plaintiff was entitled to recover the subsequent instalments. The penalty having been waived, the parties were remitted to the same position as they would have been if no default had occurred—*Surendra Nath* v. *Rishee Case Law*, 27 C.W.N. 893, 79 I.C. 291, A.I.R. 1923 Cal. 139.

But the Madras High Court is of opinion that in an instalment mortgage bond the cause of action accrues on the expiry of the period fixed in the mortgage bond for the repayment of the principal, and not when the first default is made, that Article 132 should be construed in its plain and natural sense, and the words of Article 75 should not be imported into Article 132 for the purpose of determining the starting point of limitation, and that the mortgagee is not bound to take advantage of the default clause but is at liberty to ignore it as it merely gives him an *option* to recover the whole amount upon default—*Narna* v. *Ammani*, 39 Mad. 981 (986); *Muthiah Chettiar* v. *Venkatasubbarayulu*, 49 Mad. 403, A.I.R. 1926 Mad. 160, 49 M.L.J. 394, 90 I.C. 1033. This view has also been taken by the Patna High Court in *Ramsekhar* v. *Mathura*, 4 Pat. 820, 90 I.C. 249, A.I.R. 1925 Pat. 557 (following 39 Mad. 981). See this case cited in Note 483 under Article 116. But in subsequent cases the same High Court has held that if the mortgagee accepts payment of overdue instalments which are tendered to him he must be taken to have waived his right of enforcing the default clause in the bond and limitation does not arise—*Ahammu* v. *Kunnu*, (1938) 2 M.L.J. 251, A.I.R. 1938 Mad. 836, 180 I.C. 570; *Marutheppa* v. *Soosai*, (1944) 1 M.L.J. 49, A.I.R. 1944 Mad. 172, 220 I.C. 208.

Where in pursuance of a default and option clause in a simple mortgage, the mortgagee sues for and obtains possession and on the mortgagor applying under the Encumbered Estates Act, makes an application for the inclusion of his claim for interest for the period of his non-possession it is not barred because under the document the mortgagor intended to give the mortgagee an option as regards the time for suing for interest

and as such it could be sued for along with the claim for principal—*Hardas* v. *Vidya*, 1944 O.W.N. 509, A.I.R. 1945 Oudh 70.

555. Suit against person holding adversely to the mortgagor:—A suit for sale upon a mortgage brought against the mortgagor and a person claiming a right adversely to the mortgagor by twelve years' possession (the adverse possession commencing after the mortgage) is governed by this Article. Such a suit is not a suit for possession under Article 144, because the plaintiff cannot bring a suit for possession without bringing a suit under Art. 132. The suit is in time, if brought within 12 years from the date when the money becomes due. The period of limitation did not run from the time when possession was taken by the adverse possessor, because the adverse possession of the third party obtained after the mortgage does not affect the mortgagee's right—*Rajnath* v. *Narain*, 36 All. 567 (571) (F.B.), distinguishing *Karan Singh* v. *Bakar Ali*, 5 All. 1 (P.C.).

556. Malikana:—*Malikana* is an annual recurring charge on immoveable property and must be sued for within 12 years from the time when the money sued for falls due—*Hurmuzi* v. *Hirdaynarain*, 5 Cal. 921; *Jagannath* v. *Kharachi*, 10 C.W.N. 151. A suit for an allowance for the maintenance of the younger member of a family, charged upon the inheritance to which the eldest male member alone succeeds, is within this Article—*Ahmed Hossein* v. *Nihaluddin*, 9 Cal. 945.

In order to bring the suit within this Article, the plaintiff coming into Court to claim a *malikana* allowance must claim it as a charge upon the immoveable property concerned—*Nathu* v. *Ghansham*, 41 All. 259; and if he claims it as a charge upon the property, the suit is governed by this Article, notwithstanding that the Court refuses to pass a decree against the *property*—*Shaida* v. *Phullo*, 35 All. 185. If, however, the plaintiffs do not seek to enforce it as a charge on the land for which it is payable, the suit is governed by Art. 115, in as much as in such a case the claim must be regarded as one arising out of a quasi-contract created by law—*Kallar* v. *Gunga*, 33 Cal. 998.

A suit for declaration of a right to receive *malikana* annually is a suit to establish a periodically recurring right and falls under Article 131 (*Gopinath* v. *Bhugwari Pershad*, 10 Cal. 967); but a suit to recover malikana, coupled with a claim for declaration of the plaintiff's right to receive malikana, falls under Article 132, because the declaration is merely auxiliary to the claim to recover malikana; and hence although the claim for declaration may be barred, the right to recover malikana itself is not necessarily barred —*Midnapore Zemindary Co.* v. *Muktakeshi*, 6 Pat. 51, 96 I.C. 188, A.I.R. 1926 Pat. 340.

The word 'malikana' in this Article is not restricted to malikana as contemplated in the Bengal Regulation—*Midnapore Zemindary Co.* v. *Muktakeshi*, supra. But it cannot be applied to the under-proprietary rent payable by an under-proprietor in Oudh to his superior proprietor, for what he is liable to pay is 'rent' under the Oudh Rent Act—*Brahmadin* v. *Sangam*, 14 Luck. 467, 1938 O.W.N. 1368, A.I.R. 1939 Oudh 57.

557. Huqq:—This Article applies to suits which are brought by a hakdar against the person originally liable for payment of the hak, and not to suits by one sharer in a vatan against another sharer or alleged sharer who has improperly received the plaintiff's share of the hak; such a suit falls under Art. 62—*Harmukhgauri* v. *Harisukh*, 7 Bom. 191 (193).

A right to receive a *nankar* allowance out of the profits of a particular village is a kind of *huqq*—*Deputy Commissioner* v. *Jagjivan*, 19 O.C. 49, 33 I.C. 461.

558. Clause (c)—Equitable mortgage:—Clause (c) of the Explanation has been added by sec. 9 of the Transfer of Property Amendment Supplementary Act (XXI of 1929). The reasons for inserting this clause have been thus stated:—

"There is much conflict of decisions regarding the period of limitation which governs a suit to recover the money due on a mortgage by deposit of title-deeds. Some Courts have held that it is 60 years, while others hold that it is 12 years. We think that this conflict should now be set at rest; and as the preponderance of opinion is in favour of providing a 12 years' rule in such cases, we propose to bring these mortgages under Article 132 of the Indian Limitation Act, 1908"—*Report of the Select Committee* (Gazette of India, 1929, Part V, p. 126).

The Calcutta High Court has held that according to the practice of that High Court the appropriate remedy in case of an equitable mortgage is a decree for sale and not for foreclosure (and consequently Art. 132 applies and not Art. 147)—*Srinath* v. *Gadadhar*, 24 Cal. 348 (350). If no date is fixed then the money becomes due on the date of the mortgage and limitation under Article 132 would run from the said date—*Durga Prosad* v. *Mario Galstaun*, A.I.R. 1955 Cal. 194. But according to the Bombay High Court, a mortgagee by deposit of title-deed had a right to sue for foreclosure or sale, and his suit, fell under Art. 147—*Manekji* v. *Rustomji*, 14 Bom. 269 (272, 273). This is no longer good law. Compare also sec. 96, Transfer of Property Act (as amended in 1929), under which an equitable mortgage stands on the same footing as a simple mortgage.

The result of the new clause (c) of this Article would be that in Bombay a large number of mortgage suits for which the period of limitation had hitherto been believed to be 60 years under Art. 147 would be found to be barred by limitation. In order to provide for those cases as well as for the continuance of pending suits, the Legislature has enacted a new section—sec. 15 (2) of the Transfer of Property Amendment Supplementary Act (XXI of 1929) which runs as follows:—

> 15. (2) *Notwithstanding anything contained in section 9 of this Act in the Presidency of Bombay and such other territories as the Governor General in Council may, by notification in the Gazette of India, specify in this behalf, a suit by a mortgagee for foreclosure or sale on a mortgage by deposit of title-deeds may be instituted within two years from the date of the commencement of this Act, or within sixty years from the date when the money secured by the mortgage became due whichever period expires first; and no such suit instituted within the said period of sixty years and pending at the date of the commencement of this Act, either in a Court of first instance or of appeal, shall be dismissed on the ground that the twelve years' rule of limitation is applicable.*
>
> [*N.B.*—"Two years"=1st April 1932.]

The Legislature would have done better by inserting this saving provision into the Limitation Act itself, instead of placing it at the end of the T. P. Amendment Supplementary Act.

133. (*Omitted by Sec. 3 of Act I of 1929.*)

This Article has been omitted from this place but re-enacted as Art. 48A. See Notes thereunder.

134. To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged	Twelve years.	When the transfer becomes known to the plaintiff.

and afterwards transferred by the trustee or mortgagee for a valuable consideration.	

Change:—The words in the third column have been substituted for the words "the date of the transfer" by sec. 3 of the Indian Limitation Amendment Act, I of 1929. For reason of the change, see Note 566 below.

559. Object of this article:—The underlying idea of this Article is that creator of the trust or the original mortgagor put the trustee or mortgagee in a position to deal with the property wrongly as well as rightly and that after a limited time neither the *cestui qui trust* nor the mortgagor shall be permitted to question those dealings. The creator of a trust or the mortgagor should therefore be careful to whom he entrusts or mortgages his property. The utility of such an Article lies in this that it relieves the Court of the necessity of deciding disputed questions of fact relating to transactions long past, and prevents the hard swearing and chicane to which such disputes are apt to give rise. With every year that passes the chance that the Courts may be led into a wrong conclusion on a question of fact increases—*Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866 (881). The object of this Article is to cut down the period available to the mortgagor under Article 148, and to compel him to watch the conduct of the mortgagee and to intervene on a transfer—*Narayanaswamy* v. *Periasamy*, 44 Mad. 951, 68 I.C. 734. In order to attract the operation of this Article the defendant has got affirmatively to prove that the mortgagee or his successor-in-interest has transferred a larger interest than justified by the mortgage. If there is no such proof, the shorter period under this Article is not available to the defendant in a suit for possession after redemption—*Nani Bai* v. *Gita Bai*, A.I.R. 1958 S.C. 706. The onus of proving facts which would attract the provision of this Article in preference to Art. 148 or even possibly Art. 144 would lie heavily on the person who wishes to claim the benefit of an abridged period of limitation under this Article —*Krishnaswami* v. *Sabdrathnam*, (1938) 1 M.L.J. 101, A.I.R. 1938 Mad. 394.

Article 134 and sec. 10:—In so far as this Article refers to trustees, it must be read along with section 10 which also relates to trustees and permits a *cestui que trust* to follow trust property in the hands of trustees or their assignees (excepting assignees for valuable consideration). This exception has obvious reference to the same class of considerations as are given effect to in Article 134 in respect of suits for possession—*Ram Chandra* v. *Sheikh Mohidin*, 23 Bom. 614 (618). With regard to trustees, the operation of this Article is controlled by sec. 10—*Abhiram* v. *Shyam Chand*, 36 Cal. 1003 (1004) (P.C.). That is, this Article would not apply if the transfer by the trustee was not for valuable consideration. On the other hand, section 10 does not apply where the transfer by the trustee is for valuable consideration; to such a case Article 134 applies—*Ramacharya* v. *Srinivasacharya*, 20 Bom.L.R. 441, 46 I.C. 19.

Suit against whom to be brought:—The suits contemplated by this Article are suits against the *transferee* or his representatives—*Seeti Kutti* v. *Kunhi Pathumma*, 40 Mad. 1040 (1061) (F.B.). A suit for redemption of a usufructuary mortgage from the *mortgagee* is not a suit governed by this Article but by Article 148. It cannot have been the intention of the Legislature that the mortgagee should be able to shorten the period of limitation by the mere process of making a transfer of his rights in favour of some third person. Article 134 can be applicable only when the suit is being brought against the transferee of the mortgagee—*Chetty Firm* v. *Md. Kasim*, 3 Rang. 367,

A.I.R. 1925 Rang. 377. Moreover, this Article does not apply to suits against persons who are not transferees from the mortgagee, but are transferees from persons other than the mortgagees or their heirs, *e.g.*, to a suit against a person who is a transferee from a sub-mortgagee—*Manawar* v. *Jagmillan*, 99 I.C. 280, A.I.R. 1927 All. 177.

560. Conveyed or bequeathed in trust:—A property conveyed to a *mohunt* for the benefit of the *mutt* is a property 'conveyed in trust' within the meaning of this Article—*Deivasikamani* v. *Valliammai*, 37 M.L.J. 231, 52 I.C. 914. If a property is a valid *debuttor* absolutely dedicated to one or more *Thakurs*, it falls within the description of property 'conveyed or bequeathed in trust' and the shebait is a trustee within the meaning of Art. 134—*Ramkanai* v. *Sri Sri Hari Narayan*, 2 C.L.J. 546.

But in the Privy Council case—*Vidya Varuthi* v. *Balusami*, 44 Mad. 831 (843) (P.C.), 26 C.W.N. 537, 65 I.C. 161, A.I.R. 1922 P.C. 123, the Judicial Committee laid down that the mere fact that a property was gifted to idols and images consecreted in temples, or to religious institutions, was not a ground for holding that the property was 'conveyed in trust,' that the shebait or the mohant of the idol or religious institution, to which the property was dedicated, held the property only as a custodian or manager; the property could not be said to be vested in him, or 'conveyed in trust' to him; similarly, under the Mahomedan law, the moment a *wakf* was created, the property vested in God Almighty; the *Mutwali* or *Sajjadanashin* was merely a manager. Neither the *shebait* nor the *mutwalli* was a trustee, and if the property of the endowment was transferred by the mohunt or *mutwalli*, a suit to recover the property from the transferee was governed by the general Article 144.

Vidya Varuthi's case was followed in *Abdur Rahim* v. *Narayan Das*, 50 Cal. 329 (336) (P.C.), 28 C.W.N. 121, 71 I.C. 646, A.I.R. 1923 P.C. 44, *Diwan Singh* v. *Shamdas*, 65 I.C. 722, A.I.R. 1922 Lah. 271, *Rama Reddi* v. *Ranga Dasan*, 49 Mad. 543, 96 I.C. 371, A.I.R. 1926 Mad. 796, *Ranga* v. *Latchuma*, 48 M.L.J. 114; *Mahant Ramrup* v. *Lalchand*, 1 Pat. 475 (478), and several other cases. In the earlier Privy Council case of *Ram Parkash* v. *Anand Das*, 43 Cal. 707 (P.C.) at p. 732, the Judicial Committee had remarked that a *mohant* was not only a religious preceptor but a 'trustee' in respect of the *muth*.

The case of *Vidya Varuthi* v. *Balusami*, as well as the cases which followed it, have lost their authority in view of the second para. of sec. 10, recently added by the Indian Limitation Amendment (Act I of 1929). See Notes at pp. 102, 103, *ante*, under heading "Religious Endowment." And as special provisions have been made in Articles 134A, 134B, 134C and 48B in respect of property comprised in a religious or charitable endowment, it is no longer necessary to decide whether such a property falls within the description of property "conveyed or bequeathed in trust," within the meaning of Art. 134, and the question of applicability of the ruling of *Vidya Varuthi's* case to Art. 134 becomes unnecessary. Article 134 is now restricted to trust property other than property of a religious or charitable endowment, *i.e.*, to secular trusts only.

561. Transferred:—In Art. 134 of the old Act, there were the words "*purchased from*" instead of "transferred by"; and so the Article applied only to *sales* by trustees and not to a mortgage or lease executed by a trustee; see *Abhiram Goswami* v. *Shyama Charan*, 36 Cal. 1003 (1015) (P.C.); *Iswar Shyam Chand* v. *Ram Kanai*, 38 Cal. 526 (P.C.); *Narsya* v. *Venkataramana*, 23 M.L.J. 260, 16 I.C. 53; *Bashashar* v. *Natha Singh*, 30 P.R. 1908, 102 P.L.R. 1908 (F.B.). Still, in many cases the Article was extended to transfers by way of mortgage or permanent lease. See *Maluji* v. *Fakirchand*, 22 Bom. 225; *Nilmoney* v. *Jagabandhu*, 23 Cal. 536 (544), *Yesu* v *Balkrishna*. 15 Bom. 583; *Behari* v. *Muhammad* 20 All 482 (P.B.) *Hussaini* v.

Hussain, 29 All. 471 (478); *Ramkanai* v. *Sri Sri Hari Narayan*, 2 C.L.J. 546; *Narayan* v. *Sri Ramachandra*, 27 Bom. 373 (377); *Monavikraman* v. *Ammu*, 24 Mad. 471 (F.B.).

But now the Legislature have used the word 'transfer' in order to make this Article applicable to all transfers for valuable consideration—sale, mortgage and lease. See *Narain Das* v. *Haji Abdur Hakim*, 47 Cal. 866 (880); *Vidya Varuthi* v. *Balusami*, 44 Mad. 831 (845) (P.C.); *Bagas Umarji* v. *Nathabhai*, 36 Bom. 146 (150), 12 I.C. 737; *Chetty Firm* v. *Md. Kasim*, 3 Rang. 367, A I.R. 1925 Rang. 377.

Transfer with possession:—The suits referred to in this Article being suits for possession, the transfer contemplated by this Article is a transfer *with possession* or followed by possession as a necessary incident or ingredient of it. This Article does not apply to a transfer from the trustee or mortgagee unless the transferee had *possession* under the transfer—*Husaini* v. *Husain*, 29 All. 471 (480); *Naunihal* v. *Skinner*, 47 All. 803, A.I.R. 1925 All. 707, 92 I.C. 63; *Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866 (880); *Dattagiri* v. *Dattatraya*, 27 Bom. 363 (369); *Ramchandra* v. *Sheikh Mohideen*, 23 Bom. 614; *Sagun* v. *Kaji*, 27 Bom. 500; *Chetty Firm* v. *Md. Kasim*, 3 Rang. 367; *Seeli Kuti* v. *Kunhi Pathumma*, 40 Mad. 1040 (1054) (F.B.); *Ram Piari* v. *Budh Sen*, 43 All. 164 (167), 18 A.L.J. 995; *Achche Mirza* v. *Ahmed Shah*, 1 Luck. 529, A.I.R. 1926 Oudh 594, 97 I.C. 922. Under this Article the transfer by the mortgagee must be a transfer with possession to the transferee, at least a transfer which would entitle the transferee to get possession from his vendors—*Kalidas* v. *Sushila*, 52 C.W.N. 443, A.I.R. 1947 Cal. 461. So when at the time of transfer the property is in the possession of a receiver appointed in another proceeding, this Article does not apply—*Krishnaswami* v. *Sabaratnam*, (1938) 1 M.L.J. 101, A.I.R. 1938 Mad. 394. It should be noted that under the English law (3 & 4 Vict., C. 27, sec. 25, which correspoponds to Article 134) possession by the purchaser for valuable consideration, for the statutory period, of the property conveyed in breach of trust is necessary to validate the transfer against the *cestui que trust;* see Lewin on Trusts, 5th Edn., p. 633.

This Article applies even though possession is taken by the transferee at *some time after* the date of the transfer, and is not restricted to cases where the possession is taken at the date of the transfer—*Seeti Kutti* v. *Kunhi Pathumma*, 40 Mad. 1040 (1051, 1054, 1060) (F.B.); see also *Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866. The Rangoon High Court holds that this Article cannot apply where possession was not given at the time of the transfer but passed subsequently to the transfer—*Chetty Firm* v. *Md. Kasim*, 3 Rang. 367, A.I R. 1925 Rang. 377, 90 I.C. 1011.

Since the transfer contemplated by this Article is a transfer with possession, it presupposes that the transferor-mortgagee must have been in possession of the mortgaged property at the time he made the transfer. But the possession which the transferor had at the time of the transfer need not necessarily have been acquired *under the mortgage* originally made in his favour. Even if the mortgage was a simple mortgage and if the mortgagee subsequently got possession of the mortgaged property otherwise, as for example by a purchase in execution of a simple money decree obtained by another creditor, the Article would still apply if it be established that at the time the transfer was made the mortgagee was in possession, no matter under what title—*Naunihal* v. *Skinner*, 47 All. 803, 23 A.L.J. 691, A.I.R. 1925 All. 707 (*per* Lindsay J.). But Kanhaiya Lal J. is of opinion that the transferor-mortgagee must have obtained possession (from the mortgagor) *under the mortgage*, and that if the mortgagee acquired possession in some other capacity, the transfer of possession would be deemed to have been made in that capacity in which it was acquired, and such acquisition could not be attributed to the mortgage, where the mortgage itself was a simple mortgage or a mortgage not entitling the mortgagee to possession by virtue of its incidents or terms.

But this opinion is no longer correct in view of 51 All. 367 (P.C.), cited in Note 562 below.

Execution sale:—Execution sale is not a 'transfer'; therefore this Article does not apply to a suit against a person who purchased the property at a sale in execution of a decree against the trustee or mortgagee—*Paras Ram* v *Lalman*, 7 I.C. 570 (All.); *Charu Chandra* v. *Nahush Chandra*, 50 Cal. 49 (63), A.I.R. 1923 Cal. 1, 36 C.L.J. 35; *Kalidas* v. *Kanhaya*, 11 Cal. 121 (P.C.); *Chintamoni* v. *Sarup Se*, 15 Cal. 703 (706) (so assumed); *Subbaya Pandaram* v. *Mahammad Mustapha*, 32 M.L.J. 85, 40 I.C. 50; *Kannuswami* v. *Muthusami*, 5 L.W. 250, 38 I.C. 194, 1917 M.W.N. 5; *Ram Piary* v. *Budh Sen*, 43 All. 164 (168); *Pandu* v. *Vithu*, 19 Bom. 140 (144); *Sobhag Chand* v. *Bhaichand*, 6 Bom. 193 (206); *Mahomed Mohsin* v. *Mahomed Abid*, 22 O.C. 72, 52 I.C. 159; *Bhagwan Sahai* v. *Bhagwan Din*, 9 All. 97; *Mohomed Moosa* v. *Kazi Fatahulla*, 19 S.L.R. 268, A.I.R. 1925 Sind 167, 79 I.C. 466. This Article can only apply to a case of transfer, that is to say, a case where title is conveyed by act of parties and not by reason of execution of a decree of Court—*Kalidas* v. *Sushila*, 52 C.W.N. 443, A.I.R. 1947 Cal 461. Where in execution of a money decree, the immoveable property of the judgment-debtor, in which his real interest is that of a mortgagee, is attached and sold, the auction-purchaser cannot be regarded as a purchaser within the meaning of this Article, even though the property was sold as the property of the judgment-debtor without any limitation of his interest therein—*Ahmed Kuti* v. *Raman*, 25 Mad. 99 (F.B.) (overruling *Muthu* v. *Kambalinga*, 12 Mad. 316, at p. 318, where this Article was held to apply equally to an auction sale as well as to a private sale).

In the recent Privy Council case of *Subbaiya Pandaram* v. *Muhammad Mustapha*, 46 Mad. 751 (757), the Judicial Committee were of opinion that Article 134 might apply to a case where the defendant was an *auction-purchaser* at a sale in execution of a decree against the trustee, as "there is little difference in principle between a transfer under an adverse execution, and a sale by the trustee himself." But their Lordships also observed that Art. 144 was more appropriate.

562. "Mortgagee":—A mortgagee is none the less a mortgagee even though he purchases the equity of redemption of the mortgagor at a sale held in execution of a money decree against the latter, and enters into possession as an absolute owner. It is immaterial that the mortgagee should have thought that he was an absolute owner if in fact he was a mortgagee; and it is also immaterial whether he got possession before, under or after the mortgage—*Skinner* v. *Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), 1929 A.L.J. 566, A.I.R. 1929 P.C. 158, 117 I.C. 22. This Article must be strictly construed and can be made to apply only to cases in which there has been a transfer by a person, who is actually the 'mortgagee' of the property in suit; and it is incumbent on the transferee to show that the person who sold the property to him was the mortgagee of the property. A person who purchases a property in execution of a mortgage decree does not become the 'mortgagee' of the property. Further, in order to make this Article applicable, there must be a subsisting mortgage at the date of the transfer—*Chhoti Begam* v. *Ram Prasad*, 20 O.C. 164, 39 I.C. 582 (584). Therefore, where a prior mortgagee by conditional sale, after having foreclosed his mortgage, transferred the right, title and interest thus acquired to a third person, it was held that the transfer was made not by a 'mortgagee' but by a person who had foreclosed the mortgage and had thus become the *owner* of the property; and therefore this Article could not apply—*Munna Lal* v. *Munun Lal*, 36 All. 327 (328).

The purchaser of the mortgagee's interest at an auction-sale is a mortgagee for the purposes of this Article—*Kannusami* v. *Muthusami*, 5 L.W. 250, 1917 M.W.N. 5, 38 I.C. 194; *Ghasi Ram* v. *Krishna*, 13 A.L.J. 877, 30 I.C. 564.

The term "mortgagee" used in this Article is not confined to the original mortgagee and it includes the heirs of the mortgagee. It also includes a transferee of the mortgagee rights as well, and, the term includes the persons covered by the same term in Article 148—*Ram Charan* v. *Bhagwan Dei*, A.I.R. 1955 All. 339.

A co-mortgagor who redeemed the entire mortgaged property was treated as a mere charge-holder under sec. 95 of the Transfer of Property Act before it was amended in 1929, and not as a 'mortgagee'; consequently a transfer by such person did not fall under this Article—*Jai Kishan* v. *Budhanand*, 38 All. 138 (145)). But this ruling will no longer hold good, because under secs. 92 and 95 of the Transfer of Property Act as amended in 1929, the redeeming co-mortgagor has got all the rights of a mortgagee.

563. Nature of the interest tansferred:—The question to be determined under this Article is as to what the transferee intended to purchase and what the transferor intended to transfer. The real test would be, did the transferee ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it—*Muthaya* v. *Kanthappa*, 34 M.L.J. 431, 45 I.C. 975. The question whether the transferee from a mortgagee took an absolute interest or only a mortgage-interest is a question of intention—*Ibid; Lakshmana* v. *Sankara Pandiam*, 51 M.L.J. 451, A.I.R. 1926 Mad. 311, 93 I.C. 276. For the purpose of finding out what was the intention of the parties extraneous evidence including the knowledge of the parties can be taken into consideration—*Suleman* v. *Pida Husain*, A.I.R. 1945 Oudh 258, 1945 O.W.N. 182.

In order to make this Article applicable, the transferee should take a transfer of an *absolute* and not of a restricted title. If the transferee does not profess or intend to take the transfer of an absolute interest or anything more than the qualified interest which he transferor is competent to alienate, there is no occasion for this Article to apply—*Ramkanai* v. *Sri Sri Hari Narain*, 2 C.L.J. 546. This Article is intended to protect a transferee who had reasonable grounds for believing that his transferor had the power to convey and did convey an absolute interest. This Article applies where the transferee is a person who takes the transfer under the representation made to him and in the belief that it is an absolute title which he is taking—*Husaini* v. *Husain*, 29 All. 471; *Ram Piari* v. *Budhu Sen*, 43 All. 164 (167); *Taluqdari Settlement Officer* v. *Akuji Abhram*, 46 Bom. 993, 24 Bom.L.R. 762, A.I.R. 1922 Bom. 350, 68 I.C. 487; *Manavikraman* v. *Ammu*, 24 Mad. 471 (F.B.); *Muthu* v. *Kambalinga*, 12 Mad. 316 (318); *Keshav* v. *Gafurkhan*, 46 Bom. 903 (906); *Pandu* v. *Vithu*, 19 Bom. 140 (144); *Radhanath* v. *Gisborne*, 14 M.I.A. 1; *Mahabir* v. *Sheoraj*, 9 O.C. 373; *Dalal* v. *Gur Prasad*, 12 O.C. 84, 2 I.C. 250; *Bhagwan* v. *Bhagwan*, 9 All. 97 (102); *Azim* v. *Mahmud*, 124 P.R. 1883. The transfers contemplated by this Article are transfers for value in excess of the limited powers of the trustee or the mortgagee—*Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866 (880). The transfer of a mortgaged property contemplated by this Article is something other than an express transfer of the original mortgage; it is transfer by the mortgagee purporting to transfer a larger interest than that given by the mortgage, or at any rate an interest unencumbered by a mortgage —*Skinner* v. *Naunihal*, 51 All. 367 (P.C.), 56 I.A. 192, 27 A.L.J. 566, 33 C.W.N. 761 (767), 117 I.C. 22, A.I.R. 1929 P.C. 158; *Balabhau* v. *Rangulal*, I.L.R. (1955) Nag. 100, A.I.R. 1955 Nag. 145 (F.B.); *Karuppanan* v. *Daivasigamania*, I.L.R. (1954) Mad. 650, (1954) 2 M.L.J. 12; A.I.R. (1954) Mad. 650; *Mahadeva* v. *Rudran*, A.I.R. 1954 Trav. Co. 317. Thus, where the defendant's vendor purported to transfer the *full* ownership when in point of law he had only a mortgagee-right to transfer, the case is governed by Article 134—*Rego* v. *Abbu Beari*, 21 Mad. 151; *Mirza War Ali Beg* v. *Danish Ali*, 2 O.L.J. 483, 32 I.C. 314. Thus where a usufructuary

mortgagee transfers his property alleging himself to be the owner of the property and not merely a mortgagee thereof and the transfer comes to the knowledge of the mortgagor, he is bound to sue within the period mentioned in this Article from the date of knowledge—*Narain* v. *Ram Lalla*, A.I.R. 1951 All. 433. But a contrary view has been taken by the Calcutta High Court in *Kalidas* v. *Sushila*, 52 C.W.N. 443, A.I.R. 1947 Cal. 461 where it has been held that a simple mortgage executed by a usufructuary mortgagee on the assertion that he is the full owner of the property does not come within this Article.

A purchaser for valuable consideration from a mortgagee by conditional sale, who sold the property as though he were the ostensible owner of it, comes under this Article—*Vishnu* v. *Balaji*, 12 Bom. 352 (358). So also, where the trustee of a muth property granted a permanent lease of the property, which he was not competent to do, *held* that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Article 134 (now Art. 134A) were complied with—*Baluswami* v. *Venkataswamy*, 40 Mad. 745 (751). This Article protects a person who happening to purchase from a mortgagee had reasonable grounds for believing and did believe that his vendor had the power to convey and was conveying to him an absolute interest and not merely the interest of a mortgagee—*Bhagwan Sahai* v. *Bhagwan Din*, 9 All. 97. A mortgagee who took a mortgage from a person who was merely a mortgagee of the lands but who mortgaged them as if he were the complete owner, is entitled to the benefit of this Article—*Manavikraman* v. *Ammu*, 24 Mad. 471 (483) (F.B.); *Husaini* v. *Husain*, 29 All. 471 (479); *Bagas Umarji* v. *Nathabhai*, 36 Bom. 146.

So also, where the purchaser *at the time of the purchase* believes that his transferor is an absolute owner of the property transferred, but finds later on that his transferor was only a mortgagee and not the owner of the property, he is none the less a transferee of an absolute interest, and is entitled to the benefit of this Article—*Keshav Raghunath* v. *Gafurkhan*, 46 Bom. 903 (907), 24 Bom. L.R. 319, 67 I.C. 308, A.I.R. 1922 Bom. 234. A person who has purchased a right which he honestly believed to be a full properietary right, and which was so described in the sale-deed, can claim the benefit of Art. 134, even though by the exercise of due deligence he might have discovered that his transferor was only a mortgagee, mere constructive notice without actual knowledge not being sufficient to deprive the purchaser of the benefit of this Article—*Bijai Partab* v. *Raghurai*, 25 O.C. 115, A.I.R. 1922 Oudh 7, 67 I.C. 572.

But this Article does not apply where the mortgagee transfers his interest *as such* i.e., where the defendants (transferees) claim a transfer of the *mortgagee's interest* and not of the *entire* property in the land—*Savalaram* v. *Genu*, 18 Bom. 387; *Charu Chandra* v. *Nahush Chandra*, 50 Cal. 49 (62), A.I.R. 1923 Cal. 1, 36 C.L.J. 36; *Mirza Yar Ali Beg.* v. *Danish Ali*, supra; *Sri Ram* v. *Najibullah*, 29 O.C. 353 (F.B.), 3 O.W.N. 674, A.I.R. 1926 Oudh 547, 97 I.C. 874. Thus, where the mortgagee transfers his *mortgagee-rights* as such, the transferee stands in no better position than the transferor; consequently, the mortgagor has sixty years under Art. 148 within which to bring a suit for redemption against the person who purchases only the mortgagee-rights from the mortgagee—*Drigpal* v. *Kallu*, 37 *All.* 660 (661); *Muthu* v. *Kambalinga*, 12 Mad. 316 (318); *Bhagwan Sahai* v. *Bagwan Din*, 9 All. 97 (102); *Azim* v. *Mahamud*, 124 P.R. 1883; *Ram Pjari* v. *Budh Sen*, 43 All. 164 (167); *Vishwanath* v. *Tukaram*, 27 Bom.L.R. 661, A.I.R. 1925 Bom. 417, 89 I.C. 189; *Tairamiya* v. *Shibelisaheb*, 44 Bom. 614 (618); *Gomti Mistra* v. *Deota Din*, 26 O.C. 197, 77 I.C. 737, A.I.R. 1924 Oudh 44; *Ma Myat Gyi* v. *Ma Ma Nyam*, 2 Rang. 561 (566). Where both the transferor and the transferee knew that the transferor was unable to confer a higher right than that of a sub-mortgagee on the transferee, and neither the transferor nor the tran-

feree honestly believed that the full ownership was being passed, the mere insertion of some words in the document which might be construed as if they were the words of a person possessing such right as would enable him to pass a title of full owner to his transferee, while the consideration was the consideration of a mortgage and not of sale, did not confer full ownership on the transferee. Under these circumstances, it cannot be maintained that there was an *animus* to pass anything more than an assignment of the mortgagee-rights which were vested in the transferor—*Lakshamana* v. *Sankarapandiam*, 51 M.L.J. 451, 93 I.C. 276, A.I.R. 1926 Mad. 311.

In order to get the benefit of this Article, the *onus* lies on the transferee to shew that he is transferee of an *absolute* title and not merely of the *mortgagee's rights* in the property—*Vythilingam* v. *Kuthisavattah*, 29 Mad. 501; *Veerabadra* v. *Veerappa*, 15 I C. 609 (610). If on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention—*Muthaya* v. *Kanthappa*, 34 M.L.J. 431, 45 I.C. 975; *Suleman* v. *Pida Husain*, A.I.R. 1945 Oudh 258, 1945 O.W.N. 182. Where the question whether the mortgagee was transferring a mortgagee-interest or an absolute interest finds no answer from the wording of the deed itself, it would be a natural presumption that what he transferreed was the right which he possessed, namely the mortgagee's right—*Puttu Lal* v. *Ram Chandra*, 103 I.C. 255, A.I.R. 1927 All. 689.

564. Transfer for valuable consideration:—The expression 'transferred for a valuable consideration in this Article is in contra-distinction to a mere volunteer —*Ramkanai* v. *Sri Sri Hari Narayan*, 2 C.L.J. 546; *Baikunthanath* v. *Ahmedulla*, 58 Cal. 234, 34 C.W.N. 961 (963); *Maluji* v. *Fakirchand*, 22 Bom. 225 (228). If the transferee is not a transferee for valuable consideration, a suit against him is not barred by any length of time by virtue of sec. 10—*Chettikulam* v. *Siranga*, 26 M.L.J. 537, 24 I.C. 369. Thus, Article 134 does not apply to a case of gift—*Sri Ram* v. *Matwala*, A.I.R. 1923 Lah. 219, 71 I.C. 577.

A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other—*Currie* v. *Misa*, (1875) L.R. 10 Exch. 153 (162).

A grant of a permanent lease is a transfer for a valuable consideration, the annual rent being the consideration—*Rameshwar* v. *Sri Sri Jiu Thakur*, 43 Cal. 34 (43); *Baluswamy* v. *Venkataswamy*, 40 Mad. 745 (749); *Zafar Ali* v. *Kishen Chand*, 51 I.C. 795, 99 P.R. 1919; *Ram Kanai* v. *Sri Sri Hari Narain*, 2 C.L.J. 546; *Rama Reddi* v. *Ranga Dasan*, 49 Mad. 543, A.I.R. 1926 Mad. 796, 96 I.C. 371. But the Privy Council have laid down that a permanent lease of a trust property is not a transfer for valuable consideration—*Vidya Varuthi* v. *Balusami*, 44 Mad. 831 (854) (P.C.), followed in *Lakshminarayana* v. *Rajamma*, 21 L.W. 256, 95 I.C. 1002, A.I.R. 1925 Mad. 796. A gift of a portion of the temple property to the defendants in consideration of their performing some recurrent religious services at the temple, is a transfer for a *valuable consideration* within the meaning of this Article—*Ramacharya* v. *Shrinivasachurya*, 20 Bom.L.R. 441, 46 I.C. 19 (20).

Good faith—Notice:—In order to make this Article applicable, it is not necessary that the purchaser should show that he purchased *bona fide*, in the sense of being *without notice* of the restricted nature of the transferor's title. This Article applies even though the alienee for value from a trustee or mortgagee takes the property with full knowledge that the alienor is acting in excess of his power—*Fazal Din* v. *Mohomed Hafiz*, 32 P.L.R. 17, 130 I.C. 780, A.I.R. 1931 Lah. 129; *Panu* v. *Vithu*, 19 Bom. 140

(144); *Yesu Ramji* v. *Balkrishna*, 15 Bom. 583 (585); *Hargian* v. *Baldeo*, 127 P.R. 1908 (F.B.); *Venku* v. *Ramachandrayya*, 49 Mad. 29, 49 M.L.J. 634, A.I.R. 1926 Mad. 81, 92 I.C. 342; *Kannuswami* v. *Muthuswami*, 5 L.W. 250, 1917 M.W.N. 5, 38 I.C. 194; *Raghunandan* v. *Mahadeo*, 9 O.W.N. 835, 140 I.C. 182, A.I.R. 1933 Oudh 38. If he is a purchaser for value, and takes a transfer of an absolute interest, that is sufficient to bring the case under this Article. The fact that he *knew* that his vendor was selling more than he was competent to transfer does not take the case out of this Article. The material point is not what the transferee *knows* but what he *takes*. Knowledge of the limited nature of the transferor's title will not disentitle the transferee from taking advantage of this Article though it may be an important piece of evidence in determining what interest the transferee took—*Baluswami* v. *Venkataswami*, 40 Mad. 745 (750); *Muthaya* v. *Kanthappa*, 34 M.L.J. 431, 45 I.C. 975. Where a deed of transfer was a sale-deed and what was bargained by the transferee was also an absolute sale, and the consideration that was paid by him was full price for sale, Article 134 would apply, even though he knew that his transferor had only a mortgagee-interest —*Venku* v. *Ramachandrayya*, supra. The fact that the transferee had notice that her vendor was selling to her a *debuttor* property (now falling under Art. 134A), would not preclude her from being regarded as a purchaser for valuable consideration— *Shama Charan* v. *Abhiram Goswami*, 33 Cal. 511. This Article refers to purchasers from a trustee for valuable consideration and is not restricted to purchaser in good faith. When the Limitation Act of 1871 was replaced by the Act of 1877, the Legislature omitted the words "in good faith" and the conclusion is irresistible that this alteration was made designedly with a view to protect a purchaser for valuable consideration *whether such purchaser had or had not notice* of the trust or mortgage at the time of transfer—*Ramkanai* v. *Sri Sri Hari Narain*, 2 C.L.J. 546 (552), 38 Cal. 526 (531); *Baikunthanath* v. *Ahmedulla*, 58 Cal 234, 34 C.W.N. 961 (964), A.I.R. 1931 Cal. 113; *Subbaya* v. *Mahammad Mustapha*, 32 M.L.J. 85, 40 I.C. 50; *Keshav* v. *Gafurkhan*, 46 Bom. 903 (907), 67 I.C. 308; *Venku* v. *Ramachandrayya*, 49 Mad. 29, 49 M.L.J. 634, A.I.R. 1926 Mad. 81; *Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866 (878), 24 C.W.N. 690; *Dal Singh* v. *Gur Prasad*, 12 O.C. 84, 2 I.C. 250; *Sri Ram* v. *Najibullah*, 3 O.W.N. 674 (F.B.), A.I.R. 1926 Oudh 547, 29 O.C. 353, 1 Luck. 423; *Mt. Chunai* v. *Ram Prasad*, A.I.R. 1951 All. 167 (F.B.) *Khedi* v. *Murad* 200 I.C. 732, A.I.R. 1942 Pesh. 39. The mortgagee may be dishonest; the purchaser may not make any enquiry as to his vendor's title; the mortgagor may be ignorant of the sale of his property by the mortgagee; but these facts no longer affect the rights of the purchaser who has given valuable consideration. Article 134 of the Limitation Act of 1871 required good faith on his part. That condition was however removed by the Act of 1877 and is not reimposed by the Act of 1908—*Keshav Raghunath* v. *Gafurkhan*, 46 Bom. 903 (908), 67 I.C. 308, A.I.R. 1922 Bom. 234; *Baiva Khan* v. *Bhiki*, 9 Bom. 475; *Balabhau* v. *Rangulal*, I.L.R. (1955) Nag. 100, A.I.R. 1955 Nag. 145 (F.B.). In this respect a transfer by a trustee stands on the same footing as a transfer by the mortgagee—*Baikuntha* v. *Ahmedulla*, supra.

But the Allahabad High Court dissents from this view and holds that the omission of the words "in good faith" makes no difference in the law from what it stood under the Act of 1871; that the omission of those words from the Act of 1877 and 1908 is merely due to the fact that the words were considered not altogether appropriate and that their retention would throw the onus on the transferee of proving that he had no knowledge of his vendor's title which would be in many cases a hardship upon him after the lapse of many years; and that a suit against a transferee who purchases with knowledge that his vendor's title is merely that of mortgagee does not fall under this Article—*Drigpal* v. *Kalu*, 37 All. 660 (661, 662); *Bhagwan Sahai* v. *Bhagwan Din*, 9 All. 97 (104): Abdulla v. Shamsul, 18 A.L.J. 969, 58 I.C.

833 (835); *Ghasi Ram* v. *Kishna*, 13 A.L.J. 877, 30 I.C. 564 (565). These decisions have been overruled by the Full Bench of the Allahabad High Court in *Mt. Chunai* v. *Ram Prasad*, A I.R. 1951 All. 167 (F.B.). This Full Bench decision has been followed in *Manmohan Dass* v. *Shaikh Bahab Uddin*, A.I.R. 1957 All. 740. The Bombay High Court has recently held that Article 134 does not apply to a suit by a mortgagor to recover possession from his mortgagee's transferee who had even constructive notice of the mortgage—*Viswanath* v. *Tukaram*, 27 Bom.L.R. 661, A.I.R. 1925 Bom. 417, 89 I C. 189 (distinguishing *Keshav* v. *Gafurkhan*, 46 Bom. 903 on the ground that in that case the purchaser from the mortgage became aware of the real title of the mortgagee several months *after* his purchase, and not at the time of his purchase). The Lahore High Court is now of opinion that Art. 134 applies only to *bona fide* purchasers, and that in case of other purchasers Article 148 applies—*Zaman Ali* v. *Rura*, A.I.R. 1926 Lah. 676, 96 I.C. 886; on appeal *Mehnga* v. *Zaman Ali*, 32 P L.R. 359, 132 I.C. 184, A.I.R. 1931 Lah. 464; *Wazir Chand* v. *Nathu Ram*, A.I R. 1924 Lah. 468, 6 Lah.L.J. 151, 80 I.C. 321; *Sri Ram* v. *Matwala*, 71 I.C. 577, A.I.R. 1923 Lah. 219. A purchaser from a mortgagee by conditional sale who does not enquire as to whether the mortgagee had acquired full proprietary right by proceeding under Reg. XVII of 1806 is not a *bona fide* purchaser—*Zaman Ali* v. *Rura*, supra. The Sind Court takes the same view in *Suleman* v. *Essoo*, 91 I.C. 87, A.I.R. 1926 Sind 145.

The Oudh Court has laid down (following the Calcutta High Court ruling of 47 Cal. 866) that under the present Article the transferee without notice and the transferee with notice are on the same footing—*Sri Ram* v. *Najibullah*, 3 O.W.N. 674 (F.B.), 97 I.C. 874, 1 Luck. 423, 29 O.C. 353, A.I.R. 1926 Oudh 547. This case overrules *Bijai Partab* v. *Rughuraj*, 25 O.C. 115, A.I.R. 1922 Oudh 7, 67 I C. 572, *Mahbub Ali* v. *Md. Husain*, 23 O.C. 125, and *Comti Misra* v. *Deota Din*, 26 O.C. 197, A.I.R. 1924 Oudh 44, 77 I.C. 737.

In those States to which the Indian Trusts Act applies, a transfer by a trustee does not stand on the same footing as a transfer by a mortgagee, on the question of good faith and notice. If the transferee has acquired the property from a trustee in good faith and for valuable consideration, without having a notice of the trust, he acquires an immediate title to the property under sec. 64 of the Indian Trusts Act, but if he has not acted in good faith but has paid valuable consideration, he acquires a good title after the lapse of the period of 12 years necessary for extinguishing the right of the beneficiary to follow the trust property in his hands—*Gomti Misra* v. *Deota Din*, 26 O.C. 197, A.I.R. 1924 Oudh 44, 77 I.C. 737.

564A. Plaintiff:—Under sec. 2 (8) of the Act, "Plaintiff" includes any person from or through whom the plaintiff derives his right to sue. Thus, where a trustee executes a lease of the trust property in derogation of the trust and subsequently appoints his successor and the successor files a suit to set aside the lease the word "plaintiff" in the third column of this Article includes the appointer under a deed of trust, and as he was the lessor he must be deemed to have had knowledge of the transfer contemporaneously with the execution of the deed. So a suit by him or his successor to set aside the lease after 12 years from its execution is barred under this Article—*Sri Kissen* v. *Tarachand*, A.I.R. 1940 Cal. 228, 190 I.C. 405.

565. Suits under this Article:—As a result of the insertion of Arts. 134A and 134B, the scope of the present Article has been much restricted, and it applies only to mortgaged property, and to trust property of a *secular* character. A suit by the succeeding manager of endowment property to set aside a transfer made by the preced-

ing manager and to recover the trust property is no longer governed by this Article or Art. 144, but falls under Art. 134B.

A suit for joint possession of trust property brought by a trustee against a co-trustee and an alienee of the trust property from the latter is governed by this Article or Art. 144—*Shadi* v. *Abdur Rahman*, 1 Lah. 66 (68), 51 I.C. 755.

A suit for *redemption* of a mortgage with possession, brought against a transferee who has purchased from the mortgagee for value and in belief that it is not a mortgage but an absolute title, is essentially a suit to recover possession within the meaning of this Article, although it is framed as a suit for redemption—*Lakhmi Das* v. *Badla*, 102 I.C. 135, A.I.R. 1927 All. 807; *Balabhan* v. *Rangulal*, I.L.R. (1955) Nag. 100, A I.R. 1955 Nag. 145 (F.B.).

A Hindu reversioner instituted a suit in 1914 to recover possession of certain lands which had been usufructuarily mortgaged by the last male owner in 1866, and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the lifetime of his daughter who had inherited the estate and died in 1906. *Held* that suit was governed by Article 134 and not 141, and was barred. Article 141 did hot apply as the mortgage had been created not by the female owner (daughter) herself but by the last male owner—*Sesha Naidu* v. *Periasami*, 44 Mad. 951 (958), 41 M.L.J. 163, 68 I C. 734. But where a mortgage was executed by a person who had only a life-interest in the property, and the mortgagee sold the property as absolute owner, and then after the death of the life-interest holder, the remainderman brought a suit for redemption and possession, *held* that the suit did not fall under Art. 134, as the original mortgagee was a mortgagee of a limited title only. Had the mortgagor an absolute title at the time when the mortgagee purported to convey the property as absolute owner, the case would have been brought within Art. 134. The suit fell under Art. 148—*Skinner* v. *Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), A I.R. 1929 P.C. 158, 117 I.C. 22 (reversing *Naunihal* v. *Skinner*, 47 All. 803).

This Article applies to a suit against the transferee of the mortgagee. If the mortgaged property is sold by the mortgagee but is repurchased by him from the person to whom he had sold it, the mortgagor can redeem the property from him within the period prescribed by Article 148; Article 134 cannot apply, because he is not a transferee of the mortgagee but is the mortgagee himself; nor can he be treated as an innocent transferee without notice—*Kalu Devba* v. *Rupchand*, 44 Bom. 848 (851), 22 Bom.L R. 932, 58 I.C. 39.

566. Starting point of limitation:—Where the transferee took possession not at the date of transfer, but at some subsequent time, the Calcutta High Court held that limitation ran from the date of transfer and not from the time when the transferee took possession of the property—*Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866 (882). But according to the Madras High Court, time ran not from the date of transfer but from the date when the transferee subsequently took possession under the transfer—*Seeti Kutti* v. *Kunhi Pathumma*, 40 Mad. 1040 (1054) (F.B.). See Note 561, under sub-heading *Transfer with possession.*

Neither of these views will now prevail in view of the amendment of the third column, under which the date *when the transfer becomes known to the plaintiff* is now fixed as the starting point of limitation. The reason of the amendment is thus stated:—"We consider on the whole that the date when the plaintiff obtains knowledge of the transfer he seeks to attack is the most suitable date from which limitation should run. If limitation runs from the date of the transfer itself, it is a simple matter for a dishonest trustee and a colluding transferee to conceal the fact of the transfer until the period of limitation has expired. The position is not much improved if the period is

made to run from the delivery of possession, for even the fact of possession of the nature to give rise to a cause of action can also be concealed, for instance, land may be given out originally on lease from year to year in the ordinary course of management, and then collusively sold, without any one interested knowing that the vendee's possession is other than that of a lessee from year to year. We therefore recommend that the period should run from the date when the transfer becomes known to the plaintiff"—*Report of the Select Committee* (Gazette of India, 1927, Part V, p. 258).

As the period begins to run when the transfer becomes known to the plaintiff, the initial ouns of proving that the suit is within time is on the plaintiff. If neither in the plaint nor at any subsequent stage of the case the plaintiff has ever fixed any date at which he alleges that he came to know of the transfer of the mortgaged property to the defendant, the suit must fail—*Raghunandan* v. *Mahadev*, 9 O.W.N. 835, 146 I.C. 182, A.I.R. 1933 Oudh 38. The onus initially lies on the plaintiff to prove as to when he came to know of the transfer—*Kisadi* v. *Marad*, 200 I.C. 732, A I.R. 1942 Pesh. 39.

Where certain properties were dedicated for religious purpose and on the death of the settlor simple mortgage was executed in respect of those properties by this son, and in 1924 the properties were conveyed to the mortgagee in execution of the mortgage decree, in a suit to recover possession in 1934 it was held that this Article as amended will apply and the starting point will be date of knowledge of transfer and not the date of transfer—*Gokuldoss* v. *Lakshminarasinhalu*, (1940) 2 M.L.J. 409, A.I.R. 1940 Mad. 920.

567. Effect of bar of limitation:—If a mortgagee in possession claiming to be absolutely entitled to the property mortgages it with possession to the defendant, and the original mortgagor does not bring a suit under this Article to recover possession of the property from the defendant within 12 years, the defendant will acquire the full interest of a mortgagee, and the original mortgagor will not be entitled to redeem the property from the original mortgagee without redeeming the defendant—*Bagas Umarji* v. *Nathabai*, 36 Bom. 146, 12 I.C. 737; *Taluqdari Settlement Officer* v. *Akuji*, 24 Bom.L.R. 762, A.I R. 1922 Bom. 350. In such a case, Art. 134 coupled with section 28 having given a particular legal validity to the subsequent mortgage (*i.e.*, the mortgage by the mortgagee), the original mortgagor would be barred by Art. 134 from redeeming the property from the original mortgagee alone by disregarding the subsequent mortgage. The subsequent mortgagee has a right to hold it until the debt is paid—*Maluji* v. *Fakirchand*, 22 Bom. 225 (229).

When a mortgagee sells the mortgaged property ostensibly as owner and for valuable consideration, and no suit is brought under this Article by the mortgagor, within 12 years, the right of the purchaser becomes unassailable—*Keshav* v. *Gafurkhan*, 46 Bom. 903 (908); *Krishnaji* v. *Sadanand*, 26 Bom.L.R. 341, A.I.R. 1924 Bom. 417, 80 I.C. 763.

134A. To set aside a transfer of immoveable property comprised in a Hindu, Muhammadan or Buddhist religious or charitable endowment, made by a manager thereof for a valuable consideration.	Twelve years.	When the transfer becomes known to the plaintiff.

567A. Articles 134A to 134C:—The question of the applicability of these articles does not arise in a case where at the date of the institution of the suit the amending Act by which Arts. 134A to 134C were inserted in the Limitation Act had not come into force—*Dwarkadas* v. *Rikhi Ram*, A.I.R. 1936 Lah. 784, 165 I.C. 48.

Suits by persons interested in endowment:—This Article has been added by sec. 3 of the Indian Limitation Amendment Act I of 1929. "It provides for suit by persons interested in the endowment (who would be called beneficiaries if the endowment was a trust) to set aside alienations of the endowment property made by the manager. (Such suits are generally brought under sec. 92, C. P. Code, 1908). In these cases the plaintiff is not entitled to possession, and cannot therefore claim to recover the property but he may sue *to have the transfer set aside* and for any consequential relief which may be adapted to the circumstances of the case. In the class of cases we propose a new Article 48B for moveable property, and Art. 134A for immoveable property"—*Report of the Select Committee* (Gazette of India, 1927, Part V, p. 258).

The word "plaintiff" in the third column of this Article must, in the case of a representative suit brought on behalf of the general body of worshippers or beneficiaries or persons interested in an institution, be understood to refer only to the plaintiff or plaintiffs *en nomine* on record, and cannot be taken to mean every individual member of the community or body of persons who are represented by the plaintiff or plaintiffs on record—*Veerabhodraswami* v. *Maya*, (1939) 2 M.L.J. 920, 1939 M.W.N. 1137, A.I.R. 1940 Mad. 81.

Where a *wakif* has declared that he has entered upon possession as *mutwalli*, his position becomes that of a trustee and this Article becomes applicable—*Mohammod Afzal* v. *Din Mohammad*, I.L.R. (1946) Lah. 300, A.I.R. 1947 Lah. 117.

Defence:—In *Thakarji* v. *Khushi Ram*, A.I.R. 1938 Lah. 752, 178 I.C. 806, it has been held that though a suit by a Hindu idol for injunction alleging transfer to defendant by previous mohunt is governed by this Article as the claim really was for setting aside the transfer, but if the transferee brings a suit for possession against the idol, no period of limitation will run against the idol in his defence.

Prior to the insertion of this Article, it was held that a suit brought under sec. 92, C. P. Code by the disciples of a *mutt* as persons representing the beneficiaries of the *mutt* or as persons interested in the *mutt* for the cancellation of an improper alienation made by the *mohunt* of the *mutt* property, and for its restoration to the *mutt*, was governed by Article 134 or 144—*Chidambaranatha* v. *Nallasiva*, 41 Mad. 124 (129), 33 M.L.J. 357, 42 I.C. 366; *Periyanan* v. *Govinda*, 62 M.L.J. 496, 137 I.C. 487, A.I.R. 1932 Mad. 328 (333). Similarly a suit brought under sec. 92, C. P. Code, for the dismisal of a *mohunt* and for recovery of the property of the idol from the hands of a third party to whom the same had been improperly alienated, with a prayer that the property should be delivered to the possession and custody of the person who would be appointed *mohunt*, was held to be governed by Article 134—*Sajedur Raja* v. *Gour Mohun*, 24 Cal. 418 (429). These cases would now fall under the present Article.

Object:—The object of this Article is to give additional protection to the beneficiaries of an endowment in cases where the successors of the alienating manager may fail through neglect or collusion to bring a suit to impeach the alienation (under Art. 134B). If, however, the successors of the alienating manager have allowed the suit under Art. 134B to become barred, a suit brought under Art. 134A by the beneficiaries to set aside the alienation would be infructuous, by the operatin of sec. 28. (Read the *Minute of Dissent* in Gazette of India, 1928, Part V, pp. 89-90).

Starting point:—In order to bring a case within the mischief of this Article, it is not enough that any one of the family of the plaintiff must have known of the alienation. What the Article contemplates is the actual knowledge of the person himself who goes to court as plaintiff—*Jagannath* v. *Bhagaban*, A.I.R. 1951 Orissa 255. As limitation begins to run from the time when the transfer becomes known to the plaintiff the initial onus of proving that his suit is within time is on the plaintiff. If neither in the plaint nor at any subsequent stage of the case the plaintiff has ever fixed any date on which he alleges that he came to know of the transfer to the defendant, the suit must fail on the account—*Thakarji* v. *Khushi Ram*, supra.

134B. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of immoveable property comprised in the endowment which has been transferred by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the transferor.

567B. Applicability:—This Article has been inserted by sec. 3 of the Indian Limitation Amendment Act (I of 1929). It contemplates a suit by the present manager of an endowment property (immoveable) attacking an alienation made by a predecessor. If the property is moveable, Art. 134C applies.

The suit contemplated by this Article was formerly held to be governed by Article 134—*Dattagiri* v. *Dattatraya*, 27 Bom. 363 (369); *Sagun Balkrishna* v. *Kaji Hushen*, 27 Bom. 500 (513); *Nilmoney* v. *Jagabandhu*, 23 Cal. 536 (544); *Behari* v. *Muhammad*, 20 All. 482 (F.B.); *Narayan* v. *Sri Ram Chandra*, 27 Bom. 373 (377); *Manmatha* v. *Annada*, 27 C.L.J. 201, 44 I.C. 567; *Narain Das* v. *Haji Abdur Rahim*, 47 Cal. 866; *Iswar Sham Chand* v. *Ram Kanai*, 38 Cal. 526 (P.C.). But the Privy Council held that Art. 144, and not 134, applied—*Ram Charan* v. *Naurangilal*, 12 Pat. 251 (P.C.), 37 C.W.N. 541 (543), A.I.R. 1933 P.C. 75, 142 I.C. 214. This authoritative decision would govern the suits already instituted before the Amendment of 1929.

567C. Amending Act I of 1929,—if retrospective in operation:—The Indian Limitation Act was amended by Act I of 1929 by inserting a new paragraph in sec. 10 of the Act, and four new Articles in Schedule I to the Act, *viz.*, 48B, 134A, 134B and 134C. The Act came into force on 1st January, 1929.

Sir D. F. Mulla, in his Hindu Law, says that the Amending Act I of 1929 can apply only to transfers made on or after 1st January, 1929 (Art. 426). It is submitted, with respect, that the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding unless there is distinct provision to the contrary—*Soni Ram* v. *Kanhaiya Lal*, 35 All. 227, 11 A.L.J. 389, 40 I.A. 74, 19 I.C. 291. Arts. 134A and 134B speak of 'transfer.' There is no qualifying word in either of these Articles to suggest that this transfer must be after Act I of 1929 came into force. It follows, therefore, that the Amending Act applies not only to transfers made after 1st January, 1929, but to transfers made before that date, where

the suit has been instituted after 1st January, 1929—*Abdul Qadir Shah* v. *Sirajuddin*, A.I.R. 1937 Lah. 9, 169 I.C. 732, 39 P.L.R. 222; *Sri Raghunath Jieu* v. *Ganga Gobinda*, A.I.R. 1937 Cal. 305, 41 C.W.N. 693. But the Amending Act I does not apply to actions pending at the time of the amendment—*Alla Rakhi* v. *Md. Abdur Rahim*, 56 All. 111, A.I.R. 1937 P.C. 77, 61 I.A. 50, 147 I.C. 887; *Dwarkadas* v. *Rikhi Ram*, A.I.R. 1936 Lah. 784, 165 I.C. 43.

It seems also that where the application of the Amending Act has the effect of confiscating any vested right of the plaintiff the Amending Act should not be construed as being applicable to such a case. See *Gopeshwar* v. *Jiban Chandra*, 41 Cal. 1125 (S.B.); *Sri Ragnunath Jieu* v. *Ganga Gobinda*, A.I.R. 1937 Cal. 305; *Manijhoori Bibi* v. *Akel Mahumed*, 17 C.W.N. 889.

567D. Transfers by the manager of Religious or Charitable endowment:—According to the well settled law of India (apart from the question of necessity) a *mahant* or the head of a *mutt* (or the manager or *dharmakarta* of a temple, or the *sebait* of a family idol) is incompetent to create any interest in respect of the *muth* (or *debutter*) property to endure beyond his life. In other words, 'a *mahant* has power (apart from any question of necessity) to create an interest in property appertaining the *muth* which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of *mahant* of the *muth* with the result that adverse possession of the particular property will only commence when the *mahant* who had disposed of it ceases to be *mahant* by death or otherwise'. Whether the disposition by the *mahant* purports to be a grant of a permanent lease, or it purports to be an absolute grant of the property the position is the same. In each case the transfer is a voidable transaction, and the operation of the purported grant is effective and endures only for the period during which the *mahant* had power to create an interest in the property of the *muth*. Thus, 'whatever the intended duration of the attempted grant may be, it is good, but good only for the limited period indicated.' And in either case a suit to recover possession of the *debottur* property is governed by Art. 144 of the Limitation Act, and such a suit must be brought within 12 years from the date when the alienor ceases to be the *mahant* by death or otherwise (*e.g.*, resignation or removal)—*Mahomed* v. *Ganapati*, 13 Mad. 277; *Vidya Varuthi* v. *Balusami*, 44 Mad. 831, 48 I.A. 302, 26 C.W.N. 537; *Subbaiya* v. *Mustapha*, 50 I.A. 295, A.I.R. 1923 P.C. 175, 28 C.W.N. 493; *Ramcharan* v. *Naurangi Lal*, 12 Pat. 251, 60 I.A. 124, A.I.R. 1933 P.C. 75, 37 C.W.N. 541, 142 I.C. 214; *Mahedeo Prasad* v. *Karia Bharati*, A.I.R. 1935 P.C. 44, 62 I.A. 47, 57 All. 159, 153 I.C. 1100, 39 C.W.N. 433, 61 C.L.J. 122, 68 M.L.J. 499, 37 Bom.L.R. 333; *Ponnambala* v. *Periyanan Chetty*, 59 Mad. 809, 63 I.A. 261, A.I.R. 1936 P.C. 183, 162 I.C. 465, 40 C.W.N. 901.

N.B.—The principles of *Vidya Varuthi's* case have been applied to Mahomedan Religious endowment in several cases, e.g., *Alla Rakhi* v. *Shah Mohammad*, 56 All. 111, 61 I.A. 50, 147 I.C. 887, A.I.R. 1935 P.C. 77; *Hamidmiya* v. *Nagindas*, 57 Bom. 709, 35 Bom.L.R. 252, 148 I.C. 385.

The fact that while selling *wakf* property the manager described it as his private property, would not take the case out of the purview of this Article. The relevant words are "transfer by a previous manager" and to hold that if the manager while making the transfer denies that the priperty is *wakf* the article cannot apply, would be to read in the Article words like "manager as such" which do not exist there—*Ramlal* v. *Khushi*, A.I.R. 1949 E.P. 233; See also *Lakshminarayana* v. *Kashuri*, I.L.R. (1947) Mad. 253, (1946) 2 M.L.J. 123, A.I.R. 1947 Mad. 3. The Calcutta High Court has held that if the manager alienates the particular items of endowed property as his own, the alienation is void *ab initio* and in such a case the possession of the transferee becomes unlaw-

ful from the beginning—*Hemanta Kumari* v. *Iswar Sridhar Jew*, 50 C.W.N. 629. See also *Iswar Kalimata* v. *Bijni Raj Court of Wards Estate*, A.I.R. 1952 Cal. 387.

(1) *Sale*:—Thus when the transfer challenged is an out and out grant of the property (*e.g.*, a sale) the period of limitation for a suit to recover the property is 12 years under Art. 144, Limitation Act. And the starting point of limitation is the date when the *mahant ceases to be mahant by death or otherwise—Ramcharan Das* v. *Naurangilal*, 12 Pat. 251, 60 I.A. 124, A.I.R. 1933 P.C. 75, 142 I.C. 214, 37 C.W.N. 541; *Mahadeo Prasad* v. *Kania Bharati*, A.I.R. 1935 P.C. 44, 57 All. 159, 62 I.A. 47, 39 C.W.N. 433. Such a suit is now governed by Art. 134A or 134B. *But the Amending Act I of 1929 has not effected in this respect any change in principle.* A suit by the present manager of an endowment property (immoveable) to recover possession of the property comprised in the endowment (attacking the transfer made by a previous manager) must now also be brought *under Art. 134B* within 12 years from the *death, resignation, or removal of the transferor;* otherwise such a suit will be barred—*Partap* v. *Iswar Gopal Jew*. 48 C.W.N. 172, A.I.R. 1944 Cal. 211.

(2) *Assignment of muth and its properties*:—But when the assignment or disposition is not merely of an item of the property as in (1), but is of the *muth* as well as its properties, the assignment or disposition is void, and will pass no title, with the result that the possession of the assignee is perforce adverse from the moment of the attempted assignment, and the cause of action for the suit arises on the *date of the transaction*. The suit for recovery of possession must be brought under Art. 144, Limitation Act, within 12 years of the date of assignment. In other words, time runs, not from the date of death, or resignation, or removal of the transferor, but from the *date of the alienation—Damodar Das* v. *Lakhan Das*, 37 I.A. 147, 14 C.W.N. 889, 37 Cal. 885; *Ramcharan Das* v. *Naurangilal*, 12 Pat. 251, 60 I.A. 124, A.I.R. 1933 P.C. 75, 142 I.C. 214, 37 C.W.N. 541; *Mahadeo Prasad* v. *Karia Bharthi*, A.I.R. 1935 P.C. 44, 57 All. 159, 62 I.A. 47, 39 C.W.N. 433; *Ponnambala* v. *Periyanan Chetti*, 59 Mad. 809, 63 I.A. 261, A.I.R. 1936 P.C. 183, 162 I.C. 465, 40 C.W.N. 901. So also where properties are made inalienable and impartible by Government Rules and the property is alienated by the holder thereof, the alienation is void *ab initio* and the cause of action arises from the date of the alienation—*Naransinghji* v. *Madhao*, 44 Bom.L.R. 146, A.I.R. 1942 Bom. 138, 200 I.C. 889. This is so also in the case of alienation of property charged with service in a temple—*Adinarayan* v. *Sirangachariar*, 1940 M.W.N. 404, 51 L.W. 666.

The distinction between cases contemplated by (1) and those falling under (2) lies in this that in the latter the transaction in question being void, the possession is adverse *ab initio*, *whereas* in the former case, it being a voidable one, adverse possession begins only from the time when the alienor ceases to be the manager of the institution by death or otherwise. And although in either case the period of limitation for bringing a suit for recovery of possession is 12 years, the starting point of limitation is not the same in both the cases. In (2) limitation runs from the *date of the transaction*, whereas in (1) it runs from the *death, resignation or removal of the transferor—Hemanta Kumari* v. *Iswar Sridhar Jew*, 50 C.W.N. 629 where it has been held that an alienation is void when the manager acts in negation of the trust. See also *Lakshmana Pillai* v. *Emakalaperumal Nadar*, A.I.R. 1956 Mad. 399, (1956) 2 M.L.J. 109.

The Amending Act has not effected any change in this respect. And such a suit is still governed by Art. 144, Limitation Act.

(3) *Execution sale*:—So also, when the disposition is a sale under an execution decree against the person who was the trustee of the charity, the purchaser's possession is adverse from the date of the sale. And under Art, 144, Limitation Act, a suit for

recovery of possession brought more than 12 years from the date of the sale is barred by limitation—*Subbayya Pandaram* v. *Md. Mustapha*, 46 Mad. 751, 50 I.A. 295, 74 I.C. 492. *The Amending Act has not effected any change, and even now such a suit is governed by Art. 144, Limitation Act—Ronald Duncan* v. *Iswar Radha Damodar Jieu*, 62 C.L.J. 10, 166 I.C. 859. This case has been dissented from in *Hemanta Kumari* v. *Iswar Sridhar Jew*, 50 C.W.N. 629. In a recent case their Lordships of the Judicial Committee have held that to apply the provisions of this Article to execution sales involves a reading of the article which would construe the words "transferred by a previous manager for a valuable consideration" as covering an execution sale under Court process, and the word "transferor" as extending to the judgment-debtor whose land is sold. But such a construction cannot be adopted—*Sudarsan* v. *Ram Kripal*, 54 C.W.N. 213, 63 M.L.W. 110, A.I.R. 1940 P.C. 44. See also *Lakshminarayana* v. *Kasthuri*, (1946) 2 M.L.J. 123, 59 M.L.W. 448, 1946 M.W.N. 529, I.L.R. (1947) Mad. 253, A.I.R. 1947 Mad. 3.

(4) *Permanent lease*:—Apart from question of necessity, when a *mohant* creates a permanent lease it can under the law endure only for his life-time. The tenancy thus created ends with his life (assuming that the *mohant* continues during his life to hold that office). Under Art. 144, Limitation Act, within 12 years from the date when the *mahant* transferring the property ceases to be the *mahant* by death or otherwise, the succeeding *mahant* may bring a suit to recover possession of the property. But he is not bound to do so. He may permit the lessee to continue in possession and receive rent from him. What inference should be drawn from this would depend on the facts and circumstances of a particular case. If the proper inference be that the succeeding head of the institution knowing of the infirmity of the lease, accepted rent as payable in respect of a new tenancy which it was in his power to create for the period of his own managership or to create for a shorter period and to continue from time to time, then the possession of the lessee would not be adverse until the death, resignation, or removal of the succeeding head of the institution, and the starting point of limitation of his successor again would be the date of death or resignation or removal of his predecessor—*Vidya Varuthi* v. *Balusami Aiyar*, 44 Mad. 831, 48 I.A. 302, A.I.R. 1922 P.C. 123, 65 I.C. 161, 26 C.W.N. 537; *Ponnambala* v. *Periyanan Chetti*, 59 Mad. 809, 63 I.A. 261, A.I.R. 1936 P.C. 183, 162 I.C. 465, 40 C.W.N. 901. But if the proper inference be that the succeeding head of the institution accepted the rent as payable in respect of a permanent right which it was no longer in the power of his institution to repudiate, the possession under the lease is adverse and after 12 years of such possession it would be no longer open to the manager to eject the lessee (or the sub-lessee under the lessee)—*Ponnambala* v. *Periyanan Chetti*, 59 Mad. 809, 63 I.A. 261, A.I.R. 1936 P.C. 183, 162 I.C. 465.

Under Art. 134B, Limitation Act, such a suit for recovery of possession by the present manager must be brought within 12 years from the death, resignation, or removal of the transferor—*Sri Raghunath Jieu* v. *Ganga Gibinda*, A.I.R. 1937 Cal. 305, 41 C.W.N. 693...

(5) *Mortgage*:—In *Bashashar* v. *Natha Singh*, 1908 P.R. 30 (F.B.), 102 P.L.R. 1908, a case of a mortgage by a preceding *mahant*,—it was held that the time ran from the date of the plaintiff's appointment as successor to the office of the *mahant*.

Under Art. 134B, Limitation Act, in all cases of transfer, whether by way of sale, mortgage or permanent lease, the starting point of limitation is the death, resignation or removal of the transferring manager—*Bachint Singh* v. *Ganpat*, A.I.R. 1937 Lah. 660; even though there is an interval of time between the death, resignation or removal of the previous manager and the election or appointment of the subsequent manager—

Venkateswara v. *Venkatesa*, I.L.R. (1941) Mad. 599, (1941) 1 M.L.J. 644, A.I.R. 1941 Mad. 449 (F.B.).

Article 134B has application only to voidable transfers. Transfers which are void all together, where the possession is adverse from the moment of attempted transfer, are governed by Art. 144, Limitation Act. Art. 134B has obviously no application to a case where the transfer in question is valid and binding against the endowment.

567E. Sections 28 and 134B—Extinguishment of right after lapse of statutory period:—When the right of the manager of a Hindu or Muhammadan religious or charitable endowment to recover possession of the endowed property against a transferee of such property by the previous manager of the endowment is barred under Art. 134B, the right of the plaintiff to the property, where the transfer is of full ownership, is extinguished by operation of sec. 28, Limitation Act. When the transfer is by way of mortgage or permanent lease, it becomes binding on the endowment after the lapse of the statutory period—*Sri Raghunath Jiew* v. *Ganga Gobinda*, A.I.R. 1937 Cal. 305, 41 C.W.N. 693.

567F. Starting point of limitation—'Death, resignation,' etc.:—Under the present Article, time runs neither from the date of transfer nor from the date of plaintiff's succession to office, but from the *death, resignation or removal of the transferor*, in all cases of transfer, whether by way of sale, mortgage or permanent lease. If the period of limitation is made to start from the date of plaintiff's succession to the office of manager, it is open to the criticism that "as this Article gives each successive manager a right to sue, it really imposes no definite period of limitation, but will lay the successors of a transferee for value open to the risk of a suit perhaps after several generations, after all chances of obtaining evidence have disappeared. We admit the cogency of the criticism, and we propose to put a definite limit of time upon the bringing of suits by managers to set aside transfers made by their predecessors. We propose to take as the starting point the death, resignation or removal of the transferring manager"—*Second Report of the Select Committee* (Gazette of India, 1928, Part V, p 87).

In the Privy Council case of *Lal Chand* v. *Ramrup*, 5 Pat. 312, 30 C.W.N. 721 (727), 7 P.L.T. 163, 93 I.C. 280, A.I.R. 1926 P.C. 9 (reversing *Mohant Ramrup* v. *Lal Chand*, 1 Pat. 475), the Judicial Committee had laid down that time ran from the date of the alienor's death. The same view was taken in a Bombay case—*Narayan* v. *Sri Ramchandra*, 27 Bom. 373 (378). These rulings will now stand as good.

It is not the cessation of trusteeship generally that matters for purposes of the application of this Article; it must be cessation by means of the three events referred to in the third column of the article. Where a prior trustee wrongfully alienates all the trust properties, he does not cease to be a trustee. So the period of limitation will start only from the date of the order of appointment of new trustees and formal removal of the prior trustee—*Sanyasamma* v. *Vireswasami*,, (1951) 2 M.L.J. 391, 1951 M.W.N. 724, A.I.R. 1952 Mad. 171.

Where a mahant is removed from his office by a decree of a Court, the date of removal is the date of the decree and the pendency of an appeal against the decree does not interrupt time running. So a suit filed twelve years after the date of the decree is barred under this Article—*Ramsaroop* v. *Ramrachhya*, 24 Pat. 208, A.I.R. 1945 Pat. 326, 226 I.C. 60.

'Transfer':—The word *"transfer"* in Art. 134B is wide enough to include a lease—*Sri Raghunath Jiew* v. *Ganga Gobind*, A.I.R. 1937 Cal. 305.

134C. By the manager of a Hindu, Muhammadan or Buddhist religious or charitable endowment to recover possession of moveable property comprised in the endowment which has been sold by a previous manager for a valuable consideration.	Twelve years.	The death, resignation or removal of the seller.

This Article has been added by sec. 3 of the Indian Limitation Amendment Act (I of 1929). It comprises suits of the same description as contemplated by Art. 134B, but applies to moveable property, while the preceding Article applies to *immoveable* property.

135. Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged.	Twelve years.	When the mortgagor's right to possession determines.

568. Scope:—This Article is not confined to suits against the mortgagor himself, but applies to a suit against a stranger as well. Article 146 which provides for suits for possession by mortgagees in High Courts contains the words "from the mortgagor" but these words are omitted from Article 135. Consequently Article 135 applies to a suit against a person other than the mortgagor—*Vyapuri* v. *Sanamma*, 39 Mad. 811 (829). Thus, in *Shurnomoyee* v. *Srinath*, 12 Cal. 614 (620), and *Srinath* v. *Khetter*, 16 Cal. 693 (P.C.), this Article was applied to a suit against the purchaser from the mortgagor. This Article applies not only where the suit is filed against the mortgagor, but also against a person deriving title from the mortgagor under a prior mortgage—*Gokul Prasad* v. *Sukrul* 11 O.L.J. 269, 81 I.C. 241 A.I.R. 1924 Oudh 374. The Punjab Chief Court is of opinion that this Article applies only to a suit brought by a mortgagee against the mortgagor or a person deriving title from the mortgagor. It has no application to a suit for possession by mortgagee against a stranger; to such a suit Art. 142 would apply—*Channan* v. *Mela Ram*, 117 P.R. 1919, 50 I.C. 762.

569. Cases:—This Article cannot apply when the mortgagee *had got* possession after the mortgagor's right to possession determined. Therefore where the mortgagee obtained possession under an usufructuary mortgage, but subsequently lost possession, a suit by the mortgagee to recover possession of the mortgaged property from the mortgagor was not governed by Article 135. In such a case, Article 142 or 144 would apply—*Anjuman* v. *Hisamal*, 9 N.L.R. 179, 22 I.C. 65. A mortgagee by conditional sale, who was put into possession but was subsequently wrongfully dispossessed of the mortgaged property, can maintain a suit for possession of the same (Art. 142) though his claim to foreclosure may be barred—*Aman* v. *Azgar*, 27 Cal. 185 (187). A suit by a mortgagee for possession of land mortgaged to him by a registered deed which provided that the mortgagee was to hold possession of and cultivate the land, paying the

Government revenue, and which also contained a recital that possession had in fact been given though it was never in fact given, was governed by Article 135 and not by Article 113, because it was not a suit to compel the owner of the land to convey a right of possession, as that had already been done, but to obtain possession of the land the right to which had previously been conveyed by the registered deed—*Ram Chand* v. *Gyan Chand*, 134 P.R. 1883. A deed of mortgage contained a stipulation that the whole of the mortgage money should be repaid on a certain date, and in default the mortgagee should get possession. Upon default being made, the mortgagee filed a suit for possession. *Held* that the suit was not one for specific performance, but was governed by Art. 135—*Kanhaya Lal* v. *Mohru*, 96 P.R. 1890. Where a mortgage deed contains no provision for possession being taken by the mortgagee, and foreclosure-proceedings taken by the latter under Reg. XVII of 1806 are found to be invalid, the mortgagee does not become entitled to possession and cannot sue for possession; consequently this Article cannot apply—*Nilcomol* v. *Kamini*, 20 Cal. 269 (272). Where the mortgaged property is sold in execution of a money decree against the mortgagor without impleading the mortgagee as party either in suit or in execution on account of ignorance of mortgage and subsequently the mortgagee brings a suit on mortgage for sale without impleading the purchaser under money decree sale and in execution of the mortgage decree purchases the property, a suit by him for possession of the property is not governed by this Article but by Art. 144—*Jasraj* v. *Sugrabai*, I.L.R. (1943) Kar. 315, A.I.R. 1943 Sind. 242.

570. Starting point of limitation:—Where the mortgagor mortgaged the property with possession but remained in possession inspite of the mortgage, his right to possession determined on the very date of the mortgage, and the mortgagee was at once entitled to possession; the mortgagee must sue for possession under this Article within 12 years from that date; and the fact that the possession of the mortgaged property was taken in the meantime by a prior mortgagee did not stop limitation from running (sec. 9) or entitle the plaintiff to deduct the period during which the prior mortgagee was in possession—*Hukum Chand* v. *Shahab Din*, 4 Lah. 90, A.I.R. 1924 Lah. 40, 71 I.C. 495.

Under this Article, time begins to run from the day when the mortgagor's right to possession determines, and this clearly means 'when his right to possession, according to the terms of the mortgage deed, determines'. The cause of action in a suit contemplated by this Article is the failure of the mortgagee to get possession when he was first entitled to get possession—*Anjuman* v. *Hisamal*, 9 N.L.R. 179, 22 I.C. 65. If the mortgage deed provides that on default in payment of the mortgage-money within the date fixed in the deed, the mortgagee would be entitled to possession, the period of limitation for a suit by the mortgagee for possession runs from the date of default, because the mortgagor's right to possession ceases from that date—*Kanhaya* v. *Mohru*, 96 P.R. 1890; *Modun Mohan* v. *Ashad Ally*, 10 Cal. 68 (72); *Shurnomoyee* v. *Srinath*, 12 Cal. 614 (620). Where a mortgage-deed contained a stipulation that the mortgagor should pay to the mortgagee a certain amount every harvest, and that if any default in the annual payment of interest should occur, the mortgagee would be at liberty either to recover interest independently or to add it to the principal and obtain possession of the land, and it was found that no interest was ever paid, the starting point of limitation was the date of the first default, that being the date when the mortgagor's right to possession determined, and the mere fact that the mortgagee might but did not apply for a personal remedy against the mortgagor was not an impediment either to the starting point or to the running of time—*Atra Ram* v. *Shadi Khan*, A.I.R. 1930 Lah. 327, 121 I.C. 190.

Where under the terms of a mortgage deed the mortgage money was made payable

by certain stated instalments, and it was stipulated that on the mortgagor's failure to pay six such instalments the mortgagee was to be placed in possession of the properties, *held* that limitation for the mortgagee's suit for possession ran from the date of the mortgagor's failure to pay six instalments—*Bishan Lal* v. *Khushali*, 91 P.R. 1908, 4 I.C. 921. Where, however, in such a case, defaults in payment of interest are followed by execution of *sarkhats* and payment of interest is made by such execution, the starting point of limitation begins from the date of the execution of *sarkhats* as the right to sue on default is discharged by acceptance of such *sarkhats*. It is immaterial whether the payment is made in cash or by execution of sarkhats—*Sri Newas* v. *Balashwar*, A.I.R. 1950 All. 526 (dissenting from *Bishanlal* v. *Kaushali*, 4 I.C. 921, 91 P.R. 1908); *Abdullah* v. *Ishaq Mohammad*, 41 P.L.R. 529, A.I.R. 1939 Lah. 212. A mortgage deed contained a forfeiture clause whereby the mortgagee might obtain possession of the land in default of payment of the *first or subsequent* instalments of interest. It was held that the mortgagee had a right to obtain possession as soon as the first default occurred. The fact that any subsequent default also might give him a right of possession was not sufficient to prevent time from running against him—*Jaimal* v. *Ram Rattan*, A.I.R. 1934 Lah. 993 (994).

Before the passing of the Transfer of Property Act, a mortgagee by conditional sale was entitled to possession after the year of grace, where the proceedings were taken under Reg. XVII of 1806. If the mortgagee brought the suit for possession after twelve years from the expiry of the period of grace, it was held to be barred—*Srinath* v. *Khetter*, 16 Cal. 693 (700) (P.C.); *Modun Mohun* v. *Ashad Ally*, 10 Cal. 68 (72). Where a mortgage by conditional sale expressly provided that if default should be made in the payment of the mortgage money within the stipulated period, the mortgagee should be entitled to possession without any foreclosure proceedings, and the mortgagor having failed to pay within the date fixed in the mortgage deed, the mortgagee took foreclosure proceedings *more* than 12 years after the date of default, and then after the expiry of the year of grace he brought a suit for possession, *held* that the suit was barred because the period of limitation ran not from the expiry of the period of grace, but from the date of default in payment of the mortgage money, that being the date when the mortgagee was entitled to possession under the express stipulation in the mortgage deed—*Denonath* v. *Nursingh Pershad*, 22 W.R. 90, 14 B.L.R. 87; *Nand Lal* v. *Goojar*, 94 P.R. 1912, 15 I.C. 275; *Moman* v. *Ishri Pershad*, 35 P.R. 1899. It should be observed that in these cases the mortgagee took foreclosure proceedings after the period of 12 years had run out (under Article 135) from the date of default and hence the foreclosure proceedings did not give the mortgagee a fresh cause of action. But where the mortgage deed provided that on default of payment of mortgage money within the time fixed, the mortgagee would be entitled to possession, but the mortgagee instead of suing for possession upon default took foreclosure proceedings *within* 12 years from the date of default, and then after the expiration of the year of grace he brought a suit for possession, *held* that as the mortgagee completed the foreclosure proceedings before the period of limitation for the suit under Article 135 had run out, he acquired a title as absolute owner, and he had, after the expiry of the period of grace, a fresh period of 12 years within which to bring a suit for possession, and this suit was governed by Article 144 (and not Article 135) because he was suing not as mortgagee but as absolute owner—*Ghinaram* v. *Ram Monarath*, 7 C.L.R. 580; *Ratan Das* v. *Guran*, 79 P.R. 1918, 45 I.C. 563; *Burmamoyee* v. *Dinobundhoo*, 6 Cal. 564; *Tekchand* v. *Sahel Singh*, 65 P.R. 1906; *Bhandari* v. *Jusodhan*, 90 P.R. 1895 (F.B.). A suit by a mortgagee without possession for possession of the mortgaged property on the basis of ownership is well within time if lodged within 12 years of foreclosure proceedings under Bengal Regulation VII of 1806—*Ashan* v. *Allaudian*, 40 P.L.R. 798,

A mortgagee in possession can take out out foreclosure proceedings at any time during the subsistence of his mortgage, provided it permits of foreclosure; consequently, where a usufructuary mortgage is executed in 1881, and the mortgagee has remained in possession ever since the execution of the deed, and then he issues the foreclosure notice in April 1899 under Reg. XVII of 1806 and institutes a suit in 1902 for a *declaration* that owing to the mortgage being foreclosed he is entitled to hold the land as absolute owner, the suit is not barred (although brought more than 12 years after the date fixed for redemption). Article 135 does not apply, because the suit is not one for *possession* but one for *declaration*—*Nagar* v. *Saudagar*, 57 P.R. 1908. A mortgage by conditional sale was made in 1866 for a period of six years, and provided that if after six years anything remained due to the mortgagees, they might forthwith enter into possession and realise the principal and interest. There was a provision amongst others that the property would not be transferred by the mortgagor so long as any principal or interest remained due, and that if it was transferred, the mortgagees without waiting for the expiry of the six years might bring a suit for recovery of the principal and interest and might also get possession "by completion of the sale." Nothing was paid by the mortgagor and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Reg. XVII of 1806 were not taken by the mortgagees. In 1910, the representatives of the mortgagees instituted a suit for foreclosure. It was held that the cause of action accrued in 1867, and the suit was barred —*Bonsgopal* v. *Sheo Ram*, 38 All. 97 (102), 32 I.C. 95. Where the land usufructuarily mortgaged is situated on the bank of a river and is liable to submersion but was out of water at the date of the mortgage, a suit by the mortgagee for possession of the mortgaged property must be brought within 12 years from the date of the mortgage; and the fact that the land became submerged would not stop the period of limitation and revive it when the land afterwards emerged out of water—*Barket* v. *Relu Mal*, 26 P.L.R. 729, 92 I.C. 178, A.I.R. 1925 Lah. 627.

In case of a usufructuary mortgage, the mortgagor's right to possession determines on the date of the mortgage. If at the time the mortgagor makes the usufructuary mortgage, the property is in the hands of a prior mortgagee, still Article 135 applies to a suit for possession by the usufructuary mortgagee, and time runs from the date of his mortgage. Under Art. 135, it is immaterial whether the possession of the property is held at the time of the usufructuary mortgage by the mortgagor or by a prior mortgagee. As between the mortgagor and the mortgagee, the mortgagor's right to possession ceases when he makes the usufructuary mortgage—*Husaini* v. *Ram Charan*, 18 O.C. 280, 32 I.C. 341. But the Punjab Chief Court dissents from this ruling and holds that if a property which is already in the possession of a prior mortgagee is again mortgaged with possession, a suit by the subsequent mortgagee for possession is not maintainable until the prior mortgage is redeemed. Art. 135 distinctly contemplates that the possession is with the mortgagor; limitation under Article 135 for a suit by the puisne mortgagee does not begin to run until the redemption of the first mortgage, and he is entitled to bring his suit for possession within 12 years from the date of redemption—*Budha* v. *Mul Raj*, 8 P.W.R. 1919, 48 I.C. 916, dissenting from 18 O.C. 280.

136. By a purchaser at a private sale for possession of immoveable property sold when the	Twelve years.	When the vendor is first entitled to possession.

vendor was out of possession at the date of the sale.

572. Scope:—Article 136 applies to suits brought by purchasers against *third persons* in possession of the land—*Lakshman* v. *Bishansingh*, 15 Bom. 261 (264); *Gajadhar* v. *Ram Lakshan*, 5 I.C. 273 (All.).

Where a vendor was at the time of sale out of possession, and subsequently recovered possession, a suit by the vendee to recover possession from the *vendor* would be governed by Art. 144, and not by this Article, and time runs from the date of the vendor's recovery of possession and not from the date when the vendor was originally dispossessed—*Ram Prasad* v. *Lakhi Narain*, 12 Cal. 197 (199); *Syed Nyamtula* v. *Nana*, 13 Bom. 424 (428). In *Sheo Prosad* v. *Udai*, 2 All. 718, it was held that either Article 136 or Article 144 might apply.

This Article applies when the vendor is *out* of possession at the date of sale; if the vendor is *in possession* at the date of sale, such possession is adverse to the purchaser; and a suit by the latter to recover possession is governed by Art. 144 and must be brought within 12 years from the date of sale—*Syed Nyamtula* v. *Nana*, 13 Bom. 424 (428).

This Article cannot apply where the vendor is not entitled to possession, *i.e.* where the vendor's right to possession has become time-barred. Thus, where an order under sec. 335 C.P. Code 1882 has been passed against the vendor, and he has not sued for possession of the property within the period of one year prescribed by Article 11A, and then he sells the property to the plaintiff, a suit by the plaintiff to recover the property does not fall under Article 136. This Article applies to cases in which a time has arrived when the plaintiff can assert that his vendor has become entitled to possession, and that assertion it is impossible for the plaintiff to make as long as an order under sec. 335 C.P. Code is in operation declaring that the vendor is not entitled to possession. In such a case, the plaintiff cannot evade the obstacle of Article 11A by having recourse to Article 136, as if that obstacle did not exist—*Mahadev* v. *Babi*, 26 Bom. 730 (735).

573. Vendor:—The expression 'vendor' means a vendor other than the auction-purchaser mentioned in Art. 138. In other words, this Article does not apply to a suit brought by a purchaser from an auction-purchaser who was out of possession at the date of sale, the property being in the possession in the judgment-debtor. To such a suit Article 138 would apply, because the word 'auction-purchaser' in that Article includes a purchaser from an auction-purchaser—*Sati Prasad* v. *Jogesh*, 31 Cal. 681 F.B. (over-ruling *Mohima* v. *Nabin*, 23 Cal. 49).

Where there have been transfers by successive vendors, who have all been out of possession, this Article may well be construed so as to include in the term 'vendor' the first of the series of vendors who was entitled to sue for possession—*Abbas* v. *Masabdi*, 24 I.C. 216 (Cal.).

Out of possession:—The expression 'out of possession' implies that some person is in possession *adversely* to the vendor—some person holding in a character incompatible with the idea that the ownership remained vested in the vendor—*Chintamoni* v. *Hriday*, 29 C.L.J. 241, 51 I.C. 123; *Ganpat* v. *Ganpat*, 2 N.L.R. 32; and the word 'possession' contemplates not only actual possession but also includes such possession as a member of a joint family is presumed to have in the family property until excluded therefrom—*Venkayya* v. *Rama Krishnamma*, (1911) 2 M.W.N. 175, 9 M.L.J.

397, 9 I.C. 495. Therefore, where the vendor sold to the plaintiff a share in a tank which she held jointly with other co-sharers, the mere fact that on some occasions the co-sharers caught fish in the tank and appropriated the same entirely for themselves does not prove that the vendor was out of possession. It is incumbent on the co-sharers to establish that they had set up a hostile title and excluded her from possession—*Chintamoni* v. *Hriday*, supra. If a property belonging to two tenants-in-common is in the possession of one of them, it does not follow that he is holding adversely to the other tenant-in-common, and that the latter is 'out of possession.' There must be evidence of ouster, that is to say evidence of denial by the tenant in possession of the right of the other tenant to a share in the profits of the property. It does not follow therefore that as soon as a receipt of all the profits by one tenant-in-common commences, the time is running adversely against the other tenant. It is only after continuous enjoyment by one tenant-in-common that a presumption may arise that he has denied the right of the other tenant-in-common to enjoy together with him the property —*Shivalingappa* v. *Satyava*, 23 Bom.L.R. 967, 64 I.C. 552, A.I.R. 1921 Bom. 77.

574. Starting point of limitation:—A suit by a reversioner for possession after the death of a Hindu widow falls under Article 141; but a suit by an assignee from the reversioner, who was out of possession at the date of the sale, falls under this Article and not under Art. 141, and must be brought within twelve years from the date of the death of the widow, that being the date when the reversioner was first entitled to possession (under the provision of Article 136)—*Godadhar* v. *Harekrishna*, 8 C.W.N. 535 (538). In *Ashutosh* v. *Narendra* A.I.R. 1950 Cal. 506, it has been held that a suit by the purchaser from a Hindu entitled to possession is governed by this Article, under which the starting point of limitation is the date "when the vendor is first entitled to possession." But by reason of the combined effect of this Article and Art. 141 he would be precisely in the same position as his vendor and time will begin to run against him from the date of the death of the female.

When a decree is passed declaring a person's right to the property, he is said to be entitled to possession on the date of the decree, and the period of limitation runs from that date—*Sheo Prosad* v. *Udai Singh*, 2 All 718.

In a suit by the purchaser of a share in joint family property, of which the vendor was not in possession, the *onus* lies on the purchaser to shew that his vendor's exclusion from possession was within twelve years before the institution of the suit—*Ram Lakhi* v. *Durga*, 11 Cal. 680 (683).

The words in the 3rd column ("when the vendor is *first* entitled to possession") relate to the *beginning of the dispossession referred* to in the first column, and the meaning of this Article is that if, supposing no sale had taken place, the vendor's title would have been alive at the time the vendee's suit is brought such suit is not barred; but if on the other hand the vendor had been out of possession for more than 12 years at the date of the vendee's suit, such a suit would be too late; consequently, in the case of a suit contemplated by this Article, when the purchaser succeeds in showing that the exclusion of the vendor from possession took place within 12 years of the institution of his suit, he succeeds in showing that his suit is within time. Thus, if a person (vendor) succeeds to property on his father's death, remains in possession thereof for 20 years, is then ousted by a trespasser, and 2 years after this, sells his rights, it cannot be contended in a suit brought by the vendee against the trespasser that in as much as the plaintiff's vendor was first entitled to possession on his father's death 22 years before, the suit is out of time. The period of limitation ran from the time when the dispossession began, *i.e.*, two years before, when the vendor was *first entitled to recover possession from the trespasser—Pratap Chand* v. *Sayida*, 23 All. 445 (455).

Onus of Proof:—It has been held in two cases that where the vendor was out of possession at the date of sale, and the vendee brings a suit for possession against the person in possession, it lies upon the plaintiff to show that his vendor was in possession at some period within 12 years prior to the date of the *sale*—*Deba* v. *Rohtagi*, 28 All. 479 (480); *Kashinath* v. *Sridhar*, 16 Bom. 343 (346). (In these cases, Article 142 was applied, and it is not clear from the judgments why Article 136 was not applied). Mr. Rustomji (3rd Edn., p. 534) comments on these cases as follows: "These decisions are not intelligible and it is submitted that the plaintiff ought to go further and show that his vendor was in possession within 12 years of the *suit*, and not merely that he was in possession within 12 years of the *sale*. In other words, as was observed in 23 All. 442, the plaintiff-vendee must show that supposing no sale had taken place, the vendor's title would have been alive when the vendee's suit is brought."

575. Suits under this Article:—A suit by a purchaser of the equity of redemption, for possession of the immoveable property, is governed by this Article, and the period begins to run from the date of redemption by the vendor-mortgagor, that being the date on which vendor became entitled to possession—*Badri Mal* v. *Gopal*, 130 P.R. 1906.

A suit by a purchaser from a member of a joint Hindu family who is alleged to have been out of possession at the date of sale, falls under Art. 136 and not under Art. 127 —*Venkayya* v. *Ramkrishnamma*,, 9 M.L.T. 397, 9 I.C. 495; *Ram Lakhi* v. *Durga Charan*, 11 Cal. 680 (682).

A decree directed that A should obtain possession of a house from B, if he paid B a certain sum. B was not paid according to the decree, and A sold such interest as he had in the house to C. C then sued B for recovery of possession of the house on payment of the said sum. *Held* that the suit fell under this Article and not under Article 144. Further, the decree did not create any mortgage or charge and Article 148 did not apply—*Raghunath* v. *Katki*, 32 I.C. 353, 2 O.L.J. 500.

137. Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale.	Twelve years.	When the judgment-debtor is first entitled to possession.

576. Scope:—Art. 137 applies to suits brought by auction purchasers against *third persons* (*i.e.*, persons other than the vendor or judgment-debtor) in possession of the land, in whose favour limitation runs against the purchaser in the same way as it would against the owner with whose right the purchaser is clothed; it does not apply to a suit against the judgment-debtor himself or his representatives—*Lakshman* v. *Bisan Singh*, 15 Bom. 261 (264)); *Gajadhar* v. *Ram Lakhan*, 5 I.C. 273; *Ram Lakhan* v. *Gajadhar*, 33 *All.* 224 (227), 7 A.L.J. 1184. If however the third person in possession of the land is a person who has no shadow of a title but is a mere trespasser or a stranger in the eye of the law, the suit brought against him by the auction-purchaser falls under Article 144 and not under Article 137, and the period of limitation runs from the time when the person had taken possession of the land—*Lakshman* v. *Bisansing*, 15 Bom. 261 (264); *Lakshman* v. *Moru*, 16 Bom. 722 (728).

If the judgment-debtor was out of possession at the date of sale, but subsequently recovered possession from the trespasser, a suit by the auction-purchaser against the

judgment-debtor for possession is governed by Art. 144 and is not barred if brought within twelve years from the date of such recovery of possession by the judgment-debtor, though more than 12 years after the judgment-debtor had been dispossessed—*Ram Lakhan* v. *Gajadhar*, 33 All. 224 (228); *Gajadhar* v. *Ram Lakhan*, 5 I.C. 273.

Article 137 does not apply to a suit for possession by a purchaser at a sale held in execution of a mortgage decree. "Under Article 137, the sale contemplated must be taken to be the sale of the interest possessed by the judgment-debtor referred to in that Article. Does the purchaser at a sale held in execution of a mortgage decree obtain merely the interest of the judgment-debtor? The answer is obviously 'no' The interest which the purchaser acquires is certainly more than merely the interest of the judgment-debtor. We would therefore hold that Article 137 does not apply to purchases held in execution of mortagge-decrees"—*Sundaram* v *Thiyagaraja*, A.I.R. 1923 Mad. 160, 50 M.L.J. 183; *Aditya* v. *Dhirendra*, 53 C.W.N. 899, A.I.R. 1950 Cal. 92, A.I.R. 1958 Kar. 22 (F.B.).

The expression "out of possession" in Col. 1 of this Article implies that some person is in possession adversely to the judgment debtor, some person holding in a character incompatible with the idea that the ownership remains vested in the judgment debtor—*Ningappa* v. *Danappa*, 48 Bom.L.R. 800, A.I.R. 1947 Bom. 206. Thus this Article does not apply to the case of a person who steps into the shoes of a co-owner whose co-mortgagors have redeemed his share of the property from a mortgagee. The co-mortgagors on redeeming the property and obtaining possession do not thereby hold it adversely to the non-redeeming purchaser—*Ma E Khin* v. *Mahomed Ali*, A.I.R. 1938 Rang. 65, 176 I C. 923.

577. Cases:—A sale-deed was executed on the 25th of September 1867 by A in favour of B, but B never entered into possession. On the 14th November 1874, the land was sold in execution of a decree against B. The auction-purchaser brought a suit on the 26th September 1879 for recovery of the land against the original vendor (A). It was held that the suit was barred by limitation under Art. 137, as more than 12 years had elapsed from the time when B became entitled to possession (25th Sept. 1867)—*Anand Coomari* v. *Ali Jamin*, 11 Cal. 229 (231).

Where at a partition between the members of a joint Hindu family consisting of father and three sons, the land in dispute was allotted to the father and mother for their life and after their death the land was to be divided among the sons equally, the sons got a vested interest and not a contingent interest in the land. So, if a son mortgaged his interest in that land during the life-time of the parents, the right of the auction-purchaser at a sale held under the mortgage decree to sue for possession accrued under this Article on the date of death of the parents, that being the date on which the son was entitled to possession—*Raghunath* v. *Madhav*, 25 Bom.L R. 456, A I.R. 1923 Bom. 415, 76 I.C. 217.

Three undivided brothers (B, R and A) mortgaged their joint property in 1870. In 1875 B's share was sold in execution of a decree against him and was purchased by the plaintiff. In 1877 B and his two brothers sold their property to defendants who at once paid off the mortgage and took possession. In 1890, the plaintiff sued for possession of B's share; it was held that the suit was barred by this Article, because B became entitled to possession of his share in 1877 when the mortgage was paid off by the defendants, and their possession had been since then adverse to the plaintiff—*Ganesh* v. *Ramchandra*, 20 Bom. 557 (561).

Where A has obtained a decree against B, and at a sale in execution of that decree has purchased the property himself but has obtained symbolical possession, and

then C obtains a decree against A and purchases the property at the sale held in execution of his decree, a suit brought by C to recover the property falls under this Article, because his judgment-debtor (A) who has obtained only symbolical possession is said to be 'out of possession' within the meaning of this Article, the actual possession being with B; and the period of limitation runs when A is entitled to possession,' *i.e.*, when A has obtained symbolical possession—*Ram Sumnun* v. *Genda Lal*, 22 C.L.J. 574, 29 I.C. 841 (842). Possession referred to in this Article is actual possession and not constructive or symbolical possession—*Venkataswami* v. *Nawaneetha*, (1943) 1 M.L.J. 207, 1943 M.W.N. 147, A I.R. 1943 Mad. 413.

138.	Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was in possession at the date of the sale.	Twelve years.	The date when the sale becomes absolute.

Change:—The words "the date of the sale" in the Act of 1877 have been changed into "the date when the sale becomes absolute."

578. Scope:—If the judgment-debtor is in possession of the property, the purchaser at Court-sale may either make an *application under* O. 21, rr. 95, 96 for delivery of possession, or he may at his option bring a regular *suit* for possession. The two remedies are concurrent—*Kishori* v. *Chunder*, 14 Cal. 644; *Tincourie* v. *Kishan*, A.I.R. 1955 Cal. 369. Such a suit falls under this Article, whereas the application is governed by Art. 180. Moreover, the fact that an application has been made and is rejected as being time-barred or on any other ground is no bar to a regular suit for possession under this Article—*Sheo Narain* v. *Nur Muhammad*, 29 All. 463; *Secru* v. *Bhagoban*, 9 Cal. 602. If, however the judgment debtor was not in possession at the date of sale, this Article does not apply—*Pulin* v. *Bama Charan*, 67 C.L.J. 294, A.I.R. 1938 Cal. 790, 180 I.C. 215.

This Article only applies to suits in which the auction-purchaser is the plaintiff, and the *judgment-debtor* or some one claiming through him is the defendant. It does not apply to a suit brought by one auction-purchaser against another *auction-purchaser* of the same property—*Bhagwant* v. *Bholi*, 35 All. 432, 18 I.C. 465 (reversing *Bholi* v. *Bhagwant*, 10 A.L.J. 13, 15 I.C. 10). To such a suit Art. 144 applies—*Ram Prasad* v. *Bakshi Bindeshwari*, 11 Pat. 165, A.I.R. 1932 Pat. 145 (146).

As to whether this Article applies to a decree-holder-purchaser, see Note 581 below.

This Article applies to suits brought against a judgment-debtor or against any person claiming *through him* and remaining in possession after purchase made by the auction-purchaser. It does not apply where the defendant bases his claim on title and possession as a trespasser, relying upon possession *adverse* to the judgment-debtor. Article 142 or 144 applies to such a case—*Bhikhad Bhunjan* v. *Upendra*, 4 P.L.J. 463 (471); *Janoki Nath* v. *Baikuntha*, 27 C.W.N. 259, 36 C.L.J. 140, A.I.R. 1922 Cal. 176, 70 I.C. 602. Similarly this Article does not apply where the defendant is a co-tenant of the judgment-debtor, because such co-tenant does not claim through the judgment-debtor—*Biswanath* v. *Rabija*, 56 Cal. 616, 33 C.W.N. 46 (47), 117 I.C. 593, A I.R. 1929 Cal. 250.

This Article applies not merely to a suit brought by the auction-purchaser, but also to a suit brought by a person claiming through such auction-purchaser, *e.g.*, a purchaser from the auction-purchaser—*Sati Prasad* v. *Jogesh*, 31 Cal. 681 (684) (F.B.) (overruling *Mohima* v. *Nobin*, 23 Cal. 49); *Arumuga* v. *Chockalingam*, 15 Mad. 331; *Pullayya* v. *Ramayya*, 18 Mad. 144; *Govind* v. *Gangaji*, 23 Bom. 246; *Boologam* v. *Jagannath*, I.L.R. (1955) Mad. 981, A.I.R. 1955 Mad. 202.

'In possession':—A property while under attachment in 1891 was usufructuarily mortgaged to the defendant for a period of 5 years. The property was sold in July 1891, and purchased by the plaintiff, who brought a suit in 1918 for redemption. *Held* that the suit was one for possession and not for redemption. The mortgage being void under sec. 64, C. P. Code, the plaintiff purchased the property free from the mortgage and not subject to the mortgage; *i.e.*, he purchased the property itself and not merely the equity of redemption. Art. 148 therefore did not apply. The suit was really one under Article 138, because the mortgage being void, the judgment debtor must be deemed to have been in possession at the date of the sale, and the plaintiff ought to have brought this suit within 12 years from the date of confirmation of the sale. Even if for argument's sake, the judgment-debtor is deemed to have been out of possession at the date of the sale, and Article 137 is applied, the suit is barred, because it should have been brought within 12 years from 1896, *i.e.*, the expiry of the term of the mortgage, when the judgment-debtor was entitled to possession—*Srinivasa* v. *Vellayan*, 51 M.L.J. 143, A.I.R. 1926 Mad. 966, 97 I.C. 718.

579. Limitation:—Under the Act of 1877, the period of limitation ran from the "date of sale" which meant the date of actual sale, and not the date of its confirmation—*Kishori* v. *Chunder Nath*, 14 Cal. 644; *Venkatalingam* v. *Veerasami*, 17 Mad. 89, *Govinda* v. *Gangaji*, 23 Bom. 246; *Ahamed Kutti* v. *Rahman*, 25 Mad. 99. These cases are no longer good law as under the present Act time runs from the date of confirmation of the sale. Under this Article, limitation for adverse possession against auction purchaser runs from the date of confirmation of sale by court and if no suit is instituted within 12 years of that date his title is extinguished by reason of sec. 28 of the Act—*Gobardhan* v. *Sukhamoy*, 83 C.L.J. 373, I.L.R. (1949) 1 Cal. 378, A.I.R. 1951 Cal. 481.

If the sale took place while the Act of 1877 was in force, but the suit for possession was instituted after the Act of 1908 came into operation, the suit would be governed by the new Act, and time would run from the date of confirmation of the sale and not from the date when the sale actually took place—*Bisessar* v. *Imamuddi*, 29 I.C. 833 (Cal.).

If the defendant is a person claiming through the judgment-debtor, he can tack the period of his own possession to the period during which the judgment-debtor had been in possession after the execution sale; and if the whole period exceeds 12 years, the plaintiff's suit will be barred—*Namdev* v. *Rama Chandra*, 18 Bom. 37 (40).

580. Effect of symbolical possession:—This Article refers to cases where no possession either actual or symbolical, has been obtained through the Court. In fact, it refers to cases where the auction-purchaser, instead of having recourse to the summary method provided by O. 21, rr. 95 and 96 of obtaining possession through Court, chooses to bring a regular suit for possession. If, however, the auction-purchaser obtains symbolical possession, but is disturbed by the judgment-debtor or his representatives, a subsequent suit for possession does not fall under Art. 138, but is governed by Art. 144, because such a suit is not a suit by him as auction-purchaser but an ordinary suit for possession by an owner on title—*Balgobind* v. *Lila Kuer*, 24 Pat.

717; *Bireswar* v. *Sadhiram*, A.I.R. 1950 Assam 50; *Lakshmi* v. *Narayana*, A.I.R. 1952 Tra.-Co. 86. And as regards the time from which the period of limitation is to run in such suits, it has been held that symbolical possession given by the Court to an auction-purchaser is equivalent to actual possession as against the judgment-debtor, and gives to the purchaser a new starting point of limitation—*Jagabandhu* v. *Ram Chunder*, 5 Cal. 584 (588) (F.B.); *Hari Mohan* v. *Baburali*, 24 Cal. 715; *Radha Krishna* v. *Ram Bahadur*, 16 A.L.J. 33, 22 C.W.N. 330 (P.C.); *Janoki Nath* v. *Baikuntha*, 27 C.W.N. 259, A.I.R. 1922 Cal. 176, 36 C.L.J. 140; *Mangli Prasad* v. *Debi Din*, 19 All. 499 (501); *Rajendra* v. *Bhagawan*, 39 All. 460 (462); *Narain* v. *Lalta*, 21 All. 269 (271); *Ambika Charan* v. *Madhub*, 4 Cal. 870 (876); *Joggobundhu* v. *Purnanand*, 16 Cal. 630. Hence, if after the date on which symbolical possession was given to the auction-purchaser, the judgment-debtor continued in possession, his possession became that of a trespasser from that date and gave the execution-purchaser *a fresh cause of action*, a suit which was governed by Art. 144 and the period should be reckoned from the *date of delivery of the symbolical possession*. This subject has been fully discussed in Note 621B under Article 144.

581. Section 47, C. P. Code:—If the *decree-holder* is himself the auction-purchaser of the property in execution of his decree, the question arises whether his claim for possession of the property purchased must be determined by the Court in the execution department under the provisions of sec. 47 C. P. Code, or whether a separate suit is maintainable. It has been held by the Patna High Court that the question relating to the delivery of possession does not relate to the execution, discharge or satisfaction of the decree and does not come under sec. 47 of the C. P. Code; and hence the proper proceeding relating to the delivery of possession is not by way of an application under O. 21 r 95, for which the period of limitation is prescribed by Article 180, but by way of a regular suit, which is governed by Article 138—*Shidhar* v. *Jageshwar*, 4 P.L.J. 716 (730, 733), 47 I.C. 844. In other words, this Article applies to a decree-holder purchaser in the same way as it applies to a third party purchaser —*Tribeni* v. *Ram Asray*, 10 Pat. 670 (F.B.), 12 P.L.T. 423, 133 I.C. 337, A.I.R. 1931 Pat. 241. See also *Ram Prasad* v. *Bakshi Bindeshwari Prasad*, 11 Pat. 165, A.I.R. 1932 Pat. 145 (146), 13 P.L.T. 121. The same view is taken by the Bombay High Court—*Hargovind* v. *Budar*, 48 Bom. 550 (556, 558) (F.B.), 83 I.C. 932, A.I.R. 1924 Bom. 429 (overruling *Sadashiv* v. *Narayan*, 35 Bom. 452). The Allahabad High Court holds that the decree-holder purchaser may proceed either by an application or by a suit—*Bhagwati* v. *Banwari*, 31 All. 82 (F.B.). See also *Sheo Narain* v. *Nur Muhammad*, 29 All. 463, where the decree-holder was himself the purchaser and was allowed to bring a suit for possession after the application was barred. The Punjab Chief Court also followed the view of the Allahabad Full Bench, *viz.*, that the remedy by application is concurrent with the remedy by suit—*Chotta Ram* v. *Karman*, 8 P.R. 1918, 44 I.C. 169. In *Ram Singh* v. *Abdulla*, I.L.R. (1945) Lah. 252, 46 P.L.R. 357, A.I.R. 1944 Lah. 402 (F.B.) it has been held that this Article is not limited to stranger auction-purchaser.

But the Madras and Calcutta High Courts are of opinion that proceedings for delivery of possession to the auction-purchaser are proceedings in execution of the decree and fall within the scope of sec. 47 C. P. Code, and that a decree-holder who becomes the auction-purchaser *cannot file a separate suit* as contemplated by Article 138 but must proceed in execution in accordance with sec. 47; that Article 138 cannot override the provisins of sec. 47, C. P. Code—*Kailash* v. *Gopal*, 30 C.W.N. 649 (F.B.), A.I.R. 1926 Cal. 798, 95 I.C. 494; *Kattayat* v. *Raman*, 26 Mad. 740; *Sandhu Taraganar* v. *Hussain*, 28 Mad. 87; *Kannam* v. *Avvulla Haji*, 50 Mad. 403, 99 I.C. 677, A.I.R. 1927 Mad. 288; *Madhusudan* v. *Gobinda*, 27 Cal. 34; *Ramnarain* v. *Bandi*, 31 Cal. 737.

"It will not be doing any violence to the language of the article if the word 'purchaser' is limited to a stranger, *i.e.*, to a person who is not party to the decree and who is not a decree-holder"—*Per* Saad-uddin, A.C.J., in *Hukum Chund* v. *Mir Hassan*, A.I.R. 1936 Pesh. 85.

139. By a landlord to recover possession from a tenant.	Twelve years.	When the tenancy is determined.

582. Scope:—This Article applies where the suit is brought for *possession*, and where the tenancy has been determined. Where the plaintiff brought a suit not for possession by ejectment of the tenants, but for a *declaration* that the village in suit did not constitute the permanent *thika* right of the defendants as erroneously entered in the record of rights, and that it was in the possession of the defendants in temporary *thika* to be resumed year after year and after service of due notice, *held* that Article 139 did not apply, because it was not a suit for possession and also because the tenancy had not determined but was still continuing—*Tekait Harnarayan* v. *Darshan Deo*, 3 Pat. 403 (407), 6 P.L.T. 315, A.I.R. 1924 Pat. 560, 83 I.C. 741.

This Article applies where there was a relationship of landlord and tenant between the parties. But it cannot apply where the defendants were not and never had been the tenants of the plaintiff, and had never paid rent—*Gopika Raman* v. *Atal Singh*, 56 Cal. 1003 (P.C.), 33 C.W.N. 463 (464), 114 I.C. 561, A.I.R. 1929 P.C. 99.

A person coming into possession under a lease which is *invalid or void* is not a tenant but a trespasser, and a suit to eject him is governed by Art. 144, and not by this Article—*Seshamma* v. *Chickaya*, 25 Mad. 507 (511, 512).

This Article which provides for a suit by a landlord to recover possession from a tenant, and gives 12 years from the determination of the tenancy, refers to suits in respect of tenancies in which the leases have expired, and so have terminated, or in respect of tenancies at will terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover from the holder of a title *permanent* in its tenure, as for instance, where the defendants are in possession of the property by virtue of a permanent character *not determinable* by notice from the plaintiff—*Madho Kooery* v. *Tekait Ram Chunder*, 9 Cal. 411 (417). A suit to recover possession from the defendants who claim to hold as *permanent* mokuraridars is governed by Article 144, and not by Article 139—*Ram Rachhya* v. *Kamakhya Narain*, 4 Pat. 139, 6 P.L.T. 12, A.I.R. 1925 Pat. 216, 84 I.C. 586.

A suit to recover possession from the representatives of the original tenant after the determination of the tenancy (no fresh tenancy having been created between the landlord and the original tenant's representatives, either expressly or by assent of the landlord after the termination of the tenancy) is governed by this Article and not by Article 144, and is barred if brought more than 12 years after the tenancy expired —*Sudalaimutha* v. *Suppani*, 48 M.L.J. 185, A.I.R. 1925 Mad. 446, 86 I.C. 938; *Subbraveti Ramiah* v. *Gundula Ramannah*, 33 *Mad.* 260 (261), dissenting from *Vadapalli* v. *Dronamraju*, 31 Mad. 163; *Jumma* v. *Madhusoodan*, 1941 A.L.J. 327, A.I.R. 1941 All. 306, 195 I.C. 515.

A suit by a landlord to recover possession from a tenant is governed by Art. 139. Article 139 is the specific Article for a suit between landlords and tenants and must be applied to all suits of that nature. Article 144 has no application to such a suit—*Lakhamgowda* v. *Jambhu*, A.I.R 1935 Bom. 382, 37 Bom.L.R. 593, 159 I.C. 378. So also a suit based upon title by a landlord against his ex-tenant for recovery of possession is

governed by this Article and not by Art. 144—*Sidram* v. *Mallaya*, 51 Bom.L.R. 34, A.I.R. 1949 Bom. 137 (F.B.).

583. Determination of tenancy:—(As to when a tenancy determines see sec. 111 of the Transfer of Property Act). When the tenant holds the land for a fixed period under a lease, the tenancy determines at the expiration of that period. If, after the expiration of that period, the tenant *holds over*, without the assent of the landlord, or without payment of rent or without any fresh agreement of tenancy being entered into, such holding over (which in English law is called 'tenancy by sufferance') will not amount to a fresh tenancy. The period of limitation for a suit to recover possession from the tenant will run from the expiry of the period of the lease—*Kamtheppa* v *Seshappa*, 22 Bom. 893 (897); *Chandra* v. *Daji Bhau*, 24 Bom. 504 (508); *Hari Gir* v. *Kumar Kamakhya Narain*, 3 Pat. 534 (540), A.I.R. 1924 Pat. 572, 78 I.C. 511 (dissenting from *Krishnaji* v. *Anthaji*, 18 Bom. 256); *Pusa Mal* v. *Makdum*, 31 All. 514 (518); *Ittapan* v. *Manavikrama*, 21 Mad. 153 (163); *Vadapalli* v. *Dronamraju*, 31 Mad. 163 (167), (dissenting from *Admulam* v. *Pir Ravutham*, 8 Mad. 424); *Seshamma* v. *Chickaya*, 25 Mad. 507 (511); *Khunni* v. *Madan Mohan*, 31 All. 318 (321); *Madan Mohan* v. *Rameshwar*, 7 C.L.J. 615; *Umar Baksha* v. *Baldeo Singh*, 97 P.R. 1915, 32 I.C. 35; *Debi Prasad* v. *Gujar*, 20 A.L.J. 696, A.I.R. 1922 All. 423, 68 I.C. 750; *Bisheshwar* v. *Kundan*, 44 All. 583 (585), A.I.R. 1922 All. 318, 75 I.C. 454; *Banwari* v. *Hussani*, 42 P.L.R. 535, A.I.R. 1940 Lah. 410; *Sitharamiah* v. *Ramaswami*, 46 L.W. 848, A.I.R. 1938 Mad. 73, 176 I.C. 84. Where a demise or agreement specifies the term or event upon which the tenancy is to end, on the expiry of that term or upon the happening of that event the tenancy is determined *ipso facto*—*Right* v. *Dary*, 1 T.R. 162; *Messenger* v. *Armstrong*, 1 T.R. 54; *Cabb* v. *Stokes*, 8 *East* 358 (361); *Wilson* v. *Abbott*, 9 B. & C. 88; *Doe* v. *Inglis*, 3 Taunt 54; *Doe* v. *Seyer*, 3 Camp. 8; *Shivrudrappa* v. *Balappa*, 23 Bom. 283 (286). If the tenants continue in possession thereafter for a period of more than 12 years, without any sort of agreement with the landlord, the landlord's right to recover the land will be barred by Art. 139 of the Limitation Act, the possession of the tenant having become adverse on the expiration of the tenancy—*Purshottom* v. *Vishnu*, 29 Bom.L.R. 1332, 105 I.C. 839, A.I.R. 1927 Bom. 650. Where, however, the landlord does some act (*e.g.*, takes rent) to indicate his assent to the continuance of the tenancy, that act will convert the tenancy by sufferance into a tenancy at will from year to year or month by month (sec. 116, Transfer of Property Act), and the period of limitation for a suit for recovery of possession from the tenant at will must run from the termination of such tenancy (and not from the termination of the original tenancy)—*Ramachandra* v. *Bhikambar*, 37 Cal. 674 (679); *Kuhnni* v. *Madan Mohan*, 31 All. 318 (321); *Tekait Harnarayan* v. *Darshan Deo*, 3 Pat. 403 (410), A.I.R. 1924 Pat. 560; *Kantheppa* v. *Sheshappa*, 22 Bom. 893 (898); *Ram Lochan* v. *Kamakhya*, 4 P.L.T. 123, 71 I.C. 580, A.I.R. 1923 Pat. 201.

A tenancy for a definite term does not determine by reason of the tenant's disavowal of the landlord's title, but it determines only when the landlord does some act (*e.g.*, serves a notice to quit) by which he indicates his option of terminating the lease by reason of such disavowal—*Shrinivas* v. *Muthusami*, 24 Mad. 246 (251). And unless the landlord elects to do so, the tenancy remains unaffected, in spite of the tenant's denial of the landlord's right—*Ittappan* v. *Manavikrama*, 21 Mad. 153 (160, 163). But in case of a *tenant-at-will* the denial of the landlord's title is an evidence of the cessation of the tenancy—*Ibid* (at p. 164).

A person who lawfully came into possession of land as tenant from year to year or for a term of years cannot, by setting up *during the continuance* of such relation a y title adverse to that of the landlord, acquire by the operation of the law of

limitation a title as owner or any other title inconsistent with that under which he was let into possession. In other words, so long as the tenancy continues, time does not run against the landlord in lessee's favour. The landlord's title can be extinguished only at the expiration of the period prescribed by Article 139, and under this Article the period will commence to run only when the tenancy is determined. If after the determination of the tenancy, the tenant remains in possession as trespasser, for the statutory period, he will by prescription acquire a right as owner or such limited estate as he might *prescribe for—Seshamma* v. *Chickaya,* 25 Mad. 507 (511). In *Banwari* v. *Hussaini,* 41 P.L.R. 457, A.I.R. 1939 Lah. 455 that if the landlord does not bring a suit within 12 years of the expiry of lease, his claim for possession is barred under this Article and his right to the property is extinguished under sec. 28 of the Act although the tenant has not denied the landlord's title. Thus, where the defendants had, after the expiration of a lease, held over as yearly tenants, and then after the determination of that tenancy, continued to hold possession, claiming that they were permanent tenants, for more than 12 years, *held* that the defendants had acquired by prescription a right to hold possession as permanent tenants—*Parameshwaram* v. *Krishnan,* 26 Mad. 535 (537). Where after the expiry of the period fixed in a lease the tenant *continues in possession as tenant* on same terms expressed in the lease, he cannot claim to be in adverse possession, and there is no period of time from which it can be said that the statute ran so as to debar the lessor from their remedy for the recovery of the property—*Chandrika Prasad* v. *B. B. & C. I. Ry. Co.,* A.I.R. 1935 P.C. 59, 39 C.W.N. 552, 68 M.L.J. 552, 1935 M.W.N. 434, 41 L.W. 617, 37 Bom.L.R. 390, 37 P.L.R. 331; 1935 O.W.N. 379; 61 C.L.J. 147.

A person holding a land for his life cannot, by merely giving a notice that he claims to be holding on a perpetual or hereditary tenure, make his possession adverse so as to bar a suit for possession on the expiration of the life-tenancy—*Beni Pershad* v. *Dudh Nath,* 27 Cal. 156 (166) (P.C.).

If a person is let into possession as tenant by the mortgagee in possession, his tenancy continues only during the subsistence of the mortgage and determines when the mortgagor redeems the property from the mortgagee; therefore the mortgagor's right to recover possession from him accrues when he redeems the mortgage, or at any rate when the term of the notice given by the mortgagor to the tenant after redemption has expired—*Seshamma* v. *Chickaya,* 25 Mad. 507 (512).

By the customary law of Malabar, a tenant under a kanom or kuikanom lease is entitled not to be ejected until the expiration of 12 years. But where no time is fixed for the duration of the lease (*i.e.,* where the lease is for an indefinite period) it does not under the customary law determine on the expiration of 12 years from its date; consequently, in such a case, a suit for possession brought 14 years after the expiration of 12 years from the date of the lease is not barred—*Kelappan* v. *Madhavi,* 25 Mad. 452 (453). Under sec. 5 (2) of Malabar Compensation for Tenants Improvements Act a tenant continuing in possession after determination of tenancy holds possession during such continuance as a tenant subject to the terms of the lease. So a suit in ejectment twelve years after the determination of tenancy is not barred under this Article—*Govindan* v. *D'Silva,* (1938) 1 M.L.J. 313, 1938 M.W.N. 241, A.I.R. 1938 Mad. 581.

A lease for life expires on the death of the lessee: and therefore a suit for possession against the heirs of the original lessee is barred under this Article if brought more than 12 years after the death of the lessee, in the absence of a fresh tenancy being created between the parties—*Kamakhya Narain* v. *Bechu Singh,* 6 P.L.T. 361, 88 I.C. 483, A.I.R. 1925 Pat. 499 (500); *Jumma* v. *Madhusoodan,* 1941 A.L.J. 327, A.I.R. 1941 All. 306, 195 I.C. 515. An istimrari mokarari grant conveys only a life-interest to the grantee, and not a transferable or heritable interest; such interest comes to an

end on the death of the grantee, and if the assignees of the grantee continue in possession thereafter, claiming as permanent mokararidars and are willing to pay rent as such demanding receipts in their own names, but the landlord refuses to grant such receipts and is willing to grant receipts to them as *marfatdars*, and consequently no rent is paid, *held* that there is no relationship of landlord and tenant between the proprietor and the asignees of the grantee, and a suit for possession brought more than 12 years after the death of the grantee for life is barred—*Kumar Kamakhya Narain* v. *Ram Raksha*, 7 Pat. 649 (P.C.), 9 P.L.T. 501, 32 C.W.N. 897 (902), A.I.R. 1928 P.C. 146, 109 I.C. 663.

Mere non-payment of rent for 12 years before the institution of the landlord's suit for possession, does not amount to termination of the tenancy—*Prem Sukh* v. *Bhupia*, 2 All. 517 (F.B.); *Tota* v. *Sakotia*, 18 P.R. 1888.

A disobedience by the tenant known to the landlord and accompanied by payment of rent to a third party does not, at any date as long as the term of his tenancy lasts, make the tenant's possession adverse; though in the case of a tenancy-at-will such conduct might afford evidence of the determination of the tenancy—*Ittappan* v. *Manavikrama*, 21 Mad. 153 (160); *Doe d Graves* v. *Wells*, 10 A. & E. 427 (434).

Plea of tenancy and limitation in the alternative:—In a suit for possession of land brought against a tenant who is really a trespasser, the defendant, merely by alleging tenancy in his written statement, does not preclude himself from setting up the defence of the law of limitation—*Dino Monee* v. *Durga Pershad*, 21 W.R. 70 (74) (F.B.). When a suit is brought to recover possession, the defendant may plead that he is plaintiff's tenant, and at the same time may rely on the statute of limitation. If he fails to establish the former plea, it is still open to him to rely on the second plea and in that event the suit will be treated not as a suit by a landlord against a tenant but as one to eject a trespasser (Art. 144) who has set up a pretened tenancy—*Maidin Saiba* v. *Nagappa*, 7 Bom. 96 (99); *Keamuddi* v. *Haro Mohan*, 7 C.W.N. 294.

Adverse possession by tenant:—See Note 613 under Art. 144.

584. Burden of proof:—It is not sufficient for the plaintiff merely to allege that the defendant is his tenant. The burden lies on the plaintiff to *prove* that the defendant is his tenant. If the plaintiff fails to prove the tenancy, the suit falls under Article 142, and the plaintiff must prove that he had been in possession within 12 years before the suit. And if the plaintiff fails to prove this, his suit is barred—*Haji Khan* v. *Baldeo Das*, 24 All. 90 (93).

Where there is proof of the relation of landlord and tenant, it lies upon the defendant tenant to shew that the tenancy was determined more than twelve years before suit—*Tiruchurna* v. *Sanguvien*, 3 Mad. 118; *Attar Singh* v. *Ram Ditta*, 110 P.R. 1881; *Adimulam* v. *Pir Ravutham*, 8 Mad. 424. If the defendant tenant admits that the plaintiff's ownership continued up to a certain period, he must shew under Article 139 when the tenancy terminated, or he must shew under Article 144 when his adverse possession commenced, before he can set up adverse possession—*Tulsibai* v. *Ranchhod*, 26 Bom. 442 (444).

Once the relation of landlord and tenant is established, the cessation of the tenancy must be established by the tenant by means of affirmative proof over and above the mere non-payment of rent—*Prem Sukh* v. *Bhupia*, 2 All. 517 (F.B.).

140. By a remainderman, a reversioner (other than	Twelve years.	When his estate falls into possession.

a landlord) or a devisee, for possession of immoveable property.	

585. Suit by reversioner, etc.:—This Article, as well as Article 141, applies only when the plaintiff claims to succeed to the last holder of the estate, and cannot apply where he relies solely on his possessory title—*Harihar Prosad* v. *Kesho Prosad*, 5 P.L.T. Supp. 1, A.I.R. 1925 Pat, 68 (93), 93 I.C. 454.

Where a grant of immoveable property is made to a person for life, the period of limitation for a suit by the grantor to recover possession of the property, the grantee being dead, will be twelve years from the death of the grantee—*Kuttyassan* v. *Mayan*, 14 Mad. 495 (498).

This Article applies to a suit by a reversioner other than a landlord. Article 139 deals expressly with the case of a landlord suing *as such;* Article 140 deals with the case of a reversioner other than a landlord as such suing his tenant. Thus, a suit by a landlord to recover possession from persons who have dispossessed the tenants falls under this Article—*Krishna Gobind* v. *Hari Churn*, 9 Cal 367 (370). See also *Ram Chandra* v. *Bhikhambar*, 37 Cal. 674.

The words 'remainderman,' 'reversioner' and 'devisee' are used in this Article as technical terms of English law. Hence according to that interpretation the word 'reversioner' in this Article does not include a reversioner who succeeds on the death of a Hindu widow—*Bala* v. *Jati*, 155 P.R. 1883; *Roda* v *Harnam*, 18 P.R. 1895 (F.B.); *Moro* v. *Balaji*, 19 Bom. 809 (814); *Maharaja Kesho Prasad* v. *Madho Prasad*, 3 Pat. 880 (897), A.I.R. 1924 Pat. 721, 83 I.C. 812. A remainderman claiming only an equity of redemption (the property having been mortgaged by the life-interest-holder) comes within the meaning of a 'remainderman' under this Article—*Skinner* v. *Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), 1929 A.L.J. 566, A.I.R. 1929 P.C. 158, 117 I.C. 22.

The plaintiffs brought a suit, as devisees under a will, to obtain possession of certain immoveable property; they asked also that an adoption and all other conditions of title relied on by the defendant might be set aside and their right to the proporty declared. *Held* that the suit fell under Article 140 and not under Article 118—*Fannymma* v. *Manjaya*, 21 Bom. 159. Taking Article 118 with Articles 140 and 141, it appears that when a person claiming to be the next reversionary heir and being aware of an adoption having taken place seeks to obtain a bare declaratory relief in the life time of the widow who adopted the boy to her deceased husband, he is bound to bring his suit within six years from the time of his knowledge (Art. 118), but that will not prevent the reversioner from suing to obtain possession of the estate when it falls into possession (Art. 140) or when the widow dies (Art. 141), if the suit is commenced within 12 years from that time—*Lala Prabhu* v. *Mylne*, 14 Cal. 401 (417). In this case the word 'reversioner' in Art. 140 has been wrongly interpreted.

This Article does not apply unless the plaintiff is out of possession. Thus, a property was bequeathed to three persons in common, but after the testator's death only two remained in possession of the property, and the other devisee lived in a separate house of his own and the evidence of his participation in the property of the two houses was very slight. *Held*, that although the third devisee did not participate in the property, still the entry of the other two must be held as entry on behalf of all (as they were joint tenants), unless there was clear evidence to hold adversely. Consequently, the third devisee was in possession through the other devisees, and his suit

for possession does not fall under this Article, nor is it barred under any other Article —*Audipurianam* v. *Appusundram*, 5 M.L.T. 103, 2 I.C. 311.

A Hindu testator (who was the Maharaja of a Raj estate) died in 1894 leaving a will appointing his widow as executrix, and giving her a life-estate in the properties and the remainder to any son that might be adopted by the widow. The widow died in 1907, and an adoption made by her was declared to be invalid. The plaintiff (a successor to the Maharaja) brought a suit for recovery of possession of those properties. *Held* that Article 140 did not apply, as he was neither a remainderman, reversioner nor a devisee. A reversion arises where the grantor grants a particular estate to a person and does not dispose of the remainder. That which is not disposed of remains in the grantor and is called a reversion; it is the interest in land undisposed of which reverts to the grantor after the exhaustion of the particular estate. But here the complete estate was devised by the testator (the life-estate to the Maharani, and the remainder to the son to be adopted); hence the plaintiff was not a reversioner. Nor was he a remainderman, for the remainder was devised to the son to be adopted by the widow. Nor was the plaintiff a devisee—*Maharaja Kesho Prosad* v. *Madho Prasad*, 3 Pat. 880 (897), A.I.R. 1924 Pat. 721, 5 P.L.T. 513, 83 I.C. 812.

It has now been settled by authorities (see Note 589 under Article 141, *post*) that 12 years' adverse possession against a life-tenant does not bar the right of the reversioners, whose right accrues only when the estate falls into possession. But where possession had begun to be adverse before the life-tenant entered into possession, Article 140 will not apply, and the continuous running of time will not be prevented by the interposition of the life-tenant. The adverse possession would be not only prejudicial to the life-tenant but also to the remainderman or reversioner. Thus, where after the death of the testator but before the administration has been completed, a stranger enters into possession of the property, the beneficiary (who in this case is a life-tenant, the widow of the testator) will be barred if the executor fails to sue within the period prescribed by law, for the estate is still the estate of the testator and not the estate of the beneficiary (life-tenant) and consequently a title that may be acquired by a stranger by lapse of time will be a title acquired against the testator and not against the life-tenant. Both Arts. 140 and 141 *presuppose on estate* in a life-tenant or in a Hindu or Muhammadan female; but where in respect of any particular property the title of the testator is itself extinguished under sec. 28 by reason of the executor failing to sue within the period prescribed by law, that particular property *will not descend* to the life-tenant or to the Hindu or Muhammadan female and consequently the case will not attract the operation of Article 140 or 141—*Maharaja Kesho Prasad* v. *Madho Prasad* (*Dumraon case*), 3 Pat. 880 (906), A.I.R. 1924 Pat. 721, 5 P.L.T. 513, 83 I.C. 812.

It is well settled that if a life-tenant be dispossessed the reversioner or remainderman is in time if he institutes the suit for possession of immoveable property within 12 years of the death of the life-tenant, and if successive life estates had been created the remainderman or the reversioner will be in time if he institutes the suit for possession within 12 years of the death of the last life-tenant.

Adverse possession against a life-tenant will not be adverse possession against the reversioner of the remainderman.

It is also well settled that if the cause of action arose during the life time of the last full owner, the subsequent interposition of a life estate or a widow's estate would not bring into operation either Art. 140 or Art. 141, Limitation Act, on the principle formulated in sec. 9 of the said Act. Art. 142, Limitation Act would apply, time running from the date of the dispossession—*Hemendranath* v. *Jnanendra Prasanna*, A.I.R.

1935 Cal. 702, 40 C.W.N. 115, 62 C.L.J. 49. (*Runchordas* v. *Parbatibhai*, 23 Bom. 725 (P.C.), *Jaggo Bai* v. *Utsavlal*, 51 All. 439, A.I.R. 1929 P.C. 166, *Sesha Naidu* v. *Peria Sami*, 44 Mad. 951, *Skinner* v. *Naunilal*, 51 All. 367, A.I.R. 1929 P.C. 158 folld.).

586. Suit by adopted son:—The childless widow of a Hindu, being in possession of his property as his heir, sold it to the defendant in 1868. Afterwards in 1888 she adopted a son who in 1890 brought the present suit to recover the alienated property. It was held that the suit did not fall under this Article, because the adopted son as such suing for present possession of his father's estate was not a remainderman, reversioner or devisee within the meaning of this Article. The suit fell under Article 144—*Moro* v. *Balaji*, 19 Bom. 809 (819); *Sreeramulu* v. *Krishtamma*, 26 Mad. 143 (147); *Sita Ram* v. *Rajaram*, 48 I.C. 230 (Nag.).

587. When the estate falls into possession:—The property left by a will falls into possession under the Hindu Law, immediately upon the death of the testator; and therefore a suit claiming title to shares in immoveable property under a will is barred, unless brought within 12 years from the date of the testator's death under this Article—*Mylapore Iyasawmy* v. *Yeokay*, 14 Cal. 801 (808) (P.C.). The mere fact that there is a provision in the will to the effect that the property devised should be in the possession of a manager until the devisee should attain the age of 30 years, will not prevent the estate from falling into possession immediately on the date of the testator's death—*Krishna* v. *Panchuram*, 17 *Cal.* 272 (276).

Since the cause of action accrues to a remainderman or reversioner only when the estate falls into possession, an adverse possession for any length of time against a tenant for life is ineffectual against the remainderman or reversioner whose right to possession only accrues on the death of the tenant for life—*Naunihal* v. *Skinner*, 47 All. 803, A.I.R. 1925 All. 707, 92 I.C. 63; *Skinner* v. *Naunihal*, 51 All. 367 (P.C.), 33 C.W.N. 761 (768), 1929 A L.J. 566, A.I.R. 1929 P.C. 158, 117 I.C. 22. Cf. the cases cited in Note 589 under Article 141.

If the plaintiff succeeds in making out a *prima facie* case under this Article the burden is on the defendant to show that the dispossession took place at a time when the property was in possession of the last male holder—*Hemendra* v. *Manmotha*, 43 C.W.N. 772.

141. Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female.	Twelve years.	When the female dies.

History of the Article:—In order to arrive at a correct notion of the scope of this Article, it is useful to refer to the history of the enactment of this Article. Under sec. 1, clause 12 of the Limitation Act XIV of 1859, the period of limitation applicable to suits for the recovery of immoveable property or any interest in immoveable property to which no other provision of the Act applied was 12 years from the time the cause of action arose. This clause had been interpreted by the Courts in a sense which bore hardly upon the rights of the reversionary heir under the Hindu law, for it had been held that adverse possession against a Hindu widow entitled to her deceased husband's estate was adverse possession also against the male heir who would be entitled

to the property after her death. (See Note 589 below). The consequence was that a reversonary heir who had no right to possessiin during the widow's life time might lose his property to a person who had asserted adverse possession against the widow for a period of 12 years. Then came Act IX of 1871, in which Article 142 provided as follows: "Like suit by a Hindu entitled to the possession of immoveable property on the death of a Hindu widow—Twelve years—When the widow dies." Thus, special provision was made for the reversionary heir under the Hindu Law, who was given 12 years from the death of the widow to bring his suit. The effect of this was that time counting for adverse possession could not begin to run against the reversioner until he became entitled to enter into possession (See Note 589 below). But it came to be recognised that the rule laid down in the Act of 1871 was imperfect, inasmuch as it referred only to the reversionary heir succeeding upon the death of a Hindu *widow*, whereas other Hindu females, *e.g.*, daughter, mother, also had only a limited estate in the property inherited from males So, in the later Act, XV of 1877, the scope of this Article was enlarged, so as to give the same period to Hindus and Muhammadans entitled to the possession of immoveable property on the death of a *Hindu* or *Muhammadan female*. The extension of the rule of Muhammadans was probably intended to meet certain cases in which by custom or for some other reason persons who had been Hindu and had become Muhammadans were still bound by their old personal law inspite of their change of religion. The same rule has been preserved in Article 141 of the present Limitation Act of 1908—*Ghisa* v. *Gajraj*, 18 O.C. 289, 35 I.C. 371 (375).

588. Scope of Article:—The expression "like suit" means not only a "suit for the possession of immoveable property" but it is to be read with Article 140 so as to mean a "suit for the possession of immoveable property by a *remainderman or reversioner* who is a Hindu or Muhammadan entitled to the possession on the death of a Hindu or Mahommedan female"; that is, a suit by those heirs of the original propositus who claim on the death of a female entitled only to a limited estate and who are constantly styled reversionary heirs and not unfrequently remainderman. This Article applies to those cases where there is an estate of the nature of a fee-simple or some analogous estate, out of which there has been carved by operation of law or otherwise an estate to be held by a female for her life, and a remainderman or reversioner is entitled to the remainder or reversion on the death of that female. Starling pp. 388, 389.

This Article does not apply to a suit by an *heir-at-law* of a female (as in the case of a son succeeding to the absolute estate of his mother) for possession of immoveable property in that character; it only applies to a suit by a person who before the death of a female occupied the position of a remainderman or reversioner or a devisee and on the death of the female sues on the basis of such title as remainderman, reversioner or devisee—*Hashmat Begum* v. *Mazhar Hussain*, 10 All. 343 (346). This Article must be read with Art. 140, and refers to suits brought by persons claiming under an independent title on the death of a Hindu or Mahommadan female; it does not apply to the case of a person suing on the very same cause of action which accrued to a Hindu female, and who acquires his right to sue as *her heir*—*Azam Bhuyan* v. *Faizuddin*, 12 Cal. 594 (596); *Malkarjan* v. *Amrita*, 42 Bom. 714 (717); *Ghisa* v. *Gajraj*, 18 O.C. 289, 33 I.C. 371. The estate of the Hindu or Muhammadan female referred to in this Article must be a *limited estate*, and not an *absolute* one, and the person bringing the suit must claim as the heir of the last male owner on the determination of the limited estate, and not as heir of the female. Art. 141 does not apply where the female had been in possession of an absolute estate—*Zarifunissa* v. *Shafiquzzaman*, 26 O.C. 133, A.I.R. 1923 Oudh 185, 75 I.C. 626; *Bisheshar* v. *Rameshar*, 21 O.C. 1, 4 O.L.J. 948, 44 I.C.

368; *Ghisa* v. *Gajraj*, 18 O.C. 289, 33 I.C. 371. This Article intends to provide a rule of limitation applicable to suits for the recovery of estates which were once estates in expectancy and which have become vested in the heir of the last male owner on the determination of the limited estate held by a Hindu or Muhammadan female—*Ghisa* v. *Gajraj*, supra. Art. 141 is merely an extension of Art. 140 with special reference to persons succeeding to an estate *as reversioners* upon the cessation of the peculiar estate of a Hindu widow—*Jayawant* v. *Ram Chandra*, 40 Bom. 239 (245), 33 I.C. 484, 18 Bom.L.R. 14. In an Allahabad case it was held that a suit to set aside an alienation of the plaintiff's property made during his minority by his mother as guardian, brought after the mother's death, was governed by Article 141—*Bachchan* v *Kamta*, 32 All. 392 (396). This view, it is submitted, is not correct, becuse the plaintiff was not a *reversionary* heir after the mother's death but had been the owner of the property during the life-time of his mother. He could not be said to be a person entitled to the possession of the property ,'on the death of the female."

Article 141 applies only to those cases in which the person who brings the suit is claiming under an independent title in the same way as remainderman and reversioners claim in suits under Article 140; but Article 141 should not be so interpreted that the estate of the Hindu or Muhammadan female referred to in this Article must be an estate created in the same way as the particular estate upon which the estate in remainder or reversion contemplated by Article 140 leans, that is to say, by grant or devise, or that it must be an estate characterised by the same incidents which attach to such a particular estate. The analogy connoted by the expression 'like suit' cannot be pushed to this extreme—*Ghisa* v. *Gajraz*, supra.

This Article applies only when the female on whose death the plaintiff is entitled to possession had been *out of possession;* if the female had been *in possesion* of the property *till her death*, this Article would not apply—*Gobinda* v. *Upendra*, 47 Cal. 274 (277), 23 C.W.N. 977, 56 I.C. 141. This Article applies only to suits by reversioners in respect of property of which they are out of possession and which was in the possession of the defendants at the date of the death of the female even though they are trespassers—*Sankey* v. *Jhingan*, A.I.R. 1952 Pat. 166. It does not apply to cases in which there was nobody in possession at the date of death of the female. Thus, where on the death of the female in 1902, no one had been in possession, and in 1914 the defendants for the first time during the settlement proceedings got their names entered as owners of those lands, and a suit was brought by the reversioners in 1924, it was held that Art. 144 and not Art. 141 applied to the case, that the plaintiffs must be deemed to have been in constructive possession till 1914, when the defendants claimed the lands, and time ran from that date—*Mahendra* v. *Tarak*, 36 C.W.N. 326 (328), 138 I.C. 349, A.I.R. 1932 Cal. 504. Article 141 should be construed so as to cover those cases in which the cause of action arises on the death of the female, and the only obstacle to the reversioner seeking possession is either an *act of the female* or her inaction, resulting in either case in the loss of possession (during the life-time of the female) and the need of a suit by the reversioner after her death—*Sesha Naidu* v. *Periasami*, 44 Mad. 951 (957). The Allahabad High Court applied this Article to a case in which the widow was in possession till her death and then the property was taken possession of by the defendant—*Gajadhar* v. *Parvati*, 33 All. 312. In this case, one A died leaving two widows B and C as heirs; then B died and the surviving widow C was in sole possession of the property. After the death of C the property was taken possession of by a person who had no right to it, and that person occupied the estate for more than 12 years. Afterwards a reversioner of A sued to recover possession. It was held that the suit was barred under this Article, for time ran from the date of the death of C.

Article 141 is restricted to suits by plaintiff whose title and right as the heir of the last full owner to sue for possession accrues upon the death of a female holding a women's qualified estate. To claim the benefit of this Article, the plaintiff must prove, first, that there was a qualified estate in the Hindu female, and secondly, that he was entitled to possession after the death of the female as the heir of the last male holder; and further it must be shown that having regard to the existing law the plaintiff was entitled to the possession of the properties in dispute at the date of the suit—*Maharaja Kesho Prasad* v. *Madho Prasad*, 3 Pat. 880 (898), A.I.R. 1924 Pat. 821, 5 P.L.T. 513. All that the plaintiffs need prove to bring the case within this Article is that they are Hindus or Mahomedans entitled to the estate on the termination of a limited interest of a Hindu or Mahomedan female. Once that is established they have made a prima facie case that this Article applies and to take the case out of this Article the defendants must show that the time had began to run as against the full owner and that it was actually running when the limited interest came into effect —*Ashutosh* v. *Narendra*, A.I.R. 1950 Mad. 506; *Hemendra* v. *Manmotha*, 43 C.W.N. 772; *Hemendra* v. *Jnanendra*, 63 Cal. 155, A.I.R. 1935 Cal. 702.

This Article applies even though the reversioner comes in after successive female heirs, as for instance, where he comes after the widow and the mother of the last male holder, and the mother had been dispossessed—*Kokilmoney* v. *Manick*, 11 Cal. 791; *Bankay* v. *Raghunath*, 51 All. 188 (F.B.); or where he comes after the widow and daughter, and an alienation was made by the widow—*Sham Lal* v. *Amarendra*, 23 Cal. 460 (470); *Hanuman* v. *Bhagauti*, 19 All. 357. Where the mother and the widow both held the property of the last male holder with rights of survivorship, a suit by the reversioner impeaching the alienation made by the survivor of the two, brought after the death of the survivor, is governed by this Article—*Chandi Singh* v. *Gur Prasad*, 7 O.W.N. 711, A.I.R. 1930 Oudh 339 (348), 126 I.C. 657. See also *Govind* v. *Joshi*, I.L.R. 1952 Bom. 621, 54 Bom. L.R. 263, A.I.R. 1952 Bom. 395.

This Article applies only where the reversioner is entitled to the possession of the property *immediately* on the female's death. Therefore where the property was in the possession of an usufructuary mortgagee from the widow at the time of her death, and then the defendant, a trespasser, obtained it on redemption, and the reversioner brought a suit for possession, within 12 years of the date of redemption though more than twelve years after the date of death of the widow, *held* that the suit fell under Article 144 and was not barred. Article 141 did not apply as the reversioner was not entitled to possession immediately on the widow's death, but was entitled only after the satisfaction of the mortgage—*Ganga* v. *Kanhaiya Lal*, 11 A.L.J. 179, 18 I.C. 811 (813).

Article 141 is not to be applied indiscriminately to all suits by reversioners; if the suit falls under some other Article, Article 141 cannot apply merely because it is brought by a reversioner. This Article does not cover cases where the cause of action involving loss of possession includes, *e.g.*, a transaction by the last male owner such as a mortgage (Art. 148), a mortgage by him and transfer by the mortgagee (Art. 134), a purchase in Court auction (Art. 138), a lease (Art. 139) or a carving by him of life-estates with a remainder or a reversion following it (Art. 140), or any transaction involving the possibility of forfeiture (Art. 143) or loss of possession by him (Art. 142). In these cases, the specific Article (mentioned within brackets) applies. Thus, where a Hindu reversioner instituted a suit to recover possession of certain lands which had been usufructuarily mortgaged by the last male owner in 1866 and had been sold for consideration by the mortgagee in 1900 after the death of the last male owner and during the life-time of his daughter who had inherited his estate and died in 1906, *held* that the suit fell under Article 134 and not Article 141, and was barred by limitation—*Sesha Naidu* v. *Periasami*, 44 Mad. 951 (957, 958).

This Article applies only to immoveable property, and not to moveables—*Vundravandas* v. *Cursondas* 21 Bom. 646 (667).

A suit to recover *malikana* is not a suit for possession, and it is doubtful whether *malikana* is immoveable property. The proper Article applicable to the suit is Art. 120—*Jaggo* v. *Utsava*, 51 All. 439 (P.C.), 1929 A.L.J. 716, 33 C.W.N. 809 (820), A.I.R. 1929 P.C. 166, 177 I.C. 498.

Hindu:—The word 'Hindu' in this Article means not only a person who is ethnologically a Hindu but also a person who has the legal status of a Hindu and is governed in the matter of inheritance by the Hindu Law—*Chattar Singh* v. *Roshan Singh*, I.L.R. (1946) Nag. 159, 1946 N.L.J. 690, A.I.R. 1946 Nag. 277.

589. Adverse possession against widow, whether bars reversioners:—Before the Act of 1871, adverse possession against the widow not only barred the widow, but the reversioners also, because the Act of 1859 provided a period of twelve years from the 'accrual of cause of action,' and the reversioner's cause of action accrued from the same date as the widow's cause of action, *viz.*, from the date of adverse possession—*Nobin Chunder* v. *Issur Chunder*, 9 W.R. 505 (F.B.); *Amrita* v. *Rajani Kant*, 15 B.L.R. 10, 23 W.R. 214 (P.C.); *Babu* v. *Bhikaji*, 14 Bom. 317; *Drobomoyee* v. *Davis*, 14 Cal. 323 (344); *Sambasiva* v. *Ragava*, 13 Mad. 512 (515).

But the old law has undergone a change after the passing of the Act of 1871. The Acts of 1871, 1877 and 1908 have specially provided a separate cause of action for the reversioner, which accrues when the female dies and the estate falls into possession; the reversioner may therefore sue, within twelve years from the death of the female, to recover possession of immovable property, where there has been decree against the Hindu widow or other act in the law in the widow's lifetime depriving the reversionary heir of the right to possession of the property after the widow's death; and the reversioner's right to recover possession is not affected by the fact that the widow had been out of possession for more than twelve years—*Jaggo Bai* v. *Utsava*, 51 All. 439 (P.C.), 1929 A.L.J. 716, 33 C.W.N. 809 (821), A.I.R. 1929 P.C. 166, 177 I.C. 498; *Runchordas* v. *Parvatibai*, 23 Bom. 725 (736) (P.C.); *Srinath* v. *Prosonno*, 9 Cal. 934 (937) (F.B.); *Kokilmoney* v. *Manick*, 11 Cal. 791 (795); *Abinash* v. *Narhari*, 57 Cal. 289; *Abhoy Charan* v. *Attarmoney*, 13 C.W.N. 931 (935); *Sham Lal* v. *Amarendra*, 23 Cal. 460; *Bankay* v. *Raghunath*, 26 A.L.J. 1049, A.I.R. 1928 All. 561, 112 I.C. 801; *Ram Kali* v. *Kedar*, 14 All. 156 (F.B.); *Amrit* v. *Bindesri*, 23 All. 448; *Jhamman* v. *Tiloki*, 25 All 435 (439); *Vundravandas* v. *Cursondas*, 21 Bom. 646 (652, 670); *Moro* v. *Balaji*, 19 Bom. 809 (816); *Mukta* v. *Dava*, 18 Bom. 216 (220); *Subbi* v. *Ramkrishnabhatta*, 42 Bom. 69 (77); *Atchamma* v. *Papiah*, 44 Mad. 131 (135); *Baz Khan* v. *Sultan Malik*, 43 P.R. 1901; *Rulia* v. *Rulia*, 41 P.R. 1903; *Ganga* v. *Kanhaiya*, 41 All. 154; *Venkataramayya* v. *Venkatalakashmamma*, 20 Mad. 493; *Pannalal* v. *Sumranlal*, I.L.R. (1939) Nag. 624, 1939 N.L.J. 391, A.I.R. 1939 Nag. 260; *Kalipada* v. *Palani Bala*, 1953 S.C.R. 503, 1953 S.C.J. 208, A.I.R. 1953 S.C. 125. The law allows the reversioner 12 years from the death of the widow, within which to bring his suit for possession, and it is not in the power either of the widow or of any person claiming through or against her to abbreviate that period or to substitute another period or starting point of time—*Cursondas* v. *Vundravandas*, 14 Bom. 482.

If, however the right of the female heir had been barred by twelve years' adverse possession before the Act of 1871 came into force, a reversioner suing after the Act of 1871 would also be barred, because a cause of action already barred under the Act of 1859 could not be revived by later Acts—*Braja Lal* v. *Jiban Krishna*, 26 Cal. 285 (296); *Mohima* v. *Gouri*, 2 C.W.N. 162 (164); *Drobomoyee* v. *Davis*, 14 Cal. 323 (345); *Sham Lal* v. *Amarendra*, 23 Cal. 460 (471).

The question whether adverse possession against the widow for the statutory period bars the reversioners also, was unfortunately raised before the Privy Council in *Vaithialinga* v. *Srirangath*, 48 Mad. 883, A.I.R. 1925 P.C. 249, 30 C.W.N. 313, 92 I.C. 85, 49 M.L.J. 796, although it was *not necessary for the decision* of the suit (which was a case of adverse *decree* against widow), and their Lordships after reviewing the Privy Council decisions on the subject expressed the opinion that the anverse possession against the widow barred the reversioners also, and that the Board had invariably applied the rule of the *Sivaganga Case* (see Note 590 below) where that rule was applicable. This pronouncement was made by way of *obiter*, but it has been followed by the Calcutta High Court (Single Bench) in *Aurobindo* v. *Monorama*, 55 Cal. 903, 32 C.W.N. 913 (919), A.I.R. 1928 Cal. 670. In this case it has been remarked (also by way of *obiter*) that there is no difference in principle between an adverse *decree* against a female and an adverse *possession* against a female, and since it is settled law that an adverse decree against a female binds the reversioners, an adverse possession against the female likewise bars the reversioners. It should be noted that this observation was also unnecessary for the decision of this case, because it was a declaratory suit in respect of *moveable* property, to which Article 120 applied. In a later case the Division Bench of the same High Court has observed that *Vaithialinga's case* (48 Mad. 883 P.C.) should be applied only where the adverse possession is the result of a *decree*, which is binding on the reversioner, and in such a case the reversioner is also barred; but that ruling should not be applied to a case of simple adverse possession which is not the result of any decree. "A case is an authority for what it actually decides and not for what would logically follow from such decision. *Vaithialinga's* case does not lend support to the proposition that adverse possession which barred the widow will also bar the reversionary heir under the present Limitation Act"—*Abinash* v. *Narhari*, 57 Cal. 289, 50 C.L.J. 260, 123 I.C. 444, A.I.R. 1930 Cal. 165 (168).

It has been held in some cases that where property, the estate in which has descended to a female heir, *never reaches her hands* but is held adversely to her by a stranger, the cause of action for a suit for the recovery of the property accrues at the commencement of the adverse possession by the stranger, and a suit to enforce that cause of action will be barred both against the female heir and against the reversioner after the expiration of the statutory period of limitation counting from the commencement of adverse possession, the stranger having after the expiration of that period acquired an absolute indefeasible title to the property. Article 141 does not apply to the case—*Hanuman* v. *Bhagauti*, 19 All 357 (371); *Gya Pershad* v. *Heet Narain*, 9 Cal. 83 (95); *Aurobindo* v. *Monorama*, 55 Cal. 903, 32 C.W.N. 913; *Ghandharap* v. *Lachman*, 10 All. 485 (488); *Tika Ram* v. *Shama Charan*, 20 All. 42 (46). But in another Allahabad case, where a separated Hindu died in 1862 leaving a widow and daughter but no son, and the estate descended to the widow but *possession never reached her* as a nephew of her husband (who had then no title to the property) took possession of the property *immediately on the death of the last male holder*, and retained possession for more than 12 years, and then after the death of the widow in 1887, the daughter (reversioner) sued for possession, it was held by a Full Bench that *Article 141 applied*, that the suit was not barred as the plaintiff had 12 years from the death of the widow in 1887 within which to sue, and that the adverse possession of the nephew had not become adverse to the daughter—*Ram Kali* v. *Kedar Nath*, 14 All. 156 (F.B.). This Full Bench decision was disapproved of in *Hanuman* v. *Bhagauti*, 19 All. 357 (373) and *Tika Ram* v. *Shama Charan*, 20 All. 42 (46), but has been followed in *Amrit* v. *Bindesri*, 23 All. 448 (453) and *Jhamman* v. *Tilaki*, 25 All. 435 (439), and in the Full Bench case of *Bankey* v. *Raghunandan*, 51 All. 188 (F.B.), 26 A.L.J. 1049, A.I.R. 1928 All. 561 (567), 112 I.C. 801. The Privy Council case of *Runchordas* v. *Parvatibai*, 23 Bom. 725 (P.C.) (on appeal from 21 Bom. 646) also lends support to the Alahabad

Full Bench rulings. In this case, a Hindu died in 1869 leaving two widows the survivor of whom died in 1888. He had made a will by which he left certain specific property to his widows for their lives, and bequeathed the residue of his property to trustees upon certain trusts. On his death his widows took possession of the property specially bequeathed to them, and the trustees took the residue and applied it in the manner directed in the will. On the death of the survivor of the widows, the plaintiff, a nephew of the testator, sued to have the trusts of the residue declared void, and in effect for possession of the entire property of the testator. The Privy Council held that the trusts were void, and that the plaintiff's suit fell under Article 141 and was not barred. In this case it is quite clear that in respect of the residuary estate, the trusts being void, the widows were entitled to it, but they *never obtained possession* of that estate, and the trustees had remained in possession of it for more than 12 years adversely to the widows. But still that possession did not become adverse to the reversioner (plaintiff).

On the other hand the ruling in *Hanuman* v. *Bhagauti*, 19 All. 357 seems to find some support from the Privy Council decision of *Luchhan Kunwar* v. *Manorath*, 22 Cal. 445 (P.C.). The facts of this case are that on the death of one P, his widow L was entitled to succeed to the property, but she never obtained possession as the estate was taken possession of by P's mother J immediately upon P's death. J held possession absolutely for nearly 25 years up to her death. After J's death, L together with other persons who claimed as reversionary heirs of P instituted a suit for possession of the property. It was held that the adverse possession of J and of her transferees (she having made a gift of the property to the defendants) for more than 12 years extinguished the rights of L and the other plaintiffs (reversioners of P).

But when possession had begun to be adverse against the *last male owner* before the female came in, it would not cease to be so by reason of subsequent interposition of a female heir. Thus, a Hindu widow alienated some property, and afterwards adopted a son, who died some years after attaining majority, without setting aside the alienation leaving a widow who succeeded him and who also died subsequently; a suit brought by the reversioners of the adopted son, for possession of the alienated property, within twelve years after the death of the adopted son's widow, was, held to be barred, because the alienee had acquired a prescriptive title by adverse possession as against the adopted son, and Art. 141 did not apply to this suit—*Amrita* v. *Jatindra*, 32 Cal. 165 (168). Article 141 applies where the last full owner was in possession at the time of his death. If he himself was dispossessed, time would begin to run against him and the operation of the law of limitation will not be arrested by the fact that on his death he was succeeded by a female heir, *e.g.*, widow, daughter, or mother—*Mohendra* v. *Shamsunnessa*, 21 C.L J. 157 (164), 27 I.C. 954, 19 C.W.N. 1280; *Pandurang* v. *Basappa*, 77 I.C. 479. A.I.R. 1923 Bom. 364; *Ramayya* v. *Kotamma*, 45 Mad. 370 (373), A.I.R. 1922 Mad. 59, 67 I.C. 246; *Sreepati* v. *Sarbeshwar*, 34 C.W.N. 409, A.I.R. 1930 Cal. 474 (476). See also *Maharaja Kesho Prasad* v. *Madho Prasad*, 3 Pat. 880, cited in *Note* 585 *under Article* 140.

590. Decree against female—Effect on reversioners:—An adverse *decree* against the widow stands on a different footing from an adverse possession against the widow. An adverse possession for more than 12 years against the widow does not bar the reversioner's rights, but if a decree founded upon the law of limitation (*i.e.*, founded upon adverse possession) is obtained against the widow in her life-time, the reversionary heir is barred, and he does not get the benefit of Art. 141—*Jaggo* v. *Utsava*, 51 All. 439 (P.C.), 56 I.C. 267, 33 C.W.N. 809 (821), 1929 A.L.J. 716, A.I.R, 1929 P.C. 166, 117 I.C. 498. An adverse decree in a suit brought by a Hindu widow for possession of a property as heir to her husband, if it had become final in her life-time,

would bind those claiming the property in succession to her, and unless it could be shown that there had not been a fair trial of the right in that suit, or in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit by any person claiming in succession to the widow—*Katama Nachier* v. *Raja of Sivaganga*, 9 M.I.A. 539 (604), 2 W.R. P.C. 31. A *decree* passed adversely to the female heir in respect of a transaction in which she represents the estate binds the reversioners—*Jugal Kishore* v. *Jitendra*, 10 Cal. 985 (P.C.); *Harinath* v. *Mothur Mohun*, 21 Cal. 8 (P.C.), 20 I.C. 183; *Vaithialinga* v. *Srirangath*, 48 Mad. 883 (P.C.), 52 I.A. 322, 30 C.W.N. 313, A.I.R. 1925 P.C. 249. Thus, where a suit by a female heir to recover possession from a trespasser had been dismissed on the ground that it was barred by the defendant's adverse possession after the death of the female, Article 141 did not apply, and would not give the reversioner 12 years' time to sue after the female's death, because the plaintiff being bound by the decree against the female, he was not '*entitled to possession of any property*' within the meaning of this Article—*Harinath* v. *Mothur Mohun*, 21 Cal. 8 (18) (P.C.). following the *Sivaganga* Case, 9 M.I.A. 539 (603). If a Hindu dies leaving a widow and a daughter, and an alienation being made by the widow, the daughter brings a suit to set aside the alienation which is dismissed, the adverse decree would, in the absence of fraud or collusion, be binding on the reversioner coming after the daughter's death—*Hanuman* v. *Bhagauti*, 19 All. 357 (374).

But where a gift was made by the widow, and she brought a suit to set aside that gift on the ground that the conditions on which the gift had been made were not fulfilled by the donees, and that suit was dismissed, the decree in that suit was not binding on the reversioners, who could bring a suit to recover possession within 12 years after the widow's death, under Article 141. The widow in the enjoyment of a life-estate can never fully represent the estate within the meaning of the *dicta* in the *Sivaganga case* in any litigation arising out of *acts of her own*, and the litigation by the widow in the enjoyment of a life-estate cannot represent the estate fully so as to give rise to a bar of *res judicata* against reversioners, if such litigation was qualified and *personal* to the widow or had arisen out of acts of her own affecting the estate during her own life-estate therein—*Subbi* v. *Ramakrishnabhatta*, 42 Bom. 69 (77, 79).

590A. Surrender by widow:—The basis of the doctrine of surrender is the effacement of the widow's interest, and the result of surrender is that the next heir of the husband steps into the widow's place. Therefore, where a widow surrendered her estate in favour of the daughter, the result was an acceleration of the daughter's estate, and on the daughter's death the succession opened to her father's male reversioners. A suit brought by the reversioner after 12 years of the daughter's death was barred under this Article, though it was within 12 years from the widow's death—*Sitanna* v. *Viranna*, 57 Mad. 749 (P.C.), 67 M.L.J. 20, 38 C.W.N. 697, 148 I.C. 828, A.I.R. 1934 P.C. 105 (108). But where the widow surrenders the estate to the next reversioner after her title is extinguished by reason of 12 years adverse possession, the surrenderee cannot be allowed to sue for possession and displace the title acquired by the law of limitation until after the death of the widow—*Thripurasundara* v. *Kotayya*, (1951) 2 M.L.J. 39, 1951 M.W.N. 146, 64 M.L.W. 648, A.I.R. 1951 Mad. 753. See also *Raghuraj* v. *Babu*, A.I.R. 1952 All. 875.

591. Suits under this Article:—A suit by a reversioner to recover possession of property *improperly alienated* by a Hindu widow is governed by this Article. The suit is not barred if brought within 12 years from the death of the female, although the alienee might have been in possession for more than 12 years. The law in this respect is the same under the Acts of 1859, 1871, 1877 and 1908. See *Sambasiva* v.

Ragava, 13 Mad. 512 (515); *Mukta* v. *Dada*, 18 Bom. 216; *Hanuman* v. *Bhagauti*. 19 All. 357; *Sham Lal* v. *Amarendra*, 23 Cal. 460; *Roy Radha* v. *Nauratan*, 6 C.L.J. 490; *Chiragha* v. *Mahtaba*, 79 P.R. 1898; *Khair Khan* v. *Ghulam Ghous*, 32 P.R. 1911, 10 I.C. 387; *Khiala Ram* v. *Gulab*, 33 P.R. 1911 (F.B.), 11 I.C. 392. It does not fall under Art. 91, because the cancellation of the instrument of alienation is not a condition precedent to the right of action of the reversionary heir—*Bijoy Gopal* v. *Krishna Mohishi*, 34 Cal 329 (P.C.) (reversing *Bijoy Gopal* v. *Nilratan*, 30 Cal. 990); *Harihar* v. *Dasarathi*, 33 Cal. 257; *Rakhmabai* v. *Keshab*, 31 Bom. 1. It is not necessary, in a reversioner's suit for recovery of possession of the property alienated by a widow, that the transfer should be set aside before any decree for possession is made. All that is nevessary is that the reversioner should file a suit for possession within 12 years from the death of the widow and a decree passed in such a suit must be on the basis that the transferee's possession was unlawful since the death of the widow—*Mummareddi* v. *Durairaja*, 1951 S.C.R. 655, A.I.R. 1952 S.C. 109.

A suit by a reversioner for possession of property after the death of a female is governed by this Article and not by Art. 118, even though the suit involves the question of the validity of an adoption made by the female. The other Article applies only to suits in which a *bare declaration* is sought for and does not apply to a suit for possession —*Kalyandappa* v. *Chanbasappa*, 48 Bom. 411 (P.C.); *Padmalav* v. *Fakira*, 12 P.L.T. 563 (P.C.), 35 C.W.N. 465 (467); and the fact that a person has not sued for a declaration under Art. 118 should not be a bar to a suit for possession of property under this Article—*Basdeo* v. *Gopal*, 8 All. 644 (646); *Natku* v. *Gulab*, 17 All. 167 (171); *Hari Lal* v. *Bai Rewa*, 21 Bom. 367 (379); *Baikanta* v. *Kali*, 9 C.W.N. 222 (224); *Md. Umar* v. *Md. Niazuddin*, 39 Cal. 418 (432) (P.C.); *Lala Parbhu* v. *Mylne*, 14 Cal. 401 (417); *Valaga* v. *Bandlamudi*, 30 Mad. 308 (310); *Ram Rao* v. *Venkoba*, 17 M.L.J. 282; *Bhagabat* v. *Murari*, 15 C.W.N. 524, 7 I.C. 427 (433). See Note 493 under Article 118.

Article 3, Sch. III, Bengal Tenancy Act does not in any way control the provisions of Art. 141, Limitation Act; and therefore where a Hindu widow who is in possession of her husband's estate which comprised a holding is dispossessed therefrom by the landlord, that dispossession cannot avail as against the reversioner; so that the reversioner is not required to sue within 2 years from the date of dispossession, under Art. 3, Sch. III of the Bengal Tenancy Act, but is entitled to sue for possession within 12 years from the death of the widow—*Muni Lal* v. *Nath Sahay*, 9 Pat. 634, 11 P.L.T. 714, A.I.R. 1930 Pat. 573 (575), 128 I.C. 131.

A suit for declaration and possession of a share in the partnership assets consisting of immoveable property, when the plaintiff becomes entitled thereto on the death of a Hindu female owner is governed by this Article which is more appropriate to the suit than Art. 120—*Basanti Bibi* v. *Babu Lal*, 1930 A.L.J. 1517, 124 I.C. 19, A.I.R. 1931 All. 225.

A suit by a Hindu daughter for possession of her share in her father's estate on the death of her mother or stepmother falls under this Article, and time runs from the date of the mother or stepmother's death—*Tulsa* v. *Bhagwat*, 11 A.L.J. 333, 20 I.C. 179; *Ram Singh* v. *Bhani*, 38 All. 117 (121). This shows that the plaintiff in a suit under this Article need not be a male entitled to a full estate.

Where a Muhammadan widow, who had been in possession of her husband's property in lieu of unsatisfied dower sold away the property, a suit brought after the widow's death by the heirs of the husband for possession of the property is governed by this Article, and limitation runs from the date of the widow's death and not from

the date of the transfer—*Sheikh Abdur Rahman* v. *Sheikh Wali Mahommad*, 2 Pat. 75 (80), A.I.R. 1923 Pat. 72, 68 I.C. 601, 4 P.L.T. 267.

592. Suits not under this Article:—A suit by the adopted son to recover property alienated by his adoptive mother before adoption is governed by Art. 144, and not by this Article, because he was not a person entitled to property 'on the death of a female' but entitled to the property immediately from the date of his adoption—*Moro* v. *Balaji*, 19 Bom. 809 (814).

Where succession vests jointly in two female heirs (*e.g.*, two daughters), who make no partition of the property, a suit by one on the death of the other to recover possession of the property cannot be said to be a suit under this Article, because the plaintiff does not succeed to the deceased's interest by inheritance as reversionary heir, but acquires the interest by survivorship. This Article contemplates inheritance, not survivorship—*Sachindra* v. *Rajani*, 18 C.W.N. 904 (906), 27 I.C. 250.

This Article does not apply where the plaintiff is not the nearest reversioner entitled to succeed to the property on the death of a female, but is a reversioner next in succession to the nearest reversioner. Thus, the last male owner died leaving a widow, and the widow improperly alienated a portion of the land, but the nearest reversioner did not bring a suit to challenge the alienation after the widow's death and then died; a suit was then brought by the reversioner, next in succession to the deceased reversioner, for possession of the land alienated. *Held* that the suit did not fall under this Article but under Article 144—*Sundar* v. *Salig Ram*, 26 P.R. 1911, 9 I.C. 300 (302, 303).

This Article does not apply where the cause of action accrued not on the death of the female but at some antecedent period. Thus, a property of a minor was alienated by his mother acting as guardian, in 1873. The minor died without attaining majority in 1880 and was succeeded by his mother. After the mother's death which took place in 1921, the reversionary heirs instituted a suit in 1922 to set aside the sale. It was held that this Article did not apply as the period of limitation was not to be reckoned from the death of the female, but the cause of action arose during the lifetime of the minor. Article 44 applied and the period would have run from the time of the minor's attaining majority; but as he died a minor, clause (3) of section 6 came into play, and the period of limitation was three years after the minor's death. The suit was therefore barred—*Ramaliah* v. *Brahmiah*, 59 M.L.J. 196, 127 I.C. 801, A.I.R. 1930 Mad. 821 (824).

593. Starting point of limitation:—The cause of action for a suit by the reversioners for possession of lands left by the last male owner and alienated by his widow accrues on the death of the widow, and not on the date of the alienation—*Chiragha* v. *Mahtaba*, 79 P.R. 1898; *Pursut Koer* v. *Palut Roy*, 8 Cal. 442 (445). See also 2 Pat. 75 in Note 591, *supra*. A Hindu female succeeding a reversioner to another Hindu female owner comes under Art. 141, Limitation Act, and under this Article the period of limitation which runs against such reversioner is from the death of the last female owner—*Smt. Sarju Bai* v. *Chairman, Municipal Board, Jhansi*, A.I.R. 1937 All. 168; *Bankey Lal* v. *Raghunoth*, A.I.R. 1928 All. 561.

The cause of action for the reversioner arises when the female dies. Where there are two widows of the last male holder and one of them dies, the estate passes to the surviving widow, and no cause of action accrues to the reversioners until the death of the surviving widow (even though the alienation was made by the other widow)—*Muthiyala* v. *Baradagunta*, 43 Mad. 855, 39 M.L.J. 567, A.I.R. 1921 Mad. 246, 60 I.C. 135; *Ram Dei* v. *Abu Jafar*, 27 All. 494 (498); *Mukhta* v. *Dada*, 18 Bom. 216 (220); *Cursondas* v. *Vundravandas*, 14 Bom. 482.

Similarly, where there are several daughters inheriting the father's estate, on the death of one of them, the survivors get the whole estate and no cause of action will accrue to the reversioners until all the daughters are dead.

If the reversioner comes in after successive female heirs (*e.g.*, after the widow and daughter, or after the widow and mother) his suit is in time if brought within 12 years of the date of the death of the last female holder, even though the alienation was made by the previous female holder. See *Kokilmoney* v. *Manick*, 11 Cal. 79; *Sham Lal* v. *Amarendra*, 23 Cal. 460; *Sambasiva* v. *Ragava*, 13 Mad. 512 (515); *Hanuman* v. *Bhagauti*, 19 All. 357. Under this Article, a suit may be brought within 12 years of the date of the death of the last female entitled to succession—*Pursut Koer* v. *Palut Roy*, 8 Cal. 442 (445).

If the reversioner does not bring any suit and then dies, and his representative brings a suit after the expiry of 12 years from the death of the female, the suit is barred; and the plaintiff cannot claim any extension on the ground of his minority, because when time has once begun to run against the reversioner, it cannot be stopped by the minority of the plaintiff (sec. 9)—*Rup Kishore* v. *Patrani*, 50 All. 152, 107 I.C. 45, A.I.R. 1927 All. 818 (820). A widow alienated her husband's property in 1894 and in that year a suit was brought by the plaintiff's father to set aside the alienation but it was dismissed on the ground that he was not the nearest presumptive reversioner, but one B. After the widow's death in 1879, B brought a suit in 1909 to recover possession of the property, but the suit was dismissed in 1916 on the ground that he was not a reversioner at all as his alleged adoption was invalid. The plaintiff then filed a suit in 1919 for possession of the property as reversioner. *Held* that the suit having been filed more than 12 years after the widow's death was barred under this Article; and the plaintiff had got no fresh cause of action in 1916 when it was found that B was not a reversioner at all. Once limitation had begun to run, it could not be suspended. It cannot be said that the plaintiff could not bring a suit until the judgment of 1916 was delivered—*Ranga Natha* v. *Ram Pandither*, 44 M.L.J. 87, A.I.R. 1923 Mad. 108, 70 I.C. 446.

Where a Hindu widow remarried in 1899 and transferred her first husband's property in 1913, and a suit was brought in 1913 by the reversioners of her first husband to recover the property, *held* that the suit might fall under Article 143 as her remarriage entitled forefeiture of her first husband's estate; but the suit might also fall under Article 141; if Article 141 applied, the cause of action for the plaintiff accrued not on the date of alienation, but on the remarriage in 1899, as the widow incurred civil *death*, so far as her first husband was concerned, by her remarriage, and her subsequent possession was that of another person in the eye of law. The suit was therefore barred—*Nathu* v. *Nai Babu*, 11 N.L.R. 86, 29 I.C. 612 (613).

If an alienation was made by the widow of the last male holder in 1857 and the plaintiff (who is the daughter's son of the last male holder) succeeded to the property in 1890, after the death of the last surviving daughter of the last male holder, the suit is governed by the Act of 1877, and not by the Act of 1859, because the starting point of limitation is the death of the female (1890) which took place while the Act of 1877 was in force, and not the date of alienation (1857). See *Hanuman* v. *Bhagauti*, 19 All. 357 (365); *Sambasiva* v. *Raghava*, 13 Mad. 512.

Effect of bar of limitation:—If the nearest reversioner entitled to sue under this Article does not bring a suit within 12 years of the death of the female, for possession of the property alienated by the female, and then dies, the reversioner next in succession to the deceased reversioner is not thereby barred, but is entitled to bring a suit within 12 years from the death of the deceased reversioner. The possession of the de-

fendant which was adverse to the deceased reversioner does not become adverse to the present reversioner until he succeeds to the property—*Sundar* v. *Salig Ram*, 26 P.R. 1911 (F.B.), 9 I.C. 300; *Malkarjun* v. *Amrita*, 42 Bom. 714 (718).

If there are two reversioners, and a suit is brought by one reversioner within 12 years of the death of the female, to recover possession of his share by partition, and the other reversioner is made a defendant in that suit, and the latter in his written statement claims possession of his share, such a claim would not be barred by limitation by reason of the fact that his written statement has been filed after the lapse of 12 years from the death of the female. Although it is true that a separate suit filed by the defendant at the time he filed his written statement would have been barred by limitation, and his right would have been extinguished by operation of sec. 28, still it does not follow that his right would be extinguished if he were a party to a suit instituted by another within the prescribed period in which his right to the property could be effectually determined—*Rayegavda* v. *Ramlingapa*, 53 Bom. 472, 31 Bom.L.R. 647, 119 I.C. 656, A.I.R. 1929 Bom. 345 (347), following *Narsingh* v. *Vaman*, 34 Bom. 91 (99).

Where the nearest reversioner does not take any steps to take possession or assume control of property on death of widow and one of his sons, who was in possession prior to the widow's death, continues in possession, a suit by the other sons of the nearest reversioner for partition filed more than 12 years after the death of the widow is barred by this Article and their title is extinguished under sec. 28 of the Act—*Alagiri* v. *Muthuswami*, 50 L.W. 571, 1939 M.W.N. 1225, A.I.R. 1940 Mad. 102.

594. Presumption of death of female:—The plaintiff sued in 1911 as a reversioner to recover possession of property alienated by a Hindu widow, who had disappeared in 1865 and was not heard of since 1870. The lower Courts held that under sec. 108 of the Evidence Act it would be presumed that the widow died at the time of the suit and that therefore the suit was within time. But the High Court held it lay on the plaintiff to prove affirmatively that he had brought his suit within 12 years from the actual death of the widow and that no presumption would be drawn according to the terms of sec. 108, Evidence Act—*Jayawant* v. *Ram Chandra*, 40 Bom. 239 (247), 33 I.C. 484. There is no warrant for the contention that the death of the female referred to under this Article includes death by influx of time, though it may include civil death—*Lalit* v. *Lachmi*, 1946 O.W.N. 195, A.I.R. 1946 Oudh, 213, 224 I.C. 537. When the question is not merely of *death* but of death at a *particular time*, there is no presumption as to the time, but the party concerned to make out the death on a specified date must prove it by evidence—*Parsoo* v. *Munnalal*, 13 N.L.R. 16, 37 I.C. 21. See also *Venkata Ramakrishna* v. *Sriramulu*, 46 M.L.J. 541 (P.C.), A.I.R. 1924 P.C. 136, 26 Bom.L.R. 563, where the entry in a *puruhit*'s book as to the date of death of the widow was held to be unreliable.

But where it is known that a widow died in May 1902 but the exact date of the month is unknown, and the plaintiff brought his suit on the 5th May 1914, *held* that the *defendants* were bound to prove that she died before the 5th of May 1902—*Tani* v. *Rikhi Ram*, 1 Lah. 554 (557), 56 I.C. 742.

142. For possession of immoveable property when the plaintiff, while in possession of the pro-	Twelve years.	The date of the dispossession or discontinuance.

perty, has been dispossessed or has discontinued the possession.

594A. Application of Article:—The general rule of limitation in suits for recovery of property in cases where the plaintiff while in possession has been dispossessed or has discontinued possession, is twelve years, and if the defendants rely upon a shorter period of limitation under any special law, the burden lies upon them to establish the circumstances requisite to make the shorter term applicable. Thus, where the tenants who have been dispossessed by their landlord bring a suit to recover the land within 12 years from the date of dispossession, but the defendant (landlord) contends that the land being an occupancy holding, the special period of two years limitation prescribed by Art. 3, Sch. III of the Bengal Tenancy Act applies, *held* that it lies upon the defendant to establish the occupancy character of the holding so as to bring the suit within the scope of the special rule of limitation—*Tara Nath* v. *Iswar Chandra*, 16 C.W.N. 398 (402), 14 C.L.J. 598, 11 I.C. 164.

A suit for declaration of title and confirmation of possession, in the alternative, for recovery of possession, comes under this Article—*Chandiprasad* v. *Awadh*, A.I.R. 1952 Pat. 143.

For a distinction between cases in which Art. 142 or Art. 144 applies, see Note 610 under Art. 144. There it is pointed out that if the plaintiff brings a suit on the allegation that he was in possession and was subsequently dispossessed within 12 years prior to suit, the case is governed by Art. 142; but if the plaintiff had never been in possession, so that his claim based on title and not on possession the Article applicable to his suit is Art. 144, and not Art. 142. See also *Bindhyachal* v. *Ram Gharib*, 1934 A.L.J. 973 (F.B.), A.I.R. 1934 All. 993 (997-999).

It is not the form of allegations of the plaintiff which will determine the nature of the suit, but it is the substance and actual facts found by the Courts which will go to decide whether the suit is one which comes within the purview of either Art. 142 or Art. 144—*Bodri* v. *Narain*, 27 Pat.L.T. 217, A.I.R. 1946 Pat. 185.

595. "While in possession":—When a plaintiff's title is once established, his possession, however obtained (*i.e.*, whether it is taken forcibly or not) would be possession within the meaning of this Article—*Protab Chandra* v. *Durga Charan*, 9 C.W.N. 1061 (1064). Thus, where the rightful owner of lands was dispossessed but succeeded in ousting the trespasser without recourse to law and continued in possession, such possession would be the possession of the owner within the meaning of the Article; and if the rightful owner is again afterwards dispossessed under a decree obtained by the trespasser under section 9 of the Specific Relief Act, the period of limitation for a suit by the rightful owner to recover possession would run from the date of the dispossession under the decree, and not from the date of the original dispossession. The interval between the time when the owner ousted the defendant and the time when the defendant recovered possession of the land under sec. 9 of the Specific Relief Act should enure to the benefit of the owner and not of the trespasser —*Jonab* v. *Surya Kanta*, 33 Cal. 821 (825); *Protab Chandra* v. *Durga Charan*, 9 C.W.N. 1061 (1064); *Mumtazuddin* v. *Batkatulla*, 2 C.L.J. 1; *Waziruddin* v. *Deoki*, 6 C.L.J. 472. The fact that the trespasser from whom the rightful owner wrested possession had succeeded in a suit under sec. 9 of the Specific Relief Act does not make any difference in the position of the real owner obtaining forcible possession—*Narasayya* v. *Subbayya*, I.L.R. (1943) Mad. 122, (1942) 2 M.L.J. 266, A.I.R. 1942 Mad. 728.

In other words, if there is a re-entry by the true owner, such re-entry puts an end to the previous adverse possession of the trespasser. The mere fact of physical possession held by the true owner within the statutory period is not sufficient for purposes of this Article if it is traceable not to an *animus* on his part to exercise it in assertion of his own right but to the sufference of the person in wrongful possession—*Ramachandra* v. *Ammiraju*, (1950) 2 M.L.J. 551, A.I.R. 1951 Mad. 356.

Possession is either actual or constructive. Where one co-sharer holds the share of another co-sharer who being absent had simply ceased to hold actual possession, the holder's possession implies constructive possession by the real proprietor. While either kind of possesion exists in the proprietor, time does not begin to run against him—*Shahzada Suraya* v. *Azim*, 29 P.R. 1910, 5 I.C. 888. As to the effect of symbolical possession, see Note 621B under Art. 144.

596. Dispossession:—Dispossession, referred to in this article is a forcible dispossession or ouster—*Arab* v. *Panjal*, I.L.R. (1939) Kar. 111, A.I.R. 1938 Sind. 198. It involves some element of force or fraud—*Rangulal* v. *Makhan*, A.I.R. 1951 Orissa 183. Dispossession implies the coming in of a person and driving out of another person from possession—*Rains* v. *Buxton*, (1880) 14 Ch. 537 (539); *Brojendra* v. *Sarojini*, 20 C.W.N. 481, 22 C.L.J. 283, 31 I.C. 242; *Panchoo* v. *Janeswar*, 32 C.L.J. 9, 58 I.C. 844; *Charu Chandra* v. *Nahush Chandra*, 50 Cal. 49 (63), A.I.R. 1923 Cal. 1, 74 I.C. 630; *Maherban* v. *Yusuf*, 1938 N.L.J. 418, A.I.R. 1939 Nag. 7, I.L.R. (1941) Nag. 655; *Gangoobai* v. *Soni*, 1942 N.L.J. 199; *Basantilal* v. *Ramcharan*, I.L.R. (1956) M.B. 296, A.I.R. 1956 M.B. 166. Dispossession signifies expulsion, an adverse act which has the effect of putting out. It pre-supposes physical contact, a collusion, either with another person or with his physical acts. The physical presence on the property of the person affected is not necessary but the adverse act of the other party must have the quality of destruction. Acts of possession of the former must be effaced by the latter—*Abdul* v. *Habibulla*, 69 C.L.J. 28, A.I.R. 1939 Cal. 354. Dispossession implies ouster, and the essence of ouster is that the person ousting is in actual occupation of the land. The mere finding that the plaintiffs are not in possession of the disputed land does not decide the question whether there was dispossession. The statute applies not to want of actual possession by the plaintiff but to cases where he has been out of, and *another is in, possession* of the lands for prescribed time—*Smith* v. *Lloyd*, 23 L.J. Exch. 194; *Sheikh Bahadur Ali* v. *Secretary of State*, 2 P.L.T. 133, A.I.R. 1921 Pat. 277, 61 I.C. 78. Where the plaintiff is merely resisted by the defendants in his attempt to possess separately his share in the property, but the defendants do not drive out the plaintiff from his possession, there is no dispossession—*Gaya Prasad* v. *Bakya Mani*, 56 Cal. 914, 33 C.W.N. 277 (278), 119 I.C. 289, A.I.R. 1929 Cal. 297.

Mere acts of user which do not interfere and are consistent with the owner's title are not sufficient to constitute dispossession of the owner—*Rangulal* v. *Makhan*, A.I.R. 1951 Orissa 183. A mere repudiation of the plaintiff's title behind his back is not enough to dispossess him unless it is followed by some overt act. Ibid. In case of leased land mere receipt of rent by a stranger claiming adversely to the real owner is not by itself sufficient to constitute dispossession. The rent must also be received adversely—*Radha Govinda* v. *Nilkantha*, 30 Pat. 406, A.I.R. 1951 Pat. 556.

A mere denial of the title of the plaintiff on the part of a defendant who is a co-sharer of the plaintiff, and whose possession may be regarded as plaintiff's possession, will not amount to plaintiff's dispossession, and his remedy will be by a suit for a declaration of title; but if the defendant subsequently transfers possession to a party whose possession cannot be any longer treated in law as the possession of the plaintiff,

the latter will have to consider himself as dispossessed, and will have to bring his suit within 12 years of the transfer (or rather within 12 years of the date when the transfer is brought to the notice of the plaintiff)—*Bindhyachal* v. *Ram Gharib*, 1934 A.L.J. 973 (F.B.), 152 I.C. 1, A.I.R. 1934 All. 993 (1002).

In a case where one party complains of encroachment upon common land by the other party who pleads that he has been on the land for over the statutory period, the real question is whether the wrong amounts to a complete ouster of the plaintiff by the defendant that is, to his dispossession—*Kuseshwar* v. *Uma*, 22 Pat.L.T. 1001, A.I.R. 1942 Pat. 188.

Where the defendant company had been systematically carrying on colliery work in a village belonging to the plaintiffs, and had sunk pits in different points and made bores in likely places, anywhere in the village they chose, openly and without challenge, it was held that the plaintiffs had been dispossessed not only of the surface of the village but of the whole mineral field. Although in the case of mines there is no presumption of law that possession of a part of a seam infers possession of the whole seam, still as in this case the village had been treated as a single unit of property and the defendant company's operations were consistent only with the assertion of a right to the minerals under the whole village, their title to the *whole field* had been established. In these circumstances, the fact that the company may not have worked any one pit for 12 years was immaterial, if for 12 years they have been continuously carrying on operation in various parts of the field—*Nageshwar* v. *Bengal Coal Co.*, 10 Pat. 407 (P.C.), 12 P.L.T. 251, 35 C.W.N. 265 (269, 270), A.I.R. 1931 P.C. 18. *Onkarmal* v. *Bireswar*, 61 C.W.N. 970.

If a trespasser (defendant) admits that a portion of the land belongs to the plaintiff, but declines to vacate the land inspite of demands, there is open dispossession, and the plaintiff must bring his suit within 12 years of the dispossession. The mere fact that the trespasser *admits* that the plaintiff has a share in the land, makes no difference and does not give the plaintiff further time under sec. 19, as the dispossession is not any the less adverse because the trespasser admits that it is adverse—*Nutbihari* v. *Bishweshwari*, 60 Cal. 404, 144 I.C. 177, A.I.R. 1933 Cal. 414 (415).

If a proprietor who has been collecting rent from tenants is prevented from doing so because a rival proprietor has successfully invoked the aid of a Court of Justice, the injured proprietor is 'dispossessed' from his property just as he had been driven out by physical force—*Asiatulla* v. *Sadatulla*, 26 I.C. 368; *Lala Sahu* v. *Ghunaria*, 2 I.C. 381.

Dispossession under a decree of the Court obtained under section 9 of the Specific Relief Act is dispossession within the meaning of this Article; limitation runs against the true owner from the date of such dispossession—*Protab Chandra* v. *Durga Charan*, 9 C.W.N. 1061; *Mamtazuddin* v. Barkatulla, 2 C.L.J. 1; *Jonab* v. *Suraj Kanta*, 33 Cal. 821.

Where upon the occasion of a regular settlement the plaintiffs who were the proprietors of a land on which the rent-free tenure had been resumed some years before, declined to engage for the payment of the land revenue, in consequence of which the Government made the engagement with the defendants, who were put in possession of the land, it was held that there was dispossession of the plaintiffs or discontinuance of possession by them within the meaning of this Article, and that time began to run from the date of the defendants being put into possession—*Muhammad Amanulla* v. *Badan Singh*, 17 Cal. 137 (142, 143) (P.C.), 16 I.A. 148, 23 P.R. 1890.

597. Encroachment by tenant:—Where a tenant takes possession of lands

the landlord is dispossessed in a limited sense; in other words, he is deprived of actual or *khas* possession of the land, but not of proprietary possession or possession by receipts of rent; in such a case Art. 142 would apply, and the landlord, if he wishes to eject the tenant, must bring his suit within 12 years of the dispossession. If he does not do so, his title to recover actual possession would be barred, but his right to proprietary possession, *i.e.* right to receive fair rent, would not be lost, because the possession of the tenant, so far as the latter right is concerned, has never been adverse —*Ishan* v. *Ramranjan*, 2 C.L.J. 125. If the tenant encroaches upon the lands of his landlord, and claims that these lands are *within his tenure*, and thus holds possession of those lands for more than 12 years, the landlord's suit for ejectment is barred under Article 142, and the tenant by virtue of the statute of limitation acquires a right which entitles him to claim to hold the lands *as a tenant* of his landlord and to resist the landlord's claim for khas possession. But the landlord's proprietary right is not lost, because what has been asserted by the tenant is not that he has acquired by adverse possession an absolute interest, but only a tenancy right in the property—*Gopal Krishna* v. *Lakhiram*, 16 C.W.N. 634 (636), 14 I.C. 212; *Raktoo* v. *Sudharam*, 8 C.L.J. 557; *Baldeb* v. *Jogi*, A.I.R. 1944 Pat. 109. If, however, the tenant intends the encroachment for his own exclusive benefit, and sets up a *title adverse to the entire interest* of the landlord, the latter must bring a suit to eject the tenant as a trespasser; if he fails to do so, his right to the proprietary possession as well as to the actual possession would both be barred—*Ishan* v. *Ramranjan*, 2 C.L J. 125; *Raktoo* v. *Sudharam*, 8 C.L.J. 557.

The nature and effect of the possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the tenant. Consequently, there can be no acquisition of an absolute title, where it is found that the tenant has asserted nothing but a limited interest. Adverse possession of a limited interest, though a good plea to a suit for ejectment, is good only to the extent of that interest and not of the entire interest—*Ishan* v. *Ramranjan*, 2 C.L.J. 125; *Muthurakkoo* v. *Orr*, 35 Mad 618 (621). See Note 621A under Art. 144.

An encroachment made by a tenant on the property of his landlord should not be presumed to have been made absolutely for his own benefit and as against the landlord, but should be deemed to be added to the tenure and to form part thereof—*Esubai* v. *Damodar*, 16 Bom. 552 (558). The true presumption as to encroachments made by a tenant on the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof *for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord*, unless it clearly appears by some act done at the time that the tenant made the encroachments for his own benefit—*per* Markby, J. in *Gooroo Das v. Ishwar Chandra*, 22 W.R. 246; *Muthurakkoo* v. *Orr*, 35 Mad. 618 (622). But this view has been dissented from in later cases of the Calcutta High Court. Thus, in *Nuddyar Chand* v. *Meajan*, 10 Cal. 820 (822), Garth, C.J. observes: "it would seem strange, if as a matter of law, a tenant was allowed without his landlord's permission, to appropriate any land which adjoins his own tenure, and then when his landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong, and *insist upon retaining possession of it until the expiration of his tenure.*" In *Prolhad Teor* v. *Kedar Nath*, 25 Cal. 302, it has been held that if a tenant encroaches upon the adjoining lands of his landlord, the landlord *may if he chooses* treat him as a tenant in respect of the land encroached upon, but the tenant has no right to *compel the landlord* against his will *to accept him as a tenant* in respect of that land. In another case Mookerjee, J. observes: "An encroachment made by a tenant upon the adjoining waste land of his landlord, is *prima facie* made by him in his character as a tenant; but *it is open to the landlord to repudiate* the relation, to treat him as a trespasser

and to evict him as such; on the other hand, it is open to the tenant to indicate at the time he encroaches that he intends to hold the encroached lands for his own exclusive benefit, and not to hold them as he held the land to which they are adjacent; in this event the landlord, though willing to treat him as a tenant, may be driven, by an assertion of a hostile title, to a suit to eject him as a trespasser—*Ishan* v. *Ram Ranjan*, 2 C.L.J. 125.

The Calcutta High Court has adopted the view that the tenant's possession of the encroached lands can only commence to be adverse when a title adverse to the landlord is asserted or when the landlord becomes aware of the encroachment; in other words, the tenant is bound to prove that he set up a right of tenancy to the encroached lands to the *knowledge* of his landlord—*Ishan* v. *Ramranjan*, 2 C.L.J. 125; *Wali Ahmed* v. *Tota Mea*, 31 Cal. 397 (403); *Krishna Govinda* v. *Banku Behari*, 13 C.W.N. 698, 4 I.C. 526. See also *Subodh Gopal Bose* v. *Burmah Shell etc., Ltd.*, A.I.R. 1957 Cal. 67. But the Madras High Court holds that this rule is stated in too broad terms, that the ordinary rule of law is that possession held by a person in his own right is adverse to the true owner, whether the owner is aware of such possession being taken or not, and that a tenant is not bound to prove that his encroachment was known to the landlord—*Muthurakko* v. *Orr*, 35 Mad. 618 (622). At any rate, where the tenants were cultivating the encroached lands for a considerable length of time (*e.g.*, 30 years), the landlord's knowledge of the encroachment will be presumed—*Ibid.*

598. Discontinuance of possession:—Discontinuance, being interpreted *ejusdem generis* with possession, means something of the nature of an abandonment—*Arab* v. *Panjal, I.L.R.* (1939) Kar. 111, A.I.R. 1938 Sind 198. Discontinuance refers to a case where the person in possession goes out and is *succeeded in possession by another—Brojendra* v *Sarojini*, 20 C.W.N. 481, 31 I.C. 242, 22 C.L.J. 283; *Sheikh Sohnur* v. *Huttman*, 1 C.W.N. 277; *Charu Chandra* v *Nahush Chandra*, 50 Cal. 49 (63), A.I.R. 1923 Cal. 1, 74 I.C. 630; *Hashim Ali* v. *Iffat*, 46 C.W.N. 561, 74 C.L.J. 261, A.I.R. 1942 Cal. 180; *Gangoobai* v. *Soni*, 1942 N.L.J. 99; *Maluk* v. *Anwar*, A.I.R. 1950 Pesh. 31. The word "discontinuance" implies a voluntary act, an abandonment of possession followed by the actual possession of another. An intention to abandon is necessary and it must be either proved or admitted and can not be assumed—*Maherban* v. *Yusuf*, 1938 N.L J. 418, A.I.R. 1939 Nag. 7, I.L.R. (1941) Nag. 655. The word "discontinued" connotes three elements, two physical and one mental. There must be (1) actual withdrawal, (2) with an intention to abandon and (3) that another should step in, begin to occupy after the withdrawal—*Abdul* v. *Habibulla*, 69 C.L.J. 28, A.I.R. 1939 Cal. 354. "The difference between dispossession and discontinuance of possession may be expressed in this way—the one is where a person comes in and drives out the others from possession; the other case is where the person in possession goes out and is followed into possession by other persons"—*per* Fry, J., in *Rains* v. *Buxton*, (1880) 14 Ch. D. 537 (539). "The word 'discontinuance' means an abandonment of possession followed by the *actual possession of another person*. This I think must be its meaning, for if no one succeeds to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the statute would operate. To constitute discontinuance, there must both be dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected. Actual possession is the object of the statute, and to apply its provisions to any other case would be to violate its plain meaning and policy"—*per* Blackburne, J. in *McDonell* v. *McKinty*, (1847) 10 Ir. L.R. 514. 'Discontinuance' means that a person in possession goes out and is followed into possession by another person, because unless he is so followed, he will in law be deemed to continue in possession and therefore there will be no discontinuance of possession—*Azid* v. *Maqbul*, I.L.R. (1939) All. 454, 1939 A.L.J. 94,

A.I.R. 1939 All. 257. There must be an adverse possessor in order to bring the statute into operation. It does not run unless there is a person in whose favour it can run. There must be both absence of possession by the person who has the right and actual possession by another to be protected, to bring the case within the statute—*Smith* v. *Lloyd*, (1854) 23 L.J. Ex. 194: 9 Exch. Rep. 562. The principle is, that the owner must be considered in point of law as always in possession so long as there is no intrusion. The starting point for the limitation under Article 142 is the date of possession or discontinuance, and not the date when the owner ceases to occupy the land—*Madan Mohan* v. *Braj Behari*, 5 P.L.J. 593 (594), A.I.R. 1921 Pat. 36, 1 P.L T. 505, 57 I.C. 717. Therefore, where it is found that the land in dispute is the property of the plaintiff, that though the plaintiff under a mistake laid down certain boundary pillars leaving the land in dispute outside the boundary pillars, *no one* entered into possession of the land so left out, until within 12 years before the date of the institution of the present suit, *held* that, having regard to the nature of the land (which was jungle land) the possession should be held to have continued with the plaintiff until he was actually dispossessed, and that there was no *discontinuance* of the plaintiff's possession on the date of his laying down the boundary pillars, within the meaning of this Article—*Sheikh Sohnur* v. *Huttman*, 1 C.W.N. 277 (279).

In the absence of a motive for abandonment and of the evidence of *intention to abandon*, a suit by the plaintiff for possession is not barred by Article 142—*Shahabal* v. *Ganesh*, 53 P.R. 1907. Making over possession under an invalid lease to a tenant does not amount to discontinuance—*Maharaj* v. *Budhu*, A.I.R. 1952 Pat. 46. There can be no discontinuance within the meaning of this Article merely because of absence of physical possession—*Rangulal* v. *Makhan*, A.I.R. 1951 Orissa 183. Thus, mere non-residence in a house owing to its being in a state of repair does not constitute discontinuance of possession of the house, in the absence of an intention on the owner's part to give up possession—*Krishnammal* v. *Pichannavayyan*, 7 M.L.J. 186. The fact that the land is merely allowed to lie waste while the owner is in distant place does not constitute discontinuance of possession—*Muhammad Yar* v. *Ghulam*, 49 P.R. 1884; *Ramzen* v. *Basharat*, 105 P.R. 1901; *Narain* v. *Bilta*, 204 P.L.R. 1914, 25 I.C. 82. Merely remaining quiescent at the assertion of title without knowledge does not amount to discontinuance—*Rangulal* v. *Makhan*, supra. But *long absence and inaction may be* evidence of abandonment—*Shahzada Suraya* v. *Azim*, 61 P.L.R. 1910, 5 I.C. 888, 29 P.R. 1910; *Nihal Singh* v. *Dula Singh*, 38 P.R. 1885.

There can be no discontinuance of possession by reason of the mere submergence of the land—*Rampati* v. *Ramani*, 31 C.W.N. 772 (P.C.), 126 I.C. 81, A.I.R. 1930 P.C. 198 (200).

The mere failure to cultivate uncultivable land does not constitute abandonment —*Shahabal* v. *Ganesh*, 53 P.R. 1907. The principle is that there can be no discontinuance by absence of use and enjoyment, where the land is not capable of use and enjoyment—*Leigh* v. *Jack*, (1879) L.R. 5 Ex. D. 264 (274).

The mere fact that a mine has not been worked by the owner does not amount to discontinuance of possession—*Bengal Coal Co., Ltd.*, v. *Monoranjan*, 22 C.W.N. 441, 41 I.C. 297.

A person by merely living outside the village cannot be said to have abandoned the site in the village in which he once had his residential house which has fallen down and has not been re-built for many years. Possession in case of such vacant site is presumed to go with title, and its mere use by a neighbour for the purpose of tethering his cattle thereon cannot be regarded as adverse possession—*Lachman Das* v. *Narsingh Das*, 101 P.L.R. 1916, 36 I.C. 207.

This Article does not apply where the discontinuance is by agreement of the parties; thus, where the agreement is that the plaintiff should resume possession of the mortgaged land from the mortgagee upon repayment of the loan, it cannot be said that the possession has been discontinued by the plaintiff—*Maung Sin* v. *Maung So*, 8 Rang. 556, 129 I.C. 511, A.I.R. 1931 Rang. 40; *Municipal Corporation* v. *Province of Sind*, A.I.R. 1947 Sind 69, 230 I.C. 311 (resumption by Government).

This Article does not apply where there is a change of character of possession as that does not amount to discontinuance of possession. Thus where a wakif continues to be in possession as a mutwalli after the execution of the wakfnama, there is only a change in the character of possession and not discontinuance of possession as there is no abandonment of possession—*Hashim Ali* v. *Iffat*, 46 C.W.N. 561, 74 C.L.J. 261, A.I.R. 1942 Cal. 180.

The owner of a property who had accorded *permissive occupation* of the same to a person on the ground of charity or relationship cannot be said to have discontinued possession of the property, within the meaning of this Article, because under such circumstances the possession of the occupier is the possession of the owner—*Gobind Lall* v. *Debendranath*, 6 Cal. 311 (315); where therefore the owner seeks to recover the premises so occupied, the suit does not fall under this Article but under Article 144, and limitation runs from the time when the occupation of the tenant became adverse to the owner—*Gobind Lall* v. *Debendranath*, 6 Cal. 311, 314 (reversing on appeal *Gobind* v. *Debendranath*, 5 Cal. 679); *Arab* v. *Panjal*, I.L.R. (1939) Kar. 111, A.I.R. 1938 Sindh 198; *Maluk* v. *Anwar*, A.I.R. 1950 Peshwar 31. A contrary view has been taken in *Gangoobai* v. *Soni*, 1942 N.L.J. 99, where it has been held that where in a suit for possession the plaintiff alleges a licence for a term under which the defendant got into possession there is only a discontinuance of possession and this Article and not Art. 144 applies. Where the plaintiff's husband conveyed to her a house in 1898 in satisfaction of her dower, but continued to reside in the house as before till his death in 1911, whereupon the defendant (the son of the plaintiff's husband by another wife) took forcible possession of the house, and then the plaintiff sued to recover posssession, *held* that, having regard to the relationship, the possession of the plaintiff's husband from 1898 to 1911 was only permissive occupation and did not amount to dispossession or discontinuance of possession of the plaintiff, and that consequently the plaintiff must be deemed to have held possession up to 1911—*Ibrahim* v. *Isa Rasul*, 41 Bom. 5 (12). In such cases the possession of the husband will be treated as possession of an agent or manager or relation and a mere secret change of intention or an act such as a mortgage deed executed without the knowledge of the wife will not prevail against the wife—*Bhagabai* v. *Ghanshamdas*, I.L.R. (1948) Nag. 824, A.I.R. 1948 Nag. 328.

Where on default of payment of Government revenue by a co-sharer, possession of his share was made over to another by Government on a farming lease, which expired in 1871, but on the expiry of the lease, the lessee still retained possession for over twelve years, and the original owner or his representative made no claim during the period, *held* that there was a discontinuance of possession by the original owner from 1871 within the meaning of this Article—*Madho* v. *Surjan*, 28 All. 281 (283).

599. Attachment by Magistrate:—An attachment by the Magistrate under sec. 146, Criminal Procedure Code, does not amount to dispossession of the true owner from the property attached, nor does it amount to a discontinuance of possession by the owner. Although the actual or physical possession is with the Magistrate, it is merely a custody or detention on behalf of the true owner pending the decision of the Court of competent jurisdiction. The legal possession will, during the attachment, be

with the true owner. Consequently, a suit for declaration of title to the property attached is not a suit for possession under Article 142 or 144 but falls under Article 120—*Rajah of Venkatagiri* v. *Isakapalli*, 26 Mad. 410 (413, 415), (dissenting from *Goswami* v. *Sri Girdharji*, 20 All. 120); *Panna Lal* v. *Panchu*, 49 Cal. 544, A.I.R. 1922 Cal. 419, 26 C.W.N. 432, 65 I.C. 200; Brojendra v. Sarojini, 20 C.W.N. 481, 31 I.C. 242, 22 C.L.J. 283. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law is not interrupted. If, on the other hand, the wrongdoer was in possession at the time when the attachment took place, the effect of the attachment is to interrupt his possession, and from the moment of attachment the possession of the rightful owner revives in the eye of the law—*Sarat Chandra* v. *Bibhabati*, 34 C.L.J. 302, A.I.R. 1921 Cal. 584, 66 I.C. 433.

But if after attachment, the Magistrate puts the defendant in possession of the property, then of course there is actual dispossession of the plaintiff, and a suit by the plaintiff against the defendant would be governed by this Article—*Nisarali* v. *Adebuddi*, 16 C.W.N. 1073, 16 I.C. 620.

But in the case of an attachment under sec. 145, Cr. P. Code, the possession of the Magistrate during attachment should enure for the benefit of the party who may be declared by the Magstrate under sec. 145 (4) to be the person in possession at the date of the proceedings; such person may not be the same who may be declared by the Civil Court to be the true owner of the property in dispute. The attachment under sec. 145 is different from an attachment under sec. 146, Cr. P. Code—*Abinash Chandra* v. *Tarini*, 30 C.W.N. 541, 95 I.C. 117, A.I.R. 1926 Cal. 782.

When property, which is in dispute between two parties, is attached and taken possession of by the Collector for the protection of the Government revenue, it is his duty, after crediting the Government revenue and paying the collection expenses, to pay over the surplus of the rents collected to the real owner. And so long as the Collector retains possession, his possession must be held to be on behalf of, and not adverse to, the real owner. Nor does the Collector's possession become one on behalf of the defendant, simply because he afterwards delivers possession to the defendant in consequence of a decree—*Karan Singh* v. *Bakar Ali Khan*, 5 All. 1 (6) (P.C.).

Possession of Receiver:—The possession of a Receiver appointed by the Civil Court stands on the same footing as the possession of a Magistrate during an attachment under sec. 146 Cr. P. Code. When disputes arise between claimants as to possession of immoveable property, and the property is placed in the hands of a Receiver by the Court pending the determination of the question of title, the Court, takes possession through its Receiver on behalf of the party who may ultimately establish his title, and from the moment the title is established, possession must be deemed to have been the possession of the lawful owner whose title has been established. While the Court (through its Receiver) holds possession for the benefit of the rightful owner, the previous possession on the part of the wrongdoer cannot, by any legal fiction, be deemed to continue so as to be available towards the ultimate acquisition of title against the true owner. The possession of the Receiver or the attachment by the Magistrate does not amount to dispossesson of the owner or to discontinuance of his possession—*Bisheshwar* v. *Chandreshwar*, 7 Pat. 319, A.I.R. 1928 Pat. 260 (262, 263), 108 I.C. 89, following *Sarat Chandra* v. *Bibhabati*, 34 C.L.J. 302, A.I.R. 1921 Cal. 684, 66 I.C. 433.

A Receiver is an Officer of Court and is not a particular agent of any party to the suit. To treat such Receiver as plaintiff's agent for the purpose of initiating adverse possession by the plaintiff would be to impute wrongdoing to the Court and its officers—*Reddy* v. *Reddy*, A. I. R. 1957 S.C. 314.

600. Burden of proof—possession, title:—In a case falling under this Article, the plaintiff must at the outset show that he had been in *possession* within twelve years before suit, and cannot rest merely on a proof of title; while in cases falling under Art. 144, the plaintiff may rest content with proof of title only, and the burden lies on the defendants to show that they have had a possession inconsistent with the title of the plaintiff more than twelve years before suit—*Faki* v. *Babaji*, 14 Bom. 458 (461); *Ibrahim* v. *Isa Rasul*, 41 Bom. 5 (11); *Moro Desai* v. *Rama Chandra*, 6 Bom. 508; *Monomohan* v. *Mothura Mohan*, 7 Cal. 255; *Udit Narain* v. *Golab Chandra*, 27 Cal. 221 (P.C.); *Mohima Chunder* v. *Mohesh Chunder*, 16 Cal. 473 (P.C.); *Gapaul* v. *Nilmoney*, 10 Cal. 374; *Kashinath v. Shridhar*, 16 Bom. 343; *Kuppuswami* v. *Chockalinga*, 49 M.L.J. 788, A.I.R. 1926 Mad. 181, 91 I.C. 454; *Innasimuthu* v. *Upakarath*, 23 Mad. 10 (P.C.); *Ramayya* v. *Kotamma*, 45 Mad. 370 (374); *Jafar Ali* v. *Mashuq*, 14 All. 193; *Haji Khan* v. *Baldeo*, 24 All. 90 (93); *Komil Prasad* v. *Bharat*, 23 A.L.J. 874; *Mirza Shamsher* v. *Kunjbehari*, 12 C.W.N. 273; *Asghar Reza* v. *Mehdi*, 20 Cal. 560 (P.C.); *Mahomed Ali* v. *Khaja Abdul*, 9 Cal. 744, 750 (F.B.); *Rani Hemanta Kumari* v. *Jagadindra*, 10 C.W.N. 630 (P.C.); *Midnapore Zamindari Co.* v. *Panday*, 2 P.L.J. 506, 41 I.C. 114; *Dharani Kanta* v. *Gabar Ali*, 17 C.W.N. 389 (P.C.), 18 I.C. 17; *Rakhal Chandra* v. *Durgadas*, 26 C.W.N. 724, A.I.R. 1922 Cal. 557; *Mazhar Hussain* v. *Behari*, 28 All. 760; *Maung Sin* v. *Maung Po* , 8 Rang. 556, 129 I.C. 511, A.I.R. 1931 Rang. 40; *Muthia Chetty* v. *Seena*, 56 I.C. 951, 12 Bur.L.T. 234; *Inder Lal* v. *Ram Surat*, 5 P.L.J. 724 (728); *Shiva Prasad* v. *Hira Singh*, 6 P.L.J. 478 (491, 525) (F.B.); *Nausha* v. *Umrao*, A.I.R. 1951 All 626; *Siri Ram* v. *Bishan*, A.I.R. 1952 Pepsu 46; *Ramjatan* v. *Tapaser*, A.I R. 1956 Pat. 533. The essential difference between Art. 142 and Art. 144 is that when a plaintiff is suing for possession on the basis of dispossession (Art. 142) the burden lies on *him* to show that the date of his dispossession or discontinuance of possession which gave him the cause of action for the suit was within 12 years of the suit; while if the suit is not for possession based on the ground of dispossession, but is a suit for possession of immoveable property falling under Art. 144, then on proof of title the plaintiff is entitled to succeed: his suit cannot be dismissed until the defendant further establishes his adverse possession for more than 12 years—*Bindhyachal* v. *Ram Gharib*, 1934 A.L.J. 973 (F.B), 152 I C. 1, A.I.R. 1934 All. 993 (997). In such a case the burden is on the defendant to prove adverse possession—*Mehtab* v. *Dayal*, 41 P.L.R. 715, A.I.R. 1939 Lah. 172. There is nothing in Art. 142 which would confine its application to suits based on possessory title only and would make it inapplicable where the suit is based on proprietory title or the plaintiff's title is established— *Devram* v. *Asharam*, I.L.R. (1939) Kar. 793, A.I.R. 1940 Sind. 49; the Article applies to all cases of alleged or proved dispossession whether the plaintiff's suit is based on his proprietory or possessory title—*Jai Mongal* v. *Bindeshuri*, 15 Luck. 157, 1939 O.W.N. 1005, A.I.R. 1940 Oudh. 134. In cases in which the plaintiff sues for possession of immoveable property both on the ground of title and on the ground of his possession having been disturbed by the defendant, if he proves his title, the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds in proving that fact, the suit must fail; otherwise the plaintiff is entitled to a decree. To this extent, Art. 144 will apply to the suit. But it may be that the plaintiff, though not able to substantiate his title, is in a position to prove his possession and dispossession by the defendant within 12 years. If that be the case, Art. 142 applies, and the burden will be on the plaintiff. In short, suits for possession based both on plaintiff's title and possessory title invite the application of Arts. 142 and 144 according to the varying circumstances of each case—*Mahomed Mahmud* v. *Mahomed Afaq*, 11 O.W.N. 104, 147 I.C. 805, A.I.R. 1934 Oudh 21 (24); *Arab* v. *Panjal*, I.L.R. (1939) Kar. 111, A.I.R. 1938 Sind. 198. Where there is no

evidence, or no evidence of any value, on behalf of the plaintiff as to his possession at any time during 12 years before suit, the plaintiff's case will fail; and in such a case, it is immaterial that the defendant's evidence is weak or that he offers no evidence —*Shiva Prasad* v. *Hira Singh*, 6 P.L.J. 478 (525) (F.B.), A.I.R. 1921 Pat. 237, 62 I.C. 1.

But the plaintiff need not prove *actual user*; for in fact possession is not necessarily the same thing as actual user; and if the land is of such a nature as to render it unfit for actual enjoyment in the usual modes (as for instance where the land was a narrow slip of unenclosed land adjoining a public lane and unsuitable for agriculture) it may be presumed that the possession of the plaintiff continued until the contrary is proved—*Inder Lal* v. *Ram Surat*, 5 P.L.J. 724, 58 I.C. 773. It is not the law that if a land is left vacant and no other person is in possession, the plaintiff must fail unless he shows actual possession, that is, by positive acts, user and enjoyment within 12 years of suit—*Aziz* v. *Maqbul*, I.L.R. (1939) All. 454, 1939 A.L.J. 94, A.I.R. 1939 All. 257. The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. If the land is either permanently or temporarily incapable of actual enjoyment in any of the customary modes (residence or receipt of rent), as in the case of land covered with sand by inundation or jungle land, it would be unreasonable to look for the same evidence of possession as in the case of a house or cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such case, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed—*Mahomed Ali* v. *Khaja Abdul Gunny*, 9 Cal. 744 (751) (F.B.) *Thakur Singh* v. *Bhogeraj*, 27 Cal. 25 (28, 29); *Rakhal Chandra* v. *Durgadas*, 26 C.W.N. 724, A.I.R. 1922 Cal. 557, 67 I.C. 673; *Gopal Chandra* v. *Monmohini*, 31 C.W.N. 806, 105 I.C. 369, A.I.R. 1928 Cal. 118; *Ala Baksh* v. *Bir Bikram Kishore*, 33 C.W.N. 1161 (1162).

In case of waste land, tank land or jungle land, situate within the zemindary of the plaintiff, *prima facie* evidence of his possession within 12 years anterior to the date of the suit must be given, but in determining this question, evidence of physical acts of enjoyment and user indicating possession is not necessary—*Sheo Narain* v. *Badal*, 8 O.C. 177. In a suit relating to waste lands falling under this Article, it must be determined whether having regard to the evidence as to the nature of the lands and possession, the plaintiff has been able to establish actual or constructive possession within the statutory period—*Aptabur* v. *Tara*, 70 C.L.J. 534, A.I.R. 1940 Cal. 185. Where the subject matter of dispute is a bamboo clump not capable of possession every day or even at a particular season, the plaintiff need not prove physical acts of possession—*Badri* v. *Raghunandan*, A.I.R. 1948 Pat. 408. It is also not necessary to prove acts of enjoyment over the whole land. Thus, where the plaintiff obtains a lease of low-lying land and cultivates the major portion of the same, it is not necessary for him in a suit against the landlord in whose possession the remaining land is recorded in the record of rights as waste land to prove specific acts of possession over every square yard of his holding, and cultivation of bulk of the demised area will be treated as enjoyment of possession of the whole—*Chandra* v. *Butu*, 17 Pat. 210, 1938 P.W.N. 194, A.I.R. 1938 Pat. 222. The ordinary principle that the plaintiff must prove possession within 12 years cannot apply where the land is uncultivable, or where the plaintiff has no right to take possession because of the currency of a lease of a *thicadar*. In such a case, the plaintiff cannot be deemed to be out of possession if he is receiving rent from the *thicadar* for the entire mouza. It is for the defendant to establish an adverse possession (Art. 144) for the statutory period—*Bankey Bihari* v. *Gudo Choudhury*, 11 P.L.T. 447, A.I.R. 1930 Pat. 476 (478).

So also, it is sufficient if the plaintiff can prove that he was in constructive possession of the property within twelve years before suit, by virtue of his title thereto. If it is proved that he had title to the land, it is not necessary for him to exercise overt acts of ownership—*Barjor Singh* v. *Sidh Nath*, 1 Luck. 441, A.I.R. 1927 Oudh 141, 98 I.C. 704.

Proof of symbolical possession would be sufficient in a case where such possession amounts to actual possession in the eye of law. Thus, in the case of a bare site, symbolical possession obtained by the plaintiff is equivalent to actual possession. Therefore, where the plaintiff purchased a land, which was a bare site, in a Court sale in July 1902, and obtained symbolical possession through Court in October 1904, and he alleges that he was ousted therefrom in 1914 and he brought the present suit for possession in March 1916, it was held that the symbolical possession was equivalent to actual possession of the plaintiff, and the defendant could defeat his claim only by showing an adverse possession for more than twelve years—*Kaman* v. *Umra*, 76 P.R. 1918, 47 I.C. 441. If the allegation of dispossession is not proved, the period of limitation will run from the date when the plaintiff was given symbolical possession by the Court—*Munsuf* v. *Abdul*, 48 C.W.N. 187; *Jowbala* v. *Jiwan*, A.I.R. 1950 Pepsu. 22. See also Note 621B under Art. 144.

In a case falling under Art. 142, the defendant will not have to prove that his possession was adverse; the word 'adverse' does not occur in Article 142; the question under this Article is whether the plaintiff while in possession has been dispossessed or has discontinued the possession more than 12 years before suit—*Mahammad Amanulla* v. *Badan*, 17 Cal. 137 (143) (P.C.); *Gurshai* v. *Chedi*, 27 O.C. 130, 79 I.C. 964, 1 O.W.N. 38. The Article makes no reference to the defendant or his possession—*Naru* v. *Krishna*, 40 Bom.L.R. 166, A.I.R. 1938 Bom. 210. No question of adverse possession arises for determination in a suit under Art. 142. It is not for the defendant to raise and prove adverse possession in order to show that the suit is time-barred. The plaintiff has to prove possession and dispossession within a period of 12 years prior to suit—*Sita Ram* v. *Ram Sunder*, 50 All. 813, A.I.R. 1928 All. 412 (413), 26 A.L.J. 573; *Nara* v. *Krishna*, 40 Bom.L.R. 166, A.I.R. 1938 Bom. 210; *Devram* v. *Asharam*, I.L.R. (1939) Kar. 793, A.I.R. 1940 Sind 49; *Batuk* v. *Rudra*, A.I.R. 1950 Pat. 206. Thus where the plaintiff's case is that he was in possession till a particular date when he was dispossessed by the defendant the onus is on the plaintiff to show that he was in possession within 12 years of the suit and is not on the defendant to show that the plaintiff lost his title by adverse possession on the part of the defendant—*Ramendra* v. *Barada*, 66 C.L.J. 359, A.I.R. 1938 Cal. 206. So also, the onus is on the purchaser of a tenure in a certificate sale suing for khas possession on the definite allegation of possession and dispossession to prove that he and his predecessors were in khas possession within 12 years prior to the institution of the suit and it is not necessary for the defendants to prove tenancy right alleged by them under the predecessor in interest of the plaintiff by adverse possession for 12 years—*Jinatullah* v. *Tamizuddin*, 70 C.L.J. 539, A.I.R. 1940 Cal. 194.

The plaintiff cannot, merely by proving possession at any period prior to 12 years before suit, shift the onus to the defendant—*Mahomed Ali* v. *Khaja Abdul*, 9 Cal. 744 (750) (F.B.) (dissenting from *Kally Churn* v. *Secretary of State*, 6 Cal. 725); *Maharaja Koowar Singh* v. *Nund Lal*, 8 M.I.A. 199 (220); *Suresh Chandra* v. *Shiti Kantha*, 51 Cal. 669, 28 C.W.N. 637, A.I.R. 1924 Cal. 855; *Premeswar* v. *Madhav*, A.I.R. 1950 Assam 55. Even the fact that the defendant admits that the land in dispute once belonged to the plaintiff at some time or other (not necessarily within 12 years prior to suit) does not shift the onus to the defendant of proving adverse possession—*Mazhar Husain* v. *Behari Singh*, 28 All. 760

(762). Where in a suit for possession, all that is proved is that the plaintiff was at one time the owner, but that for the last 15 or 20 years the defendants have been in possession, and the plaintiff claims that they obtained possession from him, the suit falls under Article 142, and if the plaintiff fails to prove the permissive nature of the defendants' occupation, the burden would lie on the plaintiff to show that he had been in possession within 12 years before suit. If he had proved the permissive occupation of the defendants, then the burden would have been shifted to the defendants of proving that they had acquired title by 12 years' adverse possession—*Maung Gyi* v. *Maung On*, 7 Rang. 85, 117 I.C. 591, A.I.R. 1929 Rang. 153 (154, 155); *Premeswar* v. *Madhav*, supra. In a suit for possession alleging licence for a term under which the defendant got into possession the onus is on the plaintiff to prove that the defendant's permissive possession began within 12 years prior to the suit—*Gangoobai* v. *Soni*, 1942 N.L.J. 99.

In order to be successful in a suit for possession and ejectment of the defendant, it is necessary firstly for the plaintiffs to prove their title to the suit property and secondly, to show that they have been in possession of that property within 12 years before date of suit—*Mangla* v. *Lokha*, 1941 A.M.L.J. 48. Thus where in a suit for possession the plaintiff alleges that the defendants and their predecessors-in-interest had been his tenants and that recently, that is, within 12 years before suit, the defendants had denied the contract of tenancy but also pleaded title in themselves by adverse possession and the plaintiff fails to prove the contract of tenancy or that he was in possession within 12 years of the suit, the suit fails even though the original title was with the plaintiff—*Ramcharan* v. *Mangia*, 1943 A.L.W. 328. In actions in ejectment, the plaintiffs have to prove their subsisting title, that is, possession within 12 years before they can succeed—*Bibkuty* v. *Girish*, A.I.R. 1950 Pat. 191; *Gopalan* v. *Sanku*, A.I.R. 1951 Tra-Co. 32. Where in a suit for ejectment, the record of rights raises a presumption in the plaintiff's favour, the onus is shifted to the defendant to establish affirmatively that the plaintiff has been out of possession for more than 12 years—*Sheikh Barkat* v. *Basant*, 21 C.W.N. 175, 39 I.C. 356. The actual presumption of correctness which the Record of Rights carries is merely that the plaintiff was in possession at the time the record was made. The general rule of evidence in favour of presuming the continuity of things shown to exist at a prior date cannot be availed of in suit for ejectment—*Ghoghar* v. *Jagarnath*, A.I.R. 1947 Pat. 475.

Is a suit falling under Article 142, the plaintiff has to prove possession and dispossession within 12 years. If he proves his possession 10 years ago, and that he is not in possession at the time of suit and that the defendant is, then it follows that the defendant has dispossessed him at some time known or unknown within 10 years. The suit is therefore not barred. It is not necessary for the plaintiff to prove the actual date of dispossession—*Dain* v. *Khanu*, 8 Lah. 655, A.I.R. 1928 Lah. 98, 29 P.L.R. 77; *Devram* v. *Asharam*, I.L.R. (1939) Kar. 793, A.I.R. 1940 Sind 49. If the plaintiff can prove that he was in possession within 12 years before suit, the burden lies on the defendants of proving a present title to the land in themselves, before they can succeed —*Sudama* v. *Kesho*, 102 P.R. 1879. When the plaintiff has proved that the ousting which has interfered with his possession and resulted in his dispossession has taken place within 12 years of the institution of the suit, it then lies upon the defendant to establish that he had exercised such exclusive possession as amounted to an ouster of the plaintiff from a date more than 12 years prior to the institution of the suit—*Ram Sewak* v. *Ram Sahai*, 1942 O.W.N. 281, 1942 A.L.W. 225.

In a suit for possession of certain land as having accreted to plaintiff's village by alluvion, it lies on the plaintiff to prove both title and possession within 12 years. If the plaintiff's title is proved, he may succeed either by proving that the land in suit had accreted by alluvion within the limitation period, or the plaintiff may prove that

although the land had accreted more than 12 years before suit, it had remained within the limitation period water or jungle land, in respect of which the presumption would arise that possession followed title—*Habibulla* v. *Lalta Prasad*, 34 All. 612 (614).

Where a vendee of immoveable property sues for possession, his vendor not having been in possession at the time of sale, it lies upon the plaintiff to show that his vendor was in possession at some period within twelve years prior to the date of the sale—*Deba* v. *Rohtagi*, 28 All. 479 (480); *Kashinath* v. *Shridhar*, 16 Bom. 343 (346). But see these cases commented on in Note 574 under Article 136.

A purchaser at a Court auction sale held in execution of a mortgage decree for possession of the property in the occupation of another alleged to be in possession with permission of the mortgagor must show that he is in possession within 12 years prior to the suit as the onus is on him to prove that. Mere proof of title is not enough to shift the burden on the defendant—*Official Receiver* v. *Govindaraju*, I.L.R. (1940) Mad. 953, (1940) 2 M.L.J. 190, A.I.R. 1940 Mad. 798 (F.B.); *St. Anthony's Church* v. *Krishnaveni*, A.I.R. 1955 Mad. 542. It is incumbent upon the plaintiff to prove that he has exercised acts of ownership by being in possession within 12 years of suit—*Chenchreyama* v. *Ademma*, (1949) 1 M.L.J. 428, A.I.R. 1949 Mad. 673. A declaratory decree pure and simple or even a decree for possession not effectively executed cannot satisfy the requirements of proof of possession under this Article. *Ibid.* See also, *Kishen* v. *Mohan*, A.I.R. 1951 Ajmer 1.

The quantum of evidence of possession which it will be necessary for the plaintiff to adduce will depend on the circumstances of each case. In some instances, very slight evidence may be sufficient to shift the burden of proof on the defendant. Thus, in dealing with the question of possession as between brothers and sisters in native families, regard must be had to the conditions of life under which such families live and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families, slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession—*Inayet Husen* v. *Ali Husen*, 20 All. 182 (185); *Puttathayamma* v. *Rathnarajiah*, I.L.R. (1955) Mys. 227, A.I.R. 1955 Mys. 33.

Where in a suit for possession, plaintiff pleads possession and dispossession, the suit is governed by Art. 142. Dispossession may be either actual in the sense of an existing actual possession being forcibly terminated by actual dispossession or it may be a legal constructive possession being terminated by a legal dispossession—*Beharilal* v. *Narain Das*, A.I.R. 1935 Lah. 475, 16 Lah. 442, 37 P.L.R. 743, 157 I.C. 686 (F.B.). A suit for possession, the claim being based on dispossession, is governed by Art. 142, and the burden is on the plaintiff to establish his possession within limitation—*Ram Shankar* v. *Sheo Dutt*, A.I.R. 1935 Oudh 88, 1935 O.W.N. 8, 153 I.C. 371; *Mantajuddin* v. *Alam*, 73 C.L.J. 47; *Gauri* v. *Jadunath*, 18 Luck. 624, 1942 O.W.N. 753; *Rosmat* v. *Bigaru*, A.I.R. 1950 Assam 57; *Guru Charan* v. *Mafijuddin*, 65 C.L.J. 603. A.I.R. 1938 Cal. 150; *Haider* v. *Subhan*, A.I.R. 1940 All. 428; *Nagina* v. *Municipal Committee*, 42 P.L.R. 531; *Naru* v. *Krishna*, 40 Bom.L.R. 166, A.I.R. 1938 Bom. 210; *Ram* v. *Hari*, 52 Bom.L.R. 358, A.I.R. 1950 Bom. 346. Thus where the plaintiff states that he was in possession of the share in dispute and lost it when his father's name was struck off the mutation register, the onus is on the plaintiff to prove possession within 12 years of suit—*Jwala* v. *Lakshmi*, 1941 O.W.N. 615, A.I.R. 1941 Oudh 415. So also, where in a suit for possession, the plaintiff alleges dispossession of his predecessor-in-interest by the defendant, the onus is on the plaintiff to prove his possession within 12 years from the date of the alleged dispossession—*Fanindra* v. *Satya*, A.I.R. 1941 Cal. 632.

In cases where this Article applies, the burden of proving dispossession or discontinuance of possession can be discharged either by the facts admitted in the plaint

of pleadings, or if not admitted there, then by the facts actually found—*Meherban* v. *Yusuf*, I.L.R. (1941) Nag. 655, 1938 N.L.J. 418, A.I.R. 1939 Nag. 7. A plaintiff cannot, by cleverly drafting the plaint, evade the burden of proof which this Article casts upon a person who is suing for possession on the ground of dispossession—*Sangam* v. *Ganga*, I.L.R. (1946) All. 178, A.I.R. 1946 All. 389. Where the plaintiff bases his suit on the ground of dispossession on a certain date but fails to prove dispossession on the date alleged, the requirements of law will be satisfied if it is found that the plaintiff was in possession till some time within 12 years of the suit. It would be more a question of rule of pleadings and fairness of the trial rather than a question of law to determine whether the plaintiff should be permitted to take a stand on an alternative provided by law but not pleaded by him—*Harnandan* v. *Ramanandi*, A.I.R. 1948 Pat. 391.

Where there is a clear assertion of title and there is nowhere any assertion of possession by the plaintiffs or of their dispossession by the defendants, Art. 142 cannot be applied—*Mulla Ahmad* v. *Fazal Ahmad*, A.I.R. 1935 Pesh. 133, 158 I.C. 968.

601. Presumption:—The law presumes in favour of continuity of possession —*Nathoo Lal* v. *Durga Prasad*, 1954 S.C.J. 557, A.I.R. 1954 S.C. 355. See also *Manohar* v. *Charu*, 1955 S.C.J. 114, A.I.R. 1955 S.C. 228. An owner of property starts with the presumption in his favour that he is in possession of his property. But where the plaintiff admits that he has been dispossessed by the defendant, or at any rate it is found in the case that he has been dispossessed, and is not in possession when he brings the suit, then he cannot start with the presumption in his favour that possession of the property was with him. He would have no right of action unless he claims within the period of limitation. He has to bring his suit within 12 years from the date on which he was dispossessed. The burden of showing that this date was within 12 years before suit is on the plaintiff, and he cannot claim to have discharged this burden without any proof and evidence, merely on the ground of any presumption arising from the fact of his ownership—*Bindhyachal* v. *Ram Gharib*, 1934 A.L.J. 973 (F.B.), 152 I.C. 1, A.I.R. 1934 All. 993 (997). In a case falling under Article 142, the plaintiff will have to prove not so much that he had a *title* to the land, as that he was in *possession* within 12 years before the suit. "Where in an ejectment suit the plaintiff alleged dispossession by defendant eleven years before suit, the onus of proving plaintiff's possession prior to his dispossession lies upon him (plaintiff), and in this question of evidence, the initial fact of the plaintiff's title comes to his aid with greater or less force according to the circumstances established in evidences"—*Rani Hemanta Kumari* v. *Jagadindra*, 10 C.W.N. 630 (P.C.), 8 Bom.L.R. 400, 16 M.L.J. 272, 3 A.L.J. 363. It is not sufficient to enable the plaintiff to succeed in the suit merely to prove that at some date antecedent to a period of 12 years prior to the institution of the suit he had acquired some paper title to the land; he must also prove that he was in *possession* within 12 years prior to the suit. This possession will be presumed from title under certain circumstances. Thus, where the evidence of possession on behalf of the plaintiff and on behalf of the defendant as to the former's possession within 12 years before suit, is strong and evenly balanced, the presumption that possession goes with title will prevail—*Raja Shiva* v. *Hira Singh*, 6 P.L.T. 478 (525) (F.B.), 62 I.C. 1; *Runjeet Ram* v. *Gobindhan*, 20 W.R. 25 (P.C.); *Fakir* v. *Munshi Ramcharan*, 35 I.C. 554, 1 P.L.J. 146 (148); *Dhurm Singh* v. *Hur Persad*, 12 Cal. 38 (40); *Nawab Bahadur* v. *Gopi Nath*, 13 C.L.J. 625, 6 I.C. 392 (397); *Thakur Singh* v. *Bhogeraj*, 27 Cal. 25 (27); *Kasturi* v. *Rajkumar*, 8 C.W.N. 876. The law presumes that possession follows title and does not favour forcible entry into possession by trespassers—*Tukaram* v. *Tukaram*, A.I.R. 1927 Nag. 37, 97 I.C. 1006. But if it is found that the

evidence produced by both the plaintiff and the defendant as to possession is unworthy of credit, the plaintiff's suit must fail, in as much as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given—*Raja Shiva Prasad* v. *Hira Singh*, 6 P.L.J. 478 (491) (F.B.), 62 I.C. 1, (overruling *Bhikhad Bhunjan* v. *Upendra Nath*, 4 P.L.T. 463); *Fakira* v. *Munshi Ramcharan*, 1 P.L.J. 146 (148), 35 I.C. 554; *Thakur Singh* v. *Bhogeraj*, 27 Cal. 25 (27); *Lala Singh* v. *Latif Hossen*, 21 C.L.J. 480, 28 I.C. 477; *Kasturi Singh* v. *Rajkumar*, 8 C.W.N. 876. In *Sheokali* v. *Jaleba*, 1947 A.L.J. 302, A.I.R. 1948 All. 56, it has been held that in the absence of any definite evidence of possession of either party it must be presumed that possession follows title. The presumption arises when there is absence of evidence of effective possession or conflicting evidence as to possession before the date of possession. The same view has been taken in *Ayissa* v. *Kunhaikalanthan*, (1948) 1 M.L.J. 194, A.I.R. 1948 Mad. 420. Where the evidence adduced by both parties although unsatisfactory, is not altogether valueless, the Cour tis entitled to take into consideration the presumption arising from title—*Reuf* v. *Bodhi*, A.I.R. 1950 Pat. 484. The right principles of law were applied in *Reuf* v. *Bodhi*, supra—*Jaldhari* v. *Rajendra*, A.I.R. 1958 Pat. 386. If the plaintiff's title is established to a land which emerged in 1905 after diluvion, and it is found that he was not dispossessed before 1908, he must be deemed to have been in possession from 1905 up to 1908 and thereafter till he was actually dispossessed, and a suit brought in 1917 was not barred—*Satish Chandra* v. *Birendra*, 33 C.W.N. 1016 (1023) (P.C.), 56 I.A. 305, A.I.R. 1929 P.C, 225, 118 I.C. 259. A property cannot remain without an owner and without being in possession of somebody. But if no one is in actual possession it must be deemed to be in the constructive possession of its owner, and it is in such a case that the legal presumption, that possession follows title, applies—*Aziz* v. *Maqbul*, I.L.R. (1939) All. 454, 1939 A.L.J. 94, A.I.R. 1939 All. 257.

Where the land is of such a character (*e.g.*, vacant site, waste or jungle land or land under water) that proof of any act of possession in the usual modes is substantially impracticable, it will be presumed that possession follows title and plaintiff may therefore give proof of title only; and the onus will be shifted upon the defendant to prove that he acquired the ownership by adverse possession—*Raja Shiva Prasad* v. *Hira Singh*, 6 P.L.J. 478 (525) (F.B.), 62 I.C. 1; *Rakhal Chandra* v. *Durgadas*, 26 C.W.N. 724, A.I.R. 1922 Cal. 557; *Srinivasachariar* v. *Raghava*, 46 M.L.J. 560, A.I.R. 1924 Mad. 676, 79 I.C. 1011; *Ramanathan* v. *Lakshmanan*, 54 Mad. 622, 61 M.L.J. 224, 133 I.C. 9, A.I.R. 1931 Mad. 644; *Mahommad Saheb* v. *Tilokchand*, 46 Bom. 920 (924), A.I.R. 1922 Bom. 243, 66 I.C. 764, 24 Bom.L.R. 373; *Midnapore Zamindary Co.* v. *Panday*, 2 P.L.J. 506 (509), 41 I.C. 114; *Mahomed Ali* v. *Khaja Abdul Gunny*, 9 Cal. 744 (751) (F.B.); *Ganapati* v. *Raghunath*, 33 Bom. 712 (717); *Habibulla* v. *Lalta Parsad*, 34 All. 612 (614); *Sadik Husain* v. *Etizad*, 13 O.L.J. 798, 101 I.C. 714, A.I.R. 1927 Oudh 209; *Badri* v. *Raghunandan*, A.I.R. 1948 Pat. 408; *Janaki* v. *Chacki*, A.I.R. 1951 Tra.-Co. 246. In such a case the defendant cannot succeed on account of want of proof of possession on the part of the plaintiff, unless the defendant can displace the presumption of possession following title, by proof of effective acts of possession by himself—*Ramanathan* v. *Lakshmanan*, supra. If the property in dispute has, up to a short time before suit, remained waste and unoccupied, it is not necessary for the plaintiff to prove acts of possession within 12 years of suit; he has only to prove *prima facie* title not extinguished by limitation; and the possession will be presumed to follow title. The *onus* will be shifted on to the defendant to prove when his possession became adverse—*Ramzam Ali* v. *Basarat Ali*, 105 P.R. 1901; *Muhammad Yar* v. *Ghulam*, 49 P.R. 1884; *Narain Devi* v. *Bilta*, 204 P.L.R. 1914, 25 I.C. 82. Where the plaintiff purchased a shop and two open sites adjacent to it, and sued to recover

possession of the open sites alleging that he had been unlawfully dispossessed by the defendants, and the plaintiff's title to the open sites was proved, *held* that in view of the position of the open sites with reference to the shop (of which the plaintiff was in possession) the presumption was that possession of the open sites followed title, even though the evidence of possession in regard to the open sites was equally unworthy of credit on both sides—*Mahammad Sahab* v. *Tilokchand*, 46 Bom. 920 (925), 24 Bom.L.R. 373, A.I.R. 1922 Bom. 243, 66 I.C. 764. So also, where a strip of land in question is a piece of waste land lying on the boundary of one's property, possession of such land must be presumed to be with the person who proves title to the property—*Manzur* v. *Pateshwari*, 1938 O.W.N. 744, A.I.R. 1938 Oudh 214.

Where property in dispute consists of lands actually cultivated or of house capable of actual occupation and the plaintiff sues for possession of such property on the allegation that he was dispossessed by the defendant, Art. 142 is undoubtedly applicable and the plaintiff must show his dispossession occurred within twelve years before the institution of the suit. In such a case it may be necessary for him to adduce evidence showing when his own possession ceased and that of defendant or of any other trespasser began. But where the property is of such a nature that it is not capable of actual physical occupation or possession or where the property, though capable of physical possession, is in the occupation of one through whom the plaintiff can be in constructive possession, different considerations obviously apply. A man may be in possession of his property without actually occupying it. In considering therefore, the question whether the plaintiff was dispossessed within 12 years or whether his possession discontinued within 12 years the nature of the property and the position of those actually occupying it, if it is capable of physical occupation, must be taken into consideration. It has been held in *Janaki* v. *Chacki*, A.I.R. 1951 Tra.-Co. 246 that the maxim "possession follows title" may be applied also in the case of property which admits of actual exclusive possession where it is proved that the person having the title was once in actual possession; the application of the principle is based on the presumption of continuance of that possession.

Even where the property is capable of actual possession, and one co-sharer alone is in actual occupation of it, the other co-sharers must be considered to be in constructive possession unless the co-sharer in actual possession ousts his co-sharers in denial of their rights—*Baboo Singh* v. *Ram Manohar*, A.I.R. 1935 All. 774, 1935 A.L.J. 828, 155 I.C. 824; *Masumali* v. *Custodian, E. P. Rajkot*, A.I.R. 1951 Sau. 73; *Thoppi* v. *Para Ram*, A.I.R. 1951 J. & K. 27. But where the plaintiff, a co-sharer comes to the Court on the definite allegation of possession and dispossession from the separate portion, the presumption of contructive possession does not arise and the plaintiff will have to prove actual dispossession even though the partition pleaded by the defendant is not proved—*Karim* v. *Shadhi*, I.L.R. (1938) Lah. 558, 40 P.L.R. 997, A.I.R. 1938 Lah. 241; *Sher* v. *Bhuman*, 42 P.L.R. 497.

Where land is unenclosed, acts of ownership in *one part* may be persumed to be of ownership over the *whole*, unless there are circumstances rebutting that presumption, It is not necessary that a person should use any definite portion or an unenclosed land in assertion of his ownership—*Vithaldas* v. *Secretary of State*, 26 Bom. 410 (417). So also, in the case of low lying land cultivation of major portion will be treated as enjoyment of possession of the whole. It is not necessary for the plaintiff to prove specific acts of possession of every square yard of the land—*Chandra* v. *Butu*, 17 Pat. 210, 1938 P.W.N. 194, A.I.R. 1938 Pat. 222.

Where the land in dispute is uninhabited or uncultivated, and no acts of ownership or possession by any person have been exercised over it, it is often necessary for the purpose of deciding the question of limitation to rely upon slight evidence of possession

and sometimes possession of the adjoining land, coupled with evidence of title, such as grants or leases; and the Courts are justified in presuming under such circumstances that the party who has the title has also the possession—*Mohima Chunder* v. *Hurro Lal*, 3 Cal. 768 (769, 770).

In respect of jungle or hilly land, possession must be presumed to be with the person having title. This presumption however, would cease to be operative after the land is cleared of jungle and brought under cultivation—*Mirza Shamsher* v. *Munshi Kunj Behari*, 12 C.W.N. 273.

But though in a suit for possession of a waste land, the presumption is that possession follows title, and the plaintiff can give evidence of title only, yet where the plaintiff comes into Court, alleging that he was in effective possession of the waste land until one year prior to suit, and the Court finds against the allegation of effective possession, and dismisses the suit, the plaintiff cannot afterwards fall back upon any presumption of possession following title; because the special case originally set up by him is inconsistent with any such presumption—*Sevugan* v. *Kannappa*, 60 M.L.J. 430, 130 I.C. 845, A.I.R. 1931 Mad. 282.

601A. Diluviated lands:—Where lands are by natural causes placed wholly out of the reach of their owner, as in the case of *diluvion* by a river, if the plaintiff (who is the true owner) shows his possessios down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged—*Mazhar* v. *Bihari*, 28 All. 760 (762); *Mahomed Ali* v. *Khaja Abdul Gunny*, 9 Cal. 714 (751) (F.B.); *Gunga* v. *Ashutosh*, 23 Cal. 863 (866); *Kally Charan* v. *Secretary of State*, 6 Cal. 725; *Mono Mohan* v. *Mothura Mohan*, 7 Cal. 225; *Basanta Kumar* v. *Secretary of State*, 44 Cal. 858 (P.C.). Mere sub-mergence of the land would not put an end to the possession of the owner—*Rampati* v. *Ramani*, 34 C.W.N. 772 (773) (P.C.). Therefore, in a suit for possession of alluvial lands which were diluviated more than 12 years before suit and were taken possession of by the defendant after reformation, if the plaintiff can prove possession till diluviation, the burden of proving reformation more than 12 years before suit and adverse possession during that period is shifted to the defendant—*Mono Mohan* v. *Mothura Mohan*, 7 Cal. 225; *Radha Gobinda* v. *Inglis*, 7 C.L.R. 364 (P.C.); *Ganga Kumar* v. *Ashutosh*, 23 Cal. 863 (866). If the reformation had taken place more than 12 years before suit, the plaintiffs are required to prove that they were in possession within 12 years of the date of the suit—*Birendra* v. *Satis Chandra*, 44 C.L.J. 121, A.I.R. 1926 Cal. 1166, 97 I.C. 1003. Where the plaintiff sues to recover possession of lands as reformation *in situ* alleging that he has been dispossessed from them, the burden lies on him to prove that he was in possession within 12 years of the suit. He can discharge this burden by proving that he was in constructive possession within that period. He would be in constructive possession, if he was the rightful owner and would be in time if he could prove either that the lands had appeared above water within 12 years of the suit; or if they had appeared earlier that they had become first fit for user within that period. The fact that he had no physical possession at the time of the last submergence is not material for the purpose of enabling him to call to his aid the principle of constructive possession, provided that his title had not been extinguished by adverse possession before the last submergence—*Gadadhar* v. *Sarat*, 44 C.W.N. 935, 72 C.L.J. 320, A.I.R. 1941 Cal. 193.

Where the plaintiff had an undoubted title to a certain land, but the defendant had no such title and could prove adverse possession for only 10 years before suit, *the land being under water* during the first two years of the 12 years immediately preceding the suit, and no act of possession being proved by either party during the two years of the submersion of the land, *held* that there would be a presumption that

possession followed title and that plaintiff's possession continued over the two years in question, *i.e.*, the possession continued to a time within 12 years prior to the suit, which was therefore, not barred—*Rajkumar* v. *Govind*, 19 Cal. 660 (674) (P.C.). If the plaintiff proves that after the land became submerged he exercised acts of ownership as by letting out the *jalkar* or right of fishing to tenants, *held* that this was a very strong evidence that the land covered by water over which the right of fishing was enjoyed belonged to the plaintiff. Evidence of the ownership and enjoyment of the *jalkar*, in a small piece of water as in this case (and not in a case of a *jalkar* in a deep and navigable river) is evidence of title to the land covered by the water. In this case the plaintiff has proved his ownership by letting out the *jalkar* to tenants, and this was *prima facie* evidence of possession also—*Mohini Mohan* v. *Krishna Kishore*, 9 Cal. 802 (804, 807). If it was proved that the plaintiff exercised acts of ownership over the land when covered by water, and that when the land become dry it remained waste and did not become fit for cultivation until within six or seven years before suit, *held* that the Court might and ought to presume that the plaintiff's possession continued after the land became dry, until the contrary was shown—*Mohini Mohan* v. *Krishno Kishore*, 9 Cal. 802 (807). So, the rightful owner is presumed to be in possession till a *char* becomes fit for enjoyment and the mere fact that he does not take possession as soon as it becomes fit and another person occupies it and begins to till does not show that the rightful owner is dispossessed. The denfendant has got to prove adverse possession for 12 years or over before suit—*Abdul* v. *Habibulla*, 69 C.L.J. 28, A.I.R. 1939 Cal. 354. Where a suit is brought by the owner for recovery of possession of lands diluviated and reformed *in situ*, more than 12 years after the alleged reformation, it lies on the plaintiff to show that his possession continued after reformation to a period within 12 years before the institution of the suit. If he has not admittedly had any actual possession since the lands became submerged, the plaintiff, in order to prove possession may rely on the presumption that possession of the lawful owner continues as long as the land is incapable of actual possession; but if he relies upon this presumption, he must prove that the land was incapable of actual possession within 12 years before suit—*Suresh Chandra* v. *Shiti Kanta*, 51 Cal. 669, 28 C.W.N. 637, 78 I.C. 679, A.I.R. 1924 Cal. 855.

If a *trespasser* takes possession of the land, and before he has acquired a title under the statute the land becomes submerged under water, the trespasser's possession does not continue during the period the land is under water. The dispossession by *vis major* (viz., by flood) has the same effect as voluntary abandonment, so that the trespasser will be deemed to have abandoned possession, and the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. The true owner's possession remains and continues during the period of submergence and thereafter, and time runs against him only when another person on the reappearance and reformation of the land takes actual possession —*Secretary of State* v. *Krishnamoni*, 29 Cal. 518 (535) (P.C.), (overruling the opinion of Garth C. J. on this point in *Kally Charan* v. *Secretary of State*, 6 Cal. 725); *Basanta Kumar* v. *Secretary of State*, 44 Cal. 858 (872) (P.C.); *Meherban* v. *Yusuf*, 1938 N.L.J. 418, I.L.R. (1941) Nag. 655, A.I.R. 1939 Nag. 7; *Gadadhar* v. *Sarat*, 44 C.W.N. 935, 72 C.L.J. 320, A.I.R. 1941 Cal. 193. This is in accordance with the rule laid down by Lord Macnaghten in *Agency Co.* v. *Short*, (1888) L.R. 13 A.C. 793: "If a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place." As regards the legal effect of the flooding and submergence, it was held by their Lordships of the Judicial Committee in 29 Cal. 518 that it would be contrary to principle and authority to imply the constructive possession of the

trespasser whilst the lands were submerged so as to enable the wrongdoer to obtain a title by adverse possession. The same principle was again enunciated in 44 I.A. 104. Their Lordships observed. "It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation. No rational distinction can be drawn between that case (referring to 29 I.A. 104) and the present one, where the reflooding was seasonal and occurred for several months in each year"—*Pratab Bahadur* v. *Jagatjit Singh*, A.I.R. 1936 Oudh 398.

Therefore, where a land belonging to the plaintiff became submerged under water again and again, and was held by the defendant during the periods of its reappearance, *held* that during the time the land was under water, it must be deemed to have been in the possession of the plaintiff (the rightful owner). During the months the land was not under water, the defendant was actually in occupation of it, but as soon as it was again submerged, the plaintiff's possession was revived. Consequently there was every year a break in the continuity of the defendant's possession, which enured for the benefit of the plaintiff, and which prevented the defendant acquiring title by adverse possession—*Ram Nain* v. *Deoki Misir*, 20 A.L.J. 756, A.I.R. 1923 All. 75, 69 I.C. 912.

602. Commencement of limitation:—In cases under this Article the period of 12 years runs from the date of dispossession or discontinuance of possession whereas in cases under Art. 144, it runs from the date when the possession of the defendant becomes adverse to the plaintiff—*Gauri* v. *Jodu*, 18 Luck. 624, 1942 O.W.N. 753.

In case of dispossession, limitation runs from the date of dispossession; if the plaintiff subsequently obtains possession under a decree obtained in the first Court and is again dispossessed by the decree being reversed on appeal, he does not get a fresh starting point from the date of dispossession upon reversal of the decree; the original dispossession in this case is the starting point of limitation—*Narayanan* v. *Kannamma*, 28 Mad. 338 (342). But in some Calcutta cases it has been held that if the rightful owner is dispossessed but succeeds in ousting the trespasser without recourse to law and continues in possession, and is subsequently dispossessed under a decree obtained by the latter under section 9 of the Specific Relief Act, the period of limitation for a suit by the rightful owner to recover possession will run from the date of dispossession under the decree and not from the date of the original dispossession—*Protap Chandra* v. *Durga Charan*, 9 C.W.N. 1061; *Mamtazuddin* v. *Barkatulla*, 2 C.L.J. 1; *Waziruddin* v. *Deoki*, 6 C.L.J. 472; *Jonab Ali* v. *Surya Kanta*, 33 Cal. 821. Similarly, the plaintiff was ousted from his lands by the defendants in 1905, and brought a suit under sec. 9 of the Specific Relief Act which was decreed in 1906, and in execution of that decree the plaintiff got possession in 1907. The defendants then applied for review of the judgment in the Specific Relief Act case and ultimately the plaintiff's suit was dismissed in 1908 After this date the defendants again took possession of the lands by dispossessing the plaintiff, and the present suit was instituted in 1919 for recovery of the lands. *Held* that time ran not from the date of the plaintiff's original dispossession in 1905, but from the date of his subsequent dispossession in 1908. There can be no constructive possession of a wrong-doer during the time that he is actually not in possession, and the possession of the true owner, no matter how that possession is obtained, must be considered as rightful possession in law, and the period during which the true owner is in possession will enure to his benefit and not to that of his trespasser. Consequently, where the plaintiff being the rightful owner is kept out of possession for less than 12 years, and then succeeds in regaining possession (no matter

whether in execution of a decree in a possessory suit or in any other way), and then after a time is again dispossessed (no matter whether on reversal of the decree or in any other way) and thereafter institutes a suit for recovery of possession, he can base his suit treating the subsequent dispossession as his cause of action under this Article; the period will not run from the date of the earlier dispossession—*Girish Chandra* v. *Baikuntha*, 81 I.C. 279, A.I.R. 1925 Cal. 270. Where there is an auction sale of an undivided share, in a suit by the co-owners, who are not judgment debtors, against the auction purchaser for possession, time will start to run only from the date when possession was delivered to the auction purchaser and not from the date of sale—*Krishna* v. *Baijnath*, 1943 A.L.W. 93. The starting point of limitation in a suit for ejectment on title of a person in possession of land claimed by him, having been alloted to him on partition and alleging the defendant to be a co-sharer of the joint land when undivided, it having been decided in a previous suit between the parties that the defendant was not the tenant of the plaintiff at any time, is not the date of the earlier suit but when the defendant denied the title of the plaintiff—*Pardip* v. *Ramsundar*, A.I.R. 1949 Pat. 510, 4 D.L.R. (Pat.) 154.

603. Extinguishment of title:—When the plaintiff sues for possession and alleges dispossession, but fails to shew that he has brought his suit within 12 years of such possession, there is an extinguishment of his title under section 28. Consequently, no declaration of title in his favour can be made—*Bishumbhar* v. *Nadiar Chand*, 18 C.L.J. 601, 22 I.C. 64 (65). In view of this Article read with sec. 28, the plaintiff can have no right of suit after the expiry of 12 years from the date of dispossession as his right is extinguished under sec. 28—*Kuseshwar* v. *Uma*, 22 Pat.L.T. 1001, A.I.R. 1942 Pat. 188. Thus where a decree-holder purchasing the share of the judgment debtor's property in execution fails and neglects to obtain actual possession of it within 12 years, he not only loses his remedy, but his right is also extinguished —*Ganga* v. *Ansari*, 1947 A.L.J. 202, A.I.R. 1947 All. 296. The possession necessary to found a title by adverse possession under sec. 28 is not different in character from the possession required to prevent limitation from running under this Article or Art. 144—*Hafiz* v. *Swarup*, 52 C.W.N. 382, 50 Bom.L.R 632, (1948) 2 M.L.J. 70, A.I.R. 1948 P.C. 76, 1948 A.L.J. 221, 29 Pat.L.T. 23 (P.C.).

604. Tacking of adverse possession:—Both under Articles 142 and 144 the defendant may tack the period of his adverse possession to the period of such possession held by a previous adverse possessor (provided the periods are continuous) —*Bibhuti* v. *Girish*, A I.R. 1950 Pat. 191. Under Article 144, the succeeding adverse possessor must be one who *claims through* the preceding possessor, and must *not be an independent* trespasser (see Note 622 under Article 144, under heading "Tacking of adverse possession"); but there is a difference of opinion among the High Courts (as well as among the commentators) as to whether the same condition is required under the present Article. The view of the Madras High Court is, that under Article 142, adverse possession for over 12 years by several persons in possession, *even though they do not claim from one another*, bars the true owner—*Ramayya* v. *Kotamma*, 45 Mad 370 (375), 42 M.L.J. 319, 67 I.C. 246, A.I.R. 1922 Mad. 59; *Chenchuramma* v. *Ademma*, (1949) 1 M.L.J. 428, A I.R. 1949 Mad. 673. The same view has been taken in *Ahmad* v. *Hata*, I.L.R. (1939) Lah. 399, 41 P.L.R. 538, A.I.R. 1939 Lah. 217. This view finds its support from the following observations of Kay L. J. in *Wills* v. *Earl Howe*, [1893] 2 Ch. 545: "It was suggested by the Counsel in reply that..... if a series of occupiers not claiming under one another kept out the real owner for 100 years, time would only run against him from the moment when the last of such occupiers entered into possession. I am of opinion that this is not the law. A con-

tinuous adverse possession for the statutory period, though by a succession of persons *not claiming under one another* does in my opinion, bar the true owner." The same opinion has been expressed by Dart in his *Vendors and Purchasers* (7th Edn.) Vol. I, page 474: "In order that the title of the true owner may be barred by the adverse possession of a trespasser, or a series of trespassers, the possession by them must be continuous and so long as it is continuous, it is immaterial whether they claim through one another or *independently*." A similar view has been taken in the English case of *Doe* v. *Barnard*, (1849) 13 Q.B. 945, 18 L.J.Q.B. 306. In this case the owner of a house was dispossessed and the dispossessor remained in possession till his death, for less than 12 years; thereupon his widow who had been living with him in the same house took possession and remained in possession for less than 12 years, but the aggregate period of possession of the husband and the widow was more than 12 years. It was held that the true owner was barred by the successive possession of the husband and widow for more than 12 years, although the widow did not claim from or through her husband as heiress or legatee or otherwise. So also, U. N. Mitra in his Law of Limitation, 5th Edn, p. 1160 observes: "The question of limitation under Article 142 does not depend on continuous possession for 12 years by the defendant, but on the fact that more than 12 years have elapsed since the *plaintiff was dispossessed* or discontinued the possession. The last of several successive but *independent* trespassers may, therefore, defeat the plaintiff's suit, although he himself has been in possession for only a few days before the suit." This view of Mr. Mitra is based on the decision of *Wilis* v. *Earl Howe* (cited supra). On the other hand, Mr. Rustomji is of opinion that *no distinction* should be made between Article 142 and 144 and that the same rule is applicable to both articles. "Even under Article 142 possession of independent (though successive) trespassers cannot be tacked, in as much as immediately upon the cessation of possession by one trespasser, the rightful owner is (in point of law) restored to possession, and the entry of another trespasser is tantamount in law of a *fresh disposition* of the owner, and the latter has accordingly 12 years under Article 142 reckoned from such constructive fresh dispossession"—Rustomji's Limitation, 3rd Edn., p. 646; and the learned author has supported his statement by the decision in *Solling* v. *Broughton*, [1893] A.C. 556. Mr. Starling is also of the same opinion, because he observes that "the case of *Willis* v. *Howe* is based upon the construction of the English Limitation Act (3 & 4 Wm. IV, C. 27), and it is not quite clear whether the Legislature in India intended to reproduce in Articles 142 and 144 the law existing in England. The only question for the Courts in India to consider is whether one trespasser dispossessing another can be said to derive his right to sue or the liability to be sued from that trespasser (according to the definition of plaintiff and defendant)"—Starling, 5th Edn., p. 410. The Calcutta High Court is also of opinion that even under Article 142, one trespasser cannot add to his own possession the previous independent possession of another trespasser. When the possession passes from the first to the second trespasser there is a constructive restoration, even if a momentary restoration, of the true owner's title to possession—*Janoki Nath* v. *Baikuntha Nath*, 36 C.L.J. 140, A.I.R. 1922 Cal. 176. The same view has been taken by the Rangoon High Court in *Ma Mi* v. *Hadji Mahomed*, 1 Rang. 176, 75 I.C. 31, A I.R. 1923 Rang. 261.

If the period of possession by successive trespassers is not *continuous*, the running of time in favour of the trespassers is stopped, as soon as there is an interval. As Dart observes: "If a period of time should elapse, however short, after the abandonment of one trespasser who has not been in possession for the full period, and before the entry of another, the title of the true owner is as from the time of such abandonment, restored to him without any entry or act done on his part, for the statute does not apply to a case of want of actual possession by the true owner, but only to cases where the owner is out of possession and another is in possession for the prescribed

time"—*Vendors and Purchasers*, p. 474. See also the observation of Lord Macnaghten in *Agency Co.* v. *Short*, cited in Note 601A, *ante*.

605. Suits under this Article:—Where a non-occupancy raiyat has been dispossessed of his holding either by a trespasser or by the landlord otherwise than in execution of a decree, then if his tenancy has not yet been determined, he has a *title* in him *viz.*, the title of a tenant, and a suit by the raiyat to recover possession by establishment of his *title* is not a suit under section 9 of the Specific Relief Act; consequently Article 3 cannot apply but either Article 120 or 142—*Tamizuddin* v. *Ashrub Ali*, 31 Cal. 647 (651) F.B. (overruling *Bhagabati* v. *Luton Mandal*, 7 C.W.N. 218). A suit by a minor on attaining majority to set aside a mortgage by conditional sale made by a *de facto* guardian, and for possession, is governed by this Article, and not by Art. 91, because the setting aside of the deed of conditional sale is subservient to the claim for possession, and the suit must be treated as one for recovery of immoveable property—*Ramawsar* v. *Raghubar*, 5 All. 490 (491); *Palaniappa* v. *Nallappa*, (1951) 1 M.L.J. 265, A.I.R. 1951 Mad. 817. So also a suit by a ward on attaining majority, for possession of property transferred by his guardian, a pardanashin lady, under a transfer void *ab initio*, is governed by this Article—*Hirdey* v. *Babu*, 1940 O.W.N. 1318, A.I.R. 1941 Oudh 172. A suit to recover property by setting aside a void deed of transfer, which does not require to be set aside or cancelled, is governed by this Article, and not by Art. 91—*Banku Behari* v. *Kristo Gobindo*, 30 Cal. 433 (438). A contrary view has been taken in *Lok Nath* v. *Rohlu Ram*, A.I.R. 1951 J. & K. 25 where it is held that such a suit is governed by Art. 44 and not by this Article.

This Article is not confined to suits by plaintiffs who claim the property *wholly*, but is applicable to a suit brought by a plaintiff who is a *co-sharer* or *co-owner* with the defendant—*Bindhyachal* v. *Ram Gharib*, 1934 A.L.J. 973 (F.B.), 152 I.C. 1, A.I.R. 1934 All. 993 (999). Where a plaintiff, who was a co-sharer with some of the defendants who transferred a part of the property to third parties, admits in the plaint that he was dispossessed by the transferees sometime prior to the institution of the suit, this Article applies and not Art. 144—*Bindhyachal* v. *Ram Gharib*, supra. So also, where there is an auction sale of an undivided share, a suit by the other co-sharers against the auction purchaser for possession is governed by this Article, whether the suit is based on title or on possessory title—*Krishna* v. *Baijnath*, 1943 A.L.W. 93. This Article applies to a suit for ejectment on title, of a person in possession of land claimed by the plaintiff as his, having been allotted to him on partition and alleging the defendant to be a co-sharer of the joint land when undivided—*Pardip* v. *Ramsundar*, A.I.R. 1949 Pat. 510, 4 D.L.R. (Pat.) 154.

A suit by a tenant, a widow for recovery of possession of land against her relation, who, while managing the land on her behalf, got the land mutated in his name fraudulently and then repudiated her title, is governed by this Article—*Krishna* v. *Bhuban*, A.I.R. 1950 Assam 71.

A suit by the landlord against the purchaser of a permanent tenure from a tenant, who has forfeited his tenancy by breach of a covenant in the lease whereby the landlord was entitled to re-enter in case the lessee transferred his interest by sale, gift or otherwise is governed by this Article and not by Art. 1 Sch. III of the Bengal Tenancy Act, because the tenancy being forfeited, the purchaser in this case cannot be called a 'tenant' under sec. 155 of that Act but is merely a trespasser—*Dwarika* v. *Mathura*, 21 C.W.N. 117, 34 I.C. 833 (837). Where a Municipality pulled down a structure erected by the plaintiff on his own ground, which the Municipality claimed as part of the public road, a suit by the plaintiff to recover possession of the ground is governed by this Article and not by Article 39 (which refers only to suits for da-

mages for trespass, and not to suits to recover possession from a trespasser) and must be brought within 12 years from the time the structure was pulled down—*Jaharmal* v. *Municipality of Ahmednagar*, 6 Bom. 580 (582). Where the plaintiffs bring a suit to eject the defendants from a house on the ground that the latter have been holding the house as the tenants of the plaintiffs, and have denied the title of the plaintiffs as landlords, and it is found that the defendants are not the tenants of the plaintiffs, *held* that the suit falls under Art. 142 and not under Art. 144—*Gur Sahai* v. *Chheddi*, 27 O.C. 130, A.I.R. 1925 Oudh 42, 1 O.W.N. 38, 89 I.C. 964; *Sangam* v. *Ganga*, I.L.R. (1946) All. 178, A.I.R. 1946 All. 389; even if the property belongs to a wakf—*Alam* v. *Karupannaswami*, (1938) 1 M.L.J. 113, A.I.R. 1938 Mad. 415. A suit to eject an usufructuary mortgagee and for possession by the landlord is governed either by this Article or under Art. 144 as such a mortgagee is a trespasser in relation to the land even though an usufructuary mortgage is a 'transfer' within the meaning of sec. 203 (3), C. P. Land Revenue Act—*Kuwarji* v. *Bhurelal*, 1939 N.L.J. 136, A.I.R. 1939 Nag. 163. A suit by a purchaser of immoveable property, alleging that the defendant has dispossessed the plaintiff's vendor, is governed by this Article—*Kuppuswami* v. *Chockalinga*, 49 M.L.J. 788, A.I.R. 1926 Mad. 191, 91 I.C. 454; *Deba* v. *Rohtagi*, 28 All. 479; *Kashinath* v. *Sridhar*, 16 Bom. 343. But Art. 136 might have been applied. A purchaser at a Court auction sale held in execution of a mortgage decree is not outside the scope of this Article—*Official Receiver* v. *Govindaraju*, I.L.R. (1940) Mad. 953, (1940) 2 M.L.J. 190, A.I.R. 1940 Mad. 798 (F.B.). So also, a suit against the auction purchaser at a sale held in pursuance of mortgage decree for sale in a suit upon a simple mortgage, wherein the plaintiff in whom the equity of redemption entirely vested was not a party, is governed by this Article—*Batuk* v. *Rudra*, A.I.R. 1950 Pat. 206.

This Article applies to a suit by heirs of a Mahomedan widow against a trespasser for possession of property held by the widow in lieu of her dower as such right is heritable. The heirs are not bound to sue under sec. 9, Specific Relief Act—*Abdul* v. *Mushtaq*, I.L.R. (1944) All. 68, 1943 A.L.J. 590, A.I.R. 1943 All. 36.

This Article has no application to a case where the plaintiff has been excluded from a joint-family property. Art. 127 which is more specific, applies to the case—*Umesh* v. *Jagadis*, 1 C.W.N. 543 (544).

This Article does not apply where the suit is for possession based on *title*. See Note 610 under Art. 144.

This Article has no application to a suit by a mere licensee who does not assert any claim to any interest in immoveable property—*Arun* v. *Sudhir*, 75 C.L.J. 236, A.I.R. 1943 Cal. 143.

143. Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition.	Twelve years.	When the forfeiture is incurred or the condition is broken.	

606. Scope:—Art. 143 is in general terms. By its terms it applies to all suits for possession, when the plaintiff becomes entitled to possession by reason of any forfeiture or breach of condition. The Article is not confined to suits between landlord and tenant based on forfeiture—*Jadunath* v. *Kashiswar*, A.I.R. 1935 Cal. 779. This Article applies where the landlord is entitled, *according to the terms of the tenancy*, to take khas possession as soon as a breach of condition occurs: that is, where it is

expressly stipulated in the contract of tenancy that if the tenant breaks any condition of the tenancy, the landlord will be entitled to eject him. In other words, this Article applies only where the suit for possession is based on a breach of contract. If however there is no express stipulation in the contract of tenancy for ejectment and khas possession in case any breach of condition occurs, a suit by the landlord for ejectment of the tenant for breach of a condition is a suit based on *tort* and not on breach of contract and this Article cannot apply, because it cannot be said that the landlord has become "entitled to possession *by reason of* a breach of condition" within the meaning of this Article. In fact, in such a case the landlord will not be primarily entitled to eject the tenant; his primary relief will be an injunction calling upon the tenant to make good the breach of condition and to pay damages to the landlord; and the landlord can pray by way of *secondary* relief only that if the tenant fails to comply with the injunction, the Court may award khas possession to him. See *Sharoop* v. *Joggeswar*, 26 Cal. 564 (at p. 568) where the law is, however, very briefly stated. Thus, where the landlord is entitled to possession, not on breach of condition of the tenancy, but upon noncompliance by the defendant with the order of the Court as to filling up a tank and making compensation, the suit is framed in *tort*, and not on breach of any contract; and Art. 32, and not 143, applies—*Sharoop* v. *Joggeswar*, supra.

A suit for possession on the ground of forfeiture does not fall under this Article where the *relationship of landlord and tenant does* not exist and has never existed between the parties—*Abinash* v. *Narhari*, 57 Cal. 289, A.I.R. 1930 Cal. 165 (167); *Bhairab* v. *Kadam*, infra. Thus, in 1894 the plaintiff sued the defendant for arrears of rent; the defendant denied the relationship of landlord and tenant, and the suit was eventually dismissed in 1895 on the ground that the relationship had not been established. A suit for recovery of possession was then brought after 12 years. *Held* that Article 143 did not apply because the relationship of landlord and tenant did not exist between the plaintiff and the defendant, that Article 144 applied, and as the defendant had been in possession for more than 12 years before suit, and as the circumstances of his possession made it manifest that it was adverse, the suit was barred—*Bhairab Chandra* v. *Kadam Bewa*, 18 C.L.J. 553, 22 I.C. 28 (30).

This Article is not limited to suits brought against the persons who themselves incurred the forfeiture or committed a breach of the condition against alienation, but it also applies to suits against the persons who are in possession by reason of the alienation which has entailed the forfeiture. The general scheme of Arts. 140-144 does not place any limitation as to parties, and these Articles apply to suits against *any body who may be in possession* of the property—*Ayyaswami* v. *Manavikrama*, 58 M.L.J. 89, A.I.R. 1930 Mad. 430 (432), 124 I.C. 273. Thus, this Article has been applied to a suit to recover possession (by reason of forfeiture) from the *alienees* of the property —*Zamorin* v. *Samu Nair*, 38 M.L.J. 275, A.I.R. 1922 Mad. 290, 55 I.C. 380. So also, this Article was applied to a suit brought by a lessor to recover possession, in which the transferees from the lessee were made parties—*Motilal* v. *Chandra*, 24 C.W.N. 1064, 60 I.C. 312.

607. Forfeiture:—A permanent tenant forfeits his rights and his possession becomes adverse from the date he denies his landlord's title (*e.g.*, by making an alienation, and denying the landlord's title as owner in the deed of alienation); and consequently a suit for possession brought by the landlord 12 years after the date of denial (*viz.*, the date of the alienation) is barred by this Article—*Locha Ram* v. *Jhindwadda*, 76 P.L.R. 1917, 36 I.C. 565 (567). But it is open to the landlord to condone the first forfeiture and afterwards to bring a suit within 12 years from the time when another separate and distinct act occasioning forfeiture has occurred—*Locha Ram* v. *Jhindwadda*, 141 P.L.R. 1916, 35 I.C. 235. In case of successive forfeitures, the fact that the landlord

did not exercise his right of enforcing one forfeiture does not bar him from enforcing a subsequent forfeiture or raise any estoppel against him—*Zamorin of Calicut* v. *Samu Nair*, 38 M.L.J. 275,, 55 I.C. 380 (392). But in 4 All. 493 (cited in Note 608 below) time was held to run from the first breach of condition and not from a *subsequent* breach.

Certain lands in Malabar were demised on *anubhavam* tenure, and some of them were alienated by the tenant. More than 12 years after the alienation the landlord sued to eject the tenant on the ground that the defendant had alienated his right over the property contrary to the terms of his holding and had thereby forfeited the tenancy. *Held* that assuming that the rights under the demise were forfeited by the alienation, the suit was barred under this Article—*Madavan* v. *Athi Nangiyar*, 15 Mad. 123 (124). A Hindu widow entered into a *solenamah* with her deceased husband's cousin, which provided that she would remain in possession for life of a share of the family property, that she would have no power to alienate, and that after her death her share was to belong to the cousin. The widow sold this share, and a suit was brought by the cousin's heirs to recover the property more than 12 years after the sale, but less than 12 years after the widow's death. It was held that the terms of the *solenamah* prohibited only an alienation in perpetuity, *i.e.*, such an alienation by the widow as would prevent the cousin's succeeding after her death; but here the alienation was made only for the widow's lifetime and was perfectly good for her lifetime, and as there was nothing in the words used in the *solenamah* attaching *forfeiture* to the alienation. Article 143 did not apply (but Art. 141) and the suit was not barred—*Bibi Sahodra* v. *Rai Jang*, 8 Cal. 224 (229) (P.C.). Where a *wajib-ul-arz* provided that if a resident left the village to settle elsewhere he would not be entitled to cultivation and possession, and a hereditary occupancy tenant went away from the village and settled in another place leaving his fields in charge of another person, *held* that the abandonment by the tenant of his residence in the village and his settling elsewhere involved a forfeiture of the tenure, and a suit by the proprietors of the village to resume possession of the land of the tenant must be brought within 12 years from the time when the forfeiture was incurred—*Dhian Singh* v. *Mehan Sing*, 180 P.R. 1883.

The starting point of limitation is the forfeiture itself, and not when the lessor comes to know of the forfeiture. There is nothing in this Article about the knowledge of the lessor. Ignorance would not prevent time running against him—*Ayyaswami* v. *Manavikrama*, 58 M.L.J. 89, A.I.R. 1930 Mad. 430 (433), 124 I.C. 273; *Zamorin of Calicut* v. *Samu Nair*, 38 M.L.J. 275, A.I.R. 1922 Mad. 290, 55 I.C. 380 (385); *Locha Ram* v. *Jhindwadda*, 76 P.L.R. 1917, 36 I.C. 565 (567). But in cases governed by the Transfer of Property Act, the lessor is not entitled to possession by reason of any forfeiture, unless he has *given notice in writing* to the lessee showing his intention to determine the lease; see sec. 111 (g), T. P. Act. Consequently, time does not run until the lessor has given such notice.

608. Breach of condition:—A lease provided that the lessee was to enjoy the land from generation to generation for purpose of residence without any power of alienation, and that in the event of such alienation the lessor would be entitled to khas possession. The lessee sold the land and the lessor sued to recover possession. *Held* that this Article applied, and time ran from the date of alienation and not from the date when the lessee surrendered possession to the transferee—*Motilal* v. *Chandra Kumar*, 24 C.W.N. 1064, 60 I.C. 312 (314).

Where it was stipulated in a lease that the tenant should clear a defined area in a certain time, on failure of which he would be liable to ejectment, the cause of action for a suit for ejectment accrued when the defendant did not clear the area by the

time stipulated—*Tumeezooddeen* v. *Meer Surwar*, 7 W.R. 209. Where a lease granted for the reclamation of certain jungle lands provided that the lessee should hold the lands rent-free for six years, and that in the 7th year he should cause the lands to be measured and settlement of rent made with respect to the reclaimed lands, and that on failure to do so the lessor would be entitled to possession, a suit by the lessor to eject the lessee on breach of the above conditions was governed by this Article, and not by Art. 139—*Goohi Sheikh* v. *Mathewson*, 11 C.W.N. 661 (662). Although a suit by the landlord to recover possession from a tenant on the ground of breach of condition may be barred, still if the tenant does not in the written statement deny his tenancy under the plaintiff, and does not deny his liability to pay rent to the plaintiff, the landlord's suit to *recover rent* from the tenant is not barred—*Goohi* v. *Mathewson*, 11 C.W.N. 661 (663).

This Article has no application to a suit for recovery of possession of trust property from the defendant on the ground that he has committed a breach of trust by misappropriating the income of the property. A breach of trust is not a "breach of condition" within the meaning of this Article. The suit falls under sec. 10, and is not barred by any rule of limitation—*Sathappayyar* v. *Periasami*, 14 Mad. 1 (8).

If there are *successive* breaches, time runs from the date of the *first* breach. Unlike Art. 115, this Article does not provide for fresh causes of action by reason of successive breaches of condition. Thus, the purchasers of certain land agreed to pay the vendors certain fees annually in respect of such land, and further agreed that in default of payment the vendors should be entitled to the proprietary possession of certain quantity of such land. The purchasers never paid the fees, and more than 12 years after the first default, the vendors sued them for possession of the land they were entitled to. It was held that the suit was governed by this Article, and as more than 12 years had expired from the *first breach* of such agreement, it was barred by limitation —*Bhojraj* v. *Gulshan*, 4 All. 493 (496). Where a mortgagee is entitled to get the possession of land on the first instalment of the mortgage money not being paid, a suit for possession of the land upon such non-payment falls under this Article and time runs from the date when that instalment ought to have been paid—*Nathu* v. *Krishna*, 1876 P.J. 4.

Where the parties to a deed of exchange expressly covenanted that in the event of any dispute arising in the matter of enjoyment of the property exchanged, each should return to the other what is taken, and the plaintiff was dispossessed of the lands given by the defendants, a suit based on the convenant is governed by this Article and not by Art. 113—*Srinivasa* v. *Johnsa Rowther*, 42 Mad. 690 (691).

A exchanged certain properties with B and obtained certain lands from B in exchange, and then C (a third party claiming a paramount title) brought a suit against A to recover the lands obtained by A in exchange from B, and got a decree. A then brought a suit against B to recover the lands got by B from A. *Held* that the suit was governed by this Article, as the deprivation of the property constituted a breach of the statutory condition under sec. 119 of the Transfer of Property Act, and time ran from the date of the final appellate decree in the suit brought by C against A—*Rajagopalam* v. *Somasundara*, 30 Mad. 316 (318, 319).

144. For possession of immoveable property or any interest therein not hereby otherwise specially provided for.	Twelve years.	When the possession of the defendant becomes adverse to the plaintiff.

609. Scope:—This is a residuary Article relating to suits for possession and is to be applied only when there is no other Article in the Schedule specially providing for the case; and if a suit be otherwise specially provided for, the defendant's plea of adverse possession, for whatsoever length of time, is perfectly immaterial for the purpose of limitation—*Seshamma* v. *Chickaya*, 25 Mad. 507 (510); *Mahammad Amanulla* v. *Baddan Singh*, 17 Cal. 137 (143) (P.C.); *Kannusami* v. *Muthusami*, 5 L.W. 250; *Sesha Naidu* v. *Periaswami*, 44 Mad. 951; *Pokhpal* v. *Bishan Singh*, 20 All. 155 (177); *Bindhyachal* v. *Ram Gharib*, 57 All. 278; *Shankarsa* v. *Punamchand*, A.I.R. 1937 Nag. 130; *Devram* v. *Asharam*, I.L.R. (1939) Kar. 793, A.I.R. 1940 Sind 49; *Naru* v. *Krishna*, 40 Bom.L.R. 166, A.I.R. 1938 Bom. 210; *Narayan* v. *Gurunathgonda*, I.L.R. (1939) Bom. 173, 40 Bom.L.R. 1134, A.I.R. 1939 Bom. 1; *Sidram* v. *Mallaya*, 51 Bom L.R. 34, A.I.R. 1949 Bom. 137 (F.B.); *Venkateswara* v. *Venkatesa*, I.L.R. (1941) Mad. 599, (1941) 1 M.L.J. 644, A.I.R. 1941 Mad. 449 (F.B.). This Article does not apply to suits or proceedings under Local or Special Acts prescribing period of limitation for such suits or proceedings. Thus it does not apply to proceedings under the Agra Tenancy Act—*Nimar* v. *Rang Nath*, 1938 R.D. 602; or under the U.P. Tenancy Act—*Tilakdhari* v. *Dhondha*, A.I.R. 1950 All. 439; or under the Bengal Tenancy Act—*Gagan* v. *Goljan*, A.I.R. 1950 Dac. 1 following *Mohim* v. *Kanai*, 33 C.W.N. 1085, A.I.R. 1930 Cal. 311.

This Article refers to suits "for possession" of immoveable property; that is, it applies to cases where the plaintiff is out of possession and seeks to recover possession and the defence is one of adverse possession—*Narayan* v. *Gurunathgouda*, supra. But where the plaintiff is already in possession and asks for a declaration of his right to possession, the suit does not fall under this Article but under Article 120—*Legge* v. *Rambaran*, 20 All. 35 (F.B.); *Rajani* v. *Monaram*, 53 I.C. 968, 23 C.W.N. 883. Similarly, Art. 144 does not apply where the suit is not to obtain actual possession but is for a declaration that the plaintiff is entitled to possession at some future date. The proper Article is Art. 120—*Krishnajee* v. *Annajee*, 54 Bom. 4, 31 Bom.L.R. 1240, A.I.R. 1930 Bom. 61 (63), 124 I.C. 773. A suit for injunction for preventing the defendant from interfering with the exercise of right of ownership by cutting the trees purchased falls under Art. 120. This article has no application as no question of possession of trees is involved in the suit—*Ganga* v. *Nihal*, A.I.R. 1952 All. 310. The question whether this Article or Art. 120 applies to a suit between co-owners or co-tenants *inter se*, where the title of one is denied by the other depends according as the relief claimed is one for possession or injunction—*Sewa* v. *Raghunandan*, 42 P L.R. 276, A.I.R. 1939 Lah. 315. It is not the form of relief claimed which determines the real character of the suit for the purposes of ascertaining under which article the suit falls. The plaint as a whole is to be examined to see whether it is a declaration properly so called or whether it is an unnecessary claim and a mere surplusage and the suit is really a suit for possession—*Bhoga* v. *Surajpal*, A.I.R. 1951 M B. 40.

610. Art. 142 and Art. 144:—Articles 142 and 144 are both rules of limitation, the only difference being that in the case of Art. 142, the onus lies on the plaintiff to prove his possession within 12 years, while in the case of Art. 144 it is for the defendant to prove when his possession became adverse—*Ramlal* v. *Lodha*, A.I.R. 1952 Pat. 201.

Article 142 is restricted to suits which are in terms and substance based on plaintiff's *prior possession* which has been lost by dispossession or discontinuance. If there is no allegation of original possession in the plaintiff lost by dispossession or discontinuance of possession, Article 142 cannot apply but the suit falls under Article 144 —*Vasudeo* v. *Eknath*, 35 Bom. 79 (90); *Fakir* v. *Babaji*, 14 Bom. 458 (461); *Ram Lakhan* v. *Gajadhar*, 33 All. 224 (228); *Bibi Sahodra* v. *Rai Jang Bahadur*, 8 Cal,

224 (229) (P.C.); *Subappa* v. *Venkappa*, 39 Bom. 335, 28 I.C. 24; *Govinda* v. *Md. Esoof Sahib*, 21 L.W. 398, A.I.R. 1925 Mad. 834, 87 I.C. 386; *Kunhi Moidin* v. *Pakkar*, 38 M L.T. 137, A.I R. 1927 Mad. 1094, 99 I.C. 971; *Suraj Bali* v. *Mahadeo*, 7 Luck. 250, 137 I.C. 678, A.I.R. 1932 Oudh 46; *Zahida Begum* v. *Mumtaz*, 8 O.W.N. 1364; *Sitaram* v. *Rajaram*, 48 I.C. 230 (Nag.); *Singuji* v. *Gambhirji*, A.I.R. 1925 Nag. 370, 87 I.C. 1023; *Gauri* v. *Jadu*, 18 Luck. 624, 1942 O.W.N. 753. Article 142 is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title, and the burden of proving the fact that the plaintiff was in possession and was dispossessed within 12 years before suit lies on the plaintiff; and on proving these the plaintiff is entitled to a decree unless the defendant establishes that he is the true owner of the property. But the Article applicable to a suit in which the plaintiff sues for possession of property on the basis of his *title* is Art. 144, and if in such a suit the plaintiff proves his title, he is entitled to a decree, unless the defendant succeeds in establishing his adverse possession for a period of more than 12 years—*Kanhaiya* v. *Girwar*, 51 All. 1042, 1929 A.L.J. 1106, 119 I.C. 6, A.I R. 1929 All. 753; *Kallan* v. *Mohammed Nabi*, 54 All. 209, 1933 A L.J. 105, 143 I.C. 497, A.I.R. 1933 All. 775; *Bindhyachal* v. *Ram Gharib*, 1934 A L.J. 973 (F.B.), 152 I.C. 1, A.I.R. 1934 All. 993 (997); *Zahida Begum* v. *Mumtaz Ali*, 8 O.W.N. 921, 134 I.C. 599, A.I.R. 1931 Oudh 382; *Suraj Bali* v. *Mahadeo*, supra; *Naru* v. *Krishna*, 40 Bom.L.R. 116, A.I.R. 1938 Bom. 210. A suit for possession under Art. 142 or 144 assumes that the defendant is in possession and that the plaintiff seeks to eject him. In such a suit there must be a prayer, express or implied, for dispossession of some one from the property or from the interest in it which the suit claims—*State* v. *Ganapathi*, A.I.R. 1951 Tra-Co. 232 (F.B.). The distinction is between suits for possession where the cause of action is dispossession and a suit for possession where the cause of action is not dispossession—*Devram* v. *Asharam*, I.L.R. (1939) Kar. 793, A.I.R. 1940 Sind. 49. The question as to whether the Article applicable to a particular case is Art. 142 or Art. 144 has to be decided by reference to the pleadings—*Mahomed Mahmud* v. *Mahomed Afaq*, 11 O.W.N. 104, 147 I.C. 805, A.I.R. 1934 Oudh 21 (23).

Where the plaintiff does not plead dispossession, and it is not found that he was actually dispossessed on a certain date, the suit falls under Article 144, and not under Article 142—*Ali Hammad* v. *Ghurpattar*, 47 All. 389, A.I.R. 1925 All. 454, 85 I.C. 578; *Ram Surat* v. *Badri*, 50 All. 89, A.I.R. 1927 All. 799 (800), 102 I.C. 814; *Mahomed Mahmud* v. *Mahomed Ifaq*, supra. Article 142 applies to a case where the plaintiff while possession has been dispossessed or has discontinued possession. Where the plaintiff had *never been in possession, but* the original owner was admittedly in possession up to the time of his death, and the plaintiffs derived their title from the will of the original owner and sought o recover possession on the strength of the will, Article 142 could not apply, but Article 144—*Charu Chandra* v. *Nahush Chandra*, 50 Cal. 49 (64), A.I.R. 1923 Cal. 1. Article 142 applies to a suit for recovery of possession after dispossession, and not Art. 144. Where the plaintiffs alleged that the suit lands formed part for their *patni* taluq, and that they were in possession of them up to some time when the lands diluviated, and when they reappeared and the plaintiffs went to exercise acts of possession over them they found the defendant in possession, *held* that the suit was for recovery of possession after dispossession, and that the proper Article applicable was Art. 142 and not 144—*Birendra Nath* v. *Satish Chandra*, 44 C.L.J. 121, A.I.R. 1926 Cal. 1166, 97 I.C. 1003.

Article 144 is wider in scope than Art. 142; the latter refers to suit for immoveable property; the former includes in addition interest in immoveable property—*Lokenath* v. *Jahania Bibi*, 14 C.L.J. 572, 12 I.C. 305 (307).

In a case falling under Article 142, adverse possession is not required to be proved in order to maintain a defence; but in a case under Art. 144, the defendant must show that his possession was adverse—*Md. Amanulla* v. *Badan Singh*, 17 Cal. 137 (143) (P.C.); *Deram* v. *Asharam*, I.L.R. (1939) Kar. 793, A.I.R. 1940 Snd 49. What the plaintiff has to prove under Art. 142 is that he was in possession within 12 years before suit; but under Art. 144, the onus is on the defendant to prove that his possession has become adverse more than 12 years before the suit—*Ram Surat* v. *Badri*, 50 All. 89, A.I.R. 1927 All. 799 (800), 102 I.C. 814. There is a fundamental difference between the two positions, (1) that the plaintiff had not been in possession of the property for over 12 years, that is to say, he was dispossessed more than 12 years prior to the suit, and (2) that the defendant had been in adverse possession of the property for over twelve years. This is so, although in either case the plea in effect is that the suit is time-barred. It involves essentially a question of the burden of proof. In the one case, the burden would be on the plaintiff to prove his former possession and subsequent dispossession within 12 years of the suit, and in the other it would be on the defendant to prove his continued adverse possession for over 12 years—*Nausha* v. *Umrao*, A.I.R. 1950 All. 626.

But there may be cases in which the plaintiff sues for possession of immoveable property both on the ground of title and on the ground of his possession having been disturbed by the defendant. In such cases, if he proves his title, the burden of establishing title by adverse possession lies upon the defendant, and if the defendant succeeds in proving that fact the suit must fail; otherwise the plaintiff is entitled to a decree. To this extent, Art. 144 will apply to such a suit. But it may be that the plaintiff, though not able to substantiate his title is in a position to prove his possession and dispossession by the defendant within 12 years. If that be the case, Art. 142 will apply and the burden will be on the plaintiff—*Mahomud Mahmud* v. *Mahomed Afaq*, 11 O.W.N. 104, 147 I.C. 805, A.I.R. 1934 Oudh 21 (24).

611. Immoveable Property:—The words "immoveable property" have to be interpreted in accordance with the definition of these words as given in the General Clauses Act and not according to the special definition given of these words in the Transfer of Property Act or in the Registration Act. So the words "immoveable property" includes trees attached to land, whether sold for conversion into timber or for the purposes of being enjoyed as fruit trees—*Ganga* v. *Nihal*, A.I.R. 1952 All. 310.

611A. Interest in immoveable property:—The following are interests in immoveable property:—

(1) An equity of redemption in a mortgaged property—*Casborne* v. *Scarfe*, 1 Atk. 603; *Parashram* v. *Govind*, 21 Bom. 226; *Kanti Ram* v. *Katubuddin*, 22 Cal. 33; *Umesh* v. *Zahur*, 18 Cal. 164.

(2) A *toda giras hak, i.e.*, a right to receive an annual payment from a village—*Futtehsangji* v. *Desai*, 22 W.R. 178 (P.C.).

(3) An annuity granted by a Hindu sovereign to a Hindu temple—*Collector* v. *Kriskmanath*, 5 Bom. 322.

(4) A right to officiate as priest at funeral ceremonies to Hindus—*Raghoo* v. *Kassy*, 10 Cal. 73.

(5) A right to take fruits of one's own trees—*Bapu* v. *Dhondi*, 16 Bom. 353.

(6) The right to an office in a temple and endowments attached thereto—*Alagirisami* v. *Sundareswara*, 21 Mad. 278 (287).

(7) A right to possession and management of a *saranjam*—*Narayan* v. *Vasudeo*, 15 Bom. 247.

(8) A Hindu widow's life-interest in the income of her husband's immoveable property—*Nathu* v. *Dhunbaiji*, 23 Bom. 1.

(9) A right to colllect dues from a fair on a piece of land—*Sikandar* v. *Bahadur*, 27 All. 462.

(10) A right to collect *lac* from trees—*Parmanandy* v. *Birkhu*, 5 N.L.R. 21, 1 I.C. 903; *Ramlal* v. *Lodha*, A.I.R. 1952 Pat. 201.

(11) An exclusive right (*i.e.*, excluding the owner) to catch fish in the tank of another is an interest in immoveable property and can be acquired by 12 years' enjoyment; but a right to catch fish not excluding the rightful owner, is not an interest in immoveable property but a *profit a prendre* and therefore an easement and can be acquired by 20 years' user—*Hill & Co.* v. *Sheoraj*, 1 Pat. 674, 67 I.C. 954; *Luckimoni* v. *Koruna*, 3 C.L.R. 509; *Baker Hosein* v. *Ranjit Koer*, 2 P.L.J. 289, 39 I.C. 777; *Lokenath* v. *Jahania Bibi*, 12 I.C. 305, 14 C.L.J. 572; *Sitaram* v. *Petia*, 14 N.L.R. 25, 42 I.C. 392; *Parbutty* v. *Madho*, 3 Cal. 276; *Narayan* v. *Laxmibai*, A.I.R. 1951 Nag. 382, I.L.R. (1951) Nag. 199, 1951 N.L.J. 338. An exclusive right of fishing means that no other person has a co-extensive right with the claimant of the right. The mere fact that some other person has a right to a particular class of fish in the fishery or that another person is entitled to fish at a certain time of the year does not destroy the right of exclusive fishing in any manner—*Braja* v. *Moni*, A.I.R. 1951 S.C. 247.

(12) The right to *parjot*, *charai* and *charsai* dues—*Sheoraj* v. *Debi Baksh*, 21 O.C. 119, 46 I.C. 439.

(13) The mortgage of the "superstructure of a house exclusive of the land beneath" creates an interest in immoveable property, as the apparent intention is to mortgage the house and not merely the materials—*Narayan* v. *Ramaswamy*, 8 M.H.C.R. 100.

The following are not interests in immoveable property:—

(1) A right to be placed on the register of revenue records—*Bhikaji* v. *Pandu*, 19 Bom. 43.

(2) An agreement to grant a lease does not create an interest in immoveable property, nor is a suit upon the agreement a suit for the recovery of an interest in immoveable property—*Lalta Ram* v. *Chaubain*, 22 W.R. 287.

(3) A claim to revenue from the holder of a land is not a claim to recover possession of an interest in immoveable property—*Alubi* v. *Kunhi*, 10 Mad. 115.

(4) A right to take water from the well of another is not an interest in immoveable property and cannot be lost by 12 years' adverse possession—*Ananta* v. *Ganu*, 45 Bom. 80, A.I.R. 1921 Bom. 417.

(5) A right to worship an idol—*Eshan* v. *Monmohini*, 4 Cal. 683 (685).

(6) A suit to recover a certain sum of money due as an emolument of an hereditary office attached to a temple is not a suit to recover an interest in immoveable property—*Rathna Mudaliar* v. *Tiruvenkata*, 22 Mad. 351 (352).

(7) A license to dig and search for coal—*Kamakshya* v. *Karanpura Development Co.*, A.I.R. 1950 Pat. 134.

612. Adverse possession:—The classical definition of adverse possession is to be found in the following oft-quoted words of Markby J.: "By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having a right to immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the true owner is extinguished,

and the person in possession becomes the owner"—*Bejoy Chandra* v. *Kally Prosanno*, 4 Cal. 327 (329). [It should be noticed that there is a misprint in the report of the judgment at p. 329, the words "or on behalf" being omitted. See this passage correctly cited in 30 All. 119, at p. 122]. In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him—*Secretary of State* v. *Krishnamoni*, 29 Cal. 518 (535) (P.C.). In order to constitute adverse possession, the possession must be adequate in continuity, in publicity and in extent of area to show that it was adverse to the real owner. It must be actual, exclusive and uninterrupted. The kind of possession must no doubt depend largely upon the character of the land but no presumption of possession can be made in favour of a trespasser. His possession must be confined to the land actually occupied by him. Though as a general rule possession of part is in law possession of the whole if the whole is otherwise vacant, but constructive possession of this kind can only be presumed when there is a claim based upon title. It follows from the above that in the case of Parti land the establishment of adverse possession regarding one portion of the plot cannot lead to any presumption in respect of the other portion —*Partab Bahadur Singh* v. *Jagatjit Singh*, A.I.R. 1936 Oudh 396. There must be proof of the defendant being in *possession*. Where the mortgagee was in actual possession of certain property under a usufructuary mortgage, and certain persons merely got their names recorded in the Revenue papers in place of the name of the mortgagor, it was held that such persons could not acquire possession adverse of the right to redeem because they were not in actual possession of the property—*Kunwar Sen* v. *Darbari*, 38 All. 411 (414, 415). Entries in the record of rights of the defendant's name are not sufficient. The defendant must prove *overt* acts of adverse possession besides the entries—*Nur Muhammad* v. *Qaim*, 29 P.L.R. 381, 110 I.C. 857, A.I.R. 1928 Lah. 306. Evidence of possession on paper (leases and documents of various kinds) is not sufficient—*Radhamoni* v. *Collector*, 27 Cal. 943, (949) (P.C.). A trespasser does not necessarily intend to prescribe for a hostile title simply by remaining in occupation. His attitude may be a purely negative and passive one—*Raghunathaswami* v. *Donna*, 1942 N.L.J. 431.

To prove title to the land by adverse possession, it is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner—*Radhamoni* v. *Collector*, 27 Cal. 943 (950) (P.C.); *Allah Rakhi* v. *Shah Mahomed*, 56 All. 111 (P.C.), A.I.R. 1934 P.C. 77; *Jogendra* v. *Baldeo*, 35 Cal. 961 (971); *Jagjiwandas* v. *Bai Amba*, 25 Bom. 362 (366); *Wali Ahmed* v. *Tota Meah*, 31 Cal. 397 (405); *Kuthali* v. *Kunharankutty*, 44 Mad. 883 (890) (P.C.); *Vithaldas* v. *Secretary of State*, 26 Bom. 410 (416); *Prem* v. *Tej*, A.I.R. 1950 E.P. 252; *Kalyani* v. *Borrea Coal Co.*, 49 C.W.N. 810, A.I.R. 1946 Cal. 123; *Palania* v. *Amjath*, I.L.R. (1943) Mad. 15, (1942) 2 M.L.J. 321, A.I.R. 1942 Mad. 622 (F.B.); *Kameswara Rao* v. *Somanna*, A.I.R. 1955 Andhra 212. In other words, the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation—*Jogendra* v. *Baladeo*, supra; *Nawab Bahadur* v. *Gopinath*, 13 C.L.J. 625, 6 I.C. 392 (396); *Barjor Singh* v. *Sidh Nath*, 29 O.C. 395, 1 Luck. 441, A.I.R. 1927 Oudh 141, 98 I.C. 904; *Pratab* v. *Bhaba*, A.I.R. 1952 Assam. 34. The possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive and adverse—*Armstrong* v. *Monili*, (1871) 14 Wallace 145; *Doswell* v. *Dela Lanza*, (1857) 20 Howard 32. The possession required must be *ne vic ne clam ne precario*. But it is not necessary in order to establish adverse possession, that the proof of acts of possession should cover every moment of the requisite period—*Secretary of State* v. *Debendra Lal*, 61 Cal. 262 (P.C.), 38 C.W.N. 285, 147 I.C. 545, A.I.R. 1934 P.C. 23; *Dipnarain* v. *Pundeo*, 25 Pat. 412,

A.I.R. 1947 Pat. 99. To establish adverse possession over a coal mining area it may not be necessary to carry on mining operation continuously for a period of 12 years, but continuous possession of the mining area and the mine will be a necessary ingredient to establish such adverse possession—*Kashi Bai* v. *Sudha Rani*, A.I.R. 1958 S.C. 434. An entry upon the land of the plaintiff, in order to be an assertion of hostile title, must be an entry *as an owner*. Entry on the land by persons who were *raiyats* and who never claimed as owners, is not adverse possession—*Gaya Prasad* v. *Bakya Mani*, 56 Cal. 914, 33 C.W.N. 277 (279), A.I.R. 1929 Cal. 297, 119 I.C. 289. In order to constitute adverse possession, it must be a complete possession *exclusive* of the possession of any other person—*per* Cairns L. C. in *Lows*. v. *Telford*, (1876) 1 A.C. 415 (423). Therefore, evidence of partial possession on the part of the plaintiff is sufficient to displace the adverse possession set up by the defendant—*Vithaldas* v. *Secretary of State*, 26 Bom. 410 (416). "To constitute dispossession, there must in every case be positive acts which can be referred only to the intention of obtaining exclusive control"—Pollock on possession, p. 85. Therefore, promiscuous acts done at different times by an undefined and fluctuating body of persons from the village and the neighbouring villages cannot be said to be acts done with the intention of obtaining exclusive control over the lands, and do not amount to adverse possession—*Wali Ahmed* v. *Tota Meah*, 31 Cal. 397 (405); *Lutchmeeput* v. *Sadaulla*, 9 Cal. 698. Plaintiffs obtained leave to plant trees on land belonging to Government; and the only right they were entitled to was to get the fallen dry wood from the trees. Certain transfers of the village took place, and on two occasions, the defendant who purchased the village got the proceeds of the sale of such wood. The plaintiffs on both occasions asserted their claim to the wood but were unsuccessful. They then instituted a suit for a declaration of their right to get the dry wood. The defendant pleaded adverse possession. It was held that the right being one which was only *occasional*, that is, which could only be exercised at uncertain occasions when the wood might fall or be cut down from the trees, and not being uninterrupted or continuing every year or at stated times, and there being disputes between the parties as to the right on two previous occasions, it could not be said that the defendant had acquired a title by adverse possession—*Debi Prasad* v. *Badri Prasad*, 40 All. 461 (469). No title by adverse possession can be presumed from a few acts of trespass committed only occasionally—*Kedarnath* v. *Amrit*, A.I.R. 1925 Pat. 568, 88 I.C. 676. Casual and spasmodic acts of digging or boring holes on different spots within the coal area cannot be said to be such possession as to attract the rule of adverse possession—*Kamakshya* v. *Karanpura Development Co.*, A.I.R. 1950 Pat. 134. In order that possession of mineral rights be adequate in publicity the defendant must prove that there was that to be seen on the surface which the plaintiff or his predecessor being reasonably vigilant ought to have seen and so seeing would have been put on their guard although they did not have any title to the surface—*Kalyani* v. *Borrea Coal Co.*, 49 C.W.N. 810, A.I.R. 1946 Cal. 123.

It is sufficient to constitute adverse possession that the person claiming to be the real owner should have stood by, while others continued to possess, not by any derivative title but in practical contravention of his alleged rights. The law does not require that the claimant to ownership must in such circumstances have protested against the violation of his rights and that the possession went on despite such protest—*Aruna Chellam* v. *Venkatachalapathi*, 43 Mad. 253 (269) (P.C.).

To constitute adverse possession, it is sufficient if there is an intention to hold thing as owner, and if some overt act is done upon the thing in execution of that intention; it is not necessary that it should be enjoyed in any *particular manner*—*Sibasubramanya* v. *Secretary of State*, 9 Mad. 285 (303). Thus where the owner of a serai adjoining a mosque remains in possession and uses it as exclusively his own by

raising the height of the *pushta*, by constructing therein a drain for discharge of water of the roofs of the sarai and by opening niches for his enjoyment, the possession is adverse—*Laxmi* v. *Shafi*, A.I.R. 1949 E.P. 141. Moreover, it is not necessary that some acts should always be done *upon the spot* in dispute itself, but it is enough if some overt acts of ownership were done *in relation to* that spot, as for instance, enclosing it—*Clark* v. *Elphinstone*, L.R. 6 App. Cas. 164.

Acts indicative of adverse possession must vary according to the nature of the property over which possession is exercised—*Secretary of State* v. *Debendra Lal*, 61 Cal. 262 (P.C.), 38 C.W.N. 285. The possession must be the kind of possession of which the particular subject is susceptible—*Narain* v. *Balabh*, A.I.R. 1950 H.P. 6. Thus, in case of *bil* or waste lands, the cutting of grass and the grazing of cattle are the ordinary acts by which possession is asserted—*Wali Ahmed* v. *Tota Meah*, 31 Cal. 397 (405). In case of forest lands the act of cutting wood, gathering forest produce and pasturing cattle, if such acts are accompanied with an assertion of the ownership of the soil, would be evidence of adverse possession—*Sivasubramanya* v. *Secretary of State*, 9 Mad. 285 (304). In case of a tank, the mere appropriation of the fish may not necessarily constitute adverse possession; but acts of an obviously proprietary character such as sub-letting, mortgaging, or re-excavation of the tank or the expenditure of large sums in clearing silt out of it, or the construction of masonry sluices in it, will constitute adverse possession—*Bijoy Chand Mahatab* v. *Iswar Chandra*, 21 C.W.N. 199, 35 I.C. 60 (63); *Venkatarama* v. *Secretary of State*, 33 Mad. 362, 20 M L.J. 74. The mere fact that a number of fishermen from time to time have been exercising the right of fishing with the leave and licence of some of the owners is not sufficient for the acquisition of the right by adverse possession—*Braja* v. *Moni*, A.I.R. 1951 S.C. 247.

If a bit of land which is of no use to the owner is used by a neighbouring landholder for various temporary purposes, *e.g.*, by building a privy, a hut or a shed for cows, goats, etc., but all these structures are of a flimsy and temporary character, *held* that user of this sort is insufficient to give a title to the land by adverse possession. User of this sort is common in this country and excites no particular attention. It is not intended to denote nor understood as denoting a claim to the ownership of the land. So also, the acts of throwing rubbish on the land of another, or tethering cattle on a vacant site, and placing pieces of furniture, scaffolding, building materials, etc., on another's land are done in almost every part of this country, without any claim to ownership being thereby intended—*Framji* v. *Goculdas*, 16 Bom. 338 (341, 342); *Rulia* v. *Nur Md.*, 27 P.L.R. 561, A.I.R. 1926 Lah. 615, 97 I.C. 705; *Lajpat* v. *Sohna*, 30 P.L.R. 296, 115 I.C. 71, A.I.R. 1929 Lah. 432; *Naidar* v. *Shib Ram*, 27 P.L.R. 762, 98 I.C. 880, 8 L.L.J. 535. But if the construction is not of a flimsy character or of a character indicative of an intention on the part of the person constructing the same to use it temporarily and not permanently, possession of the same for more than 12 years constitutes adverse possession—*Ahmad* v. *Dharma School*, 1947 A.L.J. 108, A.I.R. 1947 All. 409. So also, the mere erection of a few thatched structures or the planting of a few trees on the waste land of another—*Bechu* v. *Lachmi*, 8 I.C. 708 (709) (Oudh); or the use of a small piece of plaintiff's vacant land by the defendant for the purposes of a backyard (specially when the parties are brothers)—*Chokkalinga* v. *Muthusami*, 21 Mad. 53 (55); or the use of the plaintiff's abandoned waste land by the neighbours and the persons employed in the neighbouring mills as a convenient place for answering the calls of nature, does not constitute adverse user; indeed these acts are not acts of possession at all—*Jogendra* v. *Baldeo*, 35 Cal. 961 (971). In case of waste land, jungle land or tank land the defendant does not necessarily dispossess the owner by planting trees or by cultivation, as he does not by walking over

or otherwise trespassing on it—*Sheo Narain* v. *Badal*, 8 O.C. 177; *Abdul Rahim* v. *Wazir Ali*, 7 O.W.N. 509, A.I.R. 1930 Oudh 304, or by tethering of cattle or storing of logs—*Asa Ram* v. *Ramchandra*, I.L.R. (1939) All. 217, 1938 A.L.J. 1227, A.I.R. 1939 All. 161. The mere fact that the defendants had been in possession of the suit land in the sense that they had been enjoying it because it lay in front of their houses, would not be sufficient to make their enjoyment adverse as owners—*Hulas* v. *Barkatunnissa*, 1 Luck. 469, A.I.R. 1926 Oudh 393, 3 O.W.N. 475, 94 I.C. 1034. Where though foundations are laid, but the land is kept unenclosed, it does not amount to an unequivocal assertion of an intention to appropriate the land—*Asa Ram* v. *Ramchandra*, I.L.R. (1939) All. 217, 1938 A.L.J. 1227, A.I.R. 1939 All. 161. So also, the enjoyment of a *kalam peramboke*, for the purpose of using it as a threshing floor, or for storing manure and green leaves, for stocking hay-stacks after the harvest, for drying paddy before they are taken to the granary, for allowing buffaloes and other cattle to stray and remain there before they are taken for grazing, was held to be an enjoyment of too fugitive and patently permissive kind to amount to adverse possession. There is probably no village in India in which unoccupied village land is not used for the above purposes. Such user does not harm any one and is not objected to by any one—*Dindigul Taluk Board* v. *Venkatarama*, 46 Mad. 866, A.I.R. 1924 Mad. 197, 75 I.C. 38.

Possession of a *portion* of the land only cannot be held to constitute constructive possession of the *whole*, so as to enable the possessor to obtain thereby a title to the whole by limitation—*Wali Ahmed* v. *Tota Meah*, 31 Cal. 397 (405); *Nawab Bahadur* v. *Gopinath*, 13 C.L.J. 625, 6 I.C. 392 (397); *Mohini Mohan* v. *Promada Nath*, 24 Cal. 256; *Mangal Singh* v. *Ali Sher*, 120 I.C. 792, A.I.R. 1930 Lah. 303. The doctrine that possession of part is in law possession of the whole does not hold good in the case of a trespasser, if the whole is otherwise vacant. Possession by a trespasser is confined to the land actually occupied by him—*Sadik Husain* v. *Etizad*, 13 O.L.J. 798, A.I.R. 1927 Oudh 209, 101 I.C. 714; *Maheshwar* v. *Partap Bahadur*, 12 O.C. 58, 2 I.C. 63; *Kalyani* v. *Borrea Coal Co.*, 49 C.W.N. 810, A.I.R. 1946 Cal. 123. The doctrine of *constructive possession* cannot be applied in favour of a wrong-doer, whose possession must be confined to *actual* possession; that is to say, if he relies on adverse possession, he can succeed only as regards the portion of the land in suit of which he proves *actual* possession for the statutory period—*Nawab Bahadur* v. *Gopinath*, 13 C.L.J. 625, 6 I.C. 392 (397); *Ananda Hari* v. *Secretary of State*, 3 C.L.J. 316; *Jogendra* v. *Baldeo*, 35 Cal. 961; *Mirza Shamsher* v. *Munshi Kunj Behari*, 12 C.W.N. 273. In the case of mines there is no presumption in law that possession of a part of a seam infers possession of the whole seam much less of all the seams in the mineral field in which part of a seam has been worked. Possession is a question of fact and the extent of possession is an inference of fact—*Kalyani* v. *Borrea Coal Co.*, supra. The same principle applies where the possession is under an invalid lease or defective grant—*Hari* v. *Abdul*, A.I.R. 1951 Pat. 160; *Sailajananda* v. *Lakhichand*, 30 P.L.T. 388, A.I.R. 1951 Pat. 502. It is impossible to obtain by prescription anything more than what is claimed. If a man asserts that he is the owner of an undivided half share in property and holds possession of it for 12 years, he becomes owner of that half share only, not of the whole property—*Chunnu* v. *Subheti*, 22 N.L.R. 181, 98 I.C. 540, A.I.R. 1927 Nag. 67. But in many cases acts done upon parts of a tract of land may be evidence of the possession of the whole; as for instance, if a large field is surrounded by hedges, acts done in one part of it would be evidence of the possession of the whole—*Clarke* v. *Elphinstone*, L.R. 6 App. Cas. 164. It has recently been found in *Onkarmal Agarwalla* v. *Bireswar*, 61 C.W.N. 970 that the doctrine of 'fantum prescriptum quantum possessum' (the title acquired by adverse possession is limited to the area actually possessed) is confined to a mere trespasser who claims title only by possession without any claim or colour

of title, whereas the possessory title of a person claiming under a deed which is not sufficient in law to confer that title, extends to the whole area as described in the deed, provided however that the claimant "exercised such dominion over the property as to justify the inference that he was in possession of the whole." When a tract of land with a defined boundary has been throughout claimed by owner, and acts of ownership have been done upon various portions of it, such acts of enjoyment may be accepted as evidence of the possession of the whole—*Sibasubramanya* v. *Secretary of State*, 9 Mad. 285 (305). Where there are circumstances to link together various portions of ground, the possession of a part amounts constructively to adverse possession of the whole—*Suresh Chandra* v. *Shiti Kanta*, 51 Cal. 669 (679), 28 C.W.N. 637, A.I.R. 1924 Cal. 855, 78 I.C. 679. There is no reason for holding that a trespasser who takes exclusive possession of the whole land without the consent of the owner cannot acquire a right to the whole of the land, simply because he claims a title to less than the whole—*Nutbihari* v. *Bishweswari*, 60 Cal. 404, A.I.R. 1933 Cal. 414 (415), 144 I.C. 177. Where the trespasser treats the property as forming one unit with the property in his actual possession with the knowledge of the owner, an inference of adverse possession of the whole is raised—*Sailajananda* v. *Lakhichand*, supra.

Where lands are held as remuneration for services, the mere non-performance of the services is not sufficient to make the holding adverse to the landlord, just as non-payment of rent by a tenant to his landlord does not constitute his possession adverse to the landlord. To make the holding adverse, there must be, over and above the omission to render service an active assertion of an adverse right on the part of the defendant by a refusal to perform the service or a claim to hold the land free of such service—*Komargowda* v. *Bhimaji*, 23 Bom. 602 (606, 607).

, So long as a person is in *permissive* occupation of land, his possession does not become adverse; it commences to be adverse at the end of the period during which he is permitted to occupy the land—*Shivrudrappa* v. *Balappa*, 23 Bom. 283 (286); see also *Gobinda Lal* v. *Debendra Nath*, 6 Cal. 311 (314); *Ahmad Sharif* v. *Umrao*, 3 O.W.N. 460, A.I.R. 1926 Oudh 353, 94 I.C. 779; *Tulsiram* v. *Pande*, I L.R. 1955 Nag. 842, A.I.R. 1956 Nag. 11. Permissive occupation or occupation held under a license cannot be said to be adverse. Where two companies owned two adjoining pieces of land and employed a common agent, who with the best of motives permitted the defendant company to build upon the land belonging to the plaintiff company, *held* that the defendant company were mere licensees, or their occupation was at the most permissive (*viz.*, by the common agent), and that they could not put forward a plea of adverse possession—*Gujerat Ginning Co.* v. *Motilal Spinning Co.*, 53 Bom. 792, 123 I.C. 481, A.I.R. 1930 Bom. 84 (86). If the defendants were licensees, the institution of a suit against them for recovery of possess on would result in termination of the licence under which they may have held the land in question—*Raghupati Ray* v. *Debu Karmakar*, 60 C.W.N. 385, A.I.R. 1956 Cal. 79. Permissive possession is not adverse till adverse possession is asserted—*Sheodhari* v. *Suraj Prasad*, A.I.R. 1954 S.C. 758. Where the plaintiff's husband conveyed to her two houses in satisfaction of her dower, and continued to reside in one of the two houses as before, such residence must be treated as permissive on behalf of the plaintiff, and was not adverse to her right over the property—*Ibrahim* v. *Isa Rasul*, 41 Bom. 5 (12). Where possession of a portion of the land is shown to be permissive and not adverse, Courts may presume that the possession of the rest of the properties was also permissive, in the absence of evidence to the contrary—*Ram Abhilak* v. *Chaturasi*, 13 O.L.J. 839, 101 I.C. 730, A.I.R. 1927 Oudh. 582.

A person who holds possession on *behalf* of another does not by a mere denial of that other's title make his possession adverse so as to give himself the benefit of

the statute of limitation. Thus, a wife who holds possession on her husband's behalf, during his absence, cannot acquire a title by adverse possession against her husband, however long her husband may be absent—*Bijoy Chandra* v. *Kally Prosanna*, 4 Cal. 327 (329). A licensee (whose possession is only permissive) cannot claim title only from possession, however long, unless it is proved that his possession was adverse to that of the licensor to his knowledge and with his acquiescence—*Kodoth Ambu Nayar* v. *Secretary of State*, 47 Mad. 572 (582) (P.C.), 80 I.C. 835, A.I.R. 1924 P.C. 150; *Dewood Khan* v. *Banubi*, I.L.R. (1949) Nag. 862, 1950 N.L.J. 163, A.I.R. 1950 Nag. 127. The possession of a licensee is not adverse generally. But where the licensee assumes or arrogates to himself the right of transferring the subject of the licence, which in fact he cannot transfer, this involves an assertion of an absolute title and consequently a denial of the actual owner. In such a case the possession of the transferee must be unlawful from the date of its inception—*Nausha* v. *Umrao*, A.I.R. 1951 All. 626. A compromise decree wherein the title of the plaintiff is admitted and the character of permissive possession is accepted, terminates the adverseness of possession and the continuance of possession thereafter is permissive—*Alli* v. *Krishna*, A.I.R. 1950 Orissa 250.

Possession does not become adverse when the *intention* to hold adversely is wanting. Although the defendant's possession might have been wrongful, still if the plaintiff honestly though wrongly believed that the defendant (who was a Hindu female) was entitled to possession for life and the defendant herself shared that belief and so remained in possession, such possession was not adverse to the plaintiff, but merely permissive, as the *intention to hold adversely* in order to obtain an absolute estate was *wanting*—*Pirsab* v. *Gurappa*, 38 Bom. 227 (238), 24 I.C. 716.

Another important principle to be borne in mind is that the possession of the defendant does not become adverse to the plaintiff, until the plaintiff is entitled to *immediate* possession. As observed by Mr. Justice Markby: "By adverse possession I understand to be meant possession by a person holding the land on his own behalf, or on behalf of some person other than the true owner, the true owner having a right to *immediate* possession"—*Bejoy Chunder* v. *Kally Prosanno*, 4 Cal. 327 (329). This well-known rule is conveyed in the maxim *"contra non valentem agere non currit prescriptio," i.e.*, prescription does not run against a man during the time when he is not entitled to immediate possession—*Tarubai* v. *Venkatrao*, 27 Bom. 43 (51); *Malkarjun* v. *Amrita*, 42 Bom. 714 (718), 47 I.C. 153; *Chinto* v. *Janki*, 18 Bom. 51 (57). The person against whom adverse possession is exercised, must be a person who is entitled to demand possession at the moment adverse possession begins—*Aditya* v. *Dhirendra*, 53 C.W.N. 899, A.I.R. 1950 Cal. 92.

The possession of the defendant does not become adverse to the plaintiff where there was no *notice or knowledge*, or circumstance that could have given notice or knowledge, to the plaintiff that the defendant's possession was in displacement of his right. Until the plaintiff had reason to know that his rights were invaded, there could be no necessity for him to take action. Knowledge on the part of the person whose rights are invaded is an essential element of adverse possession—*Tarubai* v. *Venkatrao*, 27 Bom. 43 (69). Thus where a widow of a deceased Mahomedan does not bring to the notice of the other heirs that she is claiming the esate, of which she is in possession, adversely to them, no question of adverse possession can arise, especially when the lady has a claim for dower debt owing from the deceased husband—*Yusuf* v. *Gafoor*, A.I.R. 1952 Pat. 123, 30 Pat. 351. Possession of which the plaintiff was not aware until a recent date, is not adverse possession—*Gaya Prasad* v. *Bakya Mani*, 56 Cal. 914, 33 C.W.N. 277 (279). But actual knowledge is not necessary. Knowledge may be presumed from an open and notorious act of taking possession—*Tarubai* v. *Venkatrao*, 27 Bom. 43

(52). Possession to be adverse must be adequate in continuity, in publicity and in extent. But adverse possession need not be shown to have been brought to the knowledge of the owner. *It is sufficient that the possession be overt and without any attempt at concealment,* so that *the person against whom time is running, ought, if he exercises due vigilence, to be aware of what is happening.* Where the assertion of right is secret and not open, the possession cannot be held to be adverse—*Upendranath* v. *Jiterdranath,* 62 Cal. 921; *Secy. of State* v. *Debendra Lal,* A.I.R. 1934 P.C. 23; *Maharaja Sirish Nandy* v. *Baijnath Jugal-kishore,* 62 I.A. 40, A.I.R. 1935 P.C. 36; *Haria* v. *Bhindru,* A.I.R. 1950 H.P. 8; *Bhola Nath* v. *Shyam Sundra,* A.I.R. 1951 Orissa 235; *Dipnarain* v. *Pundeo,* 25 Pat. 512, A.I.R. 1947 Pat. 99. U. N.Mitra's Limitation, p. 135; Angell on Limitation p. 292.

Possession, in order to be adverse, must have been used *openly* without any effort made or step taken to effect concealment—*Rains* v. *Buxton,* (1880) 14 Ch. D. 533 (540). The possession taken must not be clandestine. The possession, in order to ripen into a prescriptive title must be juridical and have none of the *vitia possessions* as *clam vi aut precario.* And if in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right before it can cause time to run.—*Tarubai* v. *Venkatrao,* 27 Bom. 43 (53).

Possession is never considered adverse if its commencement can be referred to a lawful title—*Doe* v. *Brightwen,* (1809) 10 East 583; *Thomas* v. *Thomas,* (1856) 2 K. & J. 79; *Bhairabendra* v. *Rajendra,* 50 Cal. 487 (489), A.I.R. 1924 Cal. 45, 74 I.C. 193; *Rangulal* v. *Makhan,* I.L.R. (1949) 1 Cut. 804, A.I.R. 1951 Orissa 183; *Kesavan* v. *Mayankutty,* A.I.R. 1958 Ker. 58. The possession of a manager of a family or guardian does not become adverse until he has distinctly repudiated the management or guardianship—*Nabab Mir Sayad* v. *Yasin Khan,* 17 Bom. 755 (758). One who holds possession on behalf of another cannot, by a mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation—*Bejoy Chandra* v. *Kally Prosanna,* 4 Cal. 327 (329). There must be some *adverse* act, so that if the possession has commenced and continued in accordance with any *contract,* express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse—*Dandoba* v. *Krishna,* 7 Bom. 34 (39). That is to say, if there be no adverse act, nothing overt and no unmistakable ouster, or taking of possession, and all that is done is referrable to or consistent with and susceptible of explanation by, some title which does not impugn but recognise the right of the person seeking to recover possession, there can be no possession adverse to that person without notice or intimation to him of some kind, that an adverse claim has been set up in opposition to his right theretofore recognised—*Tarubai* v. *Venkatrao,* 27 Bom. 43 (53); *Ittappan* v. *Manavikraman,* 21 Mad. 153 (159). In order to prove adverse possession, it is necessary to show that the person claiming adverse possession had an *animus* to possess a thing in his own right against the right of the rightful owner. In case of persons standing in fiduciary relationship with the owner such animus will not be readily presumed and so long as he does not divest himself of that character, his possession will be attributed to the consent, express or implied, of the rightful owner—*Sajjad* v. *Shahid,* A.I.R. 1950 All 316. The payment of house tax is not such an unequivocal act as would constitute an assertion of hostile intention so as to amount to adverse possession in law—*Rangulal* v. *Makhun,* I.L.R. (1949) 1 Cut. 804, A.I.R. 1951 Orissa 183; *Kaluluddin* v. *The State of Hyderabad,* A.I.R. 1951 Hyderabad 137. A person who is once in possession in a fiduciary character does not cease to hold in that character merely because it becomes uncertain who is the actual person to whom he has to account—*Lyell* v. *Kennedy,* 14 App. Cas. 437.

Where a decree has been made declaring a right to and directing partition, but no proceedings have been taken in execution of the decree, and the parties have remained in *status quo* without any partition having been made, neither party can claim against the other to have been in adverse possession of any portion of the property—*Nasratullah* v. *Mujibullah*, 13 All. 309 (315).

It is always assumed that the person in possession is in rightful possession and so his possession is always referred to a lawful title whenever that is possible. But this principle does not apply to the possession of a trespasser—*Raghunathaswani* v. *Donna*, 1942 N.L.J. 413. Where the circumstances under which possession was assumed are known, the general principle that a Court will always attribute possession to a lawful title where that is possible cannot be relied on—*Munnalal* v. *Kashibai*, 73 I.A. 223, I.L.R. (1946) Nag. 917, 1946 A.L.J. 427, 51 C.W.N. 175, 1947 N.L.J. 106, A.I.R. 1947 P.C. 15, (1946) 2 M.L.J. 453 (P.C.); I.L.R. (1947) Kar. (P.C.) 78.

Adverse possession and easement distinguished:—If a person stands in such relation to a particular thing that he has in fact dominion over it, and if he and those under whom he claims have in fact exercised this dominion from time immemorial or for the period fixed by the law of prescription, he becomes the legal owner of the thing; but in order that the possession may generate ownership, it is necessary that the possessor should hold the thing *exclusively*, and *for himself as owner*, In other words, to constitute adverse possession two things are necessary, *viz.*, the physical fact of exclusive possession, and the intention to hold for himself as owner. If, on the other hand, a particular act is done upon a thing with the belief that another is its owner and not with the intention to hold as owner, and if the particular act has been done continuously for 20 years as fixed by the law of prescription, the person doing the act acquires a legal right to do that act, though the thing upon which it is done is in other respects under another's dominion. In principle, the act done is one of ownership or evidence of easement according as the person doing it asserts general ownership or a particular right to another's property, and in the first case the act of enjoyment is designated possession and in the latter case quasi-possession. This is the distinction in principle between acts of ownership and acts which are done in the exercise of easements—*Sivasubramanya* v. *Secretary of State*, 9 Mad. 285 (302, 303).

613. Adverse possession by tenant against landlord:—There can be no adverse possession by the tenant *during the term of his lease*. A person who lawfully came into possession of the land as tenant from year to year for a term of years, cannot, by setting up *during the continuance of such relation* any title adverse to that of the landlard, acquire by operation of the law of limitation any title as owner or any other title inconsistent with that under which he was let into possession. But the tenant can, after the determination of the tenancy, set up and acquire by prescription against the landlord, a right as owner or such limited estate as he might prescribe for—*Seshamma* v. *Chickaya*, 25 Mad. 507 (511). When certain persons come into possession as tenants they cannot acquire proprietory title by adverse possession unless adverse possession had been asserted by them to the knowledge of the landlord—*Municipal Board* v. *Mansa*, A.I.R. 1951 All. 634. A person coming into possession under a lease which is *invalid* or *void* as against the person seeking to eject him is really a trespasser, and as such, after the expiration of the period prescribed by Article 144 acquires by prescription the limited right under the lease, whether it be a lease for a term of years or a lease in perpetuity—*Seshamma* v. *Chickaya*, 25 Mad. 507 (511, 512); *Budesab* v. *Hammanta*, 21 Bom. 509; *Thakore Fatesinghji* v. *Bamanji*, 27 Bom. 515 (537). The Patna High Court has held that where the lease relied on by the defendant is prohibited by the statute, it is not open to the court to hold that the defendant

has acquired right of tenancy by prescription—*Sahabu* v. *Hari*, A.I.R. 1952 Pat. 43. The same High Court has held in a subsequent case that a person coming in possession under an invalid lease is a trespasser from the beginning and possession is adverse to the landlord so far as his right to khas possession is concerned. If the landlord accepts rent from him, his possession may not be adverse so far as the landlord's right to receive rent is concerned—*Maharaj* v. *Budhu*, A.I.R. 1952 Pat. 46.

"A tenant's possession, unlike that of a stranger, is in its inception in subserviency to and consistent with the landlord's title, and as during the existence of the tenancy the tenant is bound to protect the interest of the landlord, the landlord has a right to act upon the supposition that his interest has not been betrayed and that no change in the character of the possession has taken place, unless and until it is brought home to him that the contrary is the case. Therefore, though the law does not absolutely disable a tenant from disclaiming his landlord's title and claiming to hold in his own right, yet if he does so, the statute does not begin to operate unless the possession, before consistent with the title of the real owner, becomes tortious and wrongful by the disloyal acts of the tenant, which must be open, continued and notorius so as to preclude all doubts as to the character of the holding or the want of knowledge on the part of the owner. See *Zeller* v. *Eckhart*, 4 How. (U.S.) 289 at p. 296, cited in Angell on Limitation, 6th Edn., p. 458. It should be added, however, that if the disavowal of the landlord's title and the assertion of the claim to hold on the tenant's own account take place *during the currency of a definite term* then the tenant's possession does not necessarily become adverse immediately. For in such a case the term would become forfeited only if the landlord does some act showing his intention, on the ground of the denial of his title, to determine the tenancy. In the absence of such act, the term subsists, and the possession is, in law possession under the lease. But the moment the term comes to its natural *termination* by effluxion of time, the disloyal tenant's possession becomes adverse"—*per* Subramania Aiyer, J. in *Ittappan* v. *Manavikraman*, 21 Mad. 153 (163). So also where the tenant remains in possession on account of non-execution of a conditional decree passed in a previous suit for ejectment, the possession becomes adverse from the date of the decree—*Kripa* v. *Zahur*, 13 Lah. 311, A.I.R. 1932 Lah. 46; *Kishen* v. *Mohan*, A.I.R. 1951 Ajmer 1. Where the term of a lease is continuing, mere non-payment of rent without anything more would not amount to adverse possession. But where a lease is for a fixed period, and there is no proof that a fresh tenancy was constituted at the end of the period, then the lease may be taken to have determined on that date, and the possession of the tenant thenceforward becomes wrongful—*Shravan* v. *Fattu*, 28 Bom.L.R. 1357, A.I.R. 1927 Bom. 613, 98 I.C. 911. See Note 583 under Article 139. But where under the Tenancy Act (Punjab) the tenant has the right to continue in possession until his landlord serves him with notice of ejectment, the tenancy is not determined by lapse of time, and the holding over after the expiry of the lease does not amount to adverse possession—*Sohawa* v. *Kesar Singh*, 13 Lah. 432, 140 I.C. 474, 33 P.L.R. 771.

The possession of a tenant for life cannot become adverse within the meaning of the Limitation Act by a mere notice from him that he was holding on a perpetual or hereditary tenure—*Beni Pershad* v. *Dudh Nath*, 27 Cal. 156 (P.C.). A tenant for life cannot prescribe against his landlord during his life-time; consequently, a transferee from a tenant for life cannot prescribe against his landlord during the life-time of such tenant—*Chota Nagpur Banking Association* v. *Kamakhya*, 7 Pat. 341, 109 I.C. 306, A.I.R. 1928 Pat. 431 (434).

Where the parties are landlord and tenant, the acts, which are relied on as evidence of adverse possession must be such that they were inconsistent with the purpose to which the landlord intended to devote the land. There must be an assertion

of hostile title as against the landlord and claim of title on his own account and after such assertion to the knowledge of the landlord remaining in possession for the statutory period of twelve years or more—*Badri* v. *Narain*, 27 Pat.L.T. 217, A.I.R. 1946 Pat. 185. The acts of the tenant must be such that they amount to an assertion of possession adverse to the landlord, and not acts which were presumably done with his permission or consent. Thus, in the case of *bil* or waste lands, the cutting of grass and grazing of cattle would be ordinary acts by which possession would be asserted; but if these acts are being done by tenants on the waste lands of their landlord, they cannot be held to amount to adverse possession because these acts are such as would ordinarily be done on the waste lands of the landlord without any objection being raised and are in fact acts presumably done with his permission—*Wali Ahmed* v. *Tota Meah*, 31 Cal. 397 (405). The principle is, that acts of user committed upon land which are not inconsistent with the owner's enjoyment of the soil for the purpose for which the owner intends to use it, do not amount to adverse possession—*Leigh* v. *Jack*, (1879) L.R. 5 Ex. D. 264 (273). Where a tenant plants a grove on his holding and the landlord does not challenge his action in converting the holding into a groveland for a large number of years, a presumption may be raised that the same has been done with the consent of the landlord—*Lunkush* v. *Rajendra*, A.I.R. 1950 All. 528.

Persons who claim to be tenants of service watan lands cannot acquire any title to a permanent tenancy in the lands by setting up 12 years' adverse possession as against the watandars from whom they held the lands—*Madhavrao* v. *Raghunath*, 47 Bom. 798 (809) (P.C.), 25 Bom.L.R. 1005, 74 I.C. 362, A.I.R. 1923 P.C. 205.

Mere non-payment of rent by a tenant does not establish adverse possession on the part of the tenant. While there subsists any contract, express or implied, between the parties in and out of possession, to which possession may be referred as legal and proper, it cannot be pronounced adverse. As the possession may be referred to the contract of tenancy under which the tenant entered, mere length of enjoyment without payment of rent does not under ordinary circumstances affect the relation of the parties—*Dadoba* v. *Krishna*, 7 Bom. 34 (39), following *Doe Dem Colelough* v. *Hulse*, 3 B. & Cr. 757; *Tatia* v. *Sadashib*, 7 Bom. 40 (42); *Gangabai* v. *Kalapa*, 9 Bom. 419 (421); *Jugdeo* v. *Baldeo*, 2 Pat. 38 (52) (P.C.), A.I.R. 1922 P.C. 272, 3 P.L.T. 605, 27 C.W.N. 925, 71 I.C. 984; *Paresh Narain* v. *Kassi Chunder*, 4 Cal. 661 (663); *Prasanna* v. *Srikantha*, 40 Cal. 173 (180); *Rungo Lal* v. *Abdul Guffoor*, 4 Cal. 314 (318); *Prem Sukh* v. *Bhupia*, 2 All. 517; *Madan Mohan* v. *Rameshwar Malia*, 7 C.L.J. 615; *Tiru Churna* v. *Sanguvien*, 3 Mad. 118. But each case must be decided on its own particular features. Where rent was never paid at all for nearly 30 years and no serious attempt was ever made to recover rent, and over and above this there is the denial on oath by the defendant that he ever intended to pay rent or regarded himself as lessee, the defendant's possession must be treated as adverse—*Umar Baksh* v. *Baldeo Singh*, 97 P.R. 1915, 32 I.C. 35. Possession under a claim of right adverse against the landlord coupled with non-payment of rent for over 40 years of possession is adverse possession—*Munnalal* v. *Kashibai*, 73 I.A. 223, I.L.R. (1946) Nag. 917, 1946 A.L.J. 472, 51 C.W.N. 175, 1947 N.L.J. 106, A.I.R. 1947 P.C. 15, (1946) 2 M.L.J. 453 (P.C.), I.L.R. (1947) Kar. (P.C.) 78.

If a tenant (other than a tenant for a fixed term) instead of paying rent to the landord pays it to a third party who claims against the landlord, the possession of the third party will be adverse to the landlord, provided he has knowledge of the facts—*Ittappan* v. *Manavikrama*, 21 Mad. 153 (164); *Gossain Mahendra* v. *Rajani Kant*, 1 C.W.N. 246 (247); *Tarubai* v. *Venkatrao*, 27 Bom. 43 (57). See also Note 621A under heading "Adverse possession of limited interest," *infra*.

Adverse possession by third party against landlord:—"The possession of a trespasser

does not become adverse to the lessor, until the latter acquires a right to the *khas* possession of the demised premises. To hold that 12 years' possession by a trespasser of the whole or part of the demised premises would bar the right of the lessor, although the lessee does not renounce his character as such and the lease is still subsisting, is to violate the maxim that 'prescription does not run against a person who is unable to act.' The general principle of the law is to bar a person who has a right to enter if he does not exercise that right in a certain time, not to bar those who cannot exercise that right"—U. N. Mitra's Law of Limitation, 3rd Edn., p. 145. Therefore possession taken by a trespasser during the currency of an *ijara* lease does not become adverse to the Zemindar (lessor) until the latter is entitled to possession, *i.e.*, until upon the expiration of the lease, and a suit for possession may be brought within 12 years from the date of the termination of the lease. The principle is, that possession which is adverse to the ijardar does not become adverse to the Zemindar until he is entitled to possession—*Sharat Shundari* v. *Bhoba Pershad*, 13 Cal. 101 (103); *Krishna Govind* v. *Hari Churn*, 9 Cal. 367 (370); *Sheo Sahye* v. *Luchmessur*, 10 Cal. 577 (580); *Kishwar* v. *Kali*, 10 C.W.N. 343; *Bissesuri* v. *Baroda*, 10 Cal. 1076 (1079); *Thamman* v. *Maharaja of Vizianagram*, 29 All. 593 (595); *Gunga Kumar* v. *Asutosh*, 23 Cal. 863 (866). But during the lease the Zemindar may bring a suit under sec. 42 of the Specific Relief Act, for a declaration of his title as against the trespasser—*Bissesuri* v. *Baroda*, 10 Cal. 1076 (1078). The Calcutta High Court has laid down in another case that in a case of a *patni* or other permanent tenure, if the Zemindar finds that the patnidar or other permanent tenant has allowed a trespasser to hold adverse possession of any land included in the permanent tenure for more than twelve years, such adverse possession would be adverse to the Zemindar also; and if the patnidar then relinquishes the patni in favour of the Zemindar, the Zemindar's suit to recover possession from the trespasser would be barred, because time ran not from the date of relinquishment but from the date of the trespasser's possession—*Gobindo* v. *Surjakant*, 26 Cal. 460 (465). In other words, the Calcutta High Court has laid down in this case that possession taken by a trespasser during the term of the lease becomes adverse to the zamindar also. The same view has also been taken in *Prosonnomoyi* v. *Kali Das*, 9 C.L.R. 347. These rulings are in conflict with the other rulings of the Calcutta High Court (9 Cal. 367, 10 Cal. 577, 13 Cal. 101, 23 Cal. 863) cited above. Where a non-transferable holding is transferred in its entirety, it amounts to an abandonment by the tenant of the holding. The landlord is entitled to exercise his right of re-entry on the date of transfer. The possession of the transferee is adverse from its very inception and time runs against the landlord from the date of the transfer and if the adverse possessor remains in possession for over twelve years, the title of the tenant is completely extinguished. The landlord's right to recover the same is also similarly extinguished if he does not enforce his right to re-enter or recover within the period of limitation—*Bholanath* v. *Shyamsundra*, A.I.R. 1951 Orissa 235.

613A. Encroachment by tenant:—As regards encroachment by tenant on the lands of his *landlord*, see Note 597 under Article 142.

If a tenant during his tenancy encroaches upon the land of a *third person* and if it is proved that he encroached upon that land adversely to his landlord also, then adverse possession of the land for 12 years will give the tenant a title by limitation. But if the tenant encroaches upon the land of a third person, and holds it with his own tenure, *as part of his tenure* (*i.e.*, not adversely to his landlord, but expressly or impliedly with the acquiescence of the landlord), he is considered to have made the encroachment, not for his own benefit but for that of his landlord; and if he has acquired a title against the third person by an adverse possession, he has acquired

it for his landlord and not for himself, so that upon the termination of the tenancy, he must give it up to his landlord—*Nuddyar Chand* v. *Meajan*, 10 Cal. 820 (821). In other words, the tenant 'steals for his landlord.'

614. Adverse possession by mortgagee:—The possession by the mortgagee of the mortgaged property is not *prima facie* adverse to the mortgagor; even the fact that the mortgagee is in possession after the mortgage debt is paid off, does not make such possession adverse to the mortgagor—*Harasit* v. *Jaladhar*, 56 Cal. 1130, 33 C.W.N. 963 (965), A.I.R. 1930 Cal. 15, 121 I.C. 407. The mortgagee's possession remains that of a mortgagee until some adverse title is set up by him. Whether the mortgage is valid or not the position of the mortgagee is that of a mortgagee and nothing more unless some adverse title is set up by him—*Baijnath* v. *Muneshwar*, A.I.R. 1936 Pat. 63, 160 I.C. 1066. The mere assertion of the adverse title by a mortgagee in possession does not make his possession adverse to the mortgagor or enable him (mortgagee) to abbreviate the period of 60 years which the law allows to a mortgagor for redemption—*Ali Muhammad* v. *Lalta Baksh*, 1 All. 655 (658); *Massad* v. *Collector*, 10 Mad. 189 (191); *Bhagwant* v. *Kondi*, 14 Bom. 279; *Pandu* v. *Anpurna*, 21 Bom. 793 (796); *Ittappan* v. *Manavikrama*, 21 Mad. 153 (164); his possession can become adverse only after the expiry of the term of the mortgage—*Matadin* v. *Ahmad Ali*, 34 All. 213 (233) (P.C.). This is in accordance with the principle laid down in *Bejoy Chandra* v. *Kally Prosonno*, 4 Cal. 327 (329) that possession does not become adverse to the true owner until he is entitled to *immediate* possession. The Privy Council has laid down that as between the mortgagor and the mortgagee neither exclusive possession by the mortgagee for any length of time short of the statutory period of 60 years, nor any acquiescence by the mortgagor not amounting to a release of the equity of redemption, will be a bar or defence to a suit for redemption if the mortgagor is otherwise entitled to redeem—*Khiarajmal* v. *Daim*, 32 Cal. 296 (P.C.); *Mahendra* v. *Chandrapal*, 24 O.C. 155, 63 I.C. 284 (285); *Jiwan Singh* v. *Ghasita*, 27 P.L.R. 402, 95 I.C. 9, A.I.R. 1926 Lah. 549; *Dinanath* v. *Rama Rai*, 6 Pat. 102, 97 I.C. 348, A.I.R. 1926 Pat. 512; *Achche Mirza* v. *Ahmad*, 1 Luck. 529, A.I.R. 1926 Oudh 594, 97 I.C. 922. A person who lawfully comes into possession as mortgagee cannot, by setting up during the continuance of such relation any title adverse to that of the mortgagor inconsistent with the real relation between them, and that however notoriously and to the knowledge of the other party, acquire by the operation of the law of adverse possession a title as owner or any other title inconsistent with that under which he was let into possession—*Bagha Singh* v. *Ram Narain*, 47 All. 73, 22 A.L.J. 905, A.I.R. 1925 All. 133, 80 I.C. 935.

Where a mortgagee pays only a part of the consideration and is in possession of the whole of the mortgaged property, he cannot by the mere assertion of a larger interest than what was validly passed to him under the mortgage, acquire a title by 12 years' possession. The mortgage is valid to the extent of the amount actually advanced, and the mortgagee's possession of the property is not adverse to the mortgagor. The latter can redeem it within sixty years under Article 148—*Rajai Tirumal* v. *Pandla Muthial*, 35 *Mad.* 114 (119).

When a mortgagee in possession under a usufructuary mortgage holds over after the time limited in the mortgage-deed for surrender of the property, his possession does not, by that fact alone, become adverse to the mortgagor, who still has a period of sixty years within which to sue for recovery of possession—*Pokhpal* v. *Bishan*, 20 All. 115 (117). But a usufructuary mortgagee remaining in possession *after satisfaction* of the mortgage *by redemption* is a trespasser, and if he continues in such possession for

the statutory period, the right of the mortgagor to recover possession becomes barred —*Ram Kuer* v. *Govind Ram*, 48 All. 145, 92 I.C. 414, A.I.R. 1926 All. 62.

A mortgagee can set up adverse possession if his possession at its inception was that of a trespasser—*Jiwa Khan* v. *Lakshmi Chand*, 232 P.L.R. 1911, 11 I.C. 429. Thus, a mortgagee who obtains possession of the mortgaged property where the mortgage deed does not confer on him a right to possession of the property is a trespasser, and his possession is adverse to the mortgagor—*Jowahar* v. *Amarchand*, 27 P.L.R. 235, A.I.R. 1926 Jour. 125, 93 I.C. 934. Where a person obtains possession under an invalid mortgage and there is nothing to show that at any time he has asserted possession under any claim of absolute right, he acquires on the lapse of 12 years a prescriptive right to the limited interest by way of mortgage—*Purusottam* v. *Desouza*, A.I.R. 1950 Orissa 213; *Jamadar* v. *Amir Hassan*, A.I.R. 1957 Pat. 213. A mortgage of lands under a *Shortriem* grant burdened with service is void from the inception and a mortgagee remaining in possession for more than 12 years acquires by adverse possession a prescriptive right under the mortgage—*Adinarayana* v. *Srirangachariar*, 1940 M.W.N. 404. Where in the case of an inalienable property the equity of redemption is sold to the usufructuary mortgagee both mortgage and sale are invalid. But if the same is not questioned and the mortgagee purchaser is allowed to remain in possession for more than 12 years, he acquires title by adverse possession—*Markandra* v. *Naidu*, 26 Pat. 717, A.I.R. 1949 Pat. 197. Where a mortgagee obtained an unregistered sale of the equity of redemption (which was invalid under sec. 54, T. P. Act) and thereafter held possession of the property for more than 12 years, *held* that the unregistered sale deed, though inadmissible to prove the passing of the title of the vendor, was admissible for the purpose of determining the nature of the possession taken by the vendee (mortgagee). The deed of sale did not create any title in favour of the mortgagee, leaving him in the position of a trespasser, and as his possession extended for over a period of 12 years, he became full owner of the land—*Qadar Baksh* v. *Mangha Mal*, 4 Lah. 249 (251), 73 I.C. 889, A.I.R. 1923 Lah. 495; *Mahendra* v. *Chandrapal*, 24 O.C. 155, 63 I.C. 284 (285); *Sheo Nath* v. *Tulsipat*, 12 O.L.J. 139, A.I.R. 1925 Oudh 385, 87 I.C. 188. So also, where a mortgagor surrendered his equity of redemption to the mortgagee, but there was no registered deed, the possession of the mortgagee thereafter for more than 12 years perfected his title to the property—*Bashir Hussein* v. *Chandrapal*, 25 O.C. 83, A.I.R. 1922 Oudh 133, 68 I.C. 223. Where a mortgagee, in spite of the foreclosure proceedings under Reg. XVII of 1806 being defective, enters into possession, he holds as a trespasser, and if he so holds for 12 years, the mortgagor's right of redemption is barred—*Luchi* v. *Jaganath*, 26 A.L.J. 149, A.I.R. 1928 All. 197 (198). Where a mortgage of a certain property was executed by persons other than the real owner, who however was aware of the mortgage and acquiesced in it, the mortgagee's possession became adverse to the real owner from the date of the mortgage, and the persons who executed the mortgage were entitled to redeem to the exclusion of the true owner—*Pursottam* v. *Sagaji*, 28 Bom. 87 (91, 92). A mortgagee remaining in possession of the mortgaged property for more than 12 years in full ownership in satisfaction of the mortgage debt, under an *oral sale* from the mortgagor, acquires an absolute title to the property, and the mortgagor's right to redeem is extinguished—*Kandasami* v. *Chinnabba*, 44 Mad. 253 (257) (dissenting from *Ariyaputhira* v. *Muthukumaraswamy*, 37 Mad. 423). The parties to a mortgage by conditional sale entered into an agreement whereby the mortgagor gave up all his equity of redemption in the property mortgaged. The agreement was not registered, but both parties consented to the complete transfer of the equity of redemption, and both parties acted on the agreement for nearly 40 years. On a suit being brought by the mortgagor for redemption, *held* that the mortgagees had been in adverse possession for more than 12 years, and the suit was barred—*Khadu* v. *Sheo Person*, 39 All. 423

(426), 17 A.L.J. 366. Although a mortgagee cannot, by a mere assertion of his own or by any unilateral act of his, convert his possession as mortgagee into possession as absolute owner, still if a mortgage deed provides that in default of payment of the mortgage amount within the stipulated period the mortgagee should take possession of the property and enjoy the same as absolute owner, and the mortgage money is not paid within the stipulated period, the possession of the mortgagee thereafter for over 12 years becomes adverse to the mortgagor, whose right to redeem is consequently barred—*Usman* v. *Dasanna*, 37 Mad. 545 (547), 23 M L.J. 360, 16 I.C. 694. If a mortgagee takes possession as mortgagee, and thereafter the equity of redemption is sold to him by the mortgagor himself, but the sale is invalid, the mortgagee cannot by merely asserting to hold as absolute owner under such purchase, change the original character of his possession as mortgagee; but if in a litigation between the parties it is decided that the mortgagee is entitled to possession not on the strength of his title as mortgagee but on the strength of his title as purchaser, his possession becomes adverse from the date of the sale—*Ahmed* v. *Babu Devji*, 53 Bom. 676, 31 Bom.L.R. 778, A.I.R. 1930 Bom. 135 (139), 122 I.C. 113. Where a part of the mortgaged property was sold by the mortgagor to the mortgagee in possession, and from the consideration received the whole of the mortgage debt was paid off, but the mortgagee all the same continued in possession also of the portion of the property which had not been conveyed to him, the possession of the mortgagee as to that portion became adverse to the mortgagor—*Keshab Lall* v. *Bhola Nath*, 34 C.W.N 646, A.I.R. 1930 Cal. 402, 129 I.C. 414; *Ananthan* v. *Krishna*, A.I.R. 1957 T. C. 145.

615. Adverse possession by co-mortgagor:—Where property has been mortgaged by several co-sharers and one of them redeems it, the possession of the redeeming co-sharer does not become adverse to the other co-sharers, until there is an assertion of an exclusive title and submission to the right thus set up. The principle is, that as long as a possession can be referred to a right consistent with the subsistence of an ownership in being at its commencement, so long must the possession be referred to that right rather than to a right which contradicts the ownership—*Ram Chandra* v. *Sadashiv*, 11 Bom. 422 (424); *Bhaudin* v. *Sheikh Ismail*, 11 Bom. 425 (428); *Faki Abas* v. *Faki Nuruddin*, 16 Bom. 191 (196); *Chandbhai* v. *Hasanbhai*, 46 Bom. 213 (215), A.I.R. 1922 Bom. 150, 64 I.C. 205; *Moidin* v. *Oothumanganni*, 11 Mad 416; *Wajihuddin* v. *Ahmad*, 2 Luck. 618, A.I.R. 1927 Oudh 347 (350), 104 I.C. 400; *Ma Khin* v. *Md. Ali*, A.I.R. 1938 Rang. 65.

Even if the co-mortgagor, after redeeming the property, remortgages it to a third party, this in itself would not amount to adverse possession as against the other co-mortgagors—*Moidin* v. *Oothumanganni*, 11 Mad. 416 (417); *Ram Chandra* v. *Sadashiv*, 11 Bom. 422. If a co-mortgagor, after redeeming the entire mortgage, gets the mutation of names in his favour on the basis of his possession, he cannot be subsequently allowed to say that merely by virtue of the said act he set up an exclusive title to himself and denied the title of his co-sharers. Unless he can prove that in the mutation proceedings he denied the title of his other co-sharers to their knowledge and remained thereafter in exclusive possession for more than twelve years, his adverse possession cannot be considered to have been made out—*Wajihuddin* v. *Ahmad*. supra.

But if the mortgagee is a usufructuary one, and the amount is satisfied out of the usufruct, one co-mortgagor cannot take possession of the entire property from the mortgagee but is entitled to recover only his individual share. If, however, he takes possession of the entire property, he is then deemed to hold the shares of the other co-mortgagors adversely to them—*Gobardhan* v. *Sujan*, 16 All. 254 (256); *Inayat Hussein* v. *Ali Husein*, 20 All. 182 (184). But if the usufructuary mortgage is redeemed by one

co-mortgagor by paying the money out of his own pocket, and is not redeemed out of the usufruct, the redeeming co-mortgagor can retain possession of the property as a lien or until he is paid the shares of the money payable by the other co-sharers; and such possession is not adverse to them—*Ramchandra* v. *Sadashiv*, 11 *Bom.* 422 (424).

616. Adverse possession by third party against mortgagee or mortgagor:—Possession of mortgaged property obtained by a third party by ouster of the mortgagee in possession is not necessarily adverse to the mortgagor also, since the latter is not entitled to *immediate* possession during the existence of the mortgage; the possession can become adverse against the mortgagor only when he has become entitled to possession after satisfaction of the mortgage—*Muhammad Husain* v. *Mutti Chand*, 27 All. 395 (396); *Chinto* v. *Janki*, 18 Bom. 51 (58); *Ismdar Khan* v. *Ahmad Hussain*, 30 All. 119 (122); *Ittappan* v. *Manavikrama*, 21 Mad. 153 (164); *Shambhu* v. *Nama*, 35 Bom. 438 (442); *Tarabai* v. *Dattaram*, 49 *Bom.* 539, A.I R. 1925 Bom. 465, 87 I.C. 765; *Khyaliram* v. *Onkarlal*, A.I.R. 1950 M.B. 41. In such a case, a suit for possession by the mortgagor or those claiming under him will not be barred, although one by the mortgagee may be—*Chinto* v. *Janki*, 18 Bom. 51 (56). Nor does the right of redemption by the mortgagor is affected in such a case—*Kunda* v. *Rangi*, A.I.R. 1950 Pepsu 7. The mortgagor, having once put the mortgagee in possession, ordinarily has no right to possession himself until the mortgage is paid off. The mere fact of the mortgagee's letting the property go out of his possession cannot give the mortgagor such a right before payment. And the party in possession, though he may be a trespasser, would ordinarily be able to defend an action of ejectment at the suit of the mortgagor by setting up *jus tertii*—*Chinto* v. *Janki*, 18 Bom. 51 (58). See also, *Kunwar Sen*, v. *Darbari*, 38 All. 411 (415). If the true owner (mortgagor) has no right to immediate possession, it is practically immaterical to him who is in possession. Having no right to possession himself, he cannot eject the person in possession—*Tarubai* v. *Venkatrao*, 27 Bom. 43 (51). If the trespasser pleads adverse possession *both against the mortgagor and the mortgagee*, the burden lies upon him to shew not only that his possession was adverse to the mortgagor—*Chinto* v. *Janki*, 18 Bom. 51 (54), but also that the mortgagor had notice that the trespasser was holding in denial of the mortgagor's right—*Periya* v. *Shanmugasundaram*, 38 Mad. 903 (915) (F.B.). *Prima facie*, the possession by the trespasser by ouster of the mortgagee in possession is not full proprietary possession but is possession of a limited nature which would have the effect ordinarily of extinguishing the limited interest of the mortgagee, and vesting it in the trespasser. But there may be cases where the adverse possession against the mortgagee would also be adverse possession against the mortgagor, as for instance, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a *denial of the title of the mortgagor also*—*Ismdar Khan* v. *Ahmed Hussain*, 30 All. 119 (121); *Periya Aiya* v. *Shanmugasundaram*, 38 Mad. 903 (913) (F.B.). See also, *Khyaliram* v. *Onkarlal*, A.I.R. 1950 M.B. 41. In such a case, a suit for redemption brought by the mortgagor or his heirs would not fall under Article 148, but would be governed by Article 144, and would fail if the person in possession succeeded in proving that his possession was adverse to the mortgagor for more than 12 years prior to the suit—*Ram Piari* v. *Budh Sen*, 43 All. 164 (168); *Jai Gobind* v. *Abhairaj*, 26 O.C. 308, A.I.R. 1924 Oudh 40, 77 I.C. 125. Thus the plaintiff mortgaged his house with possession for a term which would expire in 1917. The mortgagee was dispossessed by the defendants in 1898. In 1908 they made certain additions to the building and when the plaintiff remonstrated with them they denied the plaintiff's title to the equity of redemption. The plaintiff then brought his suit for a declaration of his title. *Held* that the possession of the trespasser was not adverse to the plaintiff from 1898 to 1908, but it became adverse in 1908 when the plaintiff's title was repudiated—*Peria Aiya*

Ambalam v. *Shunmuga Sundaram*, 38 Mad. 903 (F.B.). The mere fact that the mortgagees have been paying surplus proceeds to a person who was once the owner of part of the equity of redemption should not be construed as taking away from the purchasers of the equity of redemption the right to redeem inherent in them—*Pydivadu* v. *Suryanarayanaraju*, A.I.R. 1951 Mad. 384. As long as the mortgagee is in possession, he and all claiming under him represent the mortgagor's possession. If the mortgagee in possession is dispossessed by a third party on grounds affecting only his right (*e.g.*, his right as heir to represent the original mortgagee or his right to possession in spite of a third party's lien on the property), then the dispossession of the mortgagee obviously does not imperil or call in question any right of the mortgagor, and the mortgagor is not concerned or entitled to insist on being immediately restored to possession, and the possession taken is not adverse to him and cannot cause time to run against him. But if there is an unequivocal ouster of the mortgagee by the third party preventing the possession of the mortgagor from continuing altogether by leaving no room for doubt that the person taking possession does not profess to represent the mortgagor but to hold in spite of him, then the mortgagor has a right to insist on immediate possession, because in such a case the mortgagor is as effectually and unmistakably displaced as if there had been no mortgage at all. When an ouster takes place in that manner, the mortgagor knows that no one is in possession who can represent or continue his possession or who is entitled preferentially to possession, and therefore he becomes entitled (and it is necessary and his duty) to claim possession immediately; if he does not protect his right, his equity of redemption will be barred—*Tarubai* v. *Venkatrao*, 27 Bom. 43 (68, 69). When the person taking possession of the mortgaged property shows by his acts or by his open declaration avows that he does not pretend to represent either the mortgagee or the mortgagor, but is exercising a right claimed entirely on his own account, the disaster affects not the mortgagee's interest alone, but the mortgagor's and the mortgagor, having no one in his place professing to hold for him, is entitled to seek recovery and is under the necessity of taking action as if he had been personally ousted—*Tarubai* v. *Venkatrao*, 27 Bom. 43 (58). See also *Puttappa* v. *Timmaji*, 14 Bom. 176 (179); *Ammu* v. *Ramakrishna*, 2 Mad. 226; and *Cholmondely* v. *Clinton*, (1820) 2 J. & W. 1 (at pp. 186, 187). In this English case, in which the owner of the equity of redemption had full notice of the claim of the trespasser, Lord Chancellor Eldon observed: "I say, without entangling myself with the difficulties about seisin and intrusion, I am of opinion that the adverse possession of an equity of redemption for 20 years is a bar to any other person claiming that equity of redemption, and it is an adverse possession which produces the same effect as those things you call abatement, intrusion and disseisin which belong to legal estates. It is an adverse possession which has the same effect, and for the peace of families and for the peace of the world, I think, ought to have the same effect, and therefore without going through more of the cases, I submit it to you Lordships that this bill cannot be maintained."

So also, in the case of a simple mortgage, adverse possession by a stranger against the mortgagor (taken after the mortgage) does not become adverse to the mortgagee until the mortgagee is entitled to possession; the principle is that adverse possession affects the interest only of the person who is entitled to *immediate possession*, and since the mortgagee under a simple mortgage is not entitled to immediate possession, his title is not affected by any adverse possession against the mortgagor. The interest of the mortgagor, that is, his equity of redemption, is extinguished, but the right of the mortgagee to enforce his charge upon the mortgaged property remains unaffected—*Priya Sakhi* v. *Manbodh*, 44 Cal. 425 (433); *Kali Prosonno* v. *Tara Prasanna*, 23 C.W.N. 815, 50 I.C. 304; *Nandan* v. *Jumman*, 34 All. 640 (645); *Vyapuri* v. *Sonamma*, 39 Mad. 811 (F.B.), 29 M.L.J. 645 (overruling *Ramaswami* v. *Poona Padayachi*, 36 Mad. 97); *Parthasarathi* v. *Lakshmana*, 35 Mad. 231, 21 M.L.J. 467; *Raj Nath* v.

Narain Das, 36 All. 567; *Ludbrook* v. *Ludbrook*, [1901] 2 K.B. 96. Where the defendant has been in possession adversely to the mortgagor for more than 12 years, a suit by the mortgagee for sale of the mortgaged properties is governed by Art. 132, and not by Art. 144, in as much as it is not a suit for possession of immoveable property; and the suit is not barred if it is brought within 12 years from the date on which the money becomes due. The adverse possession of the defendant against the mortgagor (which began subsequent to the mortgage) does not interfere with the mortgagee's right to bring the property to sale—*Raj Nath* v. *Narain Das*, 36 All. 567 (571) (F.B.). The possession of a person claiming to hold property adversely to the mortgagor does not become adverse to the mortgagee, who has purchased the property at a sale in execution of a decree on his mortgage, until after the sale, when the ownership in and the beneficial title to the land for the first time vest in him—*Aimandar* v. *Makhan*, 33 Cal. 1015 (1019), following *Pugh* v. *Heath*, (1882) 7 App. Cas. 235; *Aditya* v. *Dhirendra*, 53 C.W.N. 899. But this principle that the dispossession of the mortgagor having commenced after the date of mortgage does not run against the mortgagee does not apply in cases where limitation is prescribed by special Articles—*Gagan* v. *Goljan*, A.I.R. 1950 Dacca 1, *Mohim* v. *Kanai*, 33 C.W.N. 1085, A.I.R. 1930 Cal. 311.

If, however, the adverse possession of a trespasser begins *before the execution of the simple mortgage*, it will run against the *mortgagor and mortgagee both*—*Nandan* v. *Jumman*, 34 All. 640 (645); *Parthasarathy* v. *Lakshmanan*, 35 Mad. 231; *Nallamuthu v. Betha Naicken*, 23 Mad. 37 (39); *Tornton* v. *France*, [1897] 2 Q.B. 143. The term 'adverse possession' clearly implies that the person against whom adverse possession is exercised is a person who is entitled to demand possession at the moment the adverse possession begins. Where such a person has the entire interest when the adverse possession begins, he cannot, by afterwards transferring a part of the interest by mortgage, prevent the operation of prescription upon the entire interest—*per* Munro, J. in *Parthasarathy* v. *Lakshmana*, 35 Mad. 231, 21 M.L.J. 467. In other words, a distinction should be drawn between cases in which the adverse possession of a third party began *after* the mortgage and cases in which the adverse possession began *before* the mortgage. Adverse possession against the mortgagor does not affect the right of the mortgagee, when it commences after the mortgage; but this rule does not apply if the adverse possession had begun *before* the mortgage, which was effected when the mortgagor was not in possession. Therefore, if the adverse possession had begun before the excution of the mortgage, the creation of the mortgage would not stop the running of time, and the mortgagee by purchasing the mortgaged property in execution of his mortgage decree would not be entitled to recover possession of the property, if the adverse possessor had been in possession for more than 12 years—*Surendra* v. *Barisal Loan Co., Ld.*, 34 C.W.N. 519 (521, 522), 50 C.L.J. 317, A.I.R. 1930 Cal. 313, 126 I.C. 257. This distinction was overlooked in the cases of *Ramaswami* v. *Poona*, 36 Mad. 97 and *Pratab* v. *Maheshwar*, 12 O.C. 45, 2 I.C. 57, where it was held that adverse possession which began against a mortgagor *after* the execution of the simple mortgage extinguished the security of the mortgagee also. (This view proceeded from a misconception of the Privy Council decision in *Karan Singh* v *Bakar Ali* 5 All. 1). These cases are not correctly decided. The Madras case has been expressly overruled by the subsequent Full Bench case of *Vyapuri* v. *Sonamma*, 39 Mad. 811, and the Oudh case also should not be accepted as sound law.

An obstruction to a mortgagee obtaining possession (as purchaser) under his mortgage, by persons who merely claimed a lien on the property and admitted a mortgagor's title to the property does not amount to adverse possession as against the mortgagee's title as purchaser—*Purmanand* v. *Jamnabai*, 10 Bom. 49 (57).

Possession obtained by a third party, not adversely to the mortgagee but under

an agreement with the mortgagee, cannot be adverse to the mortgagor. It is only when the possession commences to be in opposition to or in displacement of the mortgagor's rights and it comes to his notice or knowledge, that it becomes adverse to him—*Tarubai* v. *Venkatrao*, 27 Bom. 43 (69). The principle is that limitation does not begin to run against a plaintiff until he is under some necessity or duty to assert his title —*Ibid* (at p.68). Thus, where after the redemption of a usufructuary mortgage, the tenants who had been let into possession of the mortgaged land by the mortgagee continued in possession, it was held that in the absence of notice to the mortgagor that the tenants claimed to hold adversely to him, possession of such tenants subsequent to the redemption was not adverse to the mortgagor, and they should be deemed to hold under the mortgagor on the same term as they held under the mortgagee—*Chinnappa* v. *Pazhaniappa*, 2 L.W. 1132, 18 M.L.T. 492, 31 I.C. 630.

If the mortgaged property is redeemed by a third party with the knowledge and consent of the mortgagor, he gets a lien on the property which he must enforce within 12 years under Article 132; but so long as the lien exists, his possession is not adverse to the mortgagor. If he does not enforce his lien within 12 years, the lien will be extinguished, and if he still holds possession of the property, such possession is that of a person having no right and therefore adverse to the mortgagor. And if the adverse possession continues for more than 12 years, his title will become perfect, so that the mortgagor will be threafter debarred from bringing a suit for redemption—*Sambhu* v. *Nama*, 35 Bom. 438 (443). If the mortgaged property had been redeemed by the third party without the knowledge and consent of the mortgagor, the possession of the third party would have been adverse to the mortgagor from the date of redemption—*Ibid* (p. 411). It is well settled that adverse possession cannot affect the right of a prior mortgagee to bring the properties to sale, and adverse possession against the purchaser under that sale cannot commence prior to the date of that sale—*Nagubai* v. *Shama Rao*, A.I.R. 1956 S.C. 593.

617. Adverse possession by vendor or vendee:—If the vendor remains in possession after sale, such possession is adverse to the purchaser, and if the purchaser does not bring a suit for possession within twelve years from the date of sale, he will be barred under this Article—*Ananda Coomari* v. *Ali Jamin*, 11 Cal. 229 (231); *Tew* v. *Jones*, 13 M. & W. 12.

If a sale takes place by an unregistered sale-deed, the possession of the purchaser under that deed becomes adverse to the vendor from the date of the invalid sale—*Sheonath* v. *Tulsi Pat.* 12 O.L.J. 139, A.I.R. 1925 Oudh 384, 87 I.C. 188; *Qudar Buksh* v. *Mangha Mal*, 4 Lah. 249 (251), A.I.R. 1923 Lah. 495, 73 I.C. 889; *Mohipal* v. *Sarjoo*, 13 O.L.J. 326, 3 O.W.N. 100, 92 I.C. 99, A.I.R. 1926 Oudh 141; *Bashir Husain* v. *Chandrapal*, 25 O.C. 83, 68 I.C. 223, A.I.R. 1922 Oudh 133; *Jasoda* v. *Janak Misra*, 4 Pat. 394, A.I.R. 1925 Pat. 787, 92 I.C. 1034, or where the sale is invalid on account of sale of an inalienable property—*Markandra* v. *Naidu*, 26 Pat. 717; A.I.R. 1949 Pat. 197. This principle applies even if the real owner is a minor—*Chhedilal* v. *Gopi*, A.I.R. 1948 Oudh 351.

Possession by vendor as tenant:—The plaintiff purchased some land under a deed of conditional sale which provided that the purchaser should become absolute owner if the vendor did not exercise his right of re-purchase in ten years. After the execution of the deed, the vendor, according to the terms of the sale-deed, remained in possession of the property as a tenant under the purchaser, and as such he and his representatives continued to hold over for more than twelve years after the date fixed in the sale deed. *Held* that the possession of the vendor after the date fixed in the sale-deed was that of a tenant holding over after the expiry of the term of the lease, and

did not become hostile to the plaintiff so as to defeat the latter's claim to recover possession—*Anantha* v. *Holeya*, 19 Mad. 437 (439).

618. Adverse possession by trustee:—Where a trust is *express*, even though the *cestui que trust* chooses to put up with the acts of the trustee and takes no steps to recover trust property for more than twelve years, yet he is not barred when he does so choose to pursue and endeavour to recover it. Section 10 applies to the case. But where the relations between the trustee and the *cestui que trust* are *not express* but have arisen by implication of law only (*e.g.*, in case of a *resulting* trust, upon failure of the declared trust) when if the trustee assumes an *adverse attitude* towards his *cestui que trust*, the latter must seek his remedy within the period of twelve years. But so long as the trustee occupies the position of a trustee as soon as the declared trusts have failed and there is a resulting trust in favour of the settlor (*i.e.*, so long as he does not assume an adverse attitude) his possession is essentially that of his *cestui que trust* and can only be changed into adverse possession against the *cestui que trust* by a conscious and deliberate act. This is to say, he must repudiate all intention of holding for the resultant *cestui que trust* and he must assert his intention of continuing to apply the trust fund to uses which the Court has declared or which are known to him to have failed. In that event his possession becomes adverse to his legal *cestui que trust*, and if that person does not take steps within 12 years, he will not be able to avail himself of the provisions of section 10—*Casamally* v. *Curimbhoy*, 36 Bom. 214 (239, 243, 244). This case has however been disapproved of in *Mahomed Ibrahim* v. *Abdul Latif*, 37 Bom. 447 in which it has been held that a person claiming under a resulting trust is always barred by the 12 years' rule without reference to the question whether the trustee assumed an adverse attitude. See also *Kherodemoney* v. *Doorgamonye*, 4 Cal. 455 which lays down that where a trustee takes possession of any property under a trust which is not valid under the law, his possession is adverse to the lawful title, and if the possession of this so-called trustee is for a period of more than 12 years, the rightful owner is barred.

A trustee can not by his declaration that he has committed or is about to commit breach of trust, prejudice the rights of the beneficiaries and claim that as from the day of his declaration he began to hold adversely to the trust. In order to make time run he would have to surrender the property to the proper custodian and then enter upon it as a trespasser. It is only in such circumstances that either he or those claiming under him can justifiably say that their title had become adverse—*Afzal* v. *Din Mahommad*, I.L.R. (1946) Lah. 300, A.I.R. 1947 Lah. 117. So also, expenditure for construction of the trust property by a trustee holding trust funds as well as his own funds does not go to show a breach of faith in order to make the property his own—*Sajjad* v. *Shahid*, A.I.R. 1950 All. 316.

The principle that a trustee cannot acquire title by adverse possession of the trust property applies equally to quasi or constructive trustees, the managers of religious endowments and in fact to all persons who stand in a fiduciary relation to others—*Venkatanarasimha* v. *Gangamma*, A.I.R. 1954 Mad. 258.

Adverse possession by third party against trustee or cestui que trust:—Where a trustee in possession of lands has been dispossessed, and the twelve years have run after his dispossession, the *cestui que trust*, although entitled successively on the prior estate and estates, will be barred—*Wych* v. *East India Co.*, (1734) 3 P. Wms. 308. Similarly, where a *cestui que trust*, who has been let into possession by the trustees, has been dispossessed and the twelve years have run after his dispossession (whereby the *cetui que trust* is barred), the trustees are also barred—*Melling* v. *Leak*, (1855) 16 C.B. 652. In other words, the rule that the statutes of limitation are no

bar in the case of trusts is only a rule applicable between the *cestui que trust* on the one hand and the trustee on the other hand; and it is not a rule extending to third parties who have been in adverse possession—*Hovenden* v. *Lord Annesley*, (1806) 2 Sch. & Lef. 629; Lewin on Trusts (5th Edn.), pp. 623-625.

Adverse possession against idol:—Authough an idol is a perpetual minor for certain purposes, it is not a perpetual minor for the purpose of limitation. So, the property of an idol can be acquired by adverse possession as against the idol—*Chittar Mal.* v. *Panchu Lal*, 48 All. 348, 93 I.C. 652, A.I.R. 1926 All. 392, following *Damodar* v. *Lakhan Das*, 37 Cal. 885 (894) (P.C.); *Dasami* v. *Param Shameshwar*, 51 All. 621, 1929 A.L.J. 473, 116 I.C. 433, A.I.R. 1929 All. 315 (318); *Periyanan* v. *Govindu*, 62 M.L.J. 496, 137 I.C. 487, A.I.R. 1932 Mad. 328 (333). And the mere fact that the idol remained in the house of the adverse possessor does not make any difference; because there can be adverse possession not only against the idol but over the idol itself—*Dasami* v. *Param*, supra. Adverse possession can be acquired against the property of the idol not only by a total stranger but even by the donor himself—*Dasami* v. *Param*, supra. An idol installed in a particular *asthan* is a juridical person capable of holding property, and getting it managed through its manager, shebait or mohant, who would represent the idol for the time being completely; and possession, if adverse against the mohant or shebait for the time being must be deemed to be adverse against the idol or the institution—*Parkas Das* v. *Janki Ballabha*, 2 Luck. 239, 95 I.C. 27, A.I.R. 1926 Oudh 444, 3 O.W.N. Supp. 1; *Dasami* v. *Param Shameshwar*, 51 All. 621, A.I.R. 1929 All. 315 (318), 116 I.C. 433.

But a *mohant* or *shebait* himself cannot hold adversely to the idol because he stands in a fiduciary relation to the idol—*Surendra Krishna* v. *Sree Sree Bhubaneshwari*, 60 Cal. 54, 144 I.C. 792, A.I.R. 1933 Cal. 295 (304). The Supreme Court recently expressed its perfect accord with this view—*Sree Sree Iswar Sridhar* v. *Sushila Bala*, (1954) S.C.J. 17, A.I.R. 1954 S.C. 69. See also *Shyamsundar* v. *Raghunath*, A.I.R. 1954 Orissa 78 and *Md. Shah* v. *Ansari*, A.I.R. 1956 S.C. 713. Possession of a shebait is in accordance with the title of the deity—*Jagannath* v. *Bhagaban*, A.I.R. 1951 Orissa, 255. But a person who has never accepted the office of a shebait is to all intents and purposes a stranger. He can therefore claim to hold adversely against the idol—*Ibid.*

Adverse possession of co-shebaiti claim:—A co-shebaiti claim in respect of a family idol is barred by twelve years' adverse possession, under Art. 124 or this Article, respectively, whether the claim is regarded as one to a share in the office or as one to a share in the endowed property. Where the shebaiti of a family idol descends by inheritance like secular property, the possession of the co-heir shebait must be considered to be the possession of all, until some thing is done which amounts to an ouster. The fact that the elder brother who managed the family properties saw to the *debsheba*, collected the income and defrayed the proper expenses, is very far from being cogent proof of ouster—*Lachhmi* v. *Ram Rup*, I.L.R. (1944) Kar. (P.C.) 170, 1944 A.L.J. 143, (1914) 1 M.L.J. 844, 1944 O.W.N. 323, A.I.R. 1944 P.C. 24, 48 C.W.N. 304.

619. Adverse possession against successor-in-title:—The word "plaintiff" in column 3 includes a person through whom the plaintiff derives his right to sue. See sec. 2 (8). It follows that if the statute has commenced to run against a person entitled, it continues to run both against him and as against persons deriving title under him, or claiming through him. Lightwood, p. 9. On this principle, possession which has already become adverse against a preceding trustee or shebait becomes adverse against the succeeding trustee or shebait as well. Thus, if a trustee or mohant of a temple or a shrine becomes dispossessed of the trust property, and the dispossessor is in possession of the property for more than 12 years, a suit brought

thereafter by a succeeding trustee or mohant for possession of the property is barred. The period of limitation runs from the date of the dispossession of the previous trustee, and the *succeeding trustee does not get a fresh period of limitation* from the time when he succeeds to the office as trustee—*Chidambaram* v. *Minammal*, 23 Mad. 439 (440); *Lakshmidhar* v. *Upendra*, A.I.R. 1950 Assam 92. As regards limitation and adverse possession, a succeeding stani is in the position of a person who inherits an estate so that if the period of limitation has begun to run during the life time of a person who holds the property, his successor in interest will also have such period running against him—*Kotharayan* v. *Muthu*, (1950) 1 M.L.J. 12, A.I.R. 1950 Mad. 355.

619A. Possession by manager:—Where a Burmese Buddhist father at the time of his re-marriage made over certain lands to his four children by his first wife, but he continued in possession and management, *held* that the possession of the father was as that of a manager on behalf of his children, and not adverse to their interest—*Maung Aung* v. *Maung San*, 5 Rang. 576, A.I.R. 1928 Rang. 13, 105 I.C. 598. So also where an adopted son of a Hindu widow takes muchilikas for the properties in his own name while he remains in management of the properties standing in the name of the widow and collects rents and income of the same, his possession is not adverse to that of the widow, as such possession is that of a manager—*Sitamma* v. *Sitapatirao*, I.L.R. (1938) Mad. 220, (1937) 2 M.L.J. 606, A.I.R. 1938 Mad. 8. But where one co-heir, who was in possession of the property with the consent of the other co-heirs and was managing it on behalf of all, *alienated* a portion of the property, the act of alienation was one adverse to the interests of all; and the period of limitation for a suit by the other co-heirs for recovery of possession of the property ran from the date of sale and not from the date of subsequent suit for partition—*Maung Tun* v. *Maung Tun Aung*, 5 Rang. 93, A.I.R. 1927 Rang. 158, 101 I.C. 691.

620. Possession between co-owners, co-sharers, etc.:—Mere occupation or enjoyment or management of joint property by one co-sharer does not constitute adverse possession as against the other co-sharers, unless there is a disclaimer of the latter's title by open assertion of a hostile title by the former, or unless there is actual ouster or some act equivalent to ouster—*Baroda* v. *Annada*, 3 C.W.N. 774; *Ujalbi* v. *Umakanta*, 31 Cal. 970 (973); *Bhairabendra* v. *Rajendra*, 50 Cal. 487; *Ayenenussa* v. *Sheikh Isuf*, 16 C.W.N. 849; *Gobinda* v. *Upendra*, 47 Cal. 274 (278); *Hasim Ali* v. *Afzal Khan*, 40 C.L.J. 30; *Faizuddin* v. *Raju*, 21 C.L.J. 192; *Nilo* v. *Govind*, 10 Bom. 24; *Dinkar* v. *Bhikaji*, 11 Bom. 365; *Gangadhar* v. *Parashram*, 29 Bom. 300; *Amrita* v. *Shridhar*, 33 Bom. 317 (322); *Ittappan* v. *Manavikrama*, 21 Mad. 153 (159); *Varada Pillai* v. *Jeevaratnammal*, 43 Mad. 244 (252) (P.C.); *Hashmal* v. *Mazhar*, 10 All. 343 (346); *Ahmed Razu Khan* v. *Ram Lal*, 37 All. 203; *Mubarakunnissa* v. *Muhammad Raja Khan*, 46 All. 377 (379), A.I.R. 1924 All. 384, 79 I.C. 174; *Bashir Ahmad* v. *Parshottam*, 6 O.W.N. 536, A.I.R. 1929 Oudh 337; *Mahipal* v. *Sarjoo*, A.I.R. 1926 Oudh 141, 3 O.W.N. 100; *Hardit Singh* v. *Gurmukh Singh*, 64 P.R. 1918 (P.C.), A.I.R. 1918 P.C. 1, 47 I.C. 626; *Chandbibi* v. *Hasanbhai*, 46 Bom. 213 (215), A.I.R. 1922 Bom. 150, 64 I.C. 205; *Velayutham* v. *Subbaroya*, 39 Mad. 879 (882); *Ma Fatima* v. *Momin*, 7 Rang. 164; *Burns* v. *Bryan*, (1887) 12 A.C. 192; *Masumali* v. *Custodian, E.P., Rajkot*, A.I.R. 1951 Sau. 73; *Thopi* v. *Para Ram*, A.I.R. 1951 J. & K. 27 (case of unregistered gift by one co-sharer to another). See also *Peeran* v. *Pedda*, A.I.R. 1958 Andhra 48. The requirements to make possession adverse vary according to peculiar facts and relationship of parties and other like circumstances in which the adverse possession commences. The acts which *prima facie* are acts of dispossession may under peculiar circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other character or have some other object when placed in *juxtaposition* with some other facts and circumstances—

Dipnarain v. *Pundeo*, 25 Pat. 412, A.I.R. 1947 Pat. 99. Many acts which would be clearly adverse and might amount to dispossession as between a stranger and a true owner of land, would, between joint owners, naturally bear a different construction—*Mahmad Ali Khan* v. *Khaja Abdul Gunny*, 9 Cal. 744 (753); *Venkatachalam* v. *Annapurni*, 55 M.L.J. 223, 109 I.C. 553, A.I.R. 1928 Mad. 625; *Prescott* v. *Nevers*, (1827) 4 Mason 326. The exclusive possession of one co-sharer, even though coupled with the non-payment of profits cannot amount to a clear adverse possession unless there has been an ouster of the other co-partners to their *knowledge* and openly. In the absence of a clear demand and a clear refusal, the possession of one co-sharer cannot become adverse as against the other—*Harkesh* v. *Hardevi*, 49 All. 763, 102 I.C. 66, A.I.R. 1927 All. 454; *Ghulam Muhammad* v. *Begum*, 31 P.L.R. 113. In order to destroy a co-sharer's title it must not only be shown that the other co-sharer was in exclusive possession of the joint property, but that there was a denial of title and an ouster of the former co-sharer or something equivalent to it. The mere fact that one co-sharer is in exclusive possession of a joint property would not amount to a denial of title or an ouster so as to destroy his title—*Ram Manohar* v. *Baboo Singh*, A.I.R. 1937 All. 124 (125); *Corea* v. *Appuhamy*, (1912) A.C. 230 foll. See also *Reddy* v. *Reddy*, A.I.R. 1957 S. C. 314. This principle applies even more strongly where the co-sharer is in possession as representing all the co-sharers—*Suraj* v. *Ram*, A.I.R. 1950 Pat. 298. No question of adverse possession arises where the possession is held under an arrangement between the co-sharers—*Chhote Khan* v. *Mal Khan*, A.I.R. 1954 S. C. 575, 1954 S.C.J. 577, (1955) 1 S.C.R. 60.

The question whether exclusive possession by a co-sharer amounts to an ouster or not, depends upon the circumstances of each case. Where the remaining co-sharers had previously been in exclusive possession of all the joint lands without, however, denial of the plaintiff's right and without any objection by him, and they leased out to a third party a part smaller than what they would get on partition, *held* that there was no ouster—*Bibi Aimana* v. *Saburannessa*, 32 C.W.N. 449 (451), following *Nabadwip* v. *Bhagaban*, 31 C.W.N. 496, A.I.R. 1937 Cal. 462, 101 I.C. 27. The act of a *lambardar* in granting a lease of *banjar* land over which the co-sharers exercised rights does not amount to their ouster as mere dispossession does not result in an ouster—*Baldeo* v. *Rewaram*, (1950) N.L.J. 51, A.I.R. 1950 Nag. 107. If one co-sharer *separately* occupies a portion of the common land without objection from his co-sharers and with their express or implied consent, such sole occupation is not to be regarded as amounting to exclusion or ouster of the other co-sharers from the possession of that portion, and they need not bring a suit for joint *possession* thereof. If the co-sharers are dissatisfied with the manner in which the plot of land is being held in possession by the first-named co-sharer, their proper remedy is to bring a suit for *partition*. On the other hand, if the separate occupation of a co-sharer is continued after objection from any of his co-sharers and in defiance of their claim to be in joint possession, then the co-sharers who are excluded and ousted from joint possession are entitled to bring a suit to obtain joint possession of the common property—*Durga Sankar* v. *Kamini Kumar*, 55 Cal. 653, A.I.R. 1928 Cal. 535 (536), 111 I.C. 74; *Ram Chandra* v. *Lakshmi Kanta*, 47 C.L.J. 603, 111 I.C. 19, A.I.R. 1928 Cal. 574.

Where a special relationship exists between the parties, such as tenants in common or members of an undivided family, the Court will presume that possession held by one is possession held on behalf of all the co-owners or members of the family, and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose rights he seeks to affect by his possession—*Muthurakkoo Thevan* v. *Orr*, 35 Mad. 618 (621); *Venkatachalam* v. *Annapurni*, 55 M.L.J. 233; *Prem* v. *Tej*, A.I.R. 1950 E.P. 252; *Lakshminarasamma* v. *Rama*, (1950) 1 M.L.J. 350, A.I.R. 1950 Mad.

680; *Sobagh* v. *Pirthe*, I.L.R. (1950) Nag. 160, A.I.R. 1951 Nag. 259; *Abdul Kareem* v. *Gowlivada*, A.I.R. 1957 Andhra 40. See also *Jadho* v. *Jadho*, A.I.R. 1958 Andhra 19. When co-owners are in joint possession, the ouster of one co-owner has got to be proved very definitely; and the mere fact that the co-owner never enjoyed a definite benefit from the estate will not lead to the inference of ouster, if it is found that he visited the house from time to time and there was no break of social relation between the parties—*Ma Bi* v. *Makhatoon*, 7 Rang. 744, 121 I.C. 785, A I.R. 1930 Rang. 72 (73). The mere entry of a name in the mutation register is no indication of adverse possession until it is shown that it was obtained after a clear declaration to the effect that the title of the other co-sharers was denied—*Bashir Ahmed* v. *Parshotam*, 6 O.W.N. 536, A.I.R. 1929 Oudh 337; *Ahmad* v. *Mt. Mukhti*, A.I.R. 1951 J. & K. 21. The entry on, and possession of, land under the common title of one co-owner will not be presumed to be adverse to the others but will ordinarily be held to be for the benefit of all the co-owners, for the reason that the possession of one co-owner is rightful possession and does not imply hostility as would be implied in case of possession by a stranger. A co-owner might however establish a plea of adverse possession if it is clearly shown that he *repudiated* the title of his co-owners by an *overt* claim to exclusive ownership for more than 12 years before suit—*Jogendra* v. *Baladeo*, 35 Cal. 961 (968, 969); *Clymer* v. *Dawkins*, (1845) 3 Howard 674; *Hari Pru* v. *Mi Aung Kraw*, 12 Bur.L.T. 129, 52 I.C. 629. The overt acts which constitute a definite and continuous assertion of an adverse right must be of an unequivocal character clearly indicating an assertion of ownership of the premises to the exclusion of the other co-tenants—*Jagannath* v. *Chandni*, 26 C.W.N. 65, A.I.R. 1921 Cal. 647, 67 I.C. 31. Thus a sale of the whole property held in common by several tenants-in-common by one of them, openly and with the knowledge of the other co-tenants must be taken as repudiation of title of the others—*Thingaraja* v. *Appavoo*, A.I.R. 1931 Mad. 22; *Nizamuddin* v. *Mangal*, A.I.R. 1949 All. 699. And the burden lies on the defendant to shew, not merely that he has been in sole occupation of the disputed lands, but also that there has been a disclaimer by the assertion of a hostile title and *notice* thereof to the owner either direct *or* to be inferred from notorious acts and circumstances—*Jogendra* v. *Baladeo*, 35 Cal. 961 (970); *Alima* v. *Kutti*, 14 Mad 96 (97). Much stronger evidence is required to show an adverse possession held by a tenant-in-common than by a stranger; a co-tenant will not be permitted to claim the protection of the statute of Limitation, unless it clearly appears that he has repudiated the title of his co-tenant and is holding adversely to him; it must further be established that the fact of adverse holding was *brought home* to the co-owner, either by information to that effect given by the tenant in common asserting the adverse right, or there must be outward acts of exclusive ownership of such a nature as to give *notice* to the co-tenant that an adverse possession and disseisin are intended to be asserted—*Jogendra* v. *Baladeo*, 35 Cal. 961 (969). Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. *Knowledge* on the part of the latter, therefore, is essential. Such knowledge may be proved directly or inferentially. On the principle of constructive notice it may also be proved by showing that the co-sharer against whom the possession was exercised had sufficient notice of facts or sufficient information which would put a reasonable person on enquiry and on receipt of which a reasonably attentive person could not but realise that he was ousted—*Abdul Wahed* v. *Mohar Bashi*, 34 C.W.N. 246 (249), A.I.R. 1930 Cal. 466. If no actual notice is given to the co-sharer of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify an *inference of knowledge* on the part of the co-owner sought to be ousted, and of laches if he fails to discover and assert his rights—*Jagannath* v. *Chandni*,

memory a presumption of ouster may be made on principle analogous to that of lost grant—*Maddelakrishnayya* v. *Maddela Udayalakshmamma*, (1953) 2 M.L.J. 241, 1953 M.W.N. 473. When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequence. So where a person who is in possession under a usufructuary mortgage granted by one of several coparceners remains in possession of the land and cultivates it for years, there can be no doubt that the requirements of continuity, publicity and extent for adverse possession are fully complied with—*Palania* v. *Amjath*, I.L.R. (1943) Mad. 15, (1942) 2 M.L.J. 321, A.I.R. 1942 Mad. 622 (F B.). It is not the law that a non-diligent co-sharer is bound to suffer; he will suffer only if the circumstances *unequivocally* tell him that he has been ousted or excluded or when he has *sufficient* information that will put a reasonable man on enquiry which if pursued would unmistakably show that he has been excluded or ousted—*Abdul Wahed* v. *Mohan*, supra. "A *silent* possession accompanied with no act which can amount to an ouster or give notice to his co-tenant that his possession is adverse ought not to be construed into an adverse possession"—*per* Marshall C. J. in *McClung* v. *Ross*, (1820) 5 Wheaton 116.

In the case of co-owners, the possession of one co-owner is in law the possession of the other co-owner as well, and it is not possible for one co-owner to put an end to that possession by any secret intention in his mind—*Corea* v. *Appuhamy*, [1921] A.C. 230. Nothing short of ouster or something equivalent to ouster can bring about that result—*Ibid*. The exclusion from the portion in dispute must be complete and total, otherwise there is no ouster—*Sobhag* v. *Pirthe*, I.L.R. (1950) Nag. 160, A.I.R. 1951 Nag. 259. Thus, if a person setting up ouster has agreed to maintain the member, whom he says he has ousted, from the proceeds of the estate in dispute there is no ouster. *Ibid*. There can be no question of ouster, if there is participation in the profits to any degree—*Mohammad Baquar* v. *Naimunnissa Bibi*, A.I.R. 1956 S.C. 548 To enable one of the co-owners to acquire title by adverse possession as against the others, his possession must be of such an actual, open, notorious, exclusive and hostile character as to amount to an ouster of the other owners. The only facts that one of the co-owners has been in actual possession of a house, that he has been alone making repairs in it, and that a short time before the institution of the suit when certain portion of the house fell down, he built them afresh, do not constitute an act of adverse possession on the part of the co-owner, so as to extinguish the rights of the other co-owners—*Mahadeo Prasad* v. *Ram Phal*, 1 Luck. 62, 3 O.W.N. 186, 92 I.C. 685, A.I.R. 1926 Oudh 258; *Sidheswar* v. *Ganga Sagar*, 13 O L.J. 61, A.I.R. 1926 Oudh 464, 2 Luck. 172, 96 I.C. 455. The same prrinciple applies to the case of co-heirs—*Bholanath* v. *Sarbamangala*, 44 C.W.N. 221, A.I.R. 1940 Cal. 93; *Aziman* v. *Abdul*, 1940 A.M.L.J. 9; *Ahmad* v. *Mt. Mukhti*, A.I.R. 1951 J. & K. 21 (case of co-heirs of a Mahomedan owner). But where the defendant has taken the property not as co-heir but as one who had a right to it under custom administering them his possession must be deemed to be adverse from the beginning—*Amir* v. *Aziz*, A.I.R. 1944 Pesh. 45. So also, as between brothers in a joint family, where no partition is proved, the mere fact that one of the brothers went to live in a neighbouring village would not make the possession of the other brothers who continued to live in the family house necessarily adverse—*Jagivandas* v. *Bat Amba*, 25 Bom. 362 (365). Where a part of the property inherited by two sisters was in the exclusive possession of one, and the rest of the joint property was in joint possession, the exclusive possession of the particular portion was not adverse to the other sister in the absence of any facts from which an adverse possession may be presumed—*Barada Sundari* v. *Annoda Sundari*, 3 C.W.N. 774 (776). Where there has been no partition, mere non-parti-

cipation in the rents and profits by one co-sharer and exclusive occupation by another would not constitute adverse possession against the former in favour of the latter—*Ittappan* v. *Manavikrama*, 21 Mad. 153 (159); *Dinkar* v. *Bhikaji*, 11 Bom. 365 (368); *Ahmadulla* v. *Bashir Ahmed*, 94 I.C. 855, A I.R. 1926 J. 102; *Md. Wasil Ali* v. *Naimuddin*, 91 I.C. 614, A.I.R. 1926 J. 166; *Prem* v. *Tej* A.I.R. 1950 E.P. 252; *Lakshminarasamma* v. *Rama*, (1950) 1 M.L.J. 350, A.I.R. Mad. 680. But such non-participation or non-possession may, in the circumstances of any particular case, amount to an adverse possession; and among the circumstances to be taken into consideration are the relationship of the parties, their position, the mode of life in the particular community to which the parties belong, the character of the property, and other circumstances of a similar character—*Ayenenussa* v. *Sheikh Isuf*, 16 C.W.N. 849, 14 I.C. 722; *Gobinda* v. *Upendra*, 47 Cal. 274 (278), 23 C.W.N. 977, 56 I.C. 141. As between co-widows, the possession of one is not adverse to the other, especially if the latter receives a maintenance allowance from the former—*Indoobunse* v. *Girbhirun*, 12 W.R. 158.

Where certain property is inherited jointly by two persons and enjoyed as tenants-in-common, the co-ownership does not cease by the death of one of them. The legal representatives of the deceased becomes co-owner with the surviving co-owner—*Lakshminarasamma* v. *Rama*, (1950) 1 M.L.J. 350, A.I.R. 1950 Mad. 680. The position of a co-owner's heir is like that of an assignee from a co-owner and does not stand on a better footing than an assignee. Such heir, therefore, in order to establish adverse possession against another co-owner must show that there was an ouster of which that co-owner had either actual or constructive notice—*Dipnarain* v. *Pandeo*, 25 Pat. 415, A I.R. 1947 Pat. 99. See also *Sunder v. Phuljharia*, A.I.R. 1957 Pat. 534.

The above rules apply not only among persons who are co-tenants, but extend to all who afterwards acquire undivided interests in the property, by purchase from the co-tenants. Thus, if the interest of a co-tenant is purchased by a third person, such purchaser becomes a tenant-in-common with the other co-tenants, and the possession of such co-tenants cannot, in the absence of clear proof to the contrary, be adverse to such purchaser. But if the purchaser, on going to the land to obtain possession is resisted by the other co-tenants, the possession of the co-tenants becomes adverse only from the date of such resistance—*Biswanath* v. *Rabija*, 56 Cal. 616, 33 C.W.N. 46 (49), 117 I.C. 593, A.I.R. 1929 Cal. 250. A purchaser from a co-sharer under an invalid sale-deed is in the same position as a co-sharer, and if he enters into possession under the invalid sale, his possession is not adverse to the co-sharers,in the absence of anything to show that he asserted a different title from that of a co-sharer—*Sheo Raj* v. *Ajudhiya*, 4 Luck. 503, 116 I.C. 195, A.I.R. 1929 Oudh 284 (285). But in case of purchase of the whole property held in common by several tenants-in-common from one of such tenants-in-common, openly and with the knowledge of other co-tenants he must be taken to have repudiated the title of the others, there and then, and possession becomes adverse from the time of his purchase. In such a case the purchaser does not become a tenant-in-common with other co-sharers—*Thiagaraja* v. *Appavoo*, A.I.R. 1931 Mad. 22; *Nizamuddin* v. *Mangal*, A.I.R. 1949 All. 699.

But it is not correct to say that one co-owner can *never* hold adversely to the other co-owner. The question depends upon the nature of the former's possession. Thus, one of the two brothers, joint owners of certain immoveable property, executed a deed of relinquishment in favour of the other (the plaintiff). The deed was never registered, but the brother (plaintiff) in whose favour it was made remained in possession of the entire property. *Held* that the document (though unregistered) was admissible in evidence for the purpose of showing the nature of the plaintiff's possession from the date of the document, and that coupled with the other evidence in the case,

it was sufficient to show that the plaintiff had been holding adversely to his brother —*Jhamplu* v. *Kutramani*, 39 All. 696 (698), 15 A.L.J. 761. See also 35 Cal. 961 cited ante. The possession of a co-owner is not ordinarily adverse to the other co-owners. But where a person originally entered not as a co-owner, but asserting a hostile title, and then became a co-owner and continued to assert the hostile title and exercised his possession to the exclusion of the other co-owner, his possession did not cease to be adverse—*Pankaj Mohon* v. *Bipin Behari*, 38 C.L.J. 220, A.I.R. 1924 Cal. 118, 76 I.C. 511. Ordinarily, the sole possession by one tenant-in-common is not adverse to the others, but the sole possession by one tenant-in-common maintained continuously for a long period without any claim or demand by the other tenants-in-common is an evidence from which an actual ouster of the latter may be presumed—*Gangadhar* v. *Parashram*, 29 Bom. 300; *Chandbhai* v. *Hasanbhai*, 46 Bom. 213 (216), 64 I.C. 205, A.I.R. 1922 Bom. 150; *Muhammad Ishaq* v. *Nathu*, 10 A.L.J. 59, 16 I.C. 342; *Culley* v. *Deo*, (1840) 11 A. & E. 1008.

Where the rights of the claimants to a certain share in property were recognised by a decree of competent Court to which all the contesting co-owners were parties and they submitted to that decree no question of adverse possession arises in a suit for partition—*Isabi* v. *Abdulla*, A.I.R. 1950 *Tra-Co.* 60 (F.B.).

These principles apply with suitable modification even in some impartible estates —*Sobha* v. *Pirtha*, I.L.R. (1950) Nag. 160, A.I.R. 1951 Nag. 259.

It cannot be assumed as a matter of law or as a matter of fact that possession of one member of a Mahomedan family is the possession of all members. But where there has been a compromise decree and admission of title of the plaintiff and acceptance of the character of permissive possession of the defendant, it is obvious that adverseness of possession is terminated and the continuance of possession after the decree is permissive—*Alli* v. *Krishna*, A.I.R. 1950 Orissa 250.

Effect of partition:—After partition, the possession of one-co-sharer cannot be taken as possession held on behalf of the others, even though the property has not been divided by metes and bounds—*Deba* v. *Rohtagi Mal*, 28 All. 479 (480). Therefore, after partition, a co-sharer remaining in possession of the share belonging to another co-sharer must be deemed to hold it adversely to the latter; and the latter cannot say that the possession by the former does not become adverse to him (the latter) until the latter has demanded and has been refused possession of his allotted share—*Mansa Ram* v. *Behari*, 6 P.R. 1912, 218 P.L.R. 1911, 12 I.C. 453 (455).

620A. Adverse possession by Hindu female:—Where a widow is in possession of her life-estate in her husband's property it is not competent to her, by mere assertion of an absolute proprietary title, in course of time to acquire such title by prescription against the reversionary heirs of her husband, who are not entitled to obtain possession till the widow's death—*Anund Kaur* v. *Sodi Narindan*, 83 P.R. 1881. But where widows, who are only entitled to maintenance, take possession of the estate and dispose of it to strangers, and the possession of the widows and the strangers covers a period of more than 12 years, a suit by the reversioners after the lapse of 12 years from the date of the widows' taking possession, would be barred, unless such possession was under an arrangement with the reversioners—*Sham Koer* v. *Dah Koer*, 29 Cal. 664 (P.C.); *Kirpal Kuar* v. *Bachan Singh*, A.I.R. 1958 S.C. 199. Where a Hindu family is joint at the time of the death of its member, his widow, entitled to maintenance only, gets possession of her husband's share and gets her name mutated, there being no presumption that mutation in the name of a Hindu widow is by way of consolation, her possession is clearly unlawful at its inception—*Pirthi* v. *Kalpu*, 1951 All.W.R. 53, A.I.R. 1952 All. 190. If a Hindu

widow who has not a scrap of title to the possession of the property (*e.g.*, a widow, during the life of her son or son's widow) takes possession of the property not in the capacity of a widow but absolutely and without any qualification, and makes a gift of the property to strangers, her possession would be a bar to the title of all persons who claim as reversioners either of her husband or of her son —*Lachhan Kunwar* v. *Manorath*, 22 Cal. 445 (449) (P.C.). Where the widow asserted that she was entitled as full heir to the separate share held by her husband; where in a written statement in a suit brought against her she had asserted that she and her co-widow were the heirs of their husband and had all along been in possession and it was only as an alternative pleading that she set up a title to possession on the footing of a right to maintenance; where in an application to the Court she made an assertion publicly that she and her co-widow were the heirs and the only heirs to the property, from which assertion mutation of it to her name followed; where the widow made an absolute gift of part of the property; and where she made such public assertion of a right to exclusive possession from 1859 to her death in 1895, the true inference was that her possession was adverse, and the reversioner's title was barred by limitation —*Satgur Prasad* v. *Raj Kishore Lal*, 42 All. 152 (157) (P.C.). Where, according to the custom of the community to which the parties belonged, the widows were excluded from inheritance, the widow's possession for more than 12 years barred the reversioner's suit for possession—*Desai Ranchhoddas* v. *Rawal Nathubhai*, 21 Bom. 110 (117). A separated Hindu died leaving two widows and a daughter-in-law, the widow of his predeceased son. Upon the death of the two widows, the daughter-in-law took possession of the property and remained in possession thereof for more than 12 years, and after her death the reversioners sued to recover possession. *Held* that as the widows' daughter-in-law was not entitled to the estate, her possession must be regarded as adverse to the reversioners, whose cause of action accrued upon the death of the two widows of the last male holder. The suit was therefore barred—*Gajadhar* v. *Parbati*, 33 All. 312 (314). Where the widow of a member of a joint Hindu family takes possession on the death of her husband of property which was in his possession during his lifetime, there is no presumption that the possession taken is merely that of a widow of a separated Hindu. In the absence of any evidence to show that her claim was limited to a widow's estate, she must be held to have acquired full tittle—*Kali Charan* v. *Piari*, 46 All. 769 (772), 22 A.L.J. 725, 83 I.C. 754, A.I.R. 1924 All. 740; *Rikhdeo* v. *Sukhdeo*, 49 All. 713, A.I.R. 1928 All. 45, 102 I.C. 175; *Uman Shankar* v. *Aisha Khatun*, 45 All. 729, A.I.R. 1924 All. 86, 74 I.C. 869. It is not an invariable rule that wherever a Hindu widow is found in adverse possession, she must be treated as being in adverse possession of a widow's estate only. Where it is found that a Hindu widow took possession of the property absolutely and not in lieu of maintenance or as the result of any arrangement with the heirs and successors of the last male holder at any time, she acquires full title by adverse possession—*Raj Bahadur* v. *Kanhaiya Bakhsh*, 4 O.W.N. 350, 99 I.C. 890, A.I.R. 1927 Oudh 138.

Where, A, a widow who inherited the property of her husband and was entitled only to a limited interest, transferred certain property of her husband to B the widow of a predeceased coparcener of her husband in 1883, and the latter remained in possession of the property for more than 12 years after the death of A (which took place in 1843) and then B transferred the property to the defendants as though she had absolute title in it, and then died in 1886, and then the plaintiffs who were the reversionary heirs of the last male holder (and as such entitled to the property after A's death) sued to recover possession of the property in 1888, *held* that the suit had been barred long ago by the adverse possession of B for more than 12 years after A's death (1843). Although a widow's estate for life never constitutes a possession adverse to the reversionary heir, still since in this case B did not obtain the property as a

widow but in a different capacity, her possession for more than 12 years after A's death became adverse to the reversioners (plaintiffs) entitled to come in after A's death —*Mahabir* v. *Adhikari*, 23 Cal. 942 (P.C.).

Possession taken by a Hindu widow under an arrangement with the other members of the family and in pursuance of an award, cannot be adverse to the members of the family—*Radha Dulaiya* v. *Rashick Lal*, 45 All. 1 (5), A.I.R. 1923 All. 25, 75 I.C. 14, 20 A.L.J. 814.

If a Hindu widow in possession of her husband's estate never claimed to have anything more than the limited estate of a Hindu female, she did not acquire any personal title to the property as *her stridhan*, but she makes it good to the estate of her deceased husband—*Lajwanti* v. *Safa Chand*, 5 Lah. 192 (198) (P.C.), 28 C.W.N. 960, 80 I.C. 788, A.I.R. 1924 P.C. 121; *Umrao Singh* v. *Pirthi*, 86 I.C. 445, A I.R. 1925 All. 369; *Chakradhar* v. *Shabkant*, 6 P.L.R. 363, 88 I.C. 767, A.I.R. 1925 Pat. 460; *Brindaban* v. *Ram Narain*, A.I.R. 1925 All. 330, 85 I.C. 449; *Deshrani* v. *Thakur Kishore Singh*, 22 N.L.R. 175, A.I.R. 1927 Nag. 104, 100 I.C. 446. If a widow (daughter-in-law) who was not entitled to succeed to her father-in-law's property, but was entitled only to maintenance, was allowed to remain in possession of the property in lieu of maintenance, and there was no evidence to show that she asserted any title adverse to the person entitled to inherit the property, *held* that the widow did not acquire the property as her *stridhan*, and that the only interest which the widow could have in the property was that of maintenance only. Consequently, an alienation of the property made by her was voidable after her death by the heirs of her father-in-law—*Jagmohan* v. *Prayag Narayan*, 6 P.L.T. 206, 87 I.C. 473, A.I.R. 1925 Pat. 523. But if the female claims to hold the property not merely for her life, but absolutely, the property so held by her for 12 years would become her absolute property—*Maluka* v. *Pateshar*, 1 Luck. 273, 3 O.W.N. 536, 96 I.C. 672, A.I.R. 1926 Oudh 371; *Varada Pillai* v. *Jeevaratnammal*, 43 Mad. 244 (252) (P.C.).

When a widow, who is entitled only to maintenance and residence, continues in possession of the property, after the death of the last male holder, to whom she is not the heir, and she holds possession simply because the reversioners have not yet come forward to take possession, her possession cannot be said to be adverse until the reversioners assert their right to possession and demand it from her. There can be no question of adverse possession prior to each assertion—*Muthuswami* v. *Ponnayya*, 51 Mad. 815, 55 M.L.J. 436, A.I.R. 1928 Mad. 820 (822), 110 I.C. 613. Where on the supposed death of her husband, his widow enters on her widow's estate in the undivided share of an estate which belonged to her husband and she thereafter enjoys it for a period much exceeding the twelve years, the possession is not adverse, as possession to be adverse must be against a living person and as the widow was asserting a right adverse to one whom she regarded as dead, though in fact the husband was living—*Bibhabaty* v. *Ramendra*, 73 I.A. 246, 51 C.W.N. 98, 49 Bom.L.R. 246, (1946) 2 M.L.J. 442, A.I.R. 1947 P.C. 19, 1946 A.L.J. 441 (P.C.), I.L.R. (1947) Kar. (P.C.) 85.

621. Other cases of adverse possession:—In case of a religious endowment, if adverse possession is proved, time will run not only against the shebait, but against the idol also, and time will run against the idol even in a case where no *shebait* has been appointed—*Administrator-General* v. *Balkissen*, 51 Cal. 953 (959), A.I.R. 1925 Cal. 140, 84 I.C. 91.

Under a mortgage of 1869 the mortgagee was entitled to immediate possession, but by arrangements between the parties, the mortgagor was allowed to remain in possession, the right of the mortgagee to claim possession being kept alive. The pro-

perty was sold by the mortgagor in the same year. A suit for pre-emption was brought in respect of such sale and decreed, and the pre-emptor thereafter sold the property to the defendant in 1871. The mortgagee sued the defendant for possession in 1883. The defendant pleaded adverse possession for more than twelve years. *Held* that the possession of a person who purchases property by asserting a right of pre-emption is not analogous to that of an auction-purchaser in execution of a decree. He merely takes the place of the original purchaser, and enters into the same contract of sale with the vendor (mortgagor) that the purchaser was making. There is privity between him and the vendor, and he comes in under the vendor, and his holding must be taken to be in acknowledgment of all obligations created by his vendor. Neither the possession of the pre-emptor nor that of the purchaser from him in 1871 is adverse to the mortgagee—*Durga Prasad* v. *Sambhu Nath*, 8 All. 86 (90, 91).

Where lands granted to one member of a joint Hindu family were held by the joint family adversely to the individual interest of the grantee and his son, for more than 12 years, the rights of the grantee and his son were barred—*Vasudeva* v. *Maguni*, 24 Mad. 387 (396) (P.C.).

A wife, during the prolonged absence of her husband, who was erroneously supposed to be dead, made a *mourasi* grant of a portion of her husband's estate. The grantee remained in possession for upwards of 12 years. It was held that the lease being void, the position of the grantee was not that of a lessee but that of a trespasser, and that his possession for more than 12 years had perfected his title—*Bejoy Chunder* v. *Kally Prosonna*, 4 Cal. 327 (330). But see *Bibhabaty* v. *Ramendra*, 73 I A. 246, 51 C.W.N. 98, 49 Bom.L.R. 246, (1946) 2 M.L.J. 442, A.I.R. 1947 P.C. 19, 1946 A.L.J. 441 (P.C.), I.L.R. (1947) Kar. (P.C.) 85 where it has been held that the possession of the widow in such circumstances is not adverse to the husband.

Where the property of a deceased Hindu vests in an executor, in trust for the beneficiaries under the will, and the bequest fails, such executor does not under the Indian law hold the property in trust for the heir of the deceased. A Hindu executor takes no estate (unlike an English executor) but only a power of management, and upon the purpose for which the executor is to hold the property failing, the property undisposed of vests in the heir at once. Consequently, the possession by the executor becomes adverse to the heir from the date of the testator's death—*Kherodemoney* v. *Doorgamoney*, 4 Cal. 455 (468).

Where a person has been is possession of a property for over 12 years as legatee with an absolute estate under a will by a testator who had no disposing power over the property, and no objection has been made by the persons entitled to the property, the person in possession acquires an absolute title to the property—*Ghanshamdoss* v. *Saraswathibai*, 21 L.W. 415, 87 I.C. 621, A.I R. 1925 Mad. 861.

Possession of plaintiff's land taken by an adjoining landowner under a mistake on the part of both parties as to the true boundary is adverse to the plaintiff—*Ma Shan* v. *Somasundaram*, 1 Rang. 492, A.I.R. 1925 Rang. 111, 83 I.C. 132.

An indefeasible title by adverse possession of diluvated lands reforming on their old site can be acquired by possession for more than statutory period after reformation. In such cases the doctrine that diluvated lands, reforming on their site remain the property of their original owner does not apply—*Ram Kirpal* v. *Janki*, A.I.R. 1951 Pat. 420.

Adverse possession of *fishery* rights can be established in a public navigable river, if exclusive acts of possession are shown for the statutory period—*Debendra Lal* v. *Secretary of State*, 31 C.W.N. 473, A.I.R. 1927 Cal. 403, 103 I.C. 13: affirmed, *Secre-*

tary of State v. *Debendra Lal*, 61 Cal. 262 (P.C.), 38 C.W.N. 285, A.I.R. 1934 P.C. 23; *Narayan* v. *Laxmibai*, A.I.R. 1951 Nag. 382, I.L.R. (1951) Nag. 199, 1951 N.L.J. 338.

Assertion of right of ownership by transfer and possession over sixty years of land belonging to a Cantonment Board amounts to adverse possession against Government and matures into full ownership—*Farid* v. *U. P. Government*, A.I.R. 1950 All. 43. See also *Keshav* v. *Municipal Commissioner*, A.I.R. 1951 M.B. 114 where it has been held that although in theory the State is the over-lord in respect of land, a person can have rights of ownership.

621A. Adverse possession of a limited interest:—Possession of a *limited interest* in immoveable property may be adverse for the purpose of barring a suit for recovery of that interest, in the same way as adverse possession of a complete interest in the property operates to bar a suit for the whole property; consequently, such possession of a limited interest may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Such adverse possession of a limited interest is good only to the extent of that interest, though it is a good plea to a suit for ejectment—*Ishan* v. *Ramranjan*, 2 C.L.J. 125; *Gopal Krishna* v. *Lakhiram*, 16 C.W.N. 634 (636), 14 I.C. 212; *Icharam* v. *Nilmoney*, 35 Cal. 470 (476); *Madhava* v. *Narayana*, 9 Mad. 244 (247); *Thakore Fatesingji* v. *Bamanji*, 27 Bom. 515 (536); *Swarnomoyi* v. *Sourindra*, 42 C.L.J. 14, A.I.R. 1925 Cal. 1189, 89 I.C. 747; *Sankaran* v. *Periasami*, 13 Mad. 467 (471); *Bhairabendra* v. *Rajendra*, 50 Cal. 487 (490), A.I.R. 1924 Cal. 45, 74 I.C. 193; *Budesab* v. *Hanmanta*, 21 Bom. 509; *Subodh Gopal Bose* v. *Khairunnessa*, 97 C.L.J. 171, 60 C.W.N. 361. Where a person is in possession by cultivating a plot of land in an agricultural area and there is nothing to show that he ever claimed a proprietory title in the plot, the presumption is that he is prescribing for a tenancy right and not for a proprietory title although there is no contract of tenancy between him and the owner and although no rent is settled—*Ram Piari* v. *Nawab*, A.I.R. 1950 All. 496. Where in an ejectment suit by an inamdar, it was shown that the defendants for more than 12 years before suit openly asserted their claim to hold as mirasi tenants, it was held that the defendants had acquired a title to the limited interest claimed by them, and could not be ejected—*Trimbak* v. *Gulam Jilani*, 34 Bom. 329; *Narhar* v. *Ganpati*, 31 Bom.L.R. 218, 117 I.C. 438, A.I.R. 1929 Bom. 174 (185). Where in respect of inam land persons in occupation assert their right to the lands themselves in a course of dealings otherwise sufficient to fulfil the requirements of a prescriptive title, there is nothing to prevent the Court from upholding such a title (*Kudiwaram* interest) as such a right can be acquired by adverse possession —*Bhagavathi* v. *Krishna*, (1949) 2 M.L.J. 609, A.I.R. 1951 Mad. 788. But the tenant will acquire only the limited interest claimed by him, but not a proprietary interest. If a trespasser while in possession claims a right less than the absolute ownership in the land, he will acquire by prescription only the inferior title set up by him. The title acquired will be determined by the *animus possidendi of the trespasser—Muthurakhoo* v. *Orr*, 35 Mad. 618 (621). Thus, if a tenant encroaches upon the lands of his landlord outside his tenancy, and claims to hold these lands as part of his tenancy (*i.e.*, he professes to hold these lands in his character *as a tenant*), and thus he holds possession of those lands for more than 12 years, the landlord's right to eject the tenant and recover khas possession is lost; but his proprietary possession (*i.e.*, possession by receipt of rent) is not lost, because the possession of the tenant, so far as the latter right is concerned, has not been adverse—*Ishan* v. *Ramranjan*, supra; *Gopal* v. *Lakhiram*, supra; *Muthurakkoo* v. *Orr*, supra. So also, where a landlord seeks to recover possession of land in his tenant's occupancy, and the tenant on the allegation of a perpetual tenancy successfully resists the landlord's attempt to dispossess him for the statutory period, the

tenant can afterwards successfully plead the law of limitation in bar of a subsequent suit in ejectment by the landlord—*Budesab* v. *Hanmanta*, 21 Bom. 509 (515). In other words, the tenant, by asserting a claim to hold as a permanent tenant, will acquire a permanent tenancy. The landlord's possessory right is extinguished, but his proprietary interest (*i.e.*, right to receive rent) remains intact. See also *Thakore Fatesingji* v. *Bomanji*, 27 Bom. 515 (546). A contrary view has been taken by the Patna High Court in *Sahabu* v. *Hari*, A.I.R. 1952 Pat. 43 (case of possession under invalid lease). But in a later case it has been held that that such a claim is adverse to the landlord's claim for khas possession—*Maharaj* v. *Budhu*, A.I.R. 1952 Pat. 46. So again, where a tenant transferred a non-transferable occupancy holding and the transferee was in possession for more than 12 years but he never repudiated the title of the landlord but claimed to hold possession as tenant, *held* that a suit for recovery of actual possession by ejectment of the transferee (defendant) was barred by limitation. Although the defendant did not set up an absolute title for the statutory period and had not consequently acquired by adverse possession such absolute title, he has yet acquired by prescription the limited interest which he has set up, namely, the interest of a tenant. Consequently it was too late for the plaintiff-landlord to seek to eject the defendant as a trespasser; his title to recover actual possession was barred, although his title to recover rent was not extinguished—*Icharam* v. *Nilmoney*, 35 Cal. 470 (477); *Bhairabendra* v. *Rajendra*, 50 Cal. 487 (490), A.I.R. 1924 Cal. 45, 74 I.C. 193; *Bholanath* v. *Shyamsundra*, A.I.R. 1951 Orissa 235.

In 21 Bom. 509 and 27 Bom. 513 cited above, the tenant by pleading a permanent tenancy had *successfully* resisted the landlord's previous suit for possession. But where the landlord at first filed a suit to recover possession from the tenant (who was a yearly tenant), and the tenant *unsuccessfully* pleaded permanent tenancy, so that the landlord obtained a decree for possession, but the tenant continued in possession and paid rent, and 20 years afterwards the landlord again brought a suit in ejectment and the tenant again pleaded permanent tenancy, *held* that the plea could not prevail. Here there had been no successful resistance by the tenant of the landlord's claim to recover possession (in the first suit); the landlord had succeeded and though the tenant had remained in possession, it is not shown that he remained in possession in assertion of a hostile title. Consequently the landlord would get a decree for possession—*Bhailal* v. *Kalansang*, 52 Bom. 55, 107 I.C. 52, A.I.R. 1927 Bom. 667 (668). See also *Md. Mumtaz Ali* v. *Mohan*, 45 All. 419 (P.C.), A.I.R. 1923 P.C. 118, 28 C.W.N. 840, 74 I.C. 476; *Madhab Rao* v. *Raghunath*, 47 Bom. 798 (P.C.), A.I.R. 1923 P.C. 205, 74 I.C. 362; *Namapillai* v. *Ramanathan*, 47 Mad. 337 (P.C.), A.I.R. 1924 P.C. 65, 82 I.C. 226, 28 C.W.N. 809.

A tenant is not precluded by an admission of tenancy from showing that the nature of the tenancy asserted by him to the knowledge of the landlord has been adverse to the right to evict either at will or on notice given—*Thakore Fatesingji* v. *Mamanji*, 27 Bom. 515 (539); *Ram Rachhaya* v. *Kamakhya Narain*, 4 Pat. 139, A.I.R. 1925 Pat. 216, 84 I.C. 586.

The mere fact that the tenant made a yearly payment of rent is not fatal to the plea of adverse possession set up by the tenant; because the tenant is not denying the landlord's right to receive rent but merely denies the landlord's right to eject him, and claims to be a permanent tenant—*Sankaran* v. *Periasami*, 13 Mad. 467 (471); *Thakore Fatesinji* v. *Bamanji*, 27 Bom. 515 (536, 540); *Charan Mahton* v. *Kamakhya Narain*, 6 P.L.T. 98, A.I.R. 1925 Pat. 357, 86 I.C. 387.

So also, the landlord's claim for enhanced rent may be barred, if the tenant denies the landlord's right to claim enhanced rent and continues to pay the original rent,

for more than 12 years. In such a case, the tenant will be entitled to continue to hold the land at the original rate of rent—*Gopalrao* v. *Mahadevrao*, 21 Bom. 394 (396).

621B. Adverse possession of equity of redemption:—Although the equity of redemption in the case of a possessory mortgage is an intangible thing, yet it is an estate in land and is fully capable of possession. A claim for possession of the equity of redemption is an interest in immoveable property within the meaning of Art. 144, Limitation Act—*Udhaibhan Singh* v. *Sheoamber Sahai*, A.I.R. 1936 Oudh 168, 1936 O.W.N. 243, 160 I.C. 290. Thus where the manager of a joint Hindu family executes an usufructuary mortgage providing payment of certain sum every year to the mortgagor and by partition thereafter amongst the members of the said family the mortgaged property falls to the share of another member, but the mortgagee in spite of the partition goes on paying the sum mentioned in the mortgage deed to the manager and after his death to his son, suit by the member to whom the property has been allotted by partition for redemption is barred as the equity of redemption has become barred by adverse possession as a result of the manager's and after his death his son's receiving rent from the very beginning of the mortgage—*Gurunath* v. *Suryakant*, I.L.R. (1940) Bom. 453, 42 Bom.L.R. 399, A.I.R. 1940 Bom. 225.

621C. Effect of symbolical possession:—If the purchaser of a property in execution of a decree finds that the property is in the possession of the judgment-debtor or some other person, he may either make an application for delivery of possession under O 21 rr 95 and 96, or he may bring a suit for possession. The application falls under Art. 180, and the suit is governed by Art. 137 or 138. If the purchaser makes an application and obtains only *symbolical*, but fails to obtain actual possession by reason of the judgment-debtor or other persons continuing in possession of the property, he may bring a regular suit for possession and such suit falls under Art. 144—*Bireswar* v. *Sadhiram*, A.I.R. 1950 Assam 50. As to the starting point of limitation in such suits, the question has to be considered from two points of view:—(1) Whether the property is or is not capable of actual possession; and (2) whether the defendant was a party to the proceedings in which symbolical possession was delivered to the plaintiff.

(1) If the property is not capable of actual possession (*e.g.*, if it is in the occupation of tenants, or other persons entitled to possession, or is an undivided share in joint property), so that the only possible method in which the auction-purchaser can take possession is symbolical possession, such symbolical possession is equivalent to actual possession and gives to the auction-purchaser a new starting point of limitation, and time runs from the date of delivery of symbolical possession, and not from the date of the sale or the date of confirmation of the sale—*Mahadev* v. *Jamu*, 36 Bom. 373 (F.B.); *Juggobundhu* v. *Ram Chandra*, 5 Cal. 584 (F.B.); *Rajendra* v. *Bhugwan*, 39 All. 460 (463); *Gulab* v. *Ataulla*, 5 O.W.N. 372 (F.B.), A.I.R. 1928 Oudh 251, 110 I.C. 70; *Sita Ram* v. *Ramsundar*, 50 All. 813, A.I.R. 1928 All. 412 (413), 26 A.L.J. 573 (undivided share in joint property); *Ram Chand* v. *Gopal Singh*, 31 P.L.R. 519, A.I.R. 1930 Lah. 914. But if the property is capable of delivery of actual possession (*e.g.*, if the property is in the possession of the judgment-debtor himself, so that he can be evicted from the property), but the auction-purchaser gets only symbolical possession, does the symbolical possession operate as actual possession as against the judgment-debtor, and give the purchaser a fresh period of limitation? The views of the High Courts are divergent. According to the Calcutta High Court, symbolical possession is equivalent to actual possession, even though actual possession could have been delivered. The symbolical possession, though erroneous, is still possession through an officer of the Court and by process of the law; therefore the judgment-debtor who

was a party to the proceeding relating to the delivery of possession cannot ignore it or treat it as a nullity. The period of limitation for the purchaser's suit for possession against the judgment-debtor runs from the date of delivery of the symbolical possession—*Hari Mohan* v. *Baburali*, 24 Cal. 715; *Bhulu* v. *Jatindra*, 27 C.W.N. 24, 77 I.C. 1035, A.I.R. 1923 Cal. 138; *Aditya* v. *Dhirendra*, 53 C.W.N. 899, A.I.R. 1950 Cal. 92. The same view is taken by the Madras High Court—*Govind* v. *Venkata*, 17 M.L.J. 598; *Kamayya* v. *Mahalakshmi*, 53 M.L.J. 339, 105 I.C. 243, A.I.R. 1927 Mad. 849 (dissenting from *Govindasami* v. *Pethapirumal*, 44 I.C. 839). The Bombay High Court is of opinion that symbolical possession given under circumstances in which actual possession ought to have been delivered, is a nullity, and the judgment-debtor will be regarded as being still in possession as from the date of sale. Time will run from the date of the sale, and no fresh period will run from the date of taking symbolical possession—*Mahadev* v. *Janu*, 36 Bom. 373 (378) (F.B.); *Raghunath* v. *Kondiba*, 46 Bom. 932 (936), 68 I.C. 91, A.I.R. 1922 Bom. 2; *Shridhar* v. *Ganpati*, 43 Bom. 559; *Lakshman* v. *Moru*, 16 Bom. 722. [The ruling in 36 Bom. 373 has been doubted in *Mahadevappa* v. *Bhima*, 46 Bom. 710 (715).] The same view is taken by the Allahabad High Court—*Jang Bahadur* v. *Hanwant*, 43 All. 520 (524) (F.B.).

(2) As to the second point, it has been authoritatively laid down by the Judicial Committee that if symbolical possession is delivered to the auction-purchaser, it is sufficient to put a stop to the previous adverse possession of a person who was a *party* to the proceedings in which symbolical possession was delievered—*Radha Krishna* v. *Ram Bahadur*, 22 C.W.N. 330 (P.C.), A.I.R. 1917 P.C. 197, 43 I.C. 268, 16 A.L.J. 33. Thus, if symbolical possession is delivered to the auction-purchaser, the *judgment-debtor* who was and must be taken to be a *party* to the execution proceedings, cannot treat the delivery of possession as a nullity, and claim to continue to be in adverse possession as from the date of the sale. His previous possession comes to an end, and in a suit for possession by the auction-purchaser, the period of limitation runs (under Art. 144) from the date of taking symbolical possession, and not from the date of confirmation of sale under Art. 138—*Hari Mohan* v. *Baburali*, 24 Cal. 715 (719, 720); *Mangali* v. *Debi Din*, 19 All. 499; *Narain* v. *Lalta*, 24 All. 269 (271); *Janoki Nath* v. *Baikuntha*, 27 C.W.N. 259, A.I.R. 1922 Cal. 176; *Kamayya* v. *Mahalakshmi*, 53 M.L.J. 339, 105 I.C. 243, A.I.R. 1927 Mad. 849 (850); *Pratap* v. *Sunderbans*, 3 P.L.T. 628, A.I.R. 1923 Pat. 76; *Harbhagwan* v. *Taja*, 26 P.L.R. 546, A.I.R. 1926 Lah. 35; *Jogobundhu* v. *Purnanund*, 16 Cal. 530 (F.B.); *Jawala* v. *Jiwan*, A.I.R. 1950 Pepsu. 22; *Aditya* v. *Dhirendra*, 53 C.W.N. 899, A.I.R. 1950 Cal. 92. Symbolical possession is equivalent to actual possession not only against the judgment-debtor but also against his representative, *e.g.*, a mortgagee from the judgment-debtor—*Harasit* v. *Jaladhar*, 33 C.W.N. 963 (964), 56 Cal. 1130, A.I.R. 1930 Cal. 15, 121 I.C. 407; *Ramanand* v. *Bindhachal*, 27 Pat. 267, A.I.R. 1948 Pat. 416. This principle applies also to the case of a defaulting proprietor whose land is sold for recovery of land revenue—*Bireswar* v. *Sadhiram*, A.I.R. 1950 Assam. 50.

But if the adverse possessor was *not a party* to the execution proceedings, the symbolical possession delivered to the auction-purchaser cannot take effect as actual possession as against the adverse possessor. And the period of limitation for a suit by the auction-purchaser against the adverse possessor runs not from the date when symbolical possession was delivered to the plaintiff, but from the date on which the defendant's possession commenced—*Harjivan* v. *Shivram*, 19 Bom. 620; *Runjit* v. *Banwari*, 10 Cal. 993; *Jobeda* v. *Tulsi*, 36 C.L.J. 472, A.I.R. 1923 Cal. 82, 77 I.C. 564; *Ranganatha* v. *Srinivasa*, 49 M.L.J. 656, 90 I.C. 1037, A.I.R. 1926 Mad. 42 (44); *Lakshman* v. *Moru*, 16 Bom. 722 (728). Thus, if a suit is brought in 1926 by the auction-purchaser against a person who had purchased the property in 1908 at a sale held in execution of a

previous decree against the judgment debtor and was not a party to the execution proceedings held in 1914, in which symbolical possession was delivered to the plaintiff, the period of limitation runs from the date when the defendant had taken possession in 1908 and not when the plaintiff obtained symbolical possession in 1914, and the suit is barred. In other words, symbolical delivery of possession to the auction-purchaser cannot take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has *previously* obtained actual possession—*Ataullah* v. *Hansraj*, 3 Luck. 668, 5 O.W.N. 616, 111 I.C. 362, A.I.R. 1928 Oudh 391 (392); *Narain* v. *Lalta*, 21 All. 269 (271). In another Oudh case, under similar circumstances (where the defendant was a *private* purchaser) it was held that time ran not from the date when the defendant had taken possession but when the sale to the plaintiff was confirmed —*Chunni* v. *Ashrafan*, 4 O.L.J. 481, 42 I.C. 192 (193); see also *Mahesh* v. *Manohar*, 18 O.C. 369, 33 I.C. 657 (658).

622. Tacking of adverse possession:—A person who is in possession of land without title has, while he continues in possession and before the statutory period has elapsed, a *transmissible* and *heritable* interest in the property; and if such person is succeeded in possession by one claiming through him, who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period—Halsbury's *Laws of England*, Vol. 19, p. 157; *Ram Piari* v. *Budh Sen*, 43 All. 164 (169). If the period of possession of a trespasser and his predecessor-in-title who was also a trespasser extended over a period of 12 years, he acquired an absolute title to the property of which he had been thus in possession—*Babu Ram* v. *Banke Behari*, 3 A.L.J. 424. The word 'defendant' in this Article includes a person through whom the defendant derived his liability to be sued (see section 2) and hence he can tack the period of the adverse possession of his predecessor-in-title to that of his own—*Namdev* v. *Ramchandra*, 18 Bom. 37 (40); *Ali Saheb* v. *Kazi Ahmed*, 16 Bom. 197 (199); *Ghisa* v. *Gajraj*, 33 I.C. 371, 18 O.C. 289; *Padajirav* v. *Ramrav*, 13 Bom. 160 (165); *Bibhuti* v. *Girish*, A.I.R. 1950 Pat. 191. One adverse possessor can tack the period of his own possession to the period of adverse possession held by another person *through whom he derived his title*, so as to make up the period of twelve years. The principle is that a title by adverse possession, in course of acquisition, is heritable, transferable and devisable—*Gano* v. *Beni*, 14 N.L.R. 82, 43 I.C. 943. The title of a wrong-doer may be transferred to a third person, while it is in course of acquisition, so that if the possession of the original wrong-doer together with that of his transferee covers a period of twelve years, the title of the original owner would be extinguished—*Gossain Das* v. *Issur Chunder*, 3 Cal. 224 (226). Where D sold a property to A, but did not give possession, and A sold the property to the plaintiff, and in execution of a money decree against D the property was sold as his and purchased by the defendants, and then the plaintiff brought a suit for possession of the property, *held* that the defendants had a right to tack the period of their own possession to that of D's possession as against A—*Harjivan* v. *Shivram*, 19 Bom. 620 (625). The auction purchaser acquires the right, title and interest of the judgment-debtor; and therefore if a vendor retains possession of the property after the sale, and the property is subsequently sold in execution of a decree against the vendor, a suit by the vendee would be barred, if the possession of the vendor and the auction purchaser covers a period of more than 12 years—*Ali Saheb* v. *Kazi Ahmed*, 16 Bom. 197 (199). In a suit against an adopted son on the ground that his alleged adoption is invalid, the defendant can tack the period of his own adverse possession to the period during which the adoptive mother was in adverse possession, so as to complete the period of twelve years—*Padajirav* v. *Ramrav*, 13 Bom. 160 (165). A mortgagor can tack on to his own adverse possession the adverse possession of his mortgagee and use such combined possession

as against a third party—*Secretary of State* v. *Debendra Lal*, 61 Cal. 262 (P.C.), 38 C.W.N. 285, A.I.R. 1934 P.C. 23. The position of the possessor under a foreclosure decree is not that of an independent stranger, but in effect that of a mortgagee, and the mortgagor can add such person's adverse possession to that of himself—*Secretary of State* v. *Debendra Lal*, supra.

Article 144 read with sub-sections (4) and (8) of Section 2 shows that the expression "the possession of the defendant" in Article 144 includes also the possession of the person from or through whom the defendant derives his liability to be sued. The period of adverse possession of two or more defendants can be tacked together if one defendant derives his interest from the other—*Jatu Das* v. *Mt. Sulochana*, A.I.R. 1957 Pat. 37.

But the defendant cannot add to his own adverse possession the adverse possession of another *independent* previous trespasser from whom he did not derive his liability to be sued, within the meaning of the definition of 'defendant' in sec. 2 (8), and whom he does not represent by birth, transfer or devise—*Secretary of State* v. *Debendra*, 61 Cal. 262 (P.C.), 38 C.W.N. 285, A.I.R. 1934 P.C. 23, 147 I.C. 545; *Ganoo* v. *Beni*, 14 N.L.R. 82, 43 I.C. 943; *Ram Lakhan* v. *Gajadhar*, 33 All. 224 (228); *Secretary of State* v. *Krishnamoni*, 29 Cal. 518 (P.C.); *Rama Chandra* v. *Balaji*, 45 Bom. 570; *Charu Chandra* v. *Nahush Chandra*, 50 Cal. 49 (66); *Basanta Kumar* v. *Secretary of State*, 44 Cal. 858 (874) (P.C.); *Karan Singh* v. *Bakar Ali*, 5 All. 1 (7) (P.C.); *Sukh Deo* v. *Ram Dulari*, 29 O.C. 131, A.I.R. 1926 Oudh 313, 92 I.C. 825. The point was raised in *Naru* v. *Krishna*, 40 Bom.L.R. 166, A.I.R. 1938 Bom. 210. A contrary view has been taken in *Raj Bahadur* v. *Satranji*, 1940 O.W.N. 291, A.I.R. 1940 Oudh 184 where it has been held that a true owner would be barred by twelve years' continuous adverse possession, even if that possession be that of two or more independent trespassers, who do not claim under one another. The defendant cannot tack to his possession the possession of another person whom he has dispossessed—*Vasudev* v. *Eknath*, 35 Bom. 79 (90); *Lakshman* v. *Vithu*, 1895 P.J. 216; *Ram Kishore* v. *Bandikartan*, 13 Cal. 203 (207); *Ganoo* v. *Beni*, 14 N.L.R. 82, 43 I.C. 943. The possession of the persons who are not the predecessors-in-interest of that person cannot be tacked on to his possession—*Padamavati* v. *Ramchandra*, A.I.R. 1951 Orissa 248. See also Note 604 under Article 142. But if the defendants were in possession, one after another, under a common agreement which provided that one would succeed after the other, the possession of the defendants could be tacked, even though they did not claim under one another—*Mahomed Azim* v. *Mahomed Saadat*, 8 O.W.N. 349, A.I.R. 1931 Oudh 177 (226), 136 I.C. 642.

Moreover, the possession must be *continuous*, that is, there must be no interval between the defendant's own possession and the possession to which he was tacking his own. Thus, where in a suit by the landlord against the tenure-holder to recover possession of land encroached upon by him, the defendant was proved to have come into possession after an interval of some months after his father's death, the defendant was held to be an independent trespasser, and could not add his own possession to that of his father (alleging that the encroachment had been begun by his father), and hence there was no adverse possession for 12 *continuous* years to extinguish the plaintiff's title—*Midnapore Zemindary Co.* v. *Panday*, 2 P.L.J. 506 (511), 41 I.C. 114. "In order that the title of the wrong-doer may be barred by the adverse possession of a series of trespassers, the possession by them must be continuous;.....but if a period of time should elapse, however short, after the abandonment of one trespasser who has not been in possession for the full statutory period, and before the entry of another, the title of the true owner is, as from the time of such abandonment, restored to him

without any entry or act done on his part"—Dart's *Vendors and Purchasers*, (7th Ed), Vol. I, page 474.

The general principle regarding the tacking of possession of separate trespassers is that it will be tacked when the second trespasser derives his possession from the first, but that this cannot be done if the two trespassers are independent of each other and the second has obtained possession otherwise than through the first. Where the subsequent trespassers claim on behalf of the village proprietary body as the owners of the land and themselves got possession on the claim that the first trespassers were in fact trespassers with no rights, their possession was in no sense derived from that of the first trespassers but merely followed that possession—*Mulla Ahmad* v. *Fazli Ahmad*, A.I.R. 1935 Pesh. 133, 158 I.C. 968.

622A. Interruption or cessation of adverse possession:—If, while the defendant is in adverse possession, the rightful owner somehow manages to oust him, and obtains possession, the adverse possession is interrupted, and comes to an end; and if the defendant again dispossesses the rightful owner under a decree obtained under sec. 9, Specific Relief Act, the period of limitation for a suit by the owner to recover possession would run from the date of the second dispossession (under the decree), and not from the date of the original adverse possession—*Jonab* v. *Surya Kanta*, 33 Cal. 821 (825); *Protap Chandra* v. *Durga Charan*, 9 C.W.N. 1061 (1064). See Note 595 under Art. 142. In other words, the adverse possession comes to an end in consequence of a re-entry by the true owner. But the re-entry, in order to vest the possession in the person entering and to prevent the bar of the statute, must be effective, as opposed to a merely formal entry. The making of an entry amounts to nothing unless something is done to divest the possession out of the trespasser and re-vest it in fact in the owner—*Deo* v. *Coombes*, (1850) 9 C.B. 714 (at p. 718). Where during the currency of possession by a trespasser the real owner exercises various acts of possession, for however a short period, such acts divest possession of the trespasser and continuity of possession is broken—*Narain* v. *Balabh*, A.I.R. 1950 H.P. 6.

The rstatute ceases to run also, if the adverse possessor quits the land and leaves the possession vacant. "If a person enters upon the land of another, and holds possession for a time, and then, without having acquired any title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects, as he was before the intrusion took place. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon the abandonment to be effectual for any purpose. It does not leave behind it any cloud in the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant"—per Lord Macnaughten in *Agency Co.* v. *Short*, (1888) L.R. 13 A.C. 793.

Thus, if during the continuance of adverse possession, and before he has completed the 12 years, the defendant voluntarily *abandons* the land, the rightful owner is in the same position in all respects as he was before the intrusion took place—*Secretary of State* v. *Krishnamoni*, 29 Cal. 518 (535) (P.C.), following *Agency Co.* v. *Short*, supra. If the defendant's possession comes to an end by *vis major* (*e.g.*, submersion of land under water), it has the same effect as voluntary abandonment—*Ibid* (at p. 535); *Mazhar Hussain* v. *Behari Singh*, 28 All. 760 (762); *Ram Krishna* v. *Mul Chand*, 1930 A.L.J. 1498, 123 I.C. 817.

An order of the Survey Officer under sec. 11, of the appellate authority under sec. 12 of Survey and Boundaries Act (IV of 1897) in itself has not the effect of causing a break in the continuity of the adverse possession held by the unsuccessful party so as to preclude his making use of his prior possession to make up the period

of twelve years to complete his title—*Sivaprasad* v. *Narasimha*, I.L.R. (1940) Mad. 501, (1940) 1 M.L.J. 79, A.I.R. 1940 Mad. 187 (F.B.).

A suit by an auction purchaser for declaration of title and for recovery of possession from the judgment-debtor brought more than 12 years from the date of confirmation of the sale but within 12 years from the date of the actual delivery of possession is not barred as the actual delivery of possession interrupts adverse possession of the judgment-debtor and gives a fresh start of limitation—*Lakshmi* v. *Narayana*, A.I.R. 1952 Trac-Co. 86.

If, during the continuance of possession, the defendant, before he has completed 12 years, is ousted from the land by a decree obtained against him by a third person, which however is subsequently reversed and the defendant recovers possession, such erroneous decree would not prejudice the defendant, and the wrongful possession given to the third person by such decree would not prevent the continuous running of time against the plaintiff and in favour of the defendant—*Dagdu* v. *Kalu*, 22 Bom. 733 (736).

A judgment of a Court declaring that a party in possession of immoveable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner, if the party *continues in possession* in spite of that judgment, and his possession remains undisturbed. The judgment rather appears to emphasize the adverseness of the possession of the trespasser as against the real owner —*Singaraveli* v. *Chokkalinga*, 46 Mad. 525 (527) (dissenting from *Mir Akbar Ali* v. *Abdul Ajij*, 44 Bom. 934); *Shaik Mukbool Ali* v. *Shaik Wajid Hossain*, 25 W.R. 249; *Raghunath* v. *Tiruvengada*, 9 M.L T. 171, 8 I.C. 883; *Ayissa* v. *Lakshmana*, 1911 M.W.N. 207, 9 I.C. 795; *Akbar* v. *Tabu*, 45 P.R. 1914, 22 I.C. 805; *Hans Raj* v. *Maulu*, 63 I.C. 881 (882) (Lah.). But the Bombay High Court is of opinion that such a decree puts an end to the adverse possession of the party in possession, and he must, if he wishes to acquire a good title by adverse possession, start afresh after the decree—*Mir Akbar Ali* v *Abdul Ajij*, 44 Bom. 934 (938). No doubt by a decree declaring title in favour of the plaintiffs, any adverse possession which the defendants had must be deemed to have been interrupted. But where such a declaration is by the decision of the trial court and no appeal against that part of the decree is taken, the appellate court's decision on different issues raised in appeal cannot be availed of by the plaintiff to make out that he had a subsisting title to the property on the date of his subsequent suit brought after twelve years of the trial court's decision but within twelve years of the appellate court's decision—*Gopalan* v. *Sanku*, A.I.R. 1951 Tra-Co. 32.

There is a considerable difference between a suit for mere declaration and a suit for declaration coupled with a prayer for possession. It is true that by a decree for declaration without more, the position of a person in wrongful occupation will not be disturbed, even if the decree be passed in his presence. If such person continues in possession even after the declaratory decree, he may nevertheless acquire a prescriptive title. The consequences are different, if the suit for declaration is coupled with a claim for possession and such suit is decreed—*Acchiman Bibi* v. *Abdur Rahim*, A.I.R. 1958 Cal. 437.

Adverse possession which has commenced during the life-time of the last male holder will not be interrupted by the interposition of a female heir holding a life-estate, and the reversioners will not be entitled to compute limitation from the death of the female heir—*Sreepati* v. *Sarbeshwar*, 34 C.W.N. 409, A.I.R. 1930 Cal. 474 (476); *Mohendra* v. *Shamsunnessa*, 19 C.W.N. 1280, 21 C.L.J. 157 (164), 27 I.C. 954; *Ramayya* v. *Kotamma*, 45 Mad. 370 (373).

Once it is held that the possession of a co-sharer has become adverse to the other co-sharer as a result of ouster, the mere assertion of his joint title by the dispossessed

co-sharer will not interrupt the running of adverse possession—*Chenabasavana* v. *Mahabaleshwarappa*, A.I.R. 1954 S.C. 337, 1954 S.C.J. 475.

623. Suits under this Article:—*Suit by adopted son*:—A suit by an adopted son to set aside an alienation made by his adoptive mother before the adoption, and for possession, is governed by this Article, and limitation runs from the date of adoption, not from the date of alienation—*Sreeramulu* v. *Kristamma*, 26 M.L.J. 143 (147); *Sitaram* v. *Rajaram*, 48 I.C. 230; *Venkataratnam* v. *Venkataramiah*, 27 M.L.J. 569, 25 I.C. 692; *Hari* v. *Waman*, 2 Bom.L.R. 441; *Moro* v. *Balaji*, 19 Bom. 809 (816); *Ramakrishna* v. *Tripurabai*, 23 Bom. 88 (95).

A suit by the adopted son of the junior widow to recover property from the adopted son of the senior widow on the ground that the adoption of the latter is invalid, falls under this Article, and limitation runs not from the date of the adoption of the plaintiff, but from the time when the defendant had taken possession of the property; see *Padajirav* v. *Ramrav*, 13 Bom. 160.

A suit for possession by an adopted son against the defendant who is in wrongful possession of the properties left by the plaintiff's adoptive father is governed by this Article, and not by Art. 119, even if the plaintiff's adoption is denied—*Chandania* v. *Salig Ram*, 26 All. 40 (47, 48). See Note 494 under Article 119.

Suits involving setting aside of sales etc.:—Where the main relief sought is the recovery of immoveable property, and a declaration of the invalidity of an instrument is sought only as an incidental step, the case will be governed by the 12 years rule of limitation. Thus, where the alienation of a property is *void*, it does not require to be set aside, a suit for recovery of the property by avoidance of such transfer is governed by this Article and not by Arts. 44, 91 and other similar Articles. Thus a suit to recover possession of property alienated by a *de facto* guardian without necessity is governed by this Article—*Kailash* v. *Rajani*, 24 Pat. 273, 1945 P.W.N. 323, A.I.R. 1945 Pat. 298; *Palaniappa* v. *Nallappa*, (1951) 1 M.L.J. 265, A.I.R. 1951 Mad. 817; so also this Article applies to a suit by a Hindu grandson to set aside an alienation of joint family property made by his grandfather before his birth. Article 126 has no application—*Jiwaji* v. *Venkatashkrishna*, I.L.R. (1940) Bom. 109, 42 Bom.L.R. 208, A.I.R. 1940 Bom. 136. See Note 330 under Article 44 and Note 420 under Article 91.

Where a property not belonging to the judgment-debtor but to a stranger is sold in execution of a decree, such stranger may treat the sale as a nullity, and sue to recover the property at any time within twelve years from the sale; such a suit is not governed by Art. 12—*Jawala* v. *Masiat*, 26 All. 346 (353). See Note 281 under Art. 12.

Suit against redeeming co-mortgagor:—Prior to the amendment of the Transfer of Property Act in 1929, it was held that a co-mortgagor redeeming the entire mortgaged property and obtaining possession merely acquired a charge under sec. 95, Transfer of Property Act, and did not become a "mortgagee" within the meaning of Article 148; and a suit brought against the redeeming co-mortgagor by the other co-mortgagors to recover their shares of the property was *not a suit for redemption* under Art. 148 but a suit for *recovery of possession* under this Article—*Vasudeb* v. *Balaji*, 26 Bom. 500 (503); *Ramchandra* v. *Sadashiv*, 11 Bom. 422; *Vithal* v. *Dinkarrao*, 3 Bom.L.R. 685; *Faki Abas* v. *Faki Nuruddin*, 16 Bom. 191; *Makhdum* v. *Jadi*, 9 O.C. 91; *Basanta* v. *Dharma*, 55 I.C. 450 (451) (Lah.); *Sheo Ganga* v. *Ranjit Singh*, 52 I.C. 375 (Oudh); *Munia* v. *Ramasami*, 41 Mad. 650 (657); *Purna Chandra* v. *Barada*, 46 Cal. 111 (116); *Jaikishan* v. *Budhanand*, 38 All. 138 (145); *Ram Narayan* v. *Ram Deni*, 6 P.L.J. 680, 63 I.C. 282 (283); *Narain Das* v. *Saroj Din*, 27 P.L.R. 65, 92 I.C. 980, A.I.R. 1926 Lah. 238; *Wajihuddin* v. *Ahmad Ashraf*, 2 Luck. 618, A.I.R. 1927 Oudh

347; see also *Shankar* v. *Bhikaji*, 53 Bom. 353, A.I.R. 1929 Bom. 139 (140), 116 I.C. 225; and limitation ran not from the date of the possession by the redeeming co-mortgagor but from the date when the possession became adverse by the assertion of an exclusive title—*Rama Chandra* v. *Sadashiv*, 11 Bom. 422 (425); *Faki Abas* v. *Faki Nurudin*, 16 Bom. 191; *Bhaudin* v. *Ismail*, 11 Bom. 425 (429); *Vithal* v. *Dinkar*, 3 Bom.L.R. 685; *Makhdum* v. *Jadi*, 9 O.C. 91. That is, time ran when the redeeming co-mortgagor denied the right of the other mortgagors to enter into possession until they had paid to him their shares of the charge upon the property which he has defrayed—*Narain Das* v. *Saraj Din*, supra; *Wazir* v. *Girdhari*, 71 I.C. 847.

On the other hand, it has been held in *Ashfaq* v. *Wazir*, 14 All. 1 (F.B.), *Khiali Ram* v. *Taik Ram*, 38 All. 540 (547), *Nura Bibi* v. *Jagat*, 8 All. 295 (300), *Saiduddin* v. *Ratanlal*, 32 All. 160 (162) and *Wazir Ali* v. *Ali Islam*, 40 All. 683 (685) that a suit against the redeeming co-mortgagors falls under Article 148 (and not under Article 144) on the ground that the redeeming co-mortgagor stands in the shoes of the mortgagee, and the period of limitation runs from the date when the original mortgage becomes redeemable and not from the time when the defendant redeems the mortgaged property.

Under section 92, Transfer of Property Act (as recently amended in 1929) a redeeming co-mortgagor stands on the same footing as a mortgagee; so that a suit against him by the other co-mortgagors for recovery of the property is really a suit for redemption (Art. 148) and not a suit for possession (Art. 144). The latter set of rulings cited above (14 All. 1; 38 All. 540, etc.) will now stand as correct, and the former set of rulings (26 Bom. 500; 11 Bom. 422, etc.) are no longer good law.

Other suits:—A suit for possession of properties to be delivered in terms of an unregistered compromise decree but not delivered is governed by this Article—*Supdu* v. *Soniram*, 46 Bom.L.R. 931, A.I.R. 1945 Bom. 143.

A suit to recover certain land, the title to which had been declared in favour of the plaintiff by an award, is not a suit to enforce specific performance of a contract under Article 113 (because an award is not a contract) but one falling under this Article; limitation runs from the date of the award—*Sornavalli* v. *Muthayya*, 23 Mad. 593 (596); *Bhajahari* v. *Behary Lal*, 33 Cal. 881 (883, 885); *Sheo Narain* v. *Beni Madho*, 23 All. 285 (287). See Note 471 under Article 113. Nor does Art. 120 apply to such a suit—*Kurbannussein* v. *Mahomed*, 49 Bom.L.R. 731; *Kurbannussein* v. *Mahomed*, 50 Bom.L.R. 604.

Where a lessee under a perpetual lease is not put in possession, a suit by him for possession is governed by this Article and not by Art. 113—*Suraj* v. *Atul*, I.L.R. (1938) All. 664, 1938 A.L.J. 561, A.I.R. 1938 All. 429.

Where a vendor delivers possession of only a part of the property sold, the remedy of the vendee is not by a suit for specific performance but by a suit for recovery of possession of the rest of the property; and such a suit is governed by Art. 144 not by Article 113—*Bhanjan* v. *Sohaura*, 18 P.R. 1911, 92 P.L.R. 1911, 9 I.C. 238 (239).

Where a vendor was out of possession at the time of sale, and subsequently recovered possession, a suit by the vendee to recover possession from the vendor would be governed by this Article (and not by Article 136), and the cause of action arises from the date of recovery of possession by the vendor and not when the vendor had been originally dispossessed—*Ram Prosad* v. *Lakhi*, 12 Cal. 197 (199); *Sheo Prasad* v. *Udai*, 2 All. 718; *Syad Nyamtulla* v. *Nana*, 13 Bom. 424 (428).

Where the sale deed is a mere paper transaction and inoperative a suit by the vendor for possession is governed by this Article and not by Art. 91—*Basant* v. *Ram*, I.L.R. (1940) Lah. 546, 41 P.L.R. 657, A.I.R. 1939 Lah. 544.

Where the defendant has planted certain trees on the waste lands of the plaintiff, a suit for removal of the trees and for recovery of possession falls under this Article, and not under Article 32—*Muhammad Shafi* v. *Bindeswari*, 46 All. 52, A.I.R. 1924 All. 443, 75 I.C. 266. Where in substance a Zaminder's suit is really for recovery of possession of land in his Zamindary by the removal of certain structures, ditches and newly planted trees, it falls under this Article and not under Art. 120—*Mahomed* v. *Jagat*, 1940 O.W.N. 990, 16 Luck. 223, A.I.R. 1941 Oudh. 45.

A suit for assessment of fair rent in respect of a plot of land which the defendant claims to hold in *lakheraj* right is governed by this Article—*Saroj* v. *Kamala Ranjan*, 45 C.W.N. 126.

A suit by a widow to recover possession of her husband's properties falls under Art. 144—*Chennamma* v. *Mangamma*, A.I.R. 1935 Mad. 709, 1935 M.W.N. 1154, 42 L.W. 535, 158 I.C. 121.

A suit by one of the heirs of a Muhammadan for partition of the property left by the deceased, is governed by Art. 144, so far as the immoveable property is concerned, and by Art. 120 as regards the moveables—*Syed Noordeen* v. *Syed Ibrahim*, 34 Mad. 74 (75). So also a suit for possession by one heir against the other falls under this Article—*Aziman* v. *Abdul*, 1940 A.M.L.J. 9.

A suit by the donor's heirs for recovery of possession of property endowed to an idol, on the ground that the endowment was invalid, is governed by this Article, and must be brought within twelve years from the date of the gift—*Sitaramji* v. *Jadunath*, 24 I.C. 72 (79) (Oudh).

A suit by one heir against another for recovery of his share is governed by this Article and not by Art. 123—*Bholanath* v. *Sarbamangala*, 44 C.W.N. 221, A.I.R. 1940 Cal. 93.

Where the share in certain property is denied, a person may sue for declaration of title to the property or for the possession of the property. The former is governed by Art. 120 and the later by this Article—*Abid* v. *Secy. of State*, A.I.R. 1951 Nag. 327, I. L.R. (1950) Nag. 633.

A suit for recovery of possession by right of survivorship is governed by this Article. Thus, if one of the two sisters (who inherited their father's property excludes the other from joint possession and enjoyment of the property, sells some of the lands, and then dies, a suit by the other sister to recover possession of the whole property by her right of survivorship is governed by this Article and not by Article 127—*Atchamma* v. *Papaih*, 44 Mad. 131 (138).

When one member of a family sues to recover immoveable property from another who is separate from him, this Article applies, if the property was never joint family property. Even if it was originally joint family property, the effect of the partition would be that any property which continued undivided after its separation would be no longer joint, and a suit to recover a share of that property would fall under Article 144, and not under Art. 127—*Govindrao* v. *Rajabai*, 27 N.L.R. 131 (P.C.), 35 C.W.N. 438 (443, 444), A.I.R. 1931 P.C. 48, 130 I.C. 673; even if the property was left undivided at a prior partition through fraud—*Sidappa* v. *Vishvanatsha*, 45 Bom.L.R. 825, A.I.R. 1943 Bom. 419.

In a suit for possession by the heirs of one coparcener against the other, who is an insane and is in exclusive possession of half share of the property as his separate property to the knowledge of the deceased coparcener, who did not assert any claim till his death, that the entire property belonged to him, this Article is the proper Article to be applied and Art. 127 has no application—*Ratneshwari* v. *Bhagwati*, 1949 F.C.R. 715, A.I.R. 1950 F.C. 142.

In a suit by a tenant against a stranger having no right to possession, the defence of acquisition of heriditary tenancy under sec. 180, U.P. Tenancy Act is of no avail and the defendant must prove possession for over twelve years for establishment of any right by adverse possession. Such a suit is governed by this Article—*Nanku* v. *Pathar*, A.I.R. 1952 All. 305.

This Article applies to a suit for possession by an auction purchaser at a Court sale after obtaining formal or symbolical possession—*Balgobind* v. *Lila Kuer*, 24 Pat. 717; *Aditya* v. *Dhirendra*, 53 C.W.N. 899. So also, a suit for possession by an auction purchaser of a particular joint family property, described with boundaries in his sale certificate, sold in enforcement of a decree obtained by a creditor against *inter alia*, the manager of the family is governed by this Article—*Vishnu* v. *Visvanath*, 47 Bom.L.R. 1102, A.I.R. 1946 Bom. 192; *Ouseph Chacko* v. *Krishna Pillai*, A.I.R. 1958 Ker. 22 (F.B.).

There is no Article of the Limitation Act which specifically provides for a suit by an alienee from a coparcener for general partition, and where the main relief claimed is actual delivery of possession after effecting partition, the suit should be regarded as one for possession of immovable property and governed by this Article—*Chettiar* v. *Dakshinamurthy*, A.I.R. 1955 Mad. 288. This view was recently adopted in *Sitamahalakshmi* v. *Ramachandra*, A.I.R. 1957 Andhra 572.

Plaintiff claiming title and alleging defendant's tenancy:—Article 144 properly applies to a case in which the defendant is holding adversely to the plaintiff without title—*Md. Yusuf* v. *Md. Waheed*, A.I.R. 1936 Pat. 147, 161 I.C. 585.

Where, in a suit for ejectment by a person claiming to be the landlord, the question of the title of the parties is gone into and the Court comes to the conclusion that the plaintiff has made out his title and that the defendant has not, but finds also that the defendant is not the tenant of the plaintiff, the plaintiff is still entitled to relief if the Court, finds that he was in possession within 12 years of the date of the suit—*Md. Yusuf* v. *Md. Waheed*, A.I.R. 1936 Pat. 147, 161 I.C. 585.

If in a suit for possession the plaintiff claims title to the property alleging that it is being held by the defendants as his tenants, and it is found that the title of the plaintiff is established but that the tenancy is not proved; the proper Article to be applied is Art. 144 and not Art. 142. The defendant must prove his adverse possession and if he fails to do that then the plaintiff must get a decree for possession though the tenancy alleged by him has been found against him—*Sulaiman Rowther* v. *Dawood Khan Shaheb*, A.I.R. 1935 Mad. 754, 1935 M.W.N. 740, 42 L.W. 593, 156 I.C. 581. See also *Maluk* v. *Anwar*, A.I.R. 1950 Pesh. 31.

Where a defendant puts forward a title to land by way of a definite transfer, no presumption can arise in favour of the continuance of the plaintiff's anterior possession. To hold otherwise would be to ignore the provisions of sec. 110, Evidence Act. Where a plaintiff avers that he was at one time the owner of immoveable property and that the defendant obtained possession from him, his suit falls under Art. 142, Limitation Act; and on his failing to prove the permissive nature of the occupation, the plaintiff cannot succeed without at first showing that he had been in possession within twelve years of bringing the suit—*Ma Pyan Gyi* v. *U Shwe Kyun*, A.I.R. 1936 Rang. 124.

624. Starting point of limitation:—Limitation runs when the possession of the defendant becomes adverse to the plaintiff. Any overt act by the person in possession of the property starts adverse possession. The fact that the plaintiff (the party having title to the property) was not aware of the overt act does not make the possession less adverse—*Khuda Baksh* v. *Karmun*, 49 P.L.R. 1915, 27 I.C. 610 (611).

Thus, where some co-owners usufructuarily mortgage specific items of property held by the members of a Mahomedan family and the mortgagee enters into possession of the mortgaged items under the mortgage-deed, limitation begins from the date of the possession and not from the date of knowledge of the ouster of the other co-owners bringing the suit for recovery of possession—*Palania* v. *Amjath*, I.L.R. (1943) Mad. 15, (1942) 2 M.L.J. 321, A.I.R. 1942 Mad. 622 (F.B.) overruling *Muthukrishna* v. *Sankaranarayana*, 27 M.L.J. 600, A.I.R. 1915 Mad. 447); *Ramchandra* v. *Kamoju*, (1940) 1 M.L.J. 673, A.I.R. 1940 Mad. 91; *Venkataram* v. *Subramaniya*, A.I.R. 1924 Mad. 741; *Maidin* v. *Kunhalikutti*, A.I.R. 1935 Mad. 1059, and *Govindaswami* v. *Kothandapani*, 52 M.L.J. 203, A.I.R. 1927 Mad. 111.

A Hindu widow in possession of her husband's property mortgaged it with possession in 1900, and in the same year sold the equity of redemption directing the vendee to pay off the mortgage. In November 1907 she adopted the plaintiff and obtained possession of the land in March, 1908. The plaintiff sued to recover possession in December 1909. *Held* that the starting point of limitation under this Article was *not when the right of the plaintiff accrued* (November 1907) *but when the defendant's possession became adverse.* The defendant's (vendee's) possession did not become adverse until he obtained possession of the mortgaged property from the mortgagee (March 1908), for it was from this date that there was a clear indication in the shape of an overt act on the part of the vendee to indicate that he was asserting his rights under the sale-deed. The suit was therefore within time—*Hanamgodda* v. *Irgowda*, 48 Bom. 654, 26 Bom.L.R. 829, A.I.R. 1925 Bom. 9, 84 I.C. 374.

The possession of the defendant does not become adverse to the plaintiff until the latter is entitled to possession of the property. The general principle of the Act is that a person who has a right to enter should be barred if he does not exercise that right in a certain time, not that those should be barred who cannot exercise a right of entry. The maxim is—*contra non valentem agere non currit praescriptio*, that is, prescription does not run against a person who is unable to act. Darby & Bosanquet, p. 289. So, in a suit by an adopted son to recover property alienated by the adoptive mother before his adoption, it was held that assuming that the possession of the alienee was adverse to the widow, that fact did not affect the plaintiff, who did not derive his right to sue from or through her and against whom the defendant's possession began to be adverse only after the adoption, when the plaintiff became entitled to possession—*More* v. *Balaji*, 19 Bom. 809 (816). In case of an adoption by a Hindu widow, limitation does not begin against the adopted son until the date of his adoption, and his right to his adoptive father's property is unaffected by any possession adverse to the adoptive mother—*Hari Vithal* v. *Waman*, 2 Bom.L.R. 411. See also *Harek Chand* v. *Bejoy Chand*, 9 C.W.N. 795 (802). But where the right of the sole coparcener is lost by adverse possession, an adoption subsequent to that does not entitle the adopted son to sue for possession as the adoption does not give any right at all—*Narayan* v. *Gurunath*, A.I.R. 1950 P.C. 43 (on appeal from *Narayan* v. *Gurunath*, I.L.R. 1939 Bom. 173, 40 Bom.L.R. 1134, A.I.R. 1939 Bom. 1). A Hindu died leaving a widow and a daughter. The widow alienated the properties for purposes not binding on the reversioners, and died in 1865. The alienees continued in possession of the lands to the exclusion of the daughter who died in 1901, and a suit was brought in 1912 by the reversioners for possession of the properties. It was held that Art. 144 applied, and the possession of the defendants (alienees) was adverse to the plaintiffs only on the death of the daughter when they became entitled to possession, and the suit was not barred by limitation—*Neelakanta* v. *Narayanaswami*, 31 M.L.J. 847, 37 I.C. 733. The last male owner of a certain property died leaving a widow and his mother. The widow alienated a portion of the land without necessity and placed the alienee in possession.

She died in 1876. The mother afterwards died in 1892. The nearest reversioner died in 1903 without challenging the alienation or expressly assenting to it. In 1909 the reversioner next in succession of the deceased reversioner sued the alienee for possession of the land alienated. The defence was that the suit was barred by limitation. *Held* that the plaintiff's right to sue for possession was an independent right and not derived from or through the deceased reversioner, and consequently the defendant's possession though adverse to the deceased reversioner could not be adverse to the plaintiff till he was entitled to possession in 1903, and the present suit instituted within 12 years from that date was in time under Article 144—*Sundar* v. *Salig Ram*, 26 P.R. 1911 (F.B.), 9 I.C. 300 (302, 303), following *Roda* v. *Harnam*, 18 P.R. 1895. On the same principle, adverse possession by a third party against the mortgagor does not become adverse to the mortgagee, until the latter is entitled to the possession of the mortgaged property (see Note 616, *ante*). So also adverse possession by a trespasser against the tenant does not become adverse to the londlord until after the expiry of the period of tenancy. See Note 613 *ante*. Similarly, adverse possession by a female entitled to a limited estate does not become adverse against the reversioners. See Note 620A.

Where the defndants had been in possession of the suit property as purchasers in a money decree, but afterwards the plaintiff in execution of a mortgage decree purchased those properties, and not then having obtained possession brought a suit to recover possession from the defendants, it was held that time ran from the date when the plaintiff attempted to enforce his rights under the sale, *i.e.*, when he had sought to obtain possession under his purchase—*Ram Prasad* v. *Bindeshwari*, 11 Pat. 165, 13 P.L.T. 121, A.I.R. 1932 Pat. 145. In *Jasraj* v. *Sugrabai*, I.L.R. (1943) Kar. 315, A.I.R. 1943 Sind 242 it has been held that the time ran from the date of purchase by the plaintiff in execution sale. The plaintiff obtained a decree in 1873 by which he became entitled to certain portions of land which were in the possession of the defendant, the actual boundaries of which were not defined by the decree but were ascertained in execution in 1876. The defendant continued in possession of some of the lands and the plaintiff had to file a fresh suit to get possession of them, to which the defendant pleaded limitation. It was held that limitation began to run when the boundaries of the lands were finally ascertained in 1876, and not from the date of the decree in 1873—*Jagajit* v. *Sarabjit*, 19 Cal. 159 (171) (P.C.)

Where certain chakran lands, which had been included in a *patni* mahal, were resumed by the Government and settled with the zeminder, and the patnidar brought a suit against the zemindar for possession of those chakran lands, *held* that the period of limitation for the suit ran not from the date when the Government settled the lands with the zemindar, but from the date when the zemindar's possession became adverse to the patnidar, *i.e.*, when some act was done by the zemindar indicative of a hostile attitude on his part towards the patnidar. The possession of the *zemindar* may become adverse to the patnidar in a variety of ways, *e.g.*, when the lands are settled by the Zemindar with tenants, or when the patnidar after being invited to come and take the lands does nothing and the Zemindar thereafter makes other arrangements either for holding the lands in *khas* or for settling the same with ijardars or the like. In each case the facts have to be investigated having regard to the language of Article 144—*Nagendrabala* v. *Bejoy Chand Mahatap*, 50 Cal. 577 (584), A.I.R. 1923 Cal. 734, 28 C.W.N. 114, 74 I.C. 153.

Adverse possession of an alinee dates from the moment the alienee is without lawful title. That time is, in the case of a void transfer, the date of the transfer; in the case of a voidable transfer, the date of avoidance and in the case of a transfer effective for a period (whether because of estoppel or otherwise), the date of the termination of the period. The starting point of limitation depends upon the nature

of the transfer—*Venkatasubramania* v. *Sivagurunatha*, A.I.R. 1938 Mad. 60. Thus where a trustee of a choultry alienates property belonging to the choultry as his own and not as a trustee the alienation is void *abinitio* and a suit for possession is to be brought within 12 years from the date of alienation and not from the death of the trustee—*Ibid; Iswar Kalimata* v. *Bijni Raj*, 4 D.L.R. (Cal.) 216; *Hemanta* v. *Sridhar*, 50 C.W.N. 629. The same principle applies also to wakf property—*Fateh Nasib* v. *Swarup*, I.L.R. (1941) 2 Cal. 434, 73 C.L.J. 475, A.I.R. 1942 Cal. 1. But where the head of a mutt transfers the property of a mutt for valuable consideration, adverse possession begins from the death of the alienator and not from the date of alienation, even if this Article applies—*Venkateswara* v. *Venkatesa*, I.L.R. (1941) Mad. 599, (1941) 1 M.L.J. 644, A.I.R. 1941 Mad. 449 (F.B.). The same principle applies even if the alienation is not supported by necessity as the alienation is not void *ab-initio*. So a suit by the succeeding mahant for possession of the alienated property within 12 years of the death of the alienating mahant, though after more than 12 years of the alienation, is in time as the possession by the alienee does not become adverse to the Math till after the death of the alienating mahunt—*Sri Thakurji* v. *Mathura*, 22 Pat.L.T. 239, A.I.R. 1941 Pat. 354. If a shebait mortgages debuttar property without necessity, but as a shebait the possession of the purchaser at a mortgage sale does not become adverse to the endowment during the lifetime of the shebait—*Hemanta* v. *Sridhar*, 50 C.W.N. 629; *Charu* v. *Nepal*, 43 C.W.N. 102, A.I.R. 1939 Cal. 21.

A suit to set aside an alienation of *sarva* inam property made by the holder thereof must be brought within 12 years from the death of the alienating inamdar. Limitation runs from the death of the alienor—*Ramchandra* v. *Lakshmibai*, 40 Bom.L.R. 400, A.I.R. 1938 Bom. 331. In the case of a grant which is not alienable by the holder, a suit by his successors to set aside an alienation by the last holder, and for possession on the ground that the holder was not full owner of the property dealt with, may be instituted within 12 years from the date of the death of the alienor. The cause of action for the suit arises only on the death of the alienor; the fact that a suit by the plaintiffs for a declaration of their reversionary interest might be barred long ago is irrelevant, because the causes of action are different—*Dilafroz* v. *Ganhar*, I.L.R. (1946) Lah. 569, I.L.R. (1946) Kar. (P.C.) 138, A. I. R. 1946 P. C. 165.

A suit by a beneficiary for possession of immoveable property transferred by a trustee within 12 years from the date of alienation is not barred—*Ramabai* v. *Raghunath*, A.I.R. 1952 Bom. 106, 53 Bom. L.R. 883.

Where a trustee alienates property which he honestly believes to be his own but which on a true construction of the deed of trust belongs to the *cestui que trust*, time, which the trustee allows to pass owing to this mistake, counts, when computing limitation for suit against alienee for possession—*Venkatasubramania* v. *Sivagurunatha*, A.I.R. 1938 Mad. 60.

A suit instituted by a grandson to set aside alienation made by his grandfather before his birth would be barred if instituted more than 12 years after the date of alienation—*Jiwaji* v. *Venkateshkrishna*, I.L.R. (1940) Bom. 109, 42 Bom.L.R. 208, A.I.R. 1940 Bom. 136.

A transfer of property by a widow who has been holding the property in lieu of her dower debt is valid during her life time, and the limitation against the true owners begins only upon her death—*Yusuf* v. *Gafoor*, 30 Pat. 357, A.I.R. 1952 Pat. 123.

Where an adjudication order is annulled but no order vesting the property to the receiver is made under sec. 37 of the Provincial Insolvency Act, the possession of the receiver does not became adverse to the quondam insolvent. But if the receiver sells the property the possession of the purchaser becomes adverse to the quondam

insolvent from the date of the sale and the suit for possession filed within 12 years from the date of sale is not barred—*Chinna* v. *Kuppa*, A.I.R. 1952 Mad. 179, (1951) 2 M.L.J. 585, 64 Mad. L. W. 1097.

625. Burden of proof:—In a suit falling under Article 144, what the plaintiff is required to establish is his *title* to the property. The plaintiff need not prove *possession*; it is not for the plaintiff to prove that he was in *possession* within 12 years prior to suit—*Syad Nyamtula* v. *Nana*, 13 Bom. 424 (428); *Karan Singh* v. *Bakar Ali*, 5 All. 1 (6) (P.C.); *Dolu Mal* v. *Rawal Baksh*, 31 P.L.R. 231, A.I R. 1930 Lah. 608; *Sukhdeo* v. *Ram Dulari*, 29 O.C. 131, A.I.R. 1926 Oudh 313, 92 I.C. 825; *Siri Ram* v. *Bishan*, A.I.R. 1952 Pepsu 46. It is only in cases failing under Articrle 142 that the plaintiff is required to prove possession within 12 years before suit. In cases under Article 144, the plaintiff may rest content with proof of *title* only in the first instance —*Faki* v. *Babaji*, 14 Bom. 458; *Jai Chand* v. *Girwar*, 41 All. 669 (673). If he fails to prove his title the suit fails—*Suba* v. *Shiva*, A.I.R. 1950 Pat. 302 and the question of adverse possession does not arise in such a case; the question of adverse possession arises only when ownership is proved—*Keshav* v. *Municipal Commissioner*, A.I R. 1951 M.B. 114.

The plaintiff's title may be presumed under certain circumstances. Thus, the admission by Government that they had paid rent for some years to the plaintiff is sufficient in law to raise a *prima facie* presumption of title in his favour; and the *onus* of proving that the land belonged to Government and that rent was paid to the plaintiff under mistake lies upon the Government—*Vithaldas* v. *Secy. of State*, 26 Bom. 410.

After the plaintiff has established his title, his onus is discharged. He is not required to prove that his title *has not been extinguished* by the operation of limitation. It was held in *Inayet* v. *Ali Husein*, 20 All. 182 (185), *Secy. of State* v. *Vira Rayan*, 9 Mad. 175, *Secy. of State* v. *Bavotti*, 15 Mad. 315, and *Secy. of State* v. *Kota Bapanamma*, 19 Mad. 165, that in a suit under this Article, the plaintiff was required to prove not only a legal title to possession but also to prove by some *pirma facie* evidence that he had a subsisting title *not extinguished* by the operation of the statute of limitation, before the defendant could be called upon to substantiate a plea of adverse possession. That is, the plaintiff was required to prove title *as well as possession* within 12 years prior to suit. The same view has been taken in *Komu* v. *Suppukutti*—A.I.R. 1950 Tra-Co. 46. But these decisions have been practically overruled by the Privy Council ruling in *Secretary of State* v. *Chellikani Rama Rao*, 39 Mad. 617 (631), in which their Lordships have observed: "The onus of establishing title to property by reason of adverse possession for a certain requisite period lies upon the *person asserting such possession* (*i.e.*, upon the *defendant*). If it were not correct, it would be open to the possessor for a year or a day to say: 'I am here, be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' .....It would be contrary to all legal principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession." In other words, when the plaintiff has established his title to a land, the burden of proving that he has lost that title by reason of the adverse possession of the defendant lies upon the defendant—*Radha Gobinda* v. *Inglis*, 7 C.L.R. 364 (P.C.); *Karan Singh* v. *Bakar Ali*, 5 All. 1 (P.C.); *Kuthali* v. *Kunharankutti*, 44 Mad. 883 (891) (P.C.); *Parmananda* v. *Sahib Ali*, 11 All. 438 (443); *Alima* v. *Kutti*, 14 Mad. 96 (97); *Jobeda* v. *Tulshi Charan*, 36 C.L.J. 472, 77 I.C. 564, A.I.R. 1923 Cal. 82; *Faki* v. *Babaji*, 14 Bom. 458 (462); *Vasudeo* v. *Eknath*, 35 Bom. 79 (91); *Syad Nyamtula* v. *Nana*, 13 Bom. 424 (428); *Chinto* v. *Janki*, 18 Bom. 51 (57); *Ram Surat* v. *Badri*, 50 All. 89,

A.I.R. 1927 All. 799; *Jaichand* v. *Girwar Singh*, 41 All. 669 (671), 17 A.L.J. 814; *Kanhaiya* v *Girwar*, 51 All. 1042; *Md. Amanulla* v. *Badan Singh*, 17 Cal. 137 (P.C.); *Radha Kanta* v. *Bhagawati*, 1 P.L.T. 192, 55 I.C. 247; *Ram Prasad* v. *Bindeshwari*, 11 Pat. 165, 13 P.L.T. 121, A.I.R. 1932 Pat. 145 (146); *Inderpal* v. *Thakur Din*, 27 O.C. 77, A.I.R. 1924 Oudh 266, 78 I.C. 895; *Gursahai* v. *Chhedi*, 27 O.C. 130, A.I.R. 1925 Oudh 42, 79 I.C. 964; *Maung Aung* v. *Maung San*, 5 Rang. 576, 105 I.C. 598, A.I.R. 1928 Rang. 13; *Muthia Chetty* v. *Seena*, 12 Bur.L.T. 234, 56 I.C. 951; *Rauf* v. *Bodhi*, A.I.R. 1950 Pat. 484. Where a suit is brought by the plaintiff for possession as the rightful heir to the property and the defendant alleges to be in possession on the basis of an adoption-deed, the burden is not on the plaintiff to disprove the fact or validity of the alleged adoption. It will be enough for him to estabish his own case and treat the alleged adoption as of no effect—*Bhoga* v. *Surajpal*, A.I.R. 1951 M.B. 40. Where in a suit for possession by the auction purchaser within 12 years of his auction purchase, the defendant, who has purchased the property after the auction purchase of the plaintiff, wants to resist the plaintiff's suit by showing previous possession the burden is on him to show previous possession—*Uchmatan* v. *Rajendra*, 67 C.L.J. 115, A.I.R. 1938 Cal. 689. When it is found as a fact that the defendant had admitted the plaintiff's ownership up to a certain period, then before the defendant can set up adverse possession, he must show when the alleged adverse possession commenced—*Tulshibai* v. *Ranchhod*, 26 Bom. 442 (444). When the possession of the defendant was in the beginning lawful and not inconsistent with the plaintiff's title, the burden lies on him to shew that his possession has assumed another character and has become inconsistent with the plaintiff's title—*Ittappan* v. *Manavikrama*, 21 Mad. 153 (159).

If the defendant fails to prove that he has been in adverse possession for more than 12 years, the plaintiff is entitled to succeed simply on the strength of his title. It is not necessary for him to go further and prove that he was in actual possession at some period within 12 years prior to the commencement of the suit—*Jaichand* v. *Girwar Singh*, 41 All. 669 (670). Thus, in a suit by Government for possession of land used as *rastha*, once the title of Government is proved it is not necessary for Government to prove continued possession—*Province of the Punjab* v. *Asa*, 43 P.L.R. 222, A.I.R. 1941 Lah. 241. Where in a suit for ejectment the defence taken is that the defendant is a tenant paying rent to the plaintiff, the onus is on the defendant to prove the same. The onus of proving possession within 12 years by the plaintiff is discharged by the admission of the defendant of his permissive possession—*Sahabu* v. *Hari*, A.I.R. 1952 Pat. 43.

A person alleging that he has become owner of immoveable property by adverse possession must establish that he was in possession of the property peaceably, openly and in assertion of a title hostile to the real owner—*Pandurang* v. *Malkappa*, 52 Bom. L.R. 146, A.I.R. 1950 Bom. 302. In the case of adverse possession claimed against a co-owner or of any one claiming through him, it is necessary to allege specifically the point of time when the possession became adverse and to prove exclusion of the other co-owner—*Abdeali* v. *Taiyab*, 1951 N.L.J. 89, A.I.R. 1951 Nag. 355. A plea of adverse possession not raised in the pleadings is not allowed to be raised in second appeal—*Krishnamraju* v. *Reddamma*, A.I.R. 1951 Mad. 608, (1951) 1 M.L.J. 49. See also, *Siri Ram* v. *Bishan*, A.I.R. 1952 Pepsu 46. But where the plaintiff does not frame the suit as one for possession, having regard to the nature of the right claimed by him, the defendant is not precluded from showing that the suit is barred by limitation merely because adverse possession is specially pleaded in the written statement —*Ram Lal* v. *Lodha*, A.I.R. 1952 Pat. 201.

626. Invalid title cured by adverse possession:—If possession is acquired by a person under an invalid title and he continues to remain in possession for more

than 12 years, although the document relating to his title may be invalid for want of registration or any other ground, yet the possession having lasted for more than 12 years, the title becomes an unassailable one. Therefore, where a party originally enters into possession under an *unregistered* sale-deed, and remains in possession for over 12 years, the defect of his title is cured by his having been in possession for the statutory period—*Mahipal* v. *Sarjoo*, 13 O.L.J. 326, 3 O.W.N. 100, 92 I.C. 99, A.I.R. 1926 Oudh 141; *Qadar Bakhsh* v. *Mangha Mal*, 4 Lah. 249 (251), A.I.R. 1923 Lah. 495, 73 I.C. 889; *Ram Udit* v. *Bhagwat*, 95 I.C. 438, A.I.R. 1926 Oudh 500. So also, where the registration of a sale-deed is found to be illegal, the purchaser gets full title to the property purchased, if he is put in possession in pursuance of the sale-deed, and continues to be in possession for over 12 years, openly and adversely to the knowledge of the vendor—*Jasoda Kuar* v. *Nanak Missir*, 4 Pat. 394, A I.R. 1925 Pat. 787, 7 P.L.T. 507, 92 I.C. 1034. Similarly, where the mortgagor surrendered his equity of redemption to the mortgagee but there was no deed of surrender, and the mortgagee remained in possession for 40 years, he acquired proprietary title to the property—*Bashir Husain* v. *Chandrapal*, 25 O.C. 83, A.I.R. 1922 Oudh 133, 68 I.C. 223. A mortgagee remaning in possession under an invalid mortgage of lands of *Shrotriem* grant burdened with service is a trespasser from the very beginning and acquires by adverse possession for over 12 years a prescriptive right under the mortgage—*Adinarayana* v. *Srirangachariar*, 1940 M.W.N. 404. So also, where an usufructuary mortgage of an inalienable property is made and the equity of redemption is thereafter sold to the mortgagee, who by remaining in possession for more than 12 years without any challenge acquires a right by adverse possession—*Markandra* v. *Naidu*, 26 Pat. 717, A I.R. 1949 Pat. 197. A mortgagee remaining in possession of the mortgaged property for more than 12 years under an oral sale or an unregistered sale of the equity of redemption (which is invalid) acquires an absolute title to the property, and the mortgagor's right of redemption is extinguished—*Kandasami* v. *Chinnabba*, 44 Mad. 253 (257); *Mahendra* v. *Chandrapal*, 24 O.C. 155, 63 I.C. 284 (285); *Qadar Bakhsh* v. *Mangha Mal*, 4 Lah. 249 (251). Where one brother executed a deed of relinquishment in favour of another, but the deed was never registered, and the brother in whose favour it was made remained in possession, *held* that the unregistered deed being insufficient to pass title, the possession taken under it must be held to be adverse and if it continued for more than 12 years, it was sufficient to create a title in favour of the person in possession—*Jhamplu* v. v. *Kutramani*, 39 All 696 (698). A donee under an oral gift, which is invalid under the Hindu law, can perfect his title by possession for twelve years. If the donee is a female, the property becomes her stridhan—*Maluka Kunwar* v. *Pateswar*, 1 Luck. 273, 3 O.W.N. 536, 96 I.C. 672, A.I.R. 1926 Oudh 371, following *Varada Pillai* v. *Jeevaratnammal*, 43 Mad. 244 (250) (P.C.). Possession for more than 12 years under an unregistered perpetual lease perfects a title by adverse possession, though the deed itself is invalid—*Bank of Upper India* v. *Harnath*, 93 I.C. 852, A.I.R. 1926 Oudh 410, and entitles him to bring a suit for possession against any person other than the owner—*Surya* v. *Tulsi*, A.I.R. 1951 Pat. 483. Where an adopted son held exclusive possession of certain property for over the statutory period, and a reversioner subsequently sued for partition and possession on the ground that the adoption was invalid, *held* assuming that the adopted son had an invalid title, he having been in exclusive possession, and the persons suing not being able to prove joint possession, the suit was barred—*Ishwari Prasad* v. *Hari Prasad*, 6 Pat. 506, 8 P.L.T. 34, A.I.R. 1927 Pat. 145, 106 I.C. 620. A grant made in contravention of sec. 12A of the Chota Nagpur Encumbered Estates Act is void, but if the grantee remains in possession for more than 12 years, he acquires a title by adverse possession—*Bageswari* v. *Jagannath*, 8 Pat. 549, A.I.R. 1929 Pat. 117 (120), 115 I.C. 699. Where a person having no legal title remains in possession of the land under a colour of an invalid grant of the land in

perpetuity, such possession, not being referable to any legal title, is adverse to the real owner from the very moment he takes possession under the invalid grant. Possession for over 70 years openly, without interruption creates a limited interest to hold the land in perpetuity. Thus where the Government grants certain land to the Municipal Committee for establishing a market free from payment of rent and the grant is found to be invalid for non-compliance of certain formalities and the Municipal Committee remains in possession for more than 70 years without payment of rent, the Municipal Committee acquires a limited interest to hold the land in perpetuity without payment of rent—*Collector of Bombay* v. *Bombay Corporation*, A.I.R. 1951 S.C. 469.

PART IX—*Thirty Years.*

145.	Against a depositary or pawnee to recover moveable property deposited or pawned.	Thirty years.	The date of the deposit or pawn.

627. Scope:—According to some cases of the Calcutta High Court this Article applies even though the moveable property is *not recoverable in specie*—*Gangahari* v. *Nabin*, 20 C. W.N. 232 (233), 34 I.C. 959; *Lala Gobind* v. *Chairman*, 6 C.L.J. 535; *Jameshwar* v. *Kailash*, A.I.R. 1929 Cal. 143 (144), 107 I.C. 473; *Administrator-General* v. *Krishto Kamini*, 31 Cal. 519 (affirming 7 C.W.N. 476). Therefore, the term "moveable property" as used in this Article includes money—*Lala Gobind* v. *Chairman*, 6 C.L.J. 535. So also, where the plaintiff made over to a goldsmith certain gold ornaments of the weight of one tola to be melted and made into new ornaments, and failing to get the ornaments on repeated demands instituted a suit for the return of one tola of gold or its price, it was held that this Article applied—*Gangahari* v. *Nabin*, supra. But in the earlier case of *Ishur Chunder* v. *Jibun Kumari*, 16 Cal. 25 (29), it was held that the term 'deposit' meant a deposit of goods to be returned in specie. In another earlier Calcutta case also it was held that this Article applied only to a case of a deposit which was recoverable in specie, and therefore the Collector was not a depositary of the surplus proceeds of a revenue sale remaining in his hands—*Secy. of State* v. *Fazal Ali*, 18 Cal. 234 (241).

According to Madras, Punjab and Allahabad High Courts, this Article is applicable only to a deposit returnable *in specie*, and is inapplicable to a deposit of money—*Jasoda Bibi* v. *Parmanand*, 16 All. 256 (258); *Kalyan Mal* v. *Kishan Chand*, 41 All. 643 (645); *Balakrishnudu* v. *Narayanaswamy*, 37 Mad. 175 (177); *Ganesh Lal* v. *Chunni Lal*, 74 P.R. 1882; *Dalipa* v. *Labhu Ram*, 4 P.R. 1919, 65 P.L.R. 1918, 47 I.C. 592; *Mohini* v. *Rahmatulah*, I.L.R. (1944) All. 554, 1944 A.L.J. 339, A.I.R. 1944 All. 241. The same view has been taken in *Ahmed* v. *Yehiya*, A.I.R. 1950 Hyderabad, 52. The Patna High Court has held that a suit by the heir of legal representative of a deceased employee for recovery of a sum of money deposited by the employee with his employer as security for good conduct is not governed by this Article—*Ram Ran Bijoy Prasad* v. *Mt. Bachria*, 20 Pat.L.T. 777, A.I.R. 1939 Pat. 688. In the Allahabad case of 41 All. 643, Walsh J. did not apply this Article even to a case of deposit of gold mohurs (which were to be returned *in specie*), but applied Article 60, on the ground that the mohurs were 'money.'

The right to officiate as priest at funeral ceremonies of Hindus is in the nature of *immoveable* property, and a suit to redeem a share of such right is governed by Article 148 and not by this Article—*Rabhoo Panday* v. *Kassy*, 10 Cal. 73 (74).

628. Deposit:—Although the term 'deposit' ordinarily implies the deposit of specific property returnable in specie, it has a wider meaning. If a G. P. Note or a sum of money is delivered to be held as *security* for the performance of some engagement and upon the express or implied understanding that the thing deposited is to be restored to the owner as soon as the engagement is fulfilled, the person with whom the deposit has been made will be treated as a depositary—*Lala Gobind* v. *Chairman*, 6 C.L.J. 535, followed in *Nand Lal* v. *Asutosh*, 55 I.C. 515 (Cal.); see also *Upendra* v. *Collector*, 12 Cal. 113 (115).

But a simple deposit of money for safe custody (and not to be kept as security for the performance of any work) does not fall under Art. 145 (but under Art. 60)—*Ganesh Lal* v. *Chunni Lal*, 74 P.R. 1882; *Balakrishnudu* v. *Narayanaswamy*, 37 Mad. 175; *Narmadabai* v. *Bhabanishankar*, 26 Bom. 430 (so assumed); see also *Kalyan Mal* v. *Kishan Chand*, 41 All 643 (645), 55 I.C. 45; *Jasoda* v. *Parmanand*, 16 All. 256 (258). If ornaments, clothes and money are deposited with a person for safe custody, a suit to recover the ornaments and clothes (but *not the money*) falls under this Article—*Narmadabai* v. *Bhabanishankar*, 26 Bom. 430 (432); *Trimbak* v. *Vithaldas*, A.I.R. 1956 Hyd. 140, I.L.R. 1956 Hyd. 264. But where certain promissory notes remain with defendant, having been left by the plaintiff as security or at any rate for safe custody, this Article applies to a suit in respect of such notes—*Habibul* v. *Haq Tikam*, 1938 A.L.J. 264, 1938 M.W.N. 390, A.I.R. 1938 P.C. 110.

Where certain G. P. Notes were made over by the plaintiffs to the defendant to be kept by him in deposit on their behalf and if necessary to be used by him for raising funds for his own purpose, and the defendant sold all the notes, but had neither replaced them nor paid their value to the plaintiffs, *held*, that a suit to recover the value of those notes was governed by Art. 145, in as much as the transaction amounted to a deposit—*Administrator-General* v. *Krishto Kamini*, 31 Cal. 519 (528); in this case, Hill J. however was of opinion (see pp. 533, 536) that the transaction did not amount to a deposit, for an essential characteristic of a deposit properly so called was that the thing deposited should not be *used* by the depositee, and that Article 145 would not apply, but Art. 49 would be the proper Article, or even Art. 115 or 120.

The Madras High Court has held in *Balakrishnudu* v. *Narayanaswamy*, 37 Mad. 175 (178) that "the term 'deposit' should be taken to mean the sort of bailment known to lawyers under the name of '*depositum*' in the Roman law of Bailments which was accepted by Lord Bracton and afterwards by Lord Holt in *Goggs* v. *Barnard*, (1703) 1 Sm. L.C. 173, as fit to be enforced in England. This depositum is a bailment of a specific thing to be kept for the bailor and returned when wanted, as opposed to commodatum where a specific thing as a horse or a watch is lent to the bailee *to be used by him* and then returned; and both are contrasted with *mutuum* where corn, wine or money or other things are given to be used and other things of the same nature and quantity are to be returned instead. In the Limitation Act, the word 'deposit' does not include so called deposits of money or other things which are not intended to be kept but to be used." The same view seems to have been taken in *Gangineni Kondiah* v. *Gottipati Pedda*, 33 Mad. 56 (at p. 59) although it was not necessary for the decision of that case. Where the plaintiff deposited certain sum with the defendant as interest, and the defendant was not prohibited from using it nor was he bound to keep it invested in any particular way, and there was nothing to show that the defendant was a trustee of the fund, *held* that the defendant did not hold the money in deposit within Article 145—*Samuel* v. *Ananthanatha*, 6 Mad. 351 (352). The Madras High Court has also held that there can be no 'deposit' if the thing deposited is not to be returned in the condition in which it would naturally remain at the time of return. Therefore, where the plaintiff gave certain loose rubies to the

defendant, so that he might get them converted into an ear-ornament, it was held that the transaction was not a deposit—*Narayanasamy* v. *Ayasamy*, 24 M.L.J. 184, 18 I.C. 921. But in the later case of *Kishtappa* v. *Lakshmi Ammal*, 44 M.L.J. 431, A.I.R. 1923 Mad. 578, 72 I.C. 842, the same High Court has laid down that the term deposit is used in Article 145 in a plain and simple language to mean simply that where one man's property is handed by that man to another, the latter becomes a depositary of it; it is not the intention of the Legislature that the Courts who have to administer the law should have to study either the case of *Goggs* v. *Bernard*, or the Roman Law in order to ascertain what is the true meaning of Article 145, the term 'deposit' should not be confined to the strict meaning of *depositum* under the Roman Law, but also includes cases where a thing is handed over to a person on the understanding that the depositary might *use the thing* for his own benefit and then return it when demanded. See also *Ahilyamba* v. *Subramania*, A.I.R. 1954 Mad. 101, where it was held that a "deposit" within the meaning of this Article includes a deposit of money.

A suit by a pledgor to recover certain jewels which had been unauthorisedly converted by the pledgee to his own use, is governed by Art. 115 or 145—*Ramaswamy* v. *Palaniappa*, 30 L.W. 898, 122 I.C. 37, A.I.R. 1930 Mad. 364 (371). The suit does not fall under Article 36, as it is not a wrong independent of contract, but arising out of the contract of pledge—*Ibid.*

Where a person receives money in the first instance as *defacto* guardian of a minor, it is money had and received. The mere fact that in a receipt executed by him later for the money received, stating that the amount remained with him as "Amanat" does not render the amount as deposit in his hand so as to attract the application of this Article to a suit for recovery of the said amount—*Shaikh Golam* v. *Najafunnessa*, 4 D.L.R. (Cal.) 141, A.I.R. 1952 Cal. 230.

The word "deposit" does not cover a transaction of the nature of a *loan*. Therefore, where the plaintiff lent some ornaments to the defendant to be used by the later in a Ram Lila procession, but the ornaments were stolen from the defendant, and the plaintiff sued to recover them, it was held that the transaction being a loan and not a deposit, Art. 145 did not apply, but Art. 115—*Chaturgun* v. *Shahzady*, 7 O.W.N. 769, 126 I.C. 682, A.I.R. 1930 Oudh 395 (396). The plaintiff handed over a jewel to the defendant to pledge it and raise loan on it for the plaintiff. Plaintiff paid off the loan, but the defendant who got back the jewel retained it, and refused to return it to the plaintiff. *Held* that as there was no agreement that the lewel should remain in *deposit* with the defendant after the payment of the loan, this Article could not apply to a suit brought by the plaintiff to recover the jewel. The suit fell under Article 49—*Gopalasami* v. *Subramania*, 35 Mad. 636 (638), 12 I.C. 207.

A contract of deposit or pawn does not come to an end on the death of the depositary or pawnee, and the legal representative who succeeds to the estate of the deceased is bound by any contract to which the deceased was a party. Therefore a suit to recover the jewel from the legal representative of the original depositary falls under this Article and not under Article 48 or 49—*Krishnaswami* v. *Gopalachariar*, 20 L.W. 758, A.I.R. 1925 Mad. 185, 84 I.C. 1026.

A depositary's depositary is not contemplated by this Article—*Lorind* v. *Punjab National Bank Ltd.*, A.I.R. 1940 Lah. 254, 191 I.C. 830.

629. Demand and refusal:—A suit for recovery of moveable property deposited is governed by this Article, and not by Art. 48 or 49, even though there has been a demand for the return of the deposit and a refusal by the depositary; limitation runs from the *date of the deposit*, and not from the date of refusal—*Narmadabai* v.

Bhabanisankar, 26 Bom. 430 (432); *Gangineni Kondiah* v. *Gottipati*, 33 Mad. 56 (61); *Promotho* v. *Prodyumno*, 26 C.W.N. 772, A.I.R. 1921 Cal. 416, 69 I.C. 900; *Gangahari* v. *Nabin Chandra*, 20 C.W.N. 232 (233), 34 I.C. 959. In England, however, time runs from the date of the demand, and no cause of action accrues until there is a demand and refusal—*Wilkinson* v. *Verity*, (1871) L.R. 6 C.P. 206; *In re Tidd*, [1893] 3 Ch. 154 (156).

630. Art. 145 and Art. 49:—Article 145 is a *special* Article dealing with a suit against a depositary to recover moveable property deposited. Article 49 on the other hand deals *generally* with a suit for other specific moveable property, and has no application where the specific provision contained in Art. 145 applies. Art. 49 cannot be deemed to provide for the cases where the possession of moveable property is transferred to another by reason of a confidential relation such as is involved in a deposit—*Gangineni Kondiah* v. *Gottipati*, 33 Mad. 56 (57); *Promotho Nath* v. *Prodyumna*, 26 C.W.N. 772, 69 I.C. 900, A.I.R. 1921 Cal. 416. Article 49 does not apply where there is a 'deposit' in any sense of the term—*Kishtappa* v. *Lakshmi Ammal*, A.I.R. 1923 Mad. 578, 44 M.L.J. 431, 72 I.C. 842.

The Allahabad High Court is of opinion that in order to entitle the owner to sue for possession of the goods deposited or to recover damages for their loss, if they are not restored to him, he must make a demand. As there is an implied contract that they will be returned on demand, on failure to return them on demand, there is a breach of contract; and the owner may *sue in contract* in which case Article 145 will apply. On the other hand, the owner may, *sue in tort*, owing to the unlawful withholding of the goods, and in that case *Art. 49 would apply* to the suit, being a suit for return of specific moveable property wrongfully detained—*Kalyan Mal* v. *Kishen Chand*, 41 All. 643, 55 I.C. 45. But all the other High Courts are of opinion that even though there is a demand for the goods and a refusal by the defendant, such refusal does not amount to a *wrongful detention* of the goods so as to attract the application of Art. 49. When goods are deposited, the Article applicable is Art. 145; and this Article is not controlled by Art. 49—*Ma Shwe* v. *Ma Saw*, 6 Rang. 547, 116 I.C. 468, A.I.R. 1928 Rang. 309; *Narmadabai* v. *Bhavanishankar*, 26 Bom. 430 (432), 4 Bom.L R. 72; *Gangineni Kondiah* v. *Gottipati*, supra; *Kistappa* v. *Lakshmi Ammal*, supra; *Gangahari* v. *Nabin*, 20 C.W.N. 232 (233), 34 I.C. 959.

146. Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property mortgaged.	Thirty years.	When any part of the principal or interest was last paid on account of the mortgage-debt.

631. Where no part of the principal or interest has been paid, the extended period of limitation prescribed by this Article cannot be taken advantage of, and the twelve years' rule will apply—*Ram Chunder* v. *Juggutmonmohini*, 4 Cal. 283.

This Article refers to suits instituted in High Courts; similar suits instituted in mofussil Courts are provided for in Article 135.

146A. By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years.	The date of the dispossession or discontinuance.	

632. An application under sec. 364 (1), Calcutta Municipal Act is plainly not a suit and therefore this Article, which applies to suits can not apply to such an application—*Corporation of Calcutta* v. *Dulal*, 40 Cr.L.J. 870, A.I.R. 1939 Cal. 470. This Article does not apply where the suit is brought not by any local authority, but by a private person to oust the defendant from the road encroached—*Achar Singh* v. *Badhawa*, 124 P.R. 1912, 15 I.C. 285.

The "local authority" need not be the owner of the street or road. This Article cannot reasonably be restricted to streets or roads formed by the Municipality on lands belonging to or acquired by it in a *proprietary* right. For instance, when the Legislature has vested a street in a Municipal Council, such vesting does not transfer to the Municipal authority the right of ownership in the site or soil over which the street exists. Still, the Municipality has a certain property in the soil of the street which would enable it as owner to bring a possessory action against trespassers; and such possessory suit would be governed by this Article—*Sundaram* v. *Municipal Council*, 25 Mad. 635 (650). Where the local authority is found not to have been in possession at all, this Article has no application as this Article contemplates prior possession of land by the local authority—*Dhajudhari* v. *Union Board*, 45 C.W.N. 802, 73 C.L.J. 608, A.I.R. 1942 Cal. 151.

Under this Article an open assertion of hostile title is not necessary to start limitation. Possession, provided it is not permissive or in the alternative discontinuance of possession by the local authority is quite sufficient to make limitation run against it—*Tila* v. *Municipal Committee*, A.I.R. 1941 Pesh. 76, 196 I.C. 648. The word 'road' in this Article includes the portion which is used as a road as also the lands kept on both sides as parts of the road for the purposes of the road—*Anukul Chandra* v *Chairman, Dacca District Board*, 32 C.W.N. 396 (398), A.I.R. 1928 Cal. 485, 113 I.C. 24.

If a person is in possession of the Municipal land for more than 30 years, the right of the Municipality to the land is extinguished—*Ashutosh* v. *Corporation of Calcutta*, 28 C.L.J. 494, 49 I.C. 93; *Municipal Commissioners* v. *Sarangapani*, 19 Mad. 154 (157). Where a person has his verandah encroaching upon the street lands for upwards of thirty years, the site becomes the property of the person to whom the verandah belongs, by the operation of this Article read with section 28. In such a case, it is no longer competent to the District Municipality to direct him to give up possession of the encroached lands under sec. 122 of the Bombay District Municipal Act (III of 1901), because it is no longer a public street, but the private property of the defendant—*Tayaballi* v. *Dohad Municipality*, 22 Bom.L.R. 951, 58 I.C. 326.

In a Madras case, Bhashyam Ayyanger, J., has made a distinction (known to English and Scotch law) between the ownership of a private person over the encroached land, and the ownership of the Government over the land, and made the following obser-

vations as to the effect of Art. 146A and sec. 28 on these two kinds of ownership: "The operation of sec. 28 upon this Article would be to extinguish the right of highway on the expiration of 30 years from the date of dispossession of the Municipality by encroachment, and thus free the land from the burden of the highway, if the person encroaching upon the land be the owner of the land. If the owner of the land on which the highway exists be a *third party*, an encroachment of a permanent character on the public highway will also, as a general rule, operate as occupation of the soil and dispossession of the owner of the soil equally with the Municipality, and his ownership will be extinguished in favour of the trespasser at the expiration of the ordinary period of limitation, *viz.*, 12 years; and at the expiration of 30 years, the ownership thus acquired by the wrong-doer will be freed from the burden of the highway. But if the highway has been dedicated to the Municipality by the *Crown*, the right of the Crown can only be extinguished at the expiration of 60 years' adverse possession or occupation by the trespasser. Therefore in cases in which the site of the street belongs to the Crown, the Municipality will be barred after the expiration of 30 years from the date of its dispossession, but the crown will have the land freed from the burden of the highway and will be entitled to remove the obstruction or encroachment, and after removing the same, it may again dedicate as a highway the portion of the land thus freed from the burden. But if it suffers the obstruction to continue for a further period of 30 years, the trespasser would become the absolute owner of the land"—*Sundaram* v. *Municipal Council*, 25 Mad. 635 (650, 651); *Basaweswaraswamy* v. *Bellary Municipal Council*, 38 Mad. 6 (11).

The period limitation for a suit for ejectment of a trespasser who has encroached upon the municipal road commences from the time the encroachment is made, and there is continuing wrong so as to entitle the plaintiff to the benefit of sec. 23. The wrong is complete as soon as the encroachment takes place—*Municipal Commissioners* v. *Sarangapani*, 19 Mad. 154 (157); *Ashutosh* v. *Corporation*, 28 C.L.J. 494, 49 I.C. 93.

PART X—*Sixty Years.*

147. By a mortgagee for foreclosure or sale.	Sixty years.	When the money secured by the mortgage becomes due.

633. English mortgage:—It was laid down by the Privy Council (overruling a large number of cases) that Article 147 of the Limitation Act applied to the one class of mortgage in which alone a suit could be and always was brought for "foreclosure or sale" (*i.e.*, foreclosure or sale *in the alternative*, and not distributively) *viz.*, to English mortgages; it did not apply to suits on simple mortgages; these are governed by Art. 132—*Vasudeva* v. *Srinivasa*, 30 Mad. 426 (P.C.). But under sec. 67, clause (*a*) of the Transfer of Property Act, as amended by the T. P. Amendment Act (XX of 1929), the right of foreclosure has been taken away from English mortgages, so that Art. 147 can no longer apply to such mortgages They now stand on the same footing as simple mortgages allowing only a suit for sale, and the only Article applicable to such a suit is Art. 132. But a suit on a English mortgage executed prior to 1st April 1929, date of T. P. Amendment Act, is outside the scope of the amendment by reason of the saving clause in sec. 63 of the Amending Act of 1929 and will therefore be governed by this Article—*Fozmal* v. *Shridhar*, 48 Bom.L.R. 327, A.I.R. 1946 Bom. 499, 227 I. C. 135; *Saradindu* v. *Jaharlal*, I.L.R. (1942) 1 Cal. 326, 74 C.L.J. 61, 46 C.W.N.

33, A.I.R. 1942 Cal. 153. A mortgage which fulfills all the requirements of an English mortgage does not loose its character as English mortgage by insertion of a clause changing the date of payment in certain event and providing for payment by mortgagor of costs of insurance etc. A suit on such a mortgage is governed by this Article—*Rajagapala* v. *Ramachandra*, I.L.R. (1942) Mad. 851, (1942) 2 M.L.J. 406, A.I.R. 1942 Mad. 628.

As the only class of mortgage in which a suit for "foreclosure or sale" was allowed has now been deprived of the remedy of foreclosure, and there is no other class of mortgage in which such alternative relief is available, the words "or sale" should be omitted from this Article. It would then apply to suits for foreclosure under anomalous mortgages the terms of which expressly provided for foreclosure. As at present worded, this Article has no application to any kind of mortgage suit whatsoever.

634. Mortgage by conditional sale:—A suit to recover money due under a mortgage by conditional sale, or for foreclosure is governed by Art. 132, not by Art. 147—*Sheoram Singh* v. *Babu Singh*, 48 All. 302, 24 A.L.J. 295, A.I.R. 1926 All. 493, 94 I.C. 849; *Balaram* v. *Mangta*, 34 Cal. 941 (945) (S.B.).

635. Usufructuary mortgage:—A usufructuary mortgagee cannot institute a suit either for foreclosure or for sale. But if the usufructuary mortgagee does not obtain possession under the mortgage, a suit to recover the money by sale of the property (treating the mortgage as a simple mortgage) is governed by Art. 132, not by Art. 147—*Rama Chandra* v. *Madhu*, 21 Mad. 326 (332) (F.B.).

636. Equitable mortgage:—A suit to recover money due under an equitable mortgage is now provided by Article 132, Explanation, clause (*c*), newly added by the Transfer of Property Amendment Supplementary Act, XXI of 1929 and the period of limitation is 12 years. See Note 558 under Art. 132. The ruling in *Manekji* v. *Rustomji*, 14 Bom. 269 (272, 273), where it was held that the mortgagee by deposit of title-deeds had a right to sue for foreclosure or sale within 60 years under Art. 147, is no longer good law.

148. Against a mortgagee to redeem or to recover possession of immoveable property mortgaged.	Sixty years.	When the right to redeem or to recover possession accrues: Provided that all claims to redeem arising under instruments of mortgage of immoveable property situate in Lower Burma which had been executed before the first day of May, 1863, shall be governed by the rules of limitation in force in that State immediately before the same day.

637. Suits under this Article:—A right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property and a suit for redemp-

tion of such right therefore falls under this Article and not under Art. 145—*Raghoo Pandey* v. *Kassey*, 10 Cal. 73 (74).

Suit by purchaser from mortgagor:—A purchaser of the equity of redemption in part of the mortgaged property is entitled to redeem his portion of the property, within 60 years from the date of the mortgage. All persons who have stepped into the shoes of the mortgagor are mortgagors for all purposes, and this Article is applicable to a suit by a purchaser of the equity of redemption of a portion of the mortgaged property—*Wazir Ali* v. *Ali Islam*, 40 All. 683 (685). The mere fact that the mortgagees have been paying surplus profits for a period of 12 years to a person who was once the owner of part of equity of redemption should not be construed as taking away from the purchasers of the equity of redemption the right to redeem inherent in them under the provision of this Article—*Pydivadu* v. *Suryanarayanaraju*, A.I.R. 1951 Mad. 384.

Suit against mortgagee's assigns:—A purchaser who purchases the mortgaged property from the mortgagee upon the representation and in the belief that it was an absolute interest that he was purchasing, is a transferee for valuable consideration, and a suit by the mortgagor to recover the property from such purchaser is governed by the shorter period of limitation provided by Article 134. (See Note 363 under Article 134). But where the purchaser has knowledge that he was purchasing the limited interest of a mortgagee, *i.e.*, where he simply takes a transfer of the mortgage, a suit against him is governed by Art. 148, not by Art. 134. See *Drigpal* v. *Kallu*, 37 All. 660; *Muthu* v. *Kambalinga*, 12 Mad. 316; *Bhagwan Shahai* v. *Bhagwan Din*, 9 All. 97. The burden of proving that the transferee had notice of the mortgage and that he was estopped from denying the mortgagor's title is on the plaintiff—*Chunai* v. *Ramprasad*, A.I.R. 1951 All. 167 (F.B.).

Redemption of usufructuary mortgage:—In a suit for redemption of an usufructuary mortgage the defence was that an order of the Debt Conciliation Board discharging the debt amounted to the satisfaction of the debt. It was held that the discharge of debt by operation of law did not amount to a redemption of the mortgage and was governed by this Article—*Mulchand* v. *Mt. Ganga*, A.I.R. 1951 Nag. 366, I.L.R. (1950) Nag. 68, 1949 N.L.J. 539.

Redemption of occupancy holding:—A mortgage of an occupancy holding is not permitted by law, but by entering into possession as mortgagee and continuing in such possession for more than 12 years, the mortgagee can only prescribe a title for the limited interest of a usufructuary mortgagee. A suit by the mortgagor against the mortgagee for possession of the holding is a suit for redemption under this Article and time runs from the date of the mortgage—*Maha Mangal* v. *Kishum*, A.I.R. 1927 All. 311, 100 I.C. 346.

Second suit for redemption:—Where a mortgagor brought a suit for redemption and obtained a decree, and about twenty-three years after the date of the decree, applied to execute the decree and prayed that this application be treated as a suit, *held* that as the decree was not executed, the relationship of mortgagor and mortgagee did not cease to exist between the parties, and the present application though barred under sec. 48, C. P. Code, could be treated under sec. 47, C. P. Code as a fresh suit for redemption, if the period prescribed by Article 148 had not been expired—*Hanmant* v. *Shidu Shambhu*, 47 Bom. 692 (695). A.I.R. 1923 Bom. 300, 25 Bom L.R. 358, 72 I.C. 556. See also *Muhamadi Begum* v. *Tufail*, 48 All. 17, A.I.R. 1926 All. 20, 92 I.C. 260. But where the right to sue becomes barred under the old Act it can not be revived. Thus where a mortgage was executed in 1791 and a suit for redemption was brought in 1849 and the mortgagee's pleader filed a statement of account of the mortgaged

property and in 1863 in another suit the existence of mortgage and the relationship of mortgagor and mortgagee was admitted as subsisting in the memorandum of second appeal signed by the pleader for the mortgagee, it was held in a suit for redemption brought in 1933 that the said acknowledgments though good under the Act of 1908 were invalid under the Act of 1859 and the right to redeem became barred after 60 years from 1791, the date of mortgage and it can not be revived even though the acknowledgments would have been good under the Act of 1908 which governs the suit—*Yoonus* v. *Sheikh Hassen*, I.L.R. (1941) Bom. 260, 43 Bom.L.R. 194, A.I.R. 1941 Bom. 178. Under sec. 22, Mewar Limitation Act, corresponding to Art. 148 of the Limitation Act, an application for execution of a redemption decree passed prior to the said Act is required to be filed with six months of the introduction of the Act. An application for execution of redemption decree filed after the expiration of that period is barred by limitation—*Khubilal* v. *Hiralal*, A.I.R. 1951 Raj. 121.

Claim for surplus profits received by mortgagee:—See 26 C.W.N. 123, cited in Note 452 under Article 105.

Suit by puisne mortgagee to redeem prior mortgage:—As to whether Art. 148 or Art. 132 applies to a suit by a puisne mortgagee to redeem a prior mortgage, where both mortgagees have brought suits on their respective mortgages and purchased the property in execution of their decrees, see 47 M.L.J. 602, 14 C.W.N. 439, 5 Pat. 513, 14 Lah. 596, and other cases cited in Note 553 under Art. 132, where the subject has been fully discussed. When the suit is not a suit for enforcing payment of money, but a suit by the second mortgagee for redemption of the prior mortgage, the suit is governed by this Article and not Art. 132—*Am. A. Firm* v. *Marudachalam*, (1948) 1 M.L.J. 284, A.IR. 1948 Mad. 412, 1948 M.W.N. 238.

Suit against redeeming co-mortgagor:—Prior to the amendment of sec. 95, Transfer of Property Act by the Amendment Act of 1929 it was held that a co-mortgagor redeeming the entire mortgaged property and obtaining possession merely acquired a charge under sec. 95, Transfer of Property Act. and did not become a "mortgagee" within the meaning of Article 148; and a suit brought against the redeeming co-mortgagor by the other co-mortgagors to recover their shares of the property was not a suit for redemption under Article 148 but a suit for recovery of possession under Art. 144—*Vasudeb* v. *Balaji*. 26 Bom. 500 (503); *Ramchandra* v. *Sadashiv*, 11 Bom. 422; *Ramchandra* v. *Ganesh*, 57 Bom. 134; *Faki Abas* v. *Faki Nurudin*, 16 Bom. 191; *Munia* v. *Ramasami*, 41 Mad. 650 (657); *Purna Chandra* v. *Barada*, 46 Cal. 111 (116); *Jaikishan* v. *Budhanand*, 38 All. 138 (145); *Ram Narayan* v. *Ram Deni*, 6 P.L.J. 680, 63 I.C. 282 (283); *Narain Das* v. *Saroj Din*, 27 P.L.R. 65, 92 I.C. 980, A.I.R. 1926 Lah. 238; *Jhandu* v. *Nur Mahomed*, 32 P.L.R. 622; *Ganda Ram* v. *Munshi Ram*, 32 P.L.R. 649; *Ram Agre* v. *Ram Udit*, 8 O.W.N. 637; *Wajihuddin* v. *Ahmad Ashraf*, 2 Luck. 618, A.I.R. 1927 Oudh 347; *Ma Ekhin* v. *Mahomed*, A.I.R. 1938 Rang. 65, 176 I.C. 923.

On the other hand, it was held in *Ashjaq* v. *Wazir*, 14 All. 1 (F.B.), *Khiali Ram* v. *Taik Ram*, 38 All. 540 (547), *Nura Bibi* v. *Jagat*, 8 All. 295 (300), *Saiduddin* v. *Ratanlal*, 32 All. 160 (162); *Wazir Ali* v. *Ali Islam*, 40 All. 683 (685); *Mukh Narain* v. *Ram Lochan*, 19 Pat. 938, 189 I.C. 855, A.I.R. 1941 Pat. 147; *Raghavendra Charya* v. *Vaman*, 45 *Bom.L.R.* 253, A.I.R. 1943 Bom. 191; *Kishen Gopal* v. *Abdul Latif*, 15 Luck. 175, 1939 O.W.N. 1045, A.I.R. 1940 Oudh 97, that a suit against the redeeming co-mortgagor fell under Article 148 (and not under Article 144) on the ground that the redeeming co-mortgagor stood in the shoes of the mortgagee, and the period of limitation ran from the date when the original mortgage became redeemable and not from the time when the defendant redeemed the mortgaged property.

But after the amendment of secs. 92 and 95 of the Transfer of Property Act effected

by the T. P. Amendment Act XX of 1929, the redeeming co-mortgagor is subrogated to the rights of the mortgagee, and therefore a suit referred to above is now a suit for redemption under Art. 148.

Application under Punjab Restriction of Mortgaged Lands Act:— If in the period intervening after the coming into force of the Punjab Restriction of Mortgaged Lands Act, the redemption of a mortgage become barred under this Article, an application under sec. 4 of the Act is not maintainable—*Ram Rakha* v. *Roda*, A.I.R. 1951 Punj. 125.

Subsequent mortgagee subrogated to rights of prior mortgagee:— A subsequent mortgagee subrogated to the rights of the prior mortgagee by paying him off is a mortgagee within the meaning of Art. 148—*Ramdayal Sen* v. *Chakrapani*, A.I.R. 1936 Pat. 60.

638. Suits not under this Article:—

Suit for annulment of mortgage and for possession:—A redemption suit is one in which the plaintiff accepting the position of a mortgagor or of a person interested in the equity of redemption asks for possession in accordance with the terms of the mortgage on payment of the amount due under it. But where the plaintiffs *do not admit the validity* of a mortgage executed by their father as the manager of joint family, and ask for possession not in accordance with but contrary to the terms of the mortgage, the suit is not one for redemption, but for possession after setting aside the father's alienation and falls under Article 126—*Chokhey Singh* v. *Hardeo*, 24 O.C. 330, A.I.R. 1921 Oudh 196 (197), 64 I.C. 757.

Suit for possession from auction purchaser in mortgage sale:—A suit contemplated by this Article is a suit for recovery of possession from a mortgagee as such. A simple mortgagee, who enters into possession by way of purchase of the equity of redemption, cannot be said to be in possession as a mortgagee. So a suit by a person in whom the equity of redemption was entirely vested for possession against a simple mortgagee auction purchaser in execution of the mortgage decree in which the plaintiff was not impleaded as a party is not governed by this Article—*Batuk* v. *Rudra*, A.I.R. 1950 Pat. 206.

Invalid sale of equity redemption:—Where a mortgagee in possession gave the mortgaged property in lease to the mortgagor, and in execution of a decree against the mortgagor for arrears of rent in respect of the lease, attached the mortgaged property and brought it up to sale in contravention of sec. 99 (old), Transfer of Property Act, and purchased it himself, the sale is voidable and not void, and the mortgagor cannot successfully maintain a suit for redemption of the property without first getting the sale set aside (Art. 12). Even if in such a case the mortgagee-purchaser is treated as a trustee of the equity of redemption for the mortgagor, the suit by the mortgagor cannot be regarded as a suit for redemption under Article 148, but a suit to enforce a trust under Article 120—*Uttam* v. *Rajkrishna*, 47 Cal. 377 (396) (F.B.), 24 C.W.N. 229.

Suit on subsequent agreement:—Where after the expiration of the term of a mortgage, the mortgagor and mortgagee agreed that the mortgagee should continue in absolute possession for a fixed term in satisfaction of the debt and then restore the property free from the mortgage lien; it was held that the agreement was distinct from the original mortgage, and was not intended to be a mortgage but a conveyance for a term of years, and a suit to recover the property does not fall under this Article but must be brought within 12 years from the expiration of the term stipulated in the agreement—*Gopal* v. *Desai*, 6 Bom. 674 (680).

Suit for accessions:—Where a mortgagor after redemption sues to take over accessions made by the mortgagee, the suit is not one really for redemption. The redemption being already completed, the relationship of mortgagor and mortgagee no longer subsists, and the subsequent suit for accessions is not a suit against a 'mortgagee' under this Article but a suit for possession under Article 144—*Khudadad* v. *Girdhari*, 163 P.W.N. 1917, 42 I.C. 468.

Suits under U. P. Debt Redemption Act:—A property comprised in a usufructuary mortgage more than 60 years old was sought to be recovered on the ground that by virtue of the help afforded by the U. P. Debt Redemption Act the whole of the mortgage money had been paid off. On a plea that it was barred by this Article, it was held that the suit is not governed by this Article for the right to recover possession did not arise until the Court determined the question of the mortgage money being paid off and when that was done, the suit was really a suit to recover possession against the defendant as trespasser—*Ram Prasad* v. *Bishambar*, 1946 A.L.J. 175, A.I.R. 1946 All. 400, 227 I C. 541. But the same High Court has dissented from this case in a subsequent case and has held that an application under sec. 12 of the said Act filed more than sixty years from the date of the mortgage, is barred under this Article—*Ram Palhawan* v. *Ummedi*, A.I.R. 1952 All. 300. See also, *Shafiq Uddin* v. *Lakhan*, 1949 A.L.J. 423, A.I.R. 1950 All. 60.

Adverse possession by mortgagee:—See Note 614 under Art. 144. This Article would apply to a case where the right to redeem or to recover possession is still in tact. But where the mortgagee has acquired the right of full owner by adverse possession for more than 12 years, there is no equity of redemption outstanding on which this Article can operate—*Markanda* v. *Naidu*, 26 Pat. 717.

639. Interest:—The mortgagee is entitled to interest for the *whole period*. Where interest is a charge on the property, the mortgagor cannot get a decree for redemption without paying all the money (principal and interest) for which the property sought to be redeemed is a security. The mere fact that if the mortgagee as plaintiff had brought a suit for recovery of interest, he could not recover interest for more than six years or 12 years before that suit, would not preclude the mortgagee from claiming (as a defendant) interest for the whole period, in a suit for redemption brought by the mortgagor. The law of limitation does not apply to a plea raised in defence—*Akbar* v. *Ragnandan*, 8 P.L.R. 1921, 57 I.C. 348 (349); *Kamta* v. *Bishambar*, 147 P.R. 1890 (F.B.); *Hoshnakmal* v. *Sohna Mal*, 114 P.R. 1894; *Ghasita* v. *Ishar*, 8 P.R. 1890. As to *post diem* interest, see Note "interest after due date" under Art. 116.

640. Latches:—The mortgagee can exercise his right of redemption at any time within the period of 60 years which the law allows him under this Article, and no Court of Justice would be justified in diminishing that period on the ground of his latches in the prosecution of his rights—*Juggernath Sahoo* v. *Syed Shah Mahomed Hossein*, 23 W.R. 99 (P.C.); *Pokhpal* v. *Bishan*, 20 All. 115 (117); *Kishori Mohan* v. *Ganga Babu*, 23 Cal. 228 (237). If the right of action is subject to a statutory limitation, latches does not have the effect of shortening the term within which the plaintiff can sue. A party cannot be said to be in delay because he takes advantage of the full period which the law allows and does not bring his action until that period is on the point of expiring. Lightwood, p. 254.

641. Starting point of limitation:—The right of redemption and the right of foreclosure are co-extensive. Ordinarily, and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created, the right of redemption can only arise *on the expiration* of the specified period—*Bakhtawar*

Begum v. *Husaini*, 36 All. 195 (199) (P.C.); *Vadju* v. *Vadju*, 5 Bom. 22; *Husaini* v. *Husain*, 29 All. 471 (473); *Raghubar* v. *Budh Lal*, 8 All. 95 (98); *Tirugnana Sambandha* v. *Nallatambi*, 16 Mad. 486 (489); *Seeti Kutti* v. *Kunhi Pathumma*, 40 Mad. 1040 (1062); *Brown* v. *Cole*, 14 Sim. 427; *Shib Narain* v. *Chitru*, A.I.R. 1949 E.P. 389, 4 D.L.R. 151 (Simla). Sec. 2 of Bengal Reg. 1 of 1798 does not authorise the mortgagor to redeem at any time when a specific date is fixed for redemption—*Khunkhun* v. *Mahabir*, 1948 A.L.J. 90, A.I.R. 1948 All. 261 (F.B.). But see *Asharfi* v. *Zamin*, I.L.R. (1939) All. 990, 1939 A.L.J. 1127, A.I.R. 1940 All. 29. In *Bhagwat* v. *Parshad Singh*, 10 All. 602 (609), *Rose Ammal* v. *Rajarathnammal*, 23 Mad. 33 (35, 36) and *Sri Setrucherla* v. *Sree Raja Varicherla*, 2 Mad. 314 (316) it has been held that there is no general rule of law which precludes a mortgagor from redeeming a mortgage before the expiry of the term for which the mortgage was intended to be made. But these decisions are no longer correct, in view of the authoritative pronouncement of the Judicial Committee in *Bakhtawar Begum* v. *Husaini Khanum*, supra, and by reason of the recent amendment of sec. 60, Transfer of Property Act (by the amendment Act XX of 1929). But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt at any time during the specified period and take back the property. So, where a usufructuary mortgage deed provided that the mortgage was for 9 years, but the mortgagor would be entitled to get back the property whenever the mortgage money would be satisfied out of the usufruct or paid by the mortgagor, whether before or after the stipulated time of 9 years, and it happened that the mortgage debt was satisfied by the usufruct in three years after the mortgage, it was held that time ran from the satisfaction of the mortgage debt, *i.e.*, from the end of the third year and not after the expiration of 9 years—*Bakhtawar Begum* v. *Husaini*, 36 All. 195 (199) (P.C.).

Where a mortgage by conditional sale provided that if at any time within seven years from the date of the mortgage the vendors would pay a stated sum to the vendee, the latter would reconvey, it was held that the time for a suit for redemption did not begin to run until after the expiration of the seven years, as it was not obligatory upon the mortgagors to pay the money before that time—*Kalka Prosad* v. *Bhuiyan Din*, 31 All. 300 (303). So also where there is a term in the mortgage bond that if money be not paid within the period mentioned therein, the mortgagee can enter into possession of the mortgaged property, the period of limitation for redemption will start from the date fixed for payment—*Mohammed Khan* v. *Mohammed Salim*, 1951 A.L.J. 174, A.I.R. 1951 All. 392.

Where a usufructuary mortgage provides for the mortgagee paying himself the debt (both principal and interest) from the rents and profits of the estate and for the surrender of possession when the debt is so paid off, and no time is fixed for redemption, the mortgagor is not entitled to bring a suit for redemption before the mortgage debt is wholly satisfied out of the rents and profits—*Tirugnana Sambandha* v. *Nallatambi*, 16 Mad. 486 (490). But where a usufructuary mortgage provides that the profits are to be taken by the mortgagee in lieu of *interest* only, and that the mortgagor would be entitled to redeem and obtain possession on payment of the principal sum, and no date for redemption is specified, the right to redeem the mortgage arcrues to the mortgagor immediately from the date of execution of the mortgage—*Soni Ram* v. *Kanhaiya Lal*, 35 All. 227 (230) (P.C.). If there was an express provision in a usufructuary mortgage that the mortgage was redeemable at any time at the will of the mortgagor, the mortgagor's right to redeem accrued on the date of the mortgage—*Anwar Husain* v. *Lalmir*, 26 All. 167 (171). In case of a *lekha mukhi* mortgage (a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of his debt, principal and interest, and in which

the mortgagor undertakes no personal responsibility, and the mortgagee is not entitled to sue for the debt), the right to redemption accrues immediately from the date of execution of the mortgage, and time runs from that date—*Khudu Lal* v. *Fazil*, 1 Lah. 89 (90); *Dittu Mal* v. *Ilahi*, 28 P.L.R. 123, 101 I.C. 549, A.I.R. 1927 Lah. 828.

If there is an acknowledgment of the mortgage by the mortgagee, the period of 60 years will run from the date of such acknowledgment—*Vithu* v. *Keshav*, 6 Bom.L.R. 38; Anwar v. *Lalmir*, 26 All. 167 (172).

But a payment of interest by the mortgagor or the receipt of the profits of the mortgaged property by the mortgagee does not extend the period of redemption, though it will extend the period in respect of the mortgagee's suit to bring the property to sale—*Anwar* v. *Lalmir*, 26 All. 167 (169); *Kallu* v. *Halki*, 18 All. 295; *Bhagwan* v. *Madhab*, 46 Bom. 1000, A.I.R. 1922 Bom. 356, 70 I.C. 906. See Note 204 under sec. 20.

Burden of proof:—In a suit for redemption of a mortgage the burden is on the mortgagor and not on the mortgagee to prove that the claim is within time as prescribed by this Article—*Suraj* v. *Rang Bahadur*, A.I.R. 1950 All. 88. The mortgagor is required to prove positively that there is a subsisting mortgage which he is entitled to redeem and that must be proved by the actual proof that the mortgage was executed within the period of limitation or by proof of a valid acknowledgment which would save limitation—*Sonkara* v. *Kuttani*, 1940 M.W.N. 446, A.I.R. 1940 Mad. 639.

149. Any suit by or on behalf of the Central Government or any State Government except a suit before the Supreme Court in the exercise of its original jurisdiction.	Sixty years.	When the period of limitation would begin to run under this Act against a like suit by a private person.

Amendment:—The words "the Secretary of State for India in Council" and the words "Secretary of State, the Crown Representative" were omitted by the Indian Independence Act (Adaptation of Central Acts and Ordinance) Order, 1948; the words "the Central Government or any Provincial Government" were inserted by the Government of India (Adaptation of Indian Laws) Order, 1937; the words "except a suit" were inserted by sec. 2 of the Indian Limitation (Amendment) Act, 1937 (XIV of 1937); and the words "Supreme Court" and "State Government" have been substituted for the words "Federal Court" and "Provincial Government" by the Adaptation of Laws Order, 1950 issued under the Constitution of India.

642. Scope of Article:—Under the Act of 1871, this Article referred to suits "in the name of" the Secretary of State but in the Acts of 1877 and 1908, the words "in the name of" have been changed into "by or on behalf of." Under the Act of 1871, this Article applied to suits by private persons for their own benefit in the name of the Secretary of State; under the Acts of 1877 and 1908 such suits will no longer fall under this Article. The present Article applies only to suits which are brought for the benefit of or on behalf of the Government and it would seem as if it was not necessary that the suit should be actually in the name of the Secretary of State—*Starling*, 5th Edn., p. 446.

It is inapplicable to suits brought by persons *claiming through Government*, as for instance, to suits by persons claiming title under *pattas* from Government—*Jaga-*

dindra v. *Hemanta*, 32 Cal. 129 (138) (P.C.); *Madhava* v. *Lokenatha*, 5 M.L.T. 107, 2 I.C. 314; *Moolchand* v. *Amarnath*, 140 P.L.R. 1917, 39 I.C. 971; or to suits by purchasers from Government—*Kuthaperumal* v. *Secy. of State*. 30 Mad. 245 (248); *Annada Mohan* v. *Kina Das*, 28 C.W.N. 66, 81 I.C. 675, A.I.R. 1924 Cal. 394; *Nawab Bahadur* v. *Gopinath*, 13 C.L.J. 625, 6 I.C. 392; *Governor General in Council* v. *Awadhoot*, I.L.R. (1946) Nag. 246, 1946 N.L.J. 223, A.I.R. 1946 Nag. 228, 223 I C. 486. Therefore, where a purchaser of land from Government sued to recover possession within 60 years but more than 12 years from the commencement of adverse possession, though within 12 years from his purchase, *held* that the suit was barred under Article 144, Article 149 not applying to the case. The period of limitation was 12 years, and the period of adverse possession which had already run against the plaintiff's predecessor-in-title (Government) should be reckoned against the plaintiff—*Annada Mohan* v. *Kina Das*, supra. Even if the plaintiff (assignee from Government) in such a suit joins the Secretary of State as a co-plaintiff, the period of limitation for a suit for possession will not be sixty years under this Article, but 12 years—*Pullanapalli Sankaran* v. *Vittil Thatakat*, 28 Mad. 505 (506). In *Kylashbashini* v. *Gocoolmoni*, 8 Cal. 230 (235), there was a *dictum* that a person claiming under Government (*e.g.*, an auction-purchaser from Government) could sue within 60 years under this Article. But this is no longer good law in view of the Privy Council decision in 32 Cal. 129 cited above.

A Municipality is not entitled to claim the benefit of this Article. So, where a suit is brought by a Municipal Committee for possession of land belonging to Government but vested in the committee for management the committee cannot take advantage of 60 years' limitation allowed by this Article—*Mehar* v. *Municipal Committee*, 50 P.L.R. 4, A I.R. 1948 Lah. 153 (F.B.) (overruling *Labha Singh* v. *Municipal Committee*, A.I.R. 1934 Lah. 960, 153 I.C. 964). The reason is that, when the Government has ceded a land to a Municipal Corporation, it cannot, with the land, cede any right or privilege inherent in the sovereign power. Consequently the Municipality cannot, in a suit brought by it, claim the benefit of sixty years' rule, but the ordinary rule of limitation will apply—*Municipal Commissioners* v. *Sarangopani*, 19 Mad. 154 (156). That is, the learned Judges in this case laid down that after the Government had once vested a land in the Municipality, the Government would lose all right of proprietorship in the land by virtue of adverse possession of the land by a trespasser for the period of 30 years under Article 146A (or 12 years under Article 142, before Article 146A was enacted). But this view has been dissented from by Bhashyam Ayyangar, J. in *Sundaram* v. *Municipal Council*, 25 Mad. 635, where his Lordship has laid down that a Municipal Council does not, by the vesting of a street in it, become the full owner of the site or soil on which the street exists, and that although adverse possession by a trespasser for 30 years (Art. 146A) may extinguish the right of the Municipality over the land, the title of the Crown to the land will not be lost until the trespasser has had possession for 60 years, (Article 149).

This Article applies only to suits brought by or on behalf of Government; it does not apply to a suit brought by a private person *against* the Government—*Secretary of State* v. *Bavotti*, 15 Mad. 315 (318). The test for the applicability of this Article is whether the property or the benefit sought in the suit belongs wholly and solely to the State—*Bank of Baghelkhand* v. *Ram Prasad*, A.I.R. 1954 V.P. 1.

Where certain lands belonging to a railway company are transferred by the railway company to a person for cultivation under a licence a suit by the railway company and the Secretary of State for ejectment of the licencee and for rent and mesne profits is governed by Art. 149 and not Art. 109 or 116—*B. N. W. Ry. Co. Ld.* v. *Janki Prasad*, A.I.R. 1936 Pat. 362.

This Article applies only to *suits* and not to *appeals* or applications; appeals by

the Crown against acquittals are especially provided for in Article 157;. and applications by Government are subject to the same period of limitation which is applicable to a private individual—*Appaya* v. *Collector*, 4 Mad. 155 (156). An *application* by Government under the Bengal Resumption of Revenue Regulation (II of 1819) is not a suit, so as to make Art. 149 applicable—*Mahabannissa* v. *Secretary of State*, 53 Cal. 561, A.I.R. 1926 Cal. 1064, 98 I.C. 334.

643. Suits under this Article:—Where a zemindar sold a ghatwali mehal as a mal mehal, and not merely his right to receive the quit rent from the ghatwal, and the vendee in collusion with the former ghatwal granted him a mokurari tenure, thus changing the nature of the tenure from a ghatwali to a mal tenure, a suit by the Government to maintain its own nominee in possession of the land as ghatwal falls under this Article—*Petumber* v. *Jugurnath*, 18 W.R. 130 (131).

A suit by Government for possession of a plot of land encroached upon by the defendant falls under this Article, and is in time if brought within 60 years from the date of the encroachment—*Ranchodlal* v. *Secretary of State*, 35 Bom. 182 (189), 9 I.C. 768.

A suit for possession by Government under sec. 9, Specific Relief Act is governed by Article 149, and not by Art. 3—*Secy. of State* v. *Dinshaw*, A.I.R. 1925 Sind 275, 87 I.C. 1002.

A suit for resumption of *lakhiraj* land by Government falls under this Article and will be barred if the defendant was in possession of the land for more than sixty years before suit. A similar suit by a private person would be governed by Article 130. See *Koylashbasini* v. *Gocoolmani*, 8 Cal. 230 (236).

A suit by Government to assess revenue on land alleged to be lakhiraj is subject to the limitation under this Article and would be barred if the owner can prove 60 years' possession of it without payment of any revenue—*Annada* v. *Secretary of State*, 43 Cal. 973 (979).

644. Adverse possession against Government:—The period of limitation against the Government being 60 years, a person can convert his possession into an absolute title as against the Government, only by proving possession for 60 years. Possession which falls short of this period is insufficient to create a title. Mere evidence of long possession is not sufficient—*Kodoth Ambu Narayan* v. *Secretary of State*, 47 Mad. 572 (582) (P.C.); *Krishna* v. *Singaravelu*, 48 Mad. 570, 91 I.C. 130, A.I.R. 1925 Mad. 780; *Abdul Wahid* v. *Secretary of State*, 7 Lah. 210, 96 I.C. 457, A.I.R. 1926 Lah. 437; *Secretary of State* v. *Challikani Rama Rao*, 39 Mad. 617 (629) (P.C.); *Bank of Upper India* v. *Secretary of State*, 33 All. 229 (232). The possession of a person for a period of 12 years, though it would be sufficient to bar a claim by any other party, would not exclude a claim by the Crown to recover what could be shown to be Government property—*Secretary of State* v. *Durbijoy*, 19 Cal. 312 (321) (P.C.).

For adverse possession, it is sufficient that the possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. And the same rule applies to adverse possession against the Crown. If the rights of the Crown have been openly usurped, it cannot be heard to plead that the fact was not *brought to its notice*. The Limitation Act is indulgent to the Crown in one respect only, namely, in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination in the statute between the Crown and the subject as regards the requisites of adverse possession—*Secretary of State* v. *Debendra Lal Khan*, 61 Cal. 262 (P.C.), 38 C.W.N. 285, 147 I.C. 545, A.I.R. 1934 P.C. 23 (25). In this case

the plaintiff was held to have acquired a prescriptive right of fishery in a large navigable river by adverse possession of the fishery, by operation of Art. 149 and sec. 28.

As long as a property remains in cantonments, it must be regarded as land held for Government under the Government regulations and under the control of the military authorities; and no person can acquire title thereto by adverse possession. It is only when the property is handed over to the civil authorities that adverse possession may be set up for the first time—*Bank of Upper India* v. *Secretary of State*, 33 All. 229 (231, 232).

In case of forests and immemorial waste lands, where the presumption is in favour of ownership of Government, the acts of adverse possession relied on by the claimant must be acts of undoubted ownership, such as the granting of leases to tenants for cultivation and the cutting of valuable trees for sale, and not such paltry acts as taking firewood, leaves and twigs and small trees and other acts which the Government permits in forests and waste lands for the benefit of the adjacent cultivation—*Secretary of State* v. *Krishnayya*, 28 Mad. 257 (298).

Where it was proved that a pucca thatched building had been erected and was in existence for a period of over 60 years and that the plaintiff had used the same openly for the purpose of tethering cattle and storing hay, etc., and it also appeared that the site had been enclosed by a *kalli* fence all round; *held* that the acts of user were sufficient to constitute title by adverse possession. *Held* also that the fact that the Government had issued patta for some stray and scattered trees on the suit land and that it had levied assessment for the same for some years past from the plaintiff cannot alter the exclusive possession of the plaintiff into mixed possession—*Secretary of State* v. *Muthukumara*, 25 L.W. 349, A.I.R. 1927 Mad. 456 (458), 101 I.C. 96.

Where a devdasi service inam consists of the grant of the land itself and not of the melwaran alone, the effect of the enfranchisement of the service inam and the issue of a fresh title deed in favour of the grantee is to extinguish the old title and create a new one in the grantee. In a suit for possession by the grantee against the defendant, the latter cannot rely on long possession which he held, when the service tenure subsisted. In order to succeed on the strength of prescriptive title, he must show that by adverse possession against the Government for sixty years prior to the enfranchisement and the grant of fresh title, he had acquired a prescriptive title to the service inam lands—*Rasa Koundan* v. *Janoki*, (1950) 2 M.L.J. 177. 1950 M.W.N. 447, A.I.R. 1951 Mad. 333.

Presumption and burden of proof:—Where a suit was brought by the Crown for incorporating certain lands into a reserve forest under the Madras Forest Act, such lands being certain islands formed in the bed of the sea near the mouth of a tidal navigable river and within 3 miles from the main land, and the defendant pleaded that he had acquired a title to the property by adverse possession, *held* that the Crown was *prima facie* the owner of the islands (which were jungle lands) and the onus lay on the defendant to prove that he had acquired a title by adverse possession for more than 60 years; it does not lie on the Crown to shew that the defendant's adverse possession commenced within 60 years before the suit—*Secretary of State* v. *Chellikani Rama Rao*, 39 Mad. 617 (P.C.) (reversing *Chellikani Rama Rao* v. *Secretary of State*, 33 Mad. 1). In 33 Mad. 1 (4, 5), it was held by the Madras High Court that if the lands came into existence as lands capable of occupation more than 60 years prior to the notification under sec. 4 of the Madras Forest Act and the defendant could prove that he was in possession of these islands, say, for 20 years prior to the notification, the presumption would be that he was in possession for 60 years, and the burden would lie on the Crown to prove that it had a subsisting title by showing that the

defendant's possession commenced or became adverse within the period of limitation, that is, within 60 years before the notification; it would not be necessary for the defendant to prove adverse possession for 60 years. But the Privy Council in 39 Mad. 617 (632, 633) overruled this view and remarked: "The objectors to afforestation (defendants) prefering claims are in the same position as persons bringing a suit for a declaration of their right.....and in such a suit the onus of establishing possession for the requisite period would lie on those persons.....The view of the High Court is erroneous ...It is an undisputed fact that these islands formed in the sea belonged to the Crown. That fact is fundamental; until adverse possession against the Crown is complete, that is, for the period of sixty years, that fundamental fact remains. And it is no part of the obligation of the Crown to fortify own fundamental right by any inquiry into possession or the acceptance of any onus on that subject."

In some earlier Madras cases it was held that the presumption under the Madras Forest Act was that all *unoccupied* land was at the disposal of the Government; but if the land was really *occupied* when a notification was published under sec. 4 of that Act, it would be a ground for presuming that the occupant was the *prima facie* owner and for shifting the onus to the Government. Thus, if the claimant started with an admitted possession and enjoyment for, say, 30 years, the onus was certainly shifted to the Government; the Government could not compel the claimant to prove 60 years' possession but must show a subsisting title of its own—*Secretary of State* v. *Kota Bapanamma*, 19 Mad. 165 (166); *Secretary of State* v. *Bavotti*, 15 Mad. 315 (317, 321). These cases must be deemed as overruled by the Privy Council in 39 Mad. 617, cited above. See the remarks of Walsh J. in *Jaichand* v. *Girwar*, 41 All. 669 (at p. 671).

In the district of Malabar, and in tracts admitted as part of it, there is no presumption that forest lands are the property of the Crown; consequently, it is incumbent on the Crown either to show possession of the proprietary rights claimed within 60 years, or if the defendants prove possession, to show that the possession of the defendants commenced or became adverse within 60 years before suit—*Secretary of State* v. *Vira Rayan*, 9 Mad. 175 (184). This case has been distinguished by their Lordships of the Judicial Committee in 39 Mad. 617 (632), owing to the peculiarity of Malabar law.

Where there is evidence both oral and documentary to show that the claimants had for a period beyond living memory or at least for fifty years uniformly asserted their rights to the forest tracts, and there was no evidence to prove that before the challenge which led to the present litigation there was any similar assertion of right on the part of the Government, the presumption was that the claimants were in possession for more than 60 years, and have acquired a title by prescription—*Sivasubramaniya* v. *Secretary of State*, 9 Mad. 285 (303, 307), affirmed by the Privy Council in *Secretary of State* v. *Siva Subramania*, 15 Mad. 101 (109).

In a suit against Government for possession of lands other than forest lands, if it is found that the plaintiff has proved possession for more than 12 years (say for 30 or 40 years) and the defendant (Crown) has failed to establish his title to the land or any possession within 60 years before suit, it will be presumed that the plaintiff has held possession for 60 years, and the burden will be thrown upon the defendant (Crown) to prove that he (Crown) has a subsisting title—*Krishna Aiyar* v. *Secretary of State*, 33 Mad. 173 (175). In the above Privy Council case (*Secy. of State* v. *Chellikani Rama Rao*, 39 Mad. 617) the lands were jungle lands, and the presumption was that the lands *prima facie* belonged to the Crown and the onus was thrown upon the claimants, but in this case (33 Mad. 173), the lands not being forest lands, no such presumption was made in favour of the Government.

Where the plaintiff and his predecessors-in-title have been in possession of the

plaint land for more than thirty years, previous to the suit, the presumption is that they were in possession prior to that time also, unless it is proved on behalf of Government that the land was unoccupied land or land in the occupation of Government before. When possession for a certain period is shown, it will be open to a Court deciding the facts to presume that possession prior to that period was also in the party whose subsequent possession is proved—*Narayana Pillai* v. *Secretary of State*, 23 M.L.J. 162, 15 I.C. 257; *Venkatarama* v. *Secretary of State*, 33 Mad. 362.

Where it was found that certain hills (the property in dispute) were within the immemorial boundaries of the village of the claimant, and he was in actual possession of the hills, and on the other hand, there was on behalf of Government nothing to meet or contradict the above evidence as to the possession of the claimant, *held* that the claimant had made out a strong *prima facie* title backed up by possession, and it did not lie on him to prove adverse possession as against Government. It lay on the Government to establish their title, if any—*Nawab Ajajuddin* v. *Secretary of State*, 28 Mad. 69 (71).

Where it is admitted or proved that the title to the property lay with the Government, and the plaintiff sues for a declaration that he has by prescription become the owner of the property, the suit must fail unless the plaintiff is able to show that he has been in adverse possession for more than 60 years. Until that period has elapsed, the Government's right in the property is not lost by section 28—*Abdul Waheb* v. *Secretary of State*, 7 Lah. 210, 96 I.C. 447, A.I.R. 1926 Lah. 437; *Secretary of State* v. *Sreeramamurthi*, 22 L.W. 546, 91 I.C. 179, A.I.R. 1926 Mad. 125.

SECOND DIVISION: APPEALS.

150. Under the Code of Criminal Procedure, 1898, (V of 1898) from a sentence of death passed by a Court of Session or by a High Court in the exercise of its Original Criminal jurisdiction.	Seven days.	The date of the sentence.

The words "or by a High Court in the exercise of its original Criminal jurisdiction" were added by sec. 8 of the Criminal Procedure Amendment Act, 1943 (26 of 1943).

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Item No. 150A, was omitted by sec. 6 of the Criminal Law (Removal of Racial Discrimination) Act, 1949 (17 of 1949) with effect from the 6th April, 1949.

151. From a decree or order of any of the High Courts of Judicature at	Twenty days.	The date of the decree or order.

Fort William, Madras, and Bombay, or of the High Court of Punjab in the exercise of its original jurisdiction.

The words "Madras, Bombay, Lahore and Rangoon" were substituted by Act 8 of 1930 and the words "and Lahore" were submitted for "Lahore and Rangoon" by the Government of India (Adaptation of Indian Laws) Order, 1937. The words "and Bombay or of the High Court of East Punjab" were substituted for the words "Bombay and Lahore" by the Indian Independence (Adaptation of Central Acts and Ordinances) Order, 1948 and the word 'Punjab' was subtituted for the words 'East Punjab' by A.O. 1950.

645. The date of the decree is the date on which judgment is pronounced (O. 20, r. 7, C. P. Code)—*Ramey* v. *Broughton*, 10 Cal. 652 (660); *New Piecegoods Bazar Co.* v. *Jivazhai*, 15 Bom.L.R. 681, 20 I.C. 537 (538). The decree of the High Court in its original side should bear the date as the judgment, and limitation should not be calculated from the date when the decree was signed by the Registrar—*Hajee Abobuckar* v. *Official Assignee*, 25 M.L.J. 560, 21 I.C. 545.

An appeal in a suit under the Indian Divorce Act (IV of 1869) falls under this Article—*A.* v. *B.* 22 Bom. 612.

This Article is applicable to an appeal against the judgment or order of a single judge passed in exercise of his jurisdiction under Article 226 of the Constitution of India—*Chairman, Budge Budge Municipality* v. *Mongru Mia*, A.I.R. 1953 Cal. 433 (S.B.)

The 'decree or order' includes a 'judgment' in the sense in which that word is used in the Letters Patent (Rangoon); therefore the period of limitation for an appeal under clause 13 of the Letters Patent from a judgment of the High Court (original side) is 20 days as prescribed by this Article—*J. N. Surty* v. *T. S. Chettiar Firm*, 4 Rang. 265, 98 I.C. 417, A.I.R. 1947 Rang. 20; *Ariff* v. *Perumal*, 5 Bur.L.J. 75, A.I.R. 1926 Rang. 143, 98 I.C. 689.

The duty to file a requisition for drawing up a decree in the original side of the High Court is primarily cast in the plaintiff, and where he has filed the requisition within 4 days (according to High Court Rules) the period required by the plaintiff for drawing up the decree should be excluded in favour of the defendant-appellant in computing the period of limitation for his appeal against the decree, if he has been otherwise diligent. And the defendant cannot be said to be wanting in diligence in not having insisted upon the decree being filed sooner, when the plaintiff was taking unnecessary time in getting the decree drawn up; because, when the requisition for drawing up the decree has been filed by the plaintiff, the defendant is not called upon to interfere in the process of the drawing up of the decree—*Sambhu Nath* v. *Gopi Lal*, 56 Cal. 709, A.I.R. 1929 Cal. 734 (735), 121 I.C. 307. For other cases in which the time taken in getting the decree prepared in accordance with the practice of the Original Side has or has not been deducted in computing the period of limitation for filing an appeal, see *Beni Madhab* v. *Matungini*, 13 Cal 104 (F.B.); *In the goods of Pashupati*, 59 Cal. 1215 (F.B.), 36 C.W.N. 469 (477) (overruling *Nibaran Chandra* v. *Martin & Co.*, 32 C.L.J. 127); *Pramatha* v. *Lee*, 49 Cal. 999 (P.C.); *Kamruddin* v. *M. N. Mitter*, 52 Cal. 342. This subject has been fully discussed in Note 128 under sec. 12.

152.	Under the Code of Civil Procedure, 1908, (V of 1908) to the Court of a District Judge.	Thirty days.	The date of the decree or order appealed from.

646. This Article must be read with O. XX, r. 7, C. P. Code, and the "date of the decree" for the purpose of calculating the time for appeal must be taken to be the day on which the judgment is pronounced—*Narayanswamy* v. *Krishnasami*, 25 I.C. 67 (Mad.).

Where a decree is amended after it is passed, the period of limitation will run from the date of the amended decree, on the analogy of clause (4) of Art. 182—*Aditya Kumar* v. *Abinash*, 34 C.W.N. 1002 (1007), A.I.R. 1931 Cal. 323; *Vishwanathan* v. *Ramanathan*, 24 Mad. 646 (649); *Amar Chandra* v. *Asad Ali*, 32 Cal. 908 (909); *Har Kishen* v. *Lahore Bank Ld.*, 64 P.R. 1919, 51 I.C. 712 (714). But in some other cases it has been held that it is not every amendment made in a decree which will enable the appellant to count the period of limitation from the date of the amended decree. If the grounds on which the appeal is based are *intimately connected with the amendment of* the decree, or if the grounds of appeal are *directed against the decree* is so far as it has been amended, the period of limitation for appeal will be counted from the date of the amendment. But if the grounds of appeal have no relation to the amendment, the period of limitation will run from the date of the decree and not from the date of the amendment—*Brojo Lal* v. *Tara Prasanna*, 3 C.L.J. 188; *Soudamini* v. *Nabalak*, 35 C.W.N. 251 (253), A.I.R. 1931 Cal. 578; *Deep Singh* v. *Raghunath*, 7 C.W.N. 882, A.I.R. 1930 Oudh 463 (465); *Sheikh Golab* v. *Janki Koer*, 5 P.L.J. 472 (478) (F.B.), 57 I.C. 236; *Gajadhar* v. *Basant Lal*, 43 All. 380; *Janikumma* v. *Venkata*, I.L.R. (1945) Mad. 378, (1944) 2 M.L.J. 384, A.I.R. 1945 Mad. 62; *Venkata* v. *Sathiraju*, I.L.R. (1946) Mad. 854, (1946) 1 M.L.J. 198, A.I.R. 1946 Mad. 291, In a later case the Calcutta High Court has, however, expressed the opinion that the appellant is entitled to wait till the amendment before preferring his appeal, even though the amendment has *no relation to the grounds* upon which the decree is sought to be challenged in appeal—*Nandalal* v. *Dasarathi*, 59 Cal. 1052, 36 C.W.N. 218 (220, 221), A.I.R. 1932 Cal. 534 (dissenting from 3 C.L.J. 188). But in *Kedar* v. *Gollam*, 40 C.W.N. 83, 165 I.C. 53 the same High Court has held that in a case where the decree, or the judgment and decree are amended on an application under sec. 152 C. P. C., the judgment or decree is not superseded in the eye of law, such amendment does not give the appellant a fresh starting point of limitation for filing the appeal.

The date of the decree means the date on which the *judgment is pronounced* and not the date when the decree is signed—*Kalimal* v. *Mohan*, A.I.R. 1949 Assam. 23; *Abdul* v. *Abdul*, 47 P.L.R. 193, A.I.R. 1945 Lah. 233; *Shivan* v. *Radha*, 196 I.C. 654, A.I.R 1941 Pesh. 74, *Dagduba* v. *Abdul*, A.I.R. 1954 Hyd. 104, and if the decree is signed on a date subsequent to the date of delivery of judgment, the period between the date of the judgment and the date of signing the decree shall not be excluded under sec. 12, unless the appellant *has applied for a copy of the judgment and decree before the decree is signed—Parbati* v. *Bhola*, 12 All. 79 (81, 82); *Bechi* v. *Ahsanullah*, 12 All. 461 (F.B.); *Harish Chandra* v. *Chandpur Co., Ltd.*, 39 Cal. 766 (772); *Jyotindra* v. *Lodna Colliery Co.*, 6 P.L.J. 350 (F.B.); *Moung Po.* v. *Ma Lal*, 7 Rang. 18, A.I.R. 1929 Rang. 116; *Topandas* v. *Manager*, 5 S.L.R. 47, 10 I.C. 210; *Khudadad* v. *Morio Khan*, 9 S.L.R. 193, 34 I.C. 867; *Dindayal* v. *Anopi*, 22 N.L.R. 69, A.I.R. 1926 Nag. 349. But a contrary view has been taken in several other cases, *e.g.*, *Ram Asray* v. *Sheonandan*, 1 P.L.J. 573; *Pondu* v. *Rajeshwar*, A.I.R.

1924 Nag. 271; *Sudhanshubhusan* v. *Mojho Bibi*, A.I.R. 1937 Cal. 732. See Note 127 under Art. 12.

The Nagpur High Court has laid down in another case that under ordinary conditions where the decree is drawn up within the period of limitation prescribed for an appeal, the limitation for filing an appeal must be counted from the day on which the judgment is pronounced; but where owing to the default of the Court the decree was drawn up 17 months after the judgment was pronounced, the period of limitation would run from the date of the decree and not from the date on which judgment was delivered —*Pandu* v. *Rajeswar*, 20 N.L.R. 131, 78 I.C. 996, A.I.R. 1924 Nag. 271.

Under O. 20, rule 7, the decree shall bear the date on which the judgment is *pronounced*. Therefore if a judgment is written, signed and dated on the 17th January but is pronounced in open Court on the 10th February, the decree must bear the date of the 10th February, and limitation runs from that date. If the decree is dated 17th January, the date is wrong—*Sagarmal* v. *Lachmisaran*, 1 Pat. 771 (773), A.I.R. 1923 Pat. 129, 75 I.C. 879.

Where a Court gives judgment but refuses to give a decree till the successful party complies with a certain condition, the Court virtually postpones the decision of the suit. The effect of such an order is to pronounce a provisional judgment which does not become operative until the decree is prepared. The latter date is the date of the judgment as well as of the decree from which limitation runs. Where therefore a Court by its judgment directed that the decree was to be prepared only after a certain amount due as penalty was paid, and the decree was actually made three months after the judgment, on the day when the penalty was paid, *held* that the time commenced to run for the purpose of appeal from the date of the decree—*Khudadad* v. *Moriokhan*, 9 S.L.R. 193, 34 I.C. 867. See also *Balarama* v. *Subbarama*, A.I.R. 1953 Mad. 360.

In appeals against execution proceedings where no formal order is drawn up in accordance with the judgment, the concluding portion of the judgment which embodies the order may be treated as an order against which the appeal is preferred. In such a contingency time will run from the date of judgment. Where, however, there is a judgment stating the grounds of decision and a separate order is also drawn up embodying the formal expression of the decision, the decree must be taken to be both the orders taken together and time for appeal must be computed from the date of the second order—*Johuran* v. *Howrah Jute Mills* Co., A.I.R. 1948 Cal. 134.

If an appeal is presented to a District Judge at his private house, after Court hours, on the last day of limitation, the Judge has jurisdiction to accept it (though he is not obliged to do so); if he accepts it the appeal must be deemed to have been presented in time—*Thakur Din Ram* v. *Hari Das*, 34 All. 482 (486) (F.B.); *Mst. Lakshmi* v. *Mt. Tara*, A.I.R. 1950 All. 104.

An appeal to the District Judge against the decree of a Revenue Court under the Agra Tenancy Act is governed by the procedure prescribed by the C. P. Code (*vide* sec. 193 of the Agra Tenancy Act, 1901) and is therefore governed by the rule of limitation prescribed by this Article—*Ram Lal* v. *Amar Chand*, 10 A.L.J. 535, 17 I.C. 653.

An appeal before the District Judge under Section 27 of the Calcutta Thika Tenancy Act, 1949, cannot be treated as an appeal under the Civil Procedure Code within the meaning of this Article—*Harendra* v. *Daulatmani*, 62 C.W.N. 143.

153. Under the same Code	Thirty	The date of the order.	

an order of a Subordinate Court refusing leave to appeal to the Supreme Court.		

The words "the Supreme Court" were substituted for the words "His Majesty in Council" by the Adaptation of Laws Order, 1950.

647. This Article refers to an appeal under O. 3, rule 1, clause (v) of the C. P. Code, 1908, to the High Court from an order made by a subordinate Court refusing (under cl. 45, rule 6) to grant a certificate that the case is a fit one for appeal to the Supreme Court.

154. Under the Code of Criminal Procedure 1898, (V of 1898) to any Court other than a High Court.	Thirty days.	The date of the sentence or order appealed from.

648. An application made to a Superior Court under sec. 195 (6) of the Criminal Procedure Code to revoke a sanction granted by an inferior Court is not an *appeal* coming under Article 154 or 155; and such applications are not governed by the rule of limitation provided by the Limitation Act—*Bapu* v. *Bapu*, 39 Mad. 750 (F.B.); *Pachai* v. *Emperor*, 40 Cal. 239; *Punna* v. *Jamita*, 1 Lah. 602. [The sanction provisions of sec. 195, Cr. P. Code have now been repealed.] So also, no question of limitation arises in respect of an application under sec. 520 of the Criminal Procedure Code—*Ibrahim* v. *Emperor*, A.I.R. 1946 N.L.J. 610, 225 I.C. 525.

In an appeal against complaint by Sub-Divisional Magistrate which was ordered to be withdrawn by the District Magistrate but was restored by the High Court, time for purposes of limitation, began to run from the date of the order of the High Court restoring the complaint—*Nawab Jam* v. *Emperor*, A.I.R. 1943 Sind 39; 44 Cr. L.J. 293, 204 I.C. 415 (F.B.)

Where a Court records a finding under sec. 476, Cr. P. Code that an enquiry should be made, such finding comes under the word "order" in Art. 154, and appeal against the order is governed by this Article. But limitation runs not from the date of recording the finding but from the time that a complaint is actually made as a result of that finding—*Doga* v. *Devji*, 52 Bom. 164, 30 Bom.L.R. 76, 29 Cr.L.J. 315 (316), A.I.R. 1928 Bom. 64. Time runs not from the date on which a Civil Court signs the complaint but from the date when it is actually filed—*Labha Mal* v. *Wasawa*, 29 P.L.R. 128, 29 Cr.L.J. 72. It may be that the appellant, may not know that a complaint has been filed till after the expiry of 30 days prescribed by this Article; but in such a case the Appellate Court may excuse the delay under sec. 5 if sufficient cause is made out—*Doga* v *Devji*, supra; See also *Hakim Rai* v. *The State*, A.I.R. 1957 Punj. 134 (F.B.).

An appeal to the District Judge under sec. 476B, Cr. P. Code, against an order of the Sub-Judge refusing to make a complaint under sec. 476, falls under this Article, and time runs from the date on which the Sub-Judge made the order refusing to take action under sec. 476—*Chandra Kumar* v. *Mathuriya*, 52 Cal. 1009, 29 C.W.N. 1035, 26 Cr.L.J. 1569 (1570). In *Hamid Ali* v. *Madhusudan*, 54 Cal. 355, 31 C.W.N. 281, A.I.R. 1927 Cal 284, there was a difference of opinion among the Judges as to whether the appeal was in the nature of a civil appeal or a criminal appeal; Chotzner, J. held

that the appeal must be dealt with as an ordinary appeal under the Cr. P. Code, while Duval, J. was of opinion that the appeal must be treated as a miscellaneous civil appeal regulated by O. XLI, C. P. Code; but no question of limitation was raised in this case. The starting point of limitation for an appeal under sec. 476 B of the Criminal Procedure Code, is the date of the complaint, that is, the date on which it is signed, and not the date of its presentation to or receipt by the Magistrate—*Narainḍas* v. *Emperor*, I.L.R. (1943) Kar. 122, 209 I.C. 119, A.I.R. 1943 Sind. 157. The provisions of sec. 5 of the Limitation Act is applicable to such appeals—*Bhikaji* v. *Sambhuram*, 1938 N.L.J. 183.

155. Under the same Code to a High Court, except in the cases provided for by article 150 and article 157.	Sixty days.	The date of the sentence or order appealed from.

649. An appeal preferred to the High Court under the Extradition Act is not governed by the period of limitation prescribed by this Article which is restricted only to appeals under the *Criminal Procedure Code*—*Hayes* v. *Christian*, 15 Mad. 414 (415). An appeal to the High Court, under sec. 408 (b) Cr. P. Code, from a sentence exceeding 4 years passed by a Magistrate specially empowered is governed by the period of limitation prescribed by this Article—*In re Abdulla*, 2 Rang. 386. An appeal to the High Court against an order of a Civil Court (District Judge or Sub-Judge) making or refusing to make a complaint under sec. 195 or 476 of the Criminal Procedure Code, is *not a civil appeal* governed by the Civil Procedure Code, but a criminal appeal for which express provision is made under sec. 476 B of the Cr. P. Code, and the appeal being one "under the Criminal Procedure Code" the period of limitation is 60 days under Art. 155, and not ninety days under Art. 156—*Rajani Kanta* v. *Bistoomoni*, 46 C.L.J. 40, 104 I.C. 456, A.I.R. 1927 Cal. 718 (719), 28 Cr.L.J. 840 (841); *Sheo Prasad* v. *Sheo Bans*, 24 A.L.J. 364, A.I.R. 1926 All. 211 (212), 93 I.C. 851. (See in this connection *Hamid Ali* v. *Madhusudan*, 54 Cal. 355, cited under Art. 154). In both the above cases (46 C.L.J. 40 and 24 A.L.J. 368) the appellant was granted an extension of time under section 5 as he had acted under a *bona fide* mistake of law in treating the appeal as a civil appeal governed by Art. 156. In a later Calcutta case, where there was an appeal to the High Court Division Bench against a complaint made by a single Bench under sec. 476 Cr. P. Code, the High Court did not decide whether Art. 151 or Art. 155 applied (*i.e.*, whether it was a *civil or criminal* appeal), because in either case the appeal was within time—*Ramjan* v. *Moolji*, 56 Cal. 932, 33 C.W.N. 329 (332), 30 Cr.L.J. 974.

In an appeal to the High Court against an order directing a complaint to be made under sec. 476B, Cr. P. Code, time runs under this Article not from the date of the order directing that a complaint be drawn up but from the date of actually making the complaint—*Fitzholmes* v. *Crown*, 7 Lah. 77, 27 Cr.L.J. 1321 (1322), A.I.R. 1927 Lah. 54.

In cases coming under secs. 562 and 563 of the Criminal Procedure Code the proceedings fall into two parts as the sentence does not immediately follow the conviction, but that does not deprive the person convicted of the right given him by sec. 408 of appealing against either conviction only, or sentence only, or both. So a person against whom a conviction is recorded under sec. 562 and who is subsequently sentenced more than 60 days after the recording of the conviction, can appeal against the sentence if

he does so within 60 days from the date of the sentence—*Mohamed* v. *The King*, 1940 Rang.L.R. 386, A.I.R. 1940 Rang. 257.

Article 155 is not limited to appeals to the High Court from the Sessions Courts in the mofussil or from other Courts from which appeals to the High Court lie direct, but extends also to appeals to a Division Bench of the High Court from the order of a Judge presiding at the original Criminal Session of the High Court, under sec. 449 clause (c) of the Cr. P. Code—*Thomas* v. *Emp.*, 53 Cal. 746, 27 Cr.L.J. 1304 (1305), A.I.R. 1926 Cal. 1203; *Gallagher* v. *Emp.*, 54 Cal. 52, 101 I.C. 657, 28 Cr.L.J. 481. If the appeal is barred by this Article, an application for leave to appeal under sec. 449 clause (c) of the Cr. P. Code is also barred, and an application for determination of the accused's status as to his being an European British subject under sec. 449 clause (c) read with sec. 443, Cr. P. Code, must be necessarily out of time—*Thomas* v. *Emp.* supra.

156. Under the Code of Civil Procedure, 1908, (V of 1908), to a High Court, except in the cases provided for by article 151 and article 153.	Ninety days.	The date of the decree or order appealed from.

650. Appeal under the C. P. Code:—Article 156 when it speaks of the Civil Procedure Code, is on the face of it speaking of a Code which relates to *procedure* and does not ordinarily deal with *substantive* rights, and the natural meaning of an 'appeal under the C. P. Code' appears to be 'an appeal governed by the C. P. Code so far as procedure is concerned.' Thus, an appeal to the High Court from the Court of the Recorder of Rangoon under the Burma Courts Act is, by virtue of sec. 97 of that Act, governed by the C. P. Code as regards procedure, and the period of limitation for such appeal is consequently governed by this Article—*Aga Mahomed* v. *Cohen*, 13 Cal. 221 (223, 224). There seems to be no good reason for holding that an "appeal under the C. P. Code" means only 'an appeal the right to prefer which is conferred by the Code itself.' On the other hand, an appeal the procedure with respect to which from its inception to its disposal is governed by the C. P. Code may rightly be spoken of as an appeal under the Code. Therefore, an appeal under the Land Acquisition Act, of which sec. 54 lays down that appeals from awards under that Act are governed as to their procedure from the date of the filing of the appeal to its disposal by the rules provided for in the C. P. Code, is governed by this Article, although in the Land Acquisition Act there is no allusion to this Article—*Ramasami* v. *Deputy Collector of Madura*, 43 Mad. 51 (55), 53 I.C. 405. Moreover it has been held in *Manavikraman* v. *Collector of Nilgiris*, 41 Mad. 943, 49 I.C. 27, 35 M.L.J. 110, that an appeal under sec. 54 of the Land Acquisition Act is to be treated as an appeal under sec. 98 of the C. P. Code. It has also been pointed out in *Dropadi* v. *Hira Lal*, 34 All. 496 (504), that there are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act which make the C. P. Code applicable to the proceedings under those Acts, and give a right of appeal to the High Court but do not prescribe any period of limitation for the appeal; it has always been assumed that such appeals are appeals under the C. P. Code, and are governed by Article 156 of the Limitation Act —*Ramasami* v. *Deputy Collector of Madura*, 43 Mad. 51 (56), 53 I.C. 405.

A second appeal under section 27 of the Burma Courts Act is not subject to the

limitation of time prescribed by this Article because that section gives a discretion to the Judicial Commissioner (High Court) under certain circumstances to admit a second appeal, and the period within which he may receive the appeal is also left to his discretion; to apply Art. 156 to such a case would be to curtail the discretion which is unfettered in this respect.—*Mahamad Hosein* v. *Inodeen*, 10 Cal. 946 (950).

Where an appeal directed against an appellate decree is presented with the certified copies of the judgment and decree appealed against within time allowed by this Article, no question of limitation arises if the certified copies of the trial Court's judgment and decree are not filed within the period of limitation—*Brojendra* v. *Jana*, I.L.R. (1946) 1 Cal. 396, 50 C.W.N. 213, A.I. R. 1947 Cal. 67.

Letters Patent Appeals are not appeals under the C. P. Code; they are governed by the special Rules of the several High Courts, and not by this Article. See *Naubat Ram* v. *Harnam Das*, 9 All. 115 (F.B.); *In re Hurruck Singh*, 11 W.R. 107; *Hurruck Singh* v. *Toolsee Ram*, 12 W.R. 548 (F.B.).

Section 19 (1) (g) of the Defence of India Act has the effect of excluding the application of the law of limitation to arbitration proceedings under that section, and an appeal arising out of an award of compensation made by the arbitrator under sec. 19 is not governed by the Limitation Act—*Kollegal Silk Factories* v. *Province of Madras*, I.L.R. (1948) Mad. 490, (1947) 2 M.L.J. 378, A.I.R. 1949 Mad. 39.

Date of decree:—See notes under Article 152.

Where a preliminary mortgage decree was passed *ex parte* but was subsequently set aside by the same Court within the appealable period, and therefore no appeal was thereafter competent to the defendant, but the High Court in revision restored the *ex parte* decree, the period of limitation for an appeal against the decree ran only from the date of the order of the High Court reviving the *ex parte* decree, and not from the date of the *ex parte* decree itself. The language of the third column should be so interpreted as to carry out the intention of the Legislature, that is to say, by dating the cause of action from a date on which the remedy is available to the party —*Peer Ammal* v. *Nathusami*, 54 Mad. 455, 60 M.L.J. 239, 130 I.C. 738, A.I.R. 1931 Mad. 149.

The period of limitation begins to run from the date of the order appointing a guardian not conditional on furnishing security as the order becomes final on the date on which it is passed and not on the date on which the security is furnished—*Mt. Amrati* v. *Bishamber*, 41 P.L.R. 592, A.I.R. 1939 Lah. 170.

157. Under the Code of Criminal Procedure, 1898 (V of 1898), from an order of acquittal.	Three months.	The date of the order appealed from.

651. This Article refers to an appeal by the Government under sec. 417 of the Cr. P. Code. The sixty days' rule prescribed by Article 155 does not apply to such appeals against acquittal—*Empress* v. *Jaydulla*, 2 Cal. 436 (438). The period of limitation has been changed to three months in place of six months by Act 26 of 1955, sec. 117 and Schedule thereto (w. e. f. 1. 1. 1956).

A complainant may apply for special leave to appeal from an order of acquittal to the High Court within a period of sixty days from the date of the order under the provisions of sub-sections 3 and 4 of s. 417, Cr. P. Code.

Justice, public interest, necessity and policy all require that appeals against acquittals should be preferred with all reasonable expedition possible, for there may be cases where a new trial may have to be ordered or further evidence to be taken, and the larger the interval that has elapsed since the investigation and trial, the greater is the inconvenience and difficulty, not only to get witnesses together but to obtain from them accurate or reliable testimony—*Emp.* v. *Yakub Khan*, 5 All. 253 (255); *Emp.* v. *U San Win*, 10 Rang. 312, 33 Cr L.J. 701.

The High Court may allow an appeal under this Article after the period of limitation has expired, for sufficient cause shown under sec. 5. See *Government Pleader, Appellant*, 1 Weir 791; *Anonymous*, 2 Weir 462.

THIRD DIVISION: APPLICATIONS.

158. Under the Arbitration Act, 1940, (10 of 1940) to set aside an award or to get an award remitted for reconsideration.	Thirty days.	The date of service of the notice of filing of the award.

652. This Article was substituted by sec. 49 and Fourth Schedule of the Arbitration Act, 1940 (10 of 1940) (with effect from the 1st July, 1940).

Prior to the amendment of this Article by the Repealing and Amending Act of 1919, it was held that the period of limitation ran from the date on which the award arrived at the Registrar's Office for the purpose of being filed, and not from the date when it was actually filed—*Nobin Kally* v. *Ambica*, 5 C.W.N. 815; or from the date of submission of the award in Court and not from the date of service upon the objecting party of the notice of filing the award in Court—*Kalian* v. *Roshanbai*, 8 S.L.R 190, 27 I.C. 371; *Mansoor* v. *Mahomedin*, 5 S.L.R. 125, 13 I.C. 234; or from the date fixed for the filing of the award and not from the date on which it was filed without the knowledge of the parties before the date fixed for its filing—*Jawahir* v. *Mehr*, 1915 P.W.R. 14, 34 I.C. 250. These decisions are no longer authoritative.

653. Scope:—*Before amendment of 1940*:—This Article applied only to applications to set aside an award, *i.e.*, to applications referred to in sec. 512, C. P. Code, 1882 (para, 16 of the Second Schedule) to set aside an award on any of the grounds mentioned in sec. 521 (para. 15 of the Second Schedule)—*Muhammad Abid* v. *Muhammad Asghur*, 8 All. 64 (67). An objection to an award was preferred after a period of ten days from the filing of the award in Court. The objection was a statement in answer to an application for having the award made a rule of the Court. Held, Art. 158 had no application to the case—*Manghooram* v. *Girdharilal*, A.I.R. 1935 Lah. 951. This Article did not apply to proceedings under para. 12 or 14 of the 2nd Schedule of C. P. Code, *i.e.*, to an application to *remit* an award for reconsideration of the arbitrators owing to some illegality of the award apparent on the face of it—*Appaya* v. *Venkatasami*, 1918 M.W.N. 477, 47 I.C. 567; *Kiroti* v. *Behari*, 1933 A.L.J. 519, 146 I.C. 596, A.I.R. 1933 All. 648; or to an application to *modify or correct an award*—*Hyder Saheb* v. *Giria Chettiar*, 24 M.L.J. 483.

Article 158 did not apply to an award which is *prima facie* an *illegal* award, *e.g.*, an award signed by only one of two arbitrators and by an umpire who has not been legally appointed. Such an award is a nullity and need not be set aside within the period of limitation prescribed by this Article. But where the award is *prima facie* a legal award, and can only be shown to be illegal after an enquiry into the allegations of the objector has been made, an application to set aside such award falls under this Article—*Ram Narain* v. *Baij Nath*, 29 Cal. 36 (41), explaining 8 All. 64.

Article 158 did not apply to the case of an application under Para. 20, Sch. 2, C. P. Code. The phraseology of Cl. 1, Art. 158 clearly suggests that the application contemplated by Art. 158 is the application which is mentioned in para 16, Sch. 2, C. P. Code—*Lachhu Singh* v. *Ganesh Das*, A.I.R. 1936 Pesh. 135.

After amendment of 1940:—Under this Article as it now stands amended by Act X of 1940, objections to the award have to be put in within 30 days from the date when the award is filed in Court and notice of the filing has been given to the parties, which is not the date when the order mentioning the filing of the award and the presence of the parties is recorded—*Harichand* v. *Lachhman*, 50 P.L.R. 57, A.I.R. 1948 E. P. 11. But where the objections do not relate to the validity or otherwise of the award but relates to the procedure of the Court under sec. 14 of the Arbitration Act in that the award being filed beyond limiation prescribed by Article 178, no decree should be passed upon it, this Article does not apply, and the objections have to be decided even if they are not filed within 30 days after the service of notice—*Dwarka* v. *Pearay*, 1948 A.L.J. 524, A.I.R. 1949 All. 234. Where certain ground to set aside award is not stated in the application but is stated in the affidavit filed during the course of hearing of the application the application must be treated as a new one and is barred by limitation if filed after 30 days after date of notice of filing of award—*Ebrahim* v. *N. I. Oil Industries*, A.I.R. 1951 Cal. 230.

654. Applications under this Article:—An application to set aside an award on the ground that three out of five arbitrators were not present at the time of the award and did not sign it, although it contained their names, is an application to set aside an award on the ground of misconduct of the arbitrators—which is a ground mentioned in sec. 521, C. P. Code: the application falls under this Article and must be made within the period prescribed by this Article—*Ram Narain* v. *Baijnath*, 29 Cal. 36 (38).

When a decree having been passed on an award, an application is preferred by the unsuccessful party to the High Court for revision, and it is found that the real object of the revision petition is to set aside the award, the revision petition is virtually an application to set aside an award, and is governed by the limitation of this Article —*Ghulam Khan* v. *Muhammad Hassan*, 29 Cal. 167 (185) (P.C.).

In *Ebrahim* v. *Pannalal*, I.L.R. (1949) 1 Cal. 245, it was held by the Calcutta High Court in dealing with an application, which was partly to set aside an award and partly for a declaration that the award was invalid, that the application in so far as it was to set aside the award was barred by limitation having been made beyond 30 days but that the application in so far as it asked for a declaration that the award was invalid was within time. But in *Sankur* v. *Kalidas*, A.I.R. 1954 Bom. 293, the Bombay High Court dissented from this view and held that the Arbitration Act, 1940, contemplated only one application to set aside an award and to such an application this Article applied.

655. Limitation:—The object of the Legislature in allowing so short a period as ten days for the preferring of objections to awards as it stood before amendment

of 1940 would seem to meet those cases where litigants who are at first very willing to have their cases referred to the decision of arbitrators whom they regard as amicably disposed towards them, subsequently do their utmost to resile from their agreement and to set aside the award the moment the arbitrators decide against them. The legislature has framed Article 158 with the object of discouraging and preventing such discreditable attempts—*Ram Narain* v. *Baij Nath*, 29 Cal. 36 (54).

When the arbitrators state a special case for the opinion of the Court, the award is not completed until the Court expresses its opinion upon the case submitted to it. Until this is done, there is no complete award, and the parties are not called upon to file their objections, if any, to the award—*Lakshman* v. *Ramachandra*, 48 Bom. 663, A.I.R. 1925 Bom. 22, 84 I.C. 378, 26 Bom.L.R. 836.

Para. 10 of Sch. II, C. P. Code lays down that notice of the filing of an award shall be given to the parties. Article 158 as it stood before the amendment of 1940 must be read with this para; and the period of ten days must be computed from the day on which the parties receive notice that the award has been submitted and not from the day on which it is actually filed in Court—*Sheo Buksh* v. *Masuma Sriam*, 19 A.L.J. 404, A.I.R. 1921 All. 63, 63 I.C. 399; *Sita Ram* v. *Rupram*, 13 N.L.R. 172, 42 I.C. 66; *Sahib Ram* v. *Chait Ram*, 96 P.L.R. 1915, 28 I.C. 427. See sec. 14 of the Indian Arbitration Act, 1940. Under this Article the starting point of limitation is the date of the service of notice of filing the award. The provisions as to service of notice of filing the award in sec. 14 (2) Arbitration Act is mandatory and the Court has no power to pass a decree on the award unless notice is given to the parties to file objections. But a party who is already cognizant of the filing of award appears in the case and applies to Court for leave to examine the award and for time to file objections, service of notice becomes unnecessary. In such a case the date of appearance in the proceedings will be deemed to be date of service of notice though actually no notice had been served, and an application filed more than 30 days from such date will be barred under this Article—*Bhola Nath* v. *Mahadev*, 56 C.W.N. 223, A.I.R. 1952 Cal. 226.

The word "parties" is not confined to the parties personally but includes pleaders and other persons specially authorised by the parties to take notice. Therefore time would run when a notice of filing has been given to a duly authorised pleader—*Gayan Singh* v. *Harbilas*, 1930 A.L.J. 995, 128 I.C. 769, A.I.R. 1930 All. 711.

Section 5 of the Limitation Act does not apply to an application to set aside an award; the Court has no authority to extend the time prescribed by this Article on any sufficient ground whatever—*Surya* v. *Banwari*, 18 C.W.N. 626 (628), 17 I.C. 7; *Devi Ditta* v. *Babu Ram*, 8 Lah. 274, 100 I.C. 955, A.I.R. 1927 Lah. 273; *Gayan Singh* v. *Harbilas*, supra; *Hastimal* v. *Hiralal*, A.I.R. 1954 Bom. 243; *Kawalsingh* v. *Baldeosingh*, A.I.R. 1957 Nag. 57; *Chandanmull* v. *Mohambal* A.I.R. 1953 Mad. 561; *Seonarain Lal* v. *Prabhu Chand*, A.I.R. 1958 Pat. 252 (F.B.). But see *Chaturbhuj* v. *Raghubar Dayal*, 36 All. 354 (361), where the High Court after setting aside in revision all orders in the case directed the lower Court to take cognizance of an application to set aside the award passed 3 years ago.

But the time may be extended under sec. 4—*Jawahir* v. *Mehr*, 1916 P.W.R. 14, 34 I.C. 250 (251).

The time required for obtaining a copy of the award shall be excluded by sec. 12 (4) although it is not necessary to file a copy of the award with the application to set aside the award—*Sova Chand* v. *Hurry Bux*, 46 Cal. 721 (727), 23 C.W.N. 280; *Ghulam Khan* v. *Md. Hassan*, 29 Cal. 167 (183) (P.C.); *Wajid Ali* v. *Nawal Kishore*, 17 All. 211 (215).

The fact that the defendant had not applied to set aside the award within ten

days prescribed by Art. 158 as it stood before the amendment of 1940 would not preclude him from appealing from the decree of the Court based upon the award, if he does not contest the award on any of the grounds mentioned in sec. 521, C. P. Code 1882 (para 15, Sch. 2, C. P. Code 1908)—*Muhammad Abid* v. *Muhammad Asahur*, 8 All. 64 (66).

A Court should pass a decree in terms of the award *after* the expiry of the period of 10 days prescribed by this Article as it stood before the amendment of 1940 for an application to set aside the award. If the decree is passed *before* that period, it is illegal and liable to be set aside—*Lakshman* v. *Ramachandra*, 48 Bom. 663, 84 I.C. 378, A.I.R. 1925 Bom. 22; *Velu Pillay* v. *Appaswami*, 21 M L.J. 44, 9 I.C. 197; *Surapparaju* v. *Narayanaraju*, 1912 M.W.N. 1232, 17 I.C. 431; *Nalmuddun* v. *Albert Peuch*, 29 All. 584 (586); *Ravjibhai* v. *Dahyabhai*, 45 Bom. 832 (834); *Ranga Chetty* v. *Govindasami*, 1921 M.W.N. 793, A I.R. 1922 Mad. 179, 15 L.W. 160, 71 I.C. 266; *Hardeo* v. *Thana*, 48 P.R. 1882; *Muni Ram* v. *Ram Asray*, 24 O.C. 234, A.I.R, 1921 Oudh 148, 64 I.C. 690; *Sri Krishan* v. *Relumal*, 9 S.L.R. 183, 34 I.C. 845 (848); *Joymungul* v. *Mohan Ram*. 23 W.R. 429 (P.C.).

159. For leave to appear and defend a suit under summary procedure referred to in section 128 (2)(f) or under Order XXXVII of the Code of Civil Procedure, 1908.	Ten days.	When the summons is served.

Change:—The words "or under Order XXXVII" have been added by the Indian Limitation (Amendment) Act, 1925 (XXX of 1925). For reasons of the amendment, see Notes under Article 5. *ante* in which a similar amendment has been made. The words "Code of Civil Procedure. 1908" were substituted for the words "same Code" by sec. 49 and Fourth Schedule of the Arbitration Act, 1940 (10 of 1940) (with effect from 1st July 1940).

656. When the summons is served:—The only date to which reference can be made as regards limitation, is the date of the service of summons as shown in the sheriff's return. The defendant cannot escape the law of limitation by alleging that there was no service of summons at all. The question as to whether the summons was served or not may be taken into consideration on an application to set aside the decree if made (O. 37, r. 4)—*Madhub* v. *Woopendra*, 23 Cal. 573 (575).

After the time fixed by the summons for obtaining leave to appear and defend has expired, the Court has no power to extend the time—*Quazi Mohmudar* v. *Sarat*, 5 C.W.N. 259 (262). A Court has no power to condone the delay in filing and obtaining leave to defend suits filed under Order 37, R. 2, Civil Procedure Code—*James* v. *Jaya Narayan*, A.I.R. 1953 Mad. 767. But where the summons issued specially mentions in addition, the date of hearing of the suit, such mention is likely to mislead the defendant and if he has appeared and applied for leave on the date of hearing which is beyond 10 days from the date of service of summons, he ought to be granted leave—*Srinivasan* v. *Bhakthavatsulu*, A.I.R. 1953 Mad. 909. The latter view, it is submitted, does not seem to be correct.

160. For an order under the same Code, to restore to the file an application for review rejected in consequence of the failure of the applicant to appear when the application was called on for hearing.	Fifteen days.	When the application for review is rejected.
161. For a review of Judgment by a Court of Small Causes other than a Presidency Small Cause Court or by a Court invested with the jurisdiction of a Court of Small Causes when exercising that jurisdiction.	Fifteen days.	The date of the decree or order.

The word "Provincial" was omitted by sec. 2 and Sch. III of Berar Laws Act, 1941 (4 of 1941) (with effect from the 1st August, 1941) and the words "other than a Presidency Small Cause Court" were inserted, *ibid.*

657. This Article corresponds to Art. 160A of the old Limitation Act, XV of 1877, and was introduced into that Act by sec 36 of the Provincial Small Cause Courts Act, IX of 1887. Before the introduction of this Article, an application for review of a judgment of a Small Cause Court was held to be governed by the 90 days' rule under Article 173; see *Madon Mohan* v. *Purno Chundra*, 10 Cal. 297 (298).

An application for review of judgment of a Small Cause Court is required to be accompanied with the deposit of costs, according to the provisions of sec. 17 of the Prov. S. C. C. Act. If the application for review of judgment is made within the period of limitation, but the deposit is not made along with the application, the Court will not allow the deposit to be made after the period of limitation, unless sufficient cause is shown for the delay (sec. 5). If no such cause is shown, the application for review of judgment will be dismissed as time-barred—*Abdul Sheikh* v. *Md. Ayub*, 24 C.W.N. 380, 56 I.C. 551, 31 C.L.J. 197.

162. For a review of judgment by any of the following Courts, namely, the High Courts at Calcutta and Madras and the High Courts of Bombay, Madhya	Twenty days.	The date of the decree or order.

Pradesh and Punjab in the exercise of its original jurisdiction.		

The words "the following Courts, namely" were inserted by sec. 2 and Sch. 1 of the Repealing and Amending Act, 1927 (10 of 1927). The words "the High Courts at Calcutta and Madras and the High Courts of Bombay, Madhya Pradesh and Punjab" were substituted for the words "the High Courts of Judicature at Fort William, Madras, Bombay and Nagpur and the High Court of Punjab" by Adoption of Laws (No. 2) 1956.

658. The judgment of a High Court in the exercise of its *matrimonial* jurisdiction is a judgment of the High Court in its *original* jurisdiction—*Harriette King* v. *James King*, 6 Bom. 416 (434). The judgment of a High Court passed in its Insolvency jurisdiction may be a judgment of the High Court in its original jurisdiction for the purpose of enforcing the judgment under Art. 183 (*In re Candas Narondas*, 13 Bom. 530, 533 P.C.), but not for the purposes of Art. 162. The review of judgment referred to in this Article is a review contemplated by O. 47, r. 1, C P. Code; an application to the High Court for review of judgment passed by it in its insolvency jurisdiction, under the provisions of sec. 8 (1), Presidency Towns Insolvency Act (III of 1909), is not governed by Article 162; nor is it governed by Art. 173, because that Article is also restricted to applications for review under the C. P. Code. The proper Article is Art. 181—*In re L. W. Nasse*, 7 Rang. 201, A.I.R. 1929 Rang. 228 (232), 118 I.C. 615. This Article does not apply to a review of a criminal case under cl. 26 of the *Letters Patent—Padam Prosad* v. *K. E.*, 33 C.W.N. 1121 (1137), (S.B.), 30 Cr.L.J. 93, 50 C.L.J. 106. An application for review of judgment of the Original Side of a High Court must be made within 20 days from the date of the decree or order and not from the date of the knowledge of the decree or order—*Debendra* v. *Satyabala*, 54 C.W N. 110, A.I.R. 1950 Cal. 217.

163. By a plaintiff, for an order to set aside a dismissal for default of appearance or for failure to pay costs of service of process or to furnish security for costs.	Thirty days.	The date of the dismissal.

Under Act XV of 1877, the words in column I ran thus: "By a plaintiff, for an order to set aside a dismissal for default."

659. Default:—When the plaintiff is absent, and although a pleader for the plaintiff appears, he is instructed only to apply for an adjournment, and is unable to answer all material questions relating to the suit, his appearance is no appearance; and the dismissal of the suit, after rejection of the application for adjournment, is a dismissal for default of appearance—*Lalta Prasad* v. *Nand Kishore*, 22 All. 66 (76) (F.B.); *Shankar* v. *Radha Krishna*, 20 All. 195; *Hinga* v. *Munna*, 31 Cal. 150 (154); *Soonderlal* v. *Goorprasad*, 23 Bom. 414 (422). *Cf. Satish Chandra* v. *Ahara Prasad*, 34 Cal. 403 (F.B.).

A plaintiff whose suit has been dismissed for default under the Presidency Small

Cause Courts Act, may either apply for a new trial within 8 days under section 38 of that Act, or may apply to have the order of dismissal set aside within thirty days under this Article—*Soonderlal* v. *Goor Prasad*, 23 Bom. 414 (426).

Non-appearance by reason of death is not default of appearance—*Debi Baksh* v. *Habib Shah*, 16 O.C. 194 (P.C.), 17 C.W.N. 829, 19 I.C. 526. In such a case, the Court is not competent to dismiss the suit for default of appearance; and the plaintiff's representatives have six months (now 3 months) under Article 176 to be brought on the record—*Ibid* (overruling 14 I.C. 221 and 14 I.C. 711).

This Article requires that an application under this Article must be made within thirty days from the date of dismissal. If a mere *notice of motion* (original side) is given within 30 days to the effect that the application would be made on a future date (which is beyond 30 days), it will not prevent time from running—*Hinga* v. *Munna*, 31 Cal. 150 (154); *Khetter Mohun* v. *Kashinath*, 20 Cal. 899. But these two cases have been disapproved of in *Jnanendra* v. *Amrita*, 60 Cal. 1106, A.I.R. 1933 Cal. 886 (887) (case under Art. 166). In *Shree Chand* v. *Sohanlal*, I.L.R. (1943) 2 Cal. 227, 47 C.W.N. 450, A.I.R. 1943 Cal 257 it has been held that merely giving notice of application or filing in the Registrar's office of the notice of application is not a sufficient compliance of this Article. This Article is not confined to applications under the Civil Procedure Code. It applies also to applications on the Original Side of a High Court—*Debendra* v. *Satyabala*, 54 C.W.N. 110, A.I.R. 1950 Cal. 217; *Shree Chand* v. *Sohanlal*, I.L.R. (1943) 2 Cal. 227, 47 C.W.N. 450, A.I.R. 1943 Cal. 257.

According to the Madras High Court Rules an application to the Registrar of the original side to issue a notice of motion is an application within the meaning of this Article and will save limitation notwithstanding that the notice mentions a date, beyond the thirty days, as the date on which the application will be heard—*Kuttayan* v. *Elleppa*, 17 M.L.J. 215.

Although under sec. 2(10) of the Limitation Act "suit" has been defined as not including an appeal or an application, yet for the purposes of this Article the application for restoration of an application for revocation of a probate dimissed for default must be deemed to be an application by a plaintiff—*Raja Ram* v. *Lakshmi Narain*, A.I.R. 1958 All. 149.

660. Starting point of limitation:—The starting point of limitation is the date of dismissal, and not the date when the applicant has *knowledge of the dismissal.* Unlike Art. 164, this Article says nothing about the applicant's knowledge of the dismissal—*DeCruz* v. *Pitts*, A.I.R. 1933 Pat. 557.

If a vacation intervenes, the application must be made on the date the Court re-opens, and not on the first motion day after the vacation—*Hinga* v. *Munna*, 31 Cal. 150 (154).

Where a suit was dismissed for default on 19th December and an application to set aside the dismissal was made on the next day, but the application was rejected on the 23rd January because the applicant failed to produce a copy of the judgment and decree as directed by the Court, a second application for the same purpose made on the 16th February, *i.e.*, nearly two months after the dismissal of the suit, was held to be barred—*Subba Row* v. *Venkataratnam*, 22 I.C. 689 (Mad.). But in an Allahabad case where an application for re-admission of a suit dismissed for default was made within 30 days but it was rejected because it was made by a person who held an invalid power-of-attorney from the plaintiff, a fresh application for the re-admission of the suit presented by that person under a proper power-of-attorney was granted, though presented more than 30 days after the dismissal for default but within 30 days from the date of the first application—*Ajodhya* v. *Chhabila*, 29 I.C. 1004 (All.).

The time during which the applicant had been erroneously prosecuting a suit to set aside the dismissal will be deducted under sec. 14 (2). The ruling in *Sheoji Ram* v. *Sheo Chand Rai*, 63 P.R. 1886 (decided under Act XV of 1877) is no longer good law, in view of sec. 14 (2) of the present Act, under which the applicant is entitled to deduct the time spent in any civil proceeding (including a *suit*) and not merely the time spent in prosecuting an application.

The period of time prescribed in this Article can be enlarged by sec. 4, *i.e.*, if the last day of limitation is a holiday, an application presented on the re-opening day will be within time. But the day of closing of the wrong Court in which the application was erroneously filed will not be deducted—*Bano Mal* v. *Bano Mal*, 55 I.C. 55 (Lah.).

If an applicant fails to apply within the period prescribed by this Article he cannot evade the law of limitation by calling his application, which is in reality an application for setting aside a dismissal for default, an application for review of judgment—*Nur Mahammad* v. *Dina*, 15 P.R. 1897. But see *Fateh Chand* v. *Menghi Bai*, 109 P.R. 1913, 19 I.C. 481, where the Court held that it had power to entertain the application for review under the above circumstances. Cf. also *Raj Narain* v. *Ananga Mohan*, 26 Cal. 598.

The period prescribed by this Article cannot be extended under section 5—*Mahadeo* v. *Lakshminarayan*, 49 Bom. 839, 90 I.C. 610, A.I.R. 1925 Bom. 521; *Madha Ram* v. *Tupoo*, 52 C.L.J. 23, 129 I.C. 779, A.I.R. 1931 Cal. 319 (320); *Ma Naw* v. *Somasundaram*, 2 Rang. 655, A.I.R. 1925 Rang. 187, 85 I.C. 324; *Sahib Ditta* v. *Reda*, 83 P.R. 1902; *Soba* v. *Dayaram*, 23 N.L.R. 83, A.I.R. 1928 Rang. 91 (92). Nor can it be extended by adding thereto the time for obtaining a copy of the order of dismissal—*Mohan Lal* v. *Sher Mahmmad*, 93 I.C. 1023 (Lah.). The Court is not entitled to extend the period of limitation by taking into consideration circumstances which appear to operate harshly against the plaintiff—*Debendra* v. *Satyabala*, 54 C.W.N. 110, A.I.R. 1950 Cal. 217. The Court has no inherent power to extend time when the application is filed beyond limitation—*Chinnappa* v. *Deenadayalu*, (1948) 1 M.L.J. 411, A.I.R. 1948 Mad. 480, 1948 M.W.N. 400.

When an order setting aside an exparte decree is passed in the absence of the plaintiff there is no rule to issue notice to the plaintiff of the date on which the restored case is to be taken up. Where on the date so fixed the plaintiff is absent and his suit is dismissed, the limitation for filling an application for restoration of the suit is governed by Art. 163, and this cannot be avoided by recourse to sec. 151, C. P. C.—*Mt. Karim Bhari* v. *Jagan Nath*, A I.R. 1936 Lah. 495, 163 I.C. 274, 38 P.L.R. 697 (*Bissamal* v. *Kesar Singh*, A.I.R. 1920 Lah. 309 ref.).

164. By a defendant, for an order to set aside a decree passed *ex parte*.	Thirty days.	The date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree.

Change:—In column I, the word 'judgment' in the old Act has been changed into 'decree'; the words in column 3 in the old Act stood thus: "The date of executing any process for enforcing the judgment."

661. Old Act and new:—Where an application to set aside an *ex parte* decree was barred by the provisions of Art. 164 of the Act of 1877, long before the

Act of 1908 was passed, the provisions of the new Act cannot revive the right to apply for setting aside the decree—*Nepal Chandra* v. *Niroda Sundari*, 39 Cal. 507 (509).

If the *ex parte decree* was passed while the old Act was in force, and the application was made after the Act of 1908 came into operation, the latter Act would apply, because the law to be applied to an application is the law existing at the time when the application is made—*Jai Bibi* v. *Ilahi*, 37 All. 597 (600); *Monohar* v. *Sadiqa*, 37 I.C. 292 (294), 101 P.R. 1916; *Zaibulnissa* v. *Ghulam Fatima*, 70 P.L.R. 1911, 10 I.C. 823; *Chidambaram* v. *Karuppan*, 35 Mad. 678 (679); *Basiruddin* v. *Sonaulla*, 15 C.W.N. 102 (105), 6 I.C. 154.

A decree was passed *ex parte* against a minor in 1894; he became a major on the 11th January 1909 and applied on the 25th January to set aside the decree. The application would be governed by Art. 164 of the Act of 1908 and would be barred. The plea of minority was available under the Limitation Act of 1877, section 7 (which applied to *all* applications), but it would not now be available under section 6 of the present Act which applies only to applications *for execution*—*Chidambaram* v. *Karuppan*, 35 Mad. 678 (679), 8 I.C. 543; *Manohar* v. *Sadiqa*, 101 P.R. 1916, 37 I.C. 292.

662. Scope:—Art. 164 prescribes a period of limitation for filing an application for setting aside an exparte decree. Sec. 3 renders it imperative that an application presented after the statutory period of limitation shall be dismissed, and it is not open to the Court to enlarge the period of limitation laid down by the statute—*Ajab Khan* v. *Alfgul*, A.I.R. 1935 Pesh. 146. This Article applies to any application (made under O. 9, r. 13, C. P. Code) which involves the setting aside of the original decree, whether made to the original Court or to the Court of appeal after an appeal has been filed. Where the application to set aside the *ex parte* decree is made to the appellate Court, the application falls under this Article and not under Article 169. This latter Article applies only to applications for rehearing of an *appeal* heard *ex parte*—*Sankara Bhatta* v. *Subraya*, 30 Mad. 535 (536). An application to set aside an *ex parte* decree passed by a Presidency Court of Small Causes falls within the terms of sec. 108 of the C. P. Code, 1882, (O. IX, r. 13) and the period of limitation for such an application is 30 days as prescribed by this Article and not 8 days as prescribed by sec. 38 of the Presidency Small Cause Courts Act—*Roshanlal* v. *Lachmi Narayan*, 17 Bom. 507 (509). An application for setting aside an *ex parte* order of adjudication of an insolvent passed under the Provincial Insolvency Act has to be made under O IX, r. 13, C. P. Code (as there is no provision in the Insolvency Act in respect of such application), and is governed by this Article—*Umar Din* v. *Raghunath*, 33 P.L.R. 698, 138 I.C. 377, A.I.R. 1932 Lah. 522.

This Article applies not only to an application for setting aside *ex parte decrees*, but also to an application for setting aside *ex parte orders in execution proceedings* which come under section 47, C. P. Code, because such orders are treated as decrees —*Subbia Naicker* v. *Ramanathan*, 37 Mad. 462 (475), 26 M.L.J. 189, 22 I.C. 899.

This Article is not restricted to applications to set aside a decree passed in a *suit*. Where a person was served with a notice to appear on a certain date and to show cause why the award passed against him should not stand filed, and on his failing to appear on that date, the award was ordered to be filed, an application by that person to set aside the order passed *ex parte* falls under this Article. This Article applies to applications for setting aside *ex parte* orders passed in proceedings other than suits—*Fleming Shaw & Co.* v. *Mangalchand*, A.I.R. 1924 Sind 56. 75 I.C. 1035.

Where the plaintiff brings a *suit* to set aside an *ex parte* decree not merely on the ground that it was passed without service of summons but also on the ground that it

was obtained by fraud, Article 164 cannot apply (as it refers only to an *application*); the suit falls under Article 95—*Moti Lal* v. *Russick Chandra*, 26 Cal. 326, at p. 333 (Footnote).

O. 9, r. 13, C. P. Code applies only to Mofussil Courts and not to the Original Side of the High Court; in the latter Court a different practice prevails in the matter of entering appearance, for here the question is not whether the defendant was present at the hearing, but whether he had entered appearance in the office. Consequently Art. 164 does not apply to an application to set aside an *ex parte decree*, and the High Court has a discretion to restore a suit although the application is presented beyond 30 days—*Haji Ramjan* v. *Hafiz Abdul*, 32 C.W.N. 411 (412), 116 I.C. 633, A.I.R. 1928 Cal. 864, following *S. N. Banerjee* v. *H. S. Suhrawardy*, 32 C.W.N. 10, but a contrary view has been taken by the same High Court in *Surendra* v. *Hrishikesh*, 46 C.W.N. 280 where it has been held that this Article applies to set aside *ex parte* decree passed on the original side of the High Court. The same view has been taken in *Debendra* v. *Satyabala*, 54 C.W.N. 110; *Abed* v. *Prafulla*, 56 C.W.N. 97 (F.B.) (overruling *S. N. Banerjee* v. *H. S. Suhrawardy*, supra); *Devji* v. *Santi*, 87 C.L.J. 169, A.I.R. 1952 Cal. 322. In a recent case the same High Court overruled the view taken in *Debendra* v. *Satyabala*, supra, and held that where the decree was passed on 28.3.'52, and the first day of the hearing of the motion was on 7.4.'52, and the Court on that day gave directions for the filing of affidavits and adjourned the hearing to 28.4.'52, the application was made on 7.4.'52, and was within time—*Sohonlal* v. *Manicklal*, 58 C.W.N. 313, 93 C.L.J. 119, A.I.R. 1954 Cal. 352.

An application to set aside an *ex parte* decree of a *Small Cause Court* must be accompanied with a deposit of the decretal amount or a security bond for the amount. See sec. 17, Prov. S. C. C. Act. If the application is made within the period of limitation prescribed by this Article, but the deposit or security is given after the expiry of the period, the application must be deemed to be barred—*Suraj* v. *Baldeo*, 50 All. 254, 25 A.L.J. 1032, A.I.R. 1928 All. 111, 108 I.C. 464; *Ram Charitar* v. *Hashim*, 1 P.L.T. 323, 56 I.C. 810; *Bishun* v. *Sheo Tahal*, 62 I.C. 108 (109) (Pat.). Where an application for setting aside an exparte decree was made with the necessary security bond but the application was withdrawn as being defective in certain formalities and a second application was made subsequently attaching the security bond and the security bond was verified by the surety some time later, it was held that the bond was effective and valid from the date on which it was filed—*Shiam Behari* v. *Banshidhar*, A.I.R. 1935 Oudh 35, 11 O.W.N. 1639, 152 I.C. 974.

When a Court finds it necessary to adjourn a pending suit, it is part of the duty of the Court to see that the date fixed for the adjourned hearing is communicated to the parties concerned or to their legal representatives, or any rate to such of them as are present or represented in Court when the adjournment takes place—*Durga Prasad* v. *Het Ram*, A.I.R. 1923 All. 79. See also *Gobardhan Ram* v. *Banarsi Ram*, A.I.R. 1957 All. 805.

663. 'Defendant':—In a probate application, the mere citing of a person does not make him a defendant. Under section 295 of the Indian Succession Act, 1925, the cause must be contentious and the person cited must appear to oppose the grant of probate, before he becomes a defendant. If such person does not appear and the probate is granted *ex parte*, it cannot be said that an order is passed *ex parte* against a 'defendant,' and this Article cannot apply to an application by such person for revocation of the probate—*Saroja* v. *Abhoy Charan*, 41 Cal. 819 (823), 24 I.C. 27.

664 Ex-parte decree:—A payment order made *ex parte* under sec. 150 of the Companies Act (1882) is not a *decree*, and this Article does not apply to an

application for setting it aside—*Hindusthan Bank Ltd.* v. *Mehraj Din*, 1 Lah. 187 (191), 55 I.C. 820. An order granting leave to execute a decree against a person on the ground that he is a partner, made under O. 21, r. 50, sub-rules (2) and (3), is not a *decree* for the purposes of this Article, but is only treated as a decree for the purpose of an appeal or enforcement. Consequently Art. 164 cannot apply to an application to set aside an *ex parte* order of that kind—*Kanji* v. *Vasanji*, 53 Bom. 839, 31 Bom.L.R. 995, A.I.R. 1929 Bom. 386 (388), 120 I.C. 833.

There is no distinction between a case decided *ex parte* by reason of the non-appearance of the defendant at the *first* hearing, and a case decided *ex parte* by reason of the absence of the defendant at an *adjourned* hearing. In both cases, the defendant may apply to set aside the *ex parte* decree—*Jonardan* v. *Ramdhone*, 23 Cal. 738 (F.B.) (overruling *Sital* v. *Heera*, 21 Cal. 269); *Muniappan* v. *Balayan*, 31 Mad. 505 (506); *Hildreth* v. *Sayaji*, 20 Bom. 380.

When on the day of hearing the defendant appears in person but only for the purpose of applying for adjournment, and the application is refused and a decree follows, such decree is not an *ex parte decree*, because the defendant cannot be said not to have appeared—*Soonderlal* v. *Goor Prasad*, 23 Bom. 414 (421); but if the defendant is absent and a *pleader* on his behalf applies for an adjournment and the pleader has no other instructions but to get an adjournment and is unable to answer all material questions relating to the suit, the defendant cannot be said to have put in appearance; and if the application is refused the decree which follows is an *ex parte* decree—*Ibid* (at p. 422); *Cooke* v. *Equitable Coal Co. Ld.*, 8 C.W.N. 621 (624); *Ram Tahal* v. *Rameshar*, 8 All. 140; *Shankar* v. *Radha*, 20 All. 195; *Ramanuja* v. *Rangaswamy*, 18 M.L.J. 51.

According to the Bombay High Court, even giving to the expression "*ex parte*" its plain natural meaning, the expression "ex parte" does carry with it the connotation that a Court or a Judge or a Tribunal has proceeded in the absence of the other party when it could have had the other party before it or when it was not prevented by law from having the other party before it—*P. N. Films Ltd.* v. *Overseas Films Corporation*, A.I.R. 1958 Bom. 10.

Article 164 does not apply to an application made by a defendant against whom a decree has been passed in a summary suit when he was precluded from appearing by reason of the fact that leave to defend was not given. Such an application falls under O. 37, r. 4, C. P. C., and the Limitation Act has not dealt with it, and so the Article applicable is Article 181—*P. N. Films Ltd.* v. *Overseas Film Corporation*, A.I.R. 1958 Bom. 10.

665. Starting point of limitation:—The third column of Articles 164 and 169 should be compared with that of Articles 163 and 168. In the case of a plaintiff or appellant seeking to set aside an *ex parte* decision, limitation runs only from the *date of the order*, whereas if a defendant or respondent seeks such relief, he can, in cases where he has not had due notice, count limitation from the date of his *knowledge* of the order—*Bissa Mal* v. *Kesar Singh*, 1 Lah. 363 (364), 58 I.C. 739.

Time runs ordinarily from the date of the *decree*, if the defendant has been duly served with summons—*Manindra* v. *Charumani*, A.I.R. 1949 Assam 5; and not from the date of the knowledge of the *suit*. If the summons had not been duly served, the period of limitation runs from the date of the *knowledge of the ex parte decree;* but under no circumstances is the period to be reckoned from the date of the *knowledge of the suit*—*Mir Ahmed* v. *Pir Bakhsh*, A.I.R. 1930 Lah. 397 (398), 129 I.C. 689; *Rajeshwari Prasad* v. *Brahmanand*, 12 Pat. 745, 145 I.C. 314, A.I.R. 1933 Pat. 279.

A decree was passed *ex parte* while the defendant was in jail. Five years afterwards the defendant applied to set aside the decree. It was held that if the application was treated as one for setting aside an *ex parte* decree, then it was barred by limitation, but if it was treated as an application for review of judgment, the Court should decide the question whether the applicant had shown sufficient cause for not applying earlier—*Janki* v. *Parmeswar*, 13 A.L.J. 482, 29 I.C. 975.

The mere fact that a party has not applied to set aside the *ex parte* decree within 30 days is no bar to his applying for a review of judgment—*Chokkalingan* v. *Lakshmanan*, 38 M.L.J. 224, 55 I.C. 444; *Lal Chet Narain* v. *Rampal*, 16 C.W.N. 643, 15 I.C. 554. But see *contra*:—*Deodip* v. *Gopal Singh*, 1 P.L.J. 547, 38 I.C. 53; *Santu* v. *Arjun*, 13 I.C. 318; *Lal Devi* v. *Amar Nath*, 57 I.C. 15 (Lah.); and *Shavaksha* v. *Hugh Hogarth*, 12 Bom.L.R. 886, 8 I.C. 616; in these cases it has been held that a party who has not applied to set aside the decree within 30 days cannot evade the law of limitation by calling his application an application for review of judgment.

If an application to set aside an *ex parte* decree, which was made in time, was consigned to the record room, that fact does not in any way necessitate a fresh application, and a subsequent application must be considered as merely in continuance of the suspended original application. Consequently no question of limitation arises—*Barkatullah* v. *Fuzl Maula*, 55 I.C. 824 (826) (Lah.).

Where service of notice on the defendant is not established, the Court has to decide whether the application is within time from the date when the petitioner came to know of the *ex parte* decree—*Mohla* v. *Kahnun*, A.I.R. 1925 Lah. 577, 91 I.C. 798.

The words "where the summons was not duly served" in the 3rd column seem to refer to the summons given for the first hearing of the suit; so, where there has been due service of such summons, the mere fact that the defendant has not received notice of an adjourned hearing will not cause limitation to run from the date on which the defendant becomes aware of the decree having been passed—*Lal Devi* v. *Amar Nath*, 57 I.C. 15 (Lah.); *Surjit Singh* v. *Torrie*, 76 I.C. 14, A.I.R. 1924 Lah. 666. So, where the defendant received due notice of the first hearing of the suit, but did not receive notice of the subsequent hearing owing to a transfer of the case to another Court, and even intentionally neglected to ascertain the date of hearing of the suit after the transfer, this would not entitle him to count the period of limitation from the date of knowledge of the decree—*Sham Sundar* v. *Devi Ditta*, 33 P.L.R. 838, 139 I.C. 354, A.I.R. 1932 Lah. 539 (540).

In computing the period of limitation, the time taken in prosecuting an infructuous proceeding in a wrong Court can be deducted—*Basiruddin* v. *Sonaulla*, 15 C.W.N. 102 (106), 6 I.C. 154.

The period of limitation prescribed by this Article cannot be extended by the Court in the exercise of its inherent powers under sec. 151, C. P. Code—*Ajodhya Mahton* v. *Phul Koer*, 1 Pat. 277, A.I.R. 1922 Pat. 479, 65 I.C. 341.

In Madras, the period prescribed by this Article can be extended under sec. 5 for sufficient cause; see Note 41 under sec. 5.

The time cannot be extended under sec. 6. See 35 Mad. 678 cited in Note 661 above.

"Duly served":—The word "duly" does not mean "personally"; so, if the defendant is absent, service on any male member is undoubtedly due service; so is service on an agent or servant under the circumstances indicated in O. 5, C. P. Code—*Venkatachalam* v. *Subbayya*, 54 M.L.J. 448, A.I.R. 1928 Mad. 655 (657), 108 I.C. 889. A summons is said to have been "duly served" if it was served in such a

manner that the defendant had knowledge of the suit or that the Court may presume that he had such knowledge (O. V, r. 19), even though it was not served in sufficient time to enable him to appear and answer on the day fixed in the summons—*Kasarchand* v. *Lakhamsi*, 11 S L.R. 71, 42 I.C. 611; *Kasarchand* v. *Lakhamsi*, 8 S.L.R. 153, 27 I.C. 351. But the Madras High Court has taken a contrary view. According to that High Court if a summons is served on a defendant too late to afford him sufficient opportunity of appearing at the hearing of the suit, it is not a case of a summons "duly served"—*Stock and Share Exchange Bureau* v. *Kothari & Sons.*, (1941) 1 M.L.J. 319, A.I.R. 1941 Mad. 435. See also *Firm Kundan Lal* v. *Firm Bani Prasad*, A.I R. 1957 All. 76; *Nagappa* v. *Rangaswami*, A.I.R. 1954 Mad. 475.

Where the plaintiff knew that the defendant did not ordinarily reside in his ancestral house, and yet insisted upon the service of summons at that place, *held* that the summons was not duly served—*Kumud Nath* v. *Jotindra Nath*, 38 Cal. 394 (400). A summons cannot be said to have been duly served where substituted service has been ordered by the Court and effected upon a misrepresentation of facts —*Kedar Mull* v. *Wazifunnissa*, 38 C.W.N. 1066, 60 C.L.J. 106, A I.R. 1934 Cal. 745; or upon allegations which were false—*Ram Kishen* v. *Mulla*, 69 I.C. 467, A.I.R. 1924 Lah. 191; or upon insufficient grounds—*Krishna Padayachi* v. *Vinayakaswamier*, 122 I.C. 35, A.I.R. 1930 Mad. 22. In such cases, time runs from the date of the applicant's knowledge of the decree. But where substituted service has been lawfully made (*e.g.*, where substituted service was directed by the Court after satisfying itself that the defendant was keeping out of the way to evade service) the summons is said to have been duly served, and time under this Article runs from the date of the decree, even though the summons does not come to the knowledge of the defendant—*Dittu Ram* v. *Nawab*, 26 P.L.R. 704, A.I.R. 1925 Lah. 639, 92 I.C. 272; *Hansraj* v. *Narain*, 31 P.L.R. 1006, A.I.R. 1931 Lah. 118, 131 I.C. 344; *Thakur Prasad* v. *Barati*, 8 O.W.N. 845, 132 I C. 778, A.I.R. 1931 Oudh 369; *Shariba* v. *Abdul*, 51 Mad. 860, 55 M.L.J. 565, A.I.R. 1928 Mad. 815 (816), 110 I.C. 490; *Narasimha* v. *Balakrishna*, 52 M.L.J. 512, A.I R. 1927 Mad. 487 (488), 101 I.C. 651; *Doraisami* v. *Balasundaram*, 52 M.L.J. 477, A.I.R. 1927 Mad. 507, 102 I C. 243; *Krishna Padayachi* v. *Vinayakaswamier*, 122 I.C. 35, A.I.R. 1930 Mad. 222. But in another Madras case it has been said that substituted service may be good service under the C. P. Code, but it is not *due* service within the meaning of this Article; the very word "substituted" clearly and conclusively indicates that it is not *due* service, *i.e.*, it is not the service that is due to the defendant or that is due according to the provisions of law for the purpose of service—*Venkatachalam* v. *Subbayya*, 54 M.L.J. 488, A.I.R. 1928 Mad. 655 (657), 108 I.C. 889. It has also been remarked by that High Court that it is incorrect to say that substituted service is necessarily due service, which can never be contested by the judgment-debtor, and it is equally incorrect to say that it is necessarily not due service. Each case must be decided on its own facts. If the defendants deliberately evaded service of summons, substituted service was due service—*Muhaidin* v. *Lakshmanan*, 61 M.L.J. 931, A I.R. 1931 Mad. 812 (813), 135 I.C. 344; see also *Gyanammal* v. *Abdul Hussain*, 61 M.L.J. 920, 134 I.C. 1202, A.I.R. 1931 Mad. 813 (817); *Shanmukhi* v. *Venkatarami*, A.I.R. 1957 Andhra 1 (F.B.). But in *Shah Shantilaal & Co.* v. *Shibonwalla*, (1949) 2 M.L.J. 815, A.I.R. 1950 Mad. 282 the Madras High Court has held that a person on whom substituted service has been effected must be held to have been duly served. See however, *Achari* v. *Parthasarathi*, (1953) 2 M.L.J. 371, A.I.R. 1954 Mad. 195. A Full Bench of the Allahabad High Court has come to the conclusion that the mere fact that substituted service has been ordered by the Court and effected according to the discretion of the Court, is not by itself tantamount to due service. Whether there has been due service or not is to be considered by the Court having regard to all the circumstances of the

case. If through no fault of his own the defendant was never put in a position to know that a suit had been instituted against him, then whatever steps might have been taken for serving the summons on him, these steps can never be accepted as amounting to due service—*Ram Bharose* v. *Ganga Singh*, 54 All. 154 (F.B.), 136 I.C. 609, 1931 A.L.J. 1049, A.I.R. 1931 All. 727 (729, 730). The Rangoon High Court has held that substituted service of summons effected in proper manner is not due service for the purpose of this Article. The reason is that the words "due service of summons" mean not only one that the summons was served in proper form according to the directions laid down in the Code but also that summons was served under circumstances which enabled the Court to be satisfied that the defendant had knowledge of the decree against him, except of course in the case where the defendant had purposely put it out of his power to have such knowledge—*Chettyar Firm* v. *Sheerazee*, A.I.R. 1939 Rang. 436.

The fact that substituted service by order of Court has been declared under O. 5, r. 20 (2), C. P. C., to be as effectual as if it had made on the defendant personally does not necessarily mean that the first part of Art. 164 covers the application to set aside decrees which follow such service. The words "or where the summons was not duly served" in Art. 164 clearly connote an inquiry into the due service of the summons which can only be found out by giving a chance to the petitioner to prove that he has not been served according to law. The petitioner is entitled to prove that the substituted service was not carried out according to law —*Ahmad Din* v. *Gokul Chand*, A.I.R. 1935 Pesh. 137, 158 I.C. 355.

Where a summons was sent by registered post to the defendant, and he wired to the Court for an adjournment which was refused, and an *ex parte* decree was passed, *held* that the summons had been duly served, and time ran from the date of the decree—*Ghansi Ram* v. *Misri Lal*, 27 Bom.L.R. 690, A.I.R. 1925 Bom. 444, 89 I.C. 223.

A summons is said to be duly served on a firm, if it is served on any one of the partners of the firm; and time runs from the date of the decree—*Adiveppa* v. *Puragji*, 26 Bom.L.R. 388, A.I.R. 1924 Bom. 366, 80 I.C. 773.

A summons served *personally* on a public servant can be said to have been duly served under O. V. r. 9, C. P. Code, even though r. 27 gives a discretion to the Court to serve the commons by sending it to the head of the office in which he is employed. If he refused to accept personal service, the service was due service all the same and time ran from the date of the decree—*Har Charan* v. *Azizullah*, 9 O.W.N. 896, A.I.R. 1932 Oudh 326 (327).

666. Knowledge of the decree:—This expression means a knowledge of the fact that a decree of the kind is in existence, but it does not embrace a knowledge of the *contents and general effect* of the decree—*Abdool Hoosein* v. *Esmailji*, 12 Bom.L.R. 462, 6 I.C. 901. But the words of the Article mean something more than a mere knowledge that a decree has been passed in some suit in some Court against the applicant. It means that the applicant must have knowledge not merely that a decree has been passed by some Court against him, but that a particular decree has been passed against him in a particular Court in favour of a particular person for a particular sum. It was not intended by the Legislature to lay down that the period under this Article would begin to run from the time the judgment-debtor might have received some vague information that a decree had been against him—*Baapurao* v. *Sadhu Bhivha*, 47 Bom. 485 (487), 25 Bom.L.R. 74, 76 I.C. 265, A.I.R. 1923 Bom. 193; *Kumud Nath* v. *Jatindra*, 38 Cal. 394 (403); *Palaniappa* v. *Vedachala*, A.I.R. 1927 Mad. 381, 99 I.C. 621; *Chintaman* v. *Pannalal*, 27 N.L.R.

53, 134 I.C. 279, A.I.R. 1931 Nag. 119. The mere knowledge of a suit pending against him, would not necessarily fix him with the knowledge of the decree passed against him, so as to compute limitation from the date of the decree—*Murugayyan Kangiar* v. *Murudayyammal*, (1956) 2 M.L.J. 86. The knowledge of the decree mentioned in Art. 164, Limitation Act, is the knowledge of the particular decree and not a knowledge of a decree. A vague information about there being a decree is not sufficient for the period of limitation to run against the applicant. The question whether the knowledge which an applicant had on a particular date can be said to be a knowledge of the decree is practically a question of fact—*Kedar Nath* v. *Kesri Mull*, A.I.R. 1937 Pat. 17; *Bapurao* v. *Sadhu Bhivba*, 47 Bom. 485, (A I.R. 1923 Bom. 193 followed). Further, it must appear that the petitioner himself had a knowledge of the decree in the suit. Where the petitioner's brothers had knowledge of the *ex parte* decree passed against the petitioner, it cannot be reasonably inferred that the petitioner himself had a similar knowledge of it, particularly when it is proved that he lived away from his brothers who never communicated the fact of the decree to him—*Kumud Nath* v. *Jatindra Nath*, 38 Cal. 394 (403), 15 C.W.N. 399, 9 I.C. 189.

An omission on the part of the defendant on whom summons was served too late to afford him opportunity of appearing at the hearing to prosecute enquiry which might have led to a knowledge of the date of hearing cannot be regarded as culpable or wilful so as to carry with it the consequence of 'knowledge'—*Stock and Share Exchange Bureau* v. *Kothari & Sons*, (1941) 1 M.L.J. 319, A.I.R. 1941 Mad. 435.

In an application under this Article the burden of proving want of knowledge of the decree till within 30 days before the application is on the applicant—*Piroj Shah* v. *Qarib Shah*, 7 Lah. 161, A.I.R. 1926 Lah. 379, 95 I.C. 124; *Sughru Mal.* v. *Sham Lal*, 146 P.W.R. 1918, 46 I.C. 777; *Mt. Ghulam* v. *Bilkis*, 228 I.C. 121; *Bengal Coal Co.* v. *Baul*, A.I.R. 1938 Cal. 535, 177 I.C. 1003.

667. Application by legal representative of defendant:—Where a defendant against whom an *ex parte* decree has been passed dies, an application by his legal representative (whether he has been brought on the record or not) to have the decree set aside must be made within the time allowed by this Article; Art. 181 will not apply. The word 'defendant' in this Article is wide enough to include the legal representative of the original defendant. The period of limitation runs from the date of the decree, as the summons was duly served on the original defendant. The alternative date mentioned in the second part of column 3 (*viz.*, the date of knowledge of the decree) applies only where the summons was not duly served on the original defendant—*Venkatasubbier* v. *Krishnamurthi*, 38 Mad. 442 (443, 444). See also *Shaligram* v. *Pundalik*, A.I.R. 1955 Nag. 238.

[As stated before, the period of limitation under the Act of 1877 ran from the date of executing any process in enforcement of the judgment. The rulings in *Hanmant* v. *Shankar*, 31 Bom. 303, *Bhoobanesury* v. *Judobendra*, 9 Cal. 869, *Poorno* v. *Prosonno*, 2 Cal 123, *Shah Muhammad* v. *Hanmant*, 20 All. 311, *Sunraj* v. *Ambika*, 6 All. 144, *Har Prasad* v. *Jafar Ali*, 7 All. 345, *Rajab Ali* v. *Upper India Paper Mills*, 15 O.C. 289, 17 I. C. 420, decided with reference to the starting point of limitation under the old Act, are no longer of any importance.]

165. Under the Code of Civil Procedure, 1908, (V of 1908), by a person dispossessed of	Thirty days.	The date of the dispossession.

immoveable property and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession.		

668. This Article contemplates the case of a person *other than the judgment-debtor* who applies to be restored to possession under O. XXI, r. 100 of the C. P. Code—*Seshagiri* v. *Valambal*, 65 Mad. L.W. 229, A.I.R. 1952 Mad. 377; *Merla* v. *Nallaparaju*, (1955) 2 S.C.R. 938, 1956 S.C.J. 101, A.I.R. 1956 S.C. 87. Where, therefore, a *judgment debtor* applies to be restored to possession of property seized by the decree-holder in excess of what has been decreed, the application falls under sec. 47 of the Code, and is governed by Art. 181 of this Act—*Abdul Karim* v. *Islamunnisa*, 38 All. 339 (344), 14 A.L.J. 401; *Bahir Das* v. *Giris*, 67 I.C. 663, A.I.R. 1923 Cal. 287; *Vachali Rohini* v. *Kombi Aliassan*, 42 Mad. 753 (760) (F.B.) (overruling *Ratnam Ayyar* v. *Krishna Dass*, 21 Mad. 494); *Rsaul* v. *Amina*, 46 Bom. 1031 (1036), A.I.R. 1922 Bom. 271, 24 Bom.L.R. 771, 68 I.C. 349; *Sharju* v. *Mir Khan*, 1 Lah.L.J. 230; *Maung Tha* v. *Ma Pyu*, 46 I.C. 323, (1918) 3 U.B.R. 79; *Jilai* v. *Abdul Rahaman*, 4 Luck. 209, 115 I.C. 444, A.I.R. 1929 Oudh 76 (79) (dissenting from 6 O.C. 44 and 17 O.C. 94). The contrary view is taken in *Har Din* v. *Lachman*, 25 All. 343, *Rajaram* v. *Itraj Kunwar*, 17 O.C. 94, 24 I.C. 137, and *Jagannath* v. *Datta*, 6 O.C. 44, where an application *by a judgment-debtor* has been held to fall under this Article. These three rulings are no longer correct, in view of the current of modern decisions cited above.

The judgment-debtor cannot even file a suit, and if he files a suit, it will be treated as an objection under sec. 47, C. P. Code—*Jilai* v. *Abdul Rahman*, supra.

166. Under the same Code to set aside a sale in execution of a decree, including any such application by a judgment-debtor.	Thirty days.	The date of the sale.

This Article corresponds to Arts. 166 and 172 of Act XV of 1877.

Change:—The words "including any such application by a judgment-debtor" were added in the first column by sec. 4 of the Indian Limitation (Amendment) Act, 1927 (I of 1927), in pursuance of the following recommendations of the Civil Justice Committee: There is a difference of opinion as to whether this Article (166) which deals with a petition to set aside a sale in execution of a decree applies when the petition is by a judgment-debtor under sec. 47, Civil Procedure Code. It is sometimes contended that that Article applies only to a petition under Order XXI, Rule 90 alone. It will be better if the matter is made clear by adding words in the first column so as to include a petition under sec. 47, C. P. Code"—*Civil Justice Committee Report*, pp. 495-496.

669. Scope:—The scope of this Article is something wider than that of Arts. 166 and 172 of the Act of 1877 taken together; it applies to *all* applications under the C. P. Code for setting aside an execution sale.

Article 166 of the old Limitation Act applied only when the application was made on the ground of irregularity in publishing or conducting the sale (O. 21, r. 90), or on the ground that the decree holder purchased without the permission of the Court (O. 21, r. 72); and Art. 172 applied only where the ground of setting aside the sale was that the judgment-debtor had no saleable interest in the property.

But if the sale was sought to be set aside on *any other* ground, the application fell under Art. 178 (*i.e.*, 181 of this Act). Thus, if the sale was sought to be set aside on the ground that it was brought about by *fraud*, Art. 178, and not Art. 166 applied—*Nemai* v. *Deno*, 2 C.W.N. 691; *Sakharam* v. *Damodhar*, 9 Bom. 468; *Sarat* v. *Nemai*, 5 C.W.N. 265; *Bhuban Mohun* v. *Nunda Lal*, 26 Cal. 324; *Purna Chandra* v. *Anukul*, 36 Cal. 654 (656); so was the case if the sale was sought to be cancelled on the ground that notice was not served on the judgment-debtor as required by section 248, C. P. Code (O. 21, r. 22)—*Livinia Ashton* v. *Madhabmoni*, 14 C.W.N. 560, 5 I.C. 390; *Lakshmi* v. *Srish*, 13 C.L.J. 162, 9 I.C. 584; or on the ground that the judgment-debtor had purchased the property in contravention of the provision of law —*Chand Monee* v. *Santa Monee*, 24 Cal. 707 (710).

But the present Article of the Act of 1908 is quite general in its terms and is not restricted to applications under O. 21, rules 72 and 89 to 91; it is comprehensive enough to cover all applications under the C. P. Code for setting aside execution sale on *any* ground whatsoever. An application under the C. P. Code to set aside a sale in execution of a decree falls under this Article, even though the application falls under sec. 47, C. P. Code and not under O. 21, rule 90—*Ramdhari* v. *Deonandan*, 2 Pat. 65, 3 P.L.T. 501, 77 I.C. 957, A.I.R. 1922 Pat. 507; *Ganapathi* v. *Krishnamachariar*, 43 M.L.J. 184, A.I.R. 1922 Mad. 417, 70 I.C. 743; *Kashi Ram* v. *Hasmat*, 1931 A.L.J. 119, 130 I.C. 708, A.I.R. 1931 All. 145 (146); *Ma Pwa* v. *Md. Tambi*, 1 Rang. 533, 77 I.C. 368, A.I.R. 1924 Rang. 124; *Haripada* v. *Barada Prasad*, 51 Cal. 1014, A.I.R. 1925 Cal. 351, 82 I.C. 322; *Ramsagor* v. *Ramajodhya*, 21 Pat. 774, A.I.R. 1943 Pat. 75; *Bhan Kumar* v. *Lachmi Kanta*, A.I.R. 1941 Pat. 566; *Gouri* v. *Ude*, I.L.R. (1942) Lah. 559, 44 P.L.R. 302, A.I.R. 1942 Lah. 153 (F.B.); *Periyannan* v. *Rama-Swami*, (1945) 1 M.L.J. 267, 58 L.W. 235; *Marati* v. *Kisanlal*, 1938 N.L.J. 389, A.I.R. 1938 Nag. 556, I.L.R. 1941 Nag. 381; *Brahmanandam* v. *Sarveswara*, (1940) 2 M.L.J. 503; *Ballabhdas* v. *Sobhaji*, I.L.R. (1947) Nag. 344, A.I.R. 1948 Nag. 52, 1947 N.L.J. 240. In *Ram Chandra* v. *Sarupa*, I.L.R. (1939) Lah. 103, 41 P.L.R. 436, A.I.R. 1939 Lah. 113, it has been held that there is no article applicable to an application under sec. 47, C. P. Code. In *Seshagiri* v. *Valambul*, 65 Mad. L.W. 229, A.I.R. 1952 Mad. 377 the Madras High Court has held that an application under Or. 21 r. 90 is governed by this Article. The Patna High Court has held that where the sales are sought to be set aside only under the provisions of Or. 21 r. 90, this Article applies. If, however the allegations amount to a pleading that the sales were void, the party would be entitled to make an application under Art. 181—*Md. Umar* v. *Moti Chand*, A.I.R. 1952 Pat. 244. This Article applies to an application to set aside a sale on the ground that the personal property of the applicant was sold in execution of a decree against the applicant's father—*Satis Chandra* v. *Nishi Chandra*, 46 Cal. 975 (977, 978), 54 I.C. 431; or that part of property sold was his personal property—*Chakku* v. *Nemai*, A.I.R. 1940 Pat. 192, 189 I.C. 256; or that part of property sold was exempted from sale under sec. 60 of the Civil Procedure Code—*Ramsagar* v. *Ramajodhya*, supra; it applies to an application to set aside a sale on the ground that the sale took place contrary to the directions given in the decree—*Muthia Chettiar* v. *Bava Saheb*, 27 M.L.J. 605, 26 I.C. 46; it applies where the execution sale is sought to be set aside on the ground of fraud—*Arjun* v. *Gunendra*, 18 C.W.N. 1266, 27 I.C. 294; *Rai Kishori* v. *Mukunda*, 15 C.W.N. 965, 11 I.C. 295; *Ganapathi* v. *Krishnamachari*,

43 M.L.J. 184, 70 I.C. 743, A.I.R. 1922 Mad. 417; *Ramdhari* v. *Deonandan*, 2 Pat. 65, A.I.R. 1922 Pat. 507, 77 I.C. 957, 3 P.L.T. 501; *Ghulam* v. *Negapattinam*, (1950) 1 M.L.J. 432, 1950 M.W.N. 240, A.I.R. 1950 Mad. 460; it applies to an application to set aside a sale on the ground of irregularity in the service of notice under O. 21 rule 22—*Das Narayan* v. *Mir Mahammad*, 6 P.L.J. 319 (326), A.I.R. 1921 Pat. 145, 61 I.C. 823; or on the ground of absence of notice under Or. 21 r. 66 C. P. Code, ——*Ghulam* v. *Nagapattinam*, supra; or on the ground that there was no attachment prior to the sale or that there had been a defective attachment—*Ma Pwa* v. *Md. Tambi*, 1 Rang. 533, A.I.R. 1924 Rang. 124, 77 I.C. 368; or on the ground that the sale was held without valuation as required by sec. 13 of the Bihar Money Lenders Act—*Sheo Dayal* v. *Moti Kuer*, 21 Pat. 281, 23 Pat.L.T. 139, A.I.R. 1942 Pat. 238.

Article 166 governs all applications made under the Civil Procedure Code to set aside a sale in execution of a decree. Art. 181 is the residuary Article and cannot apply when there is a specific Article which is applicable—*Gulzarilal* v. *Sheocharan*, A.I.R. 1935 All 880, 1935 A.L.J. 940, 156 I.C. 389.

An application made after the present Act of 1908 came into operation to set aside a sale held prior to that Act, on the ground of fraud, is governed by Art. 166 of the present Act and not by Art. 178 of the Act of 1877. Section 6 of the General Clauses Act does not preserve the right of the applicant to apply within three years of the date of sale, which he had under Art. 178 of the old Act—*Rai Kishori* v. *Mukunda*, 15 C.W.N. 965 (971), 11 I.C. 295; *Ganapathi* v. *Krishnamachari*, 43 M.L.J. 184, 70 I.C. 743, A.I.R. 1922 Mad. 417.

Although this Article speaks of an *application* to set aside a sale, still if a *notice of motion* (given in the original side of the High Court) is made within the period of thirty days, it is in time, and the fact that it comes on for disposal after the expiry of thirty days does not matter—*Jnanendra* v. *Amrita*, 60 Cal. 1106, A.I.R. 1933 Cal. 886 (887), dissenting from *Hinga* v. *Munna*, 31 Cal. 150, and *Khetter Mohun* v. *Kashinath*, 20 Cal. 899.

Under the C. P. Code, 1882, if the auction-purchaser failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property, the purchaser was entitled under sec. 315 of that Code to receive back the purchase-money, and an application for the refund of the money was governed by Article 178 of the Limitation Act of 1877; the purchaser was not required to make any application for setting aside the sale as contemplated by Article 172 of the Act of 1877. But the law has undergone a change after the passing of the C. P. Code of 1908. Under this Code, a purchaser who fails to obtain possession of the property purchased, on account of the judgment-debtor having no saleable interest in the property, is required to make an application under O. 21, rule 91 to set aside the sale, and then when the sale is set aside, to make another application for refund of the purchase-money under O. 21, rule 93. The first application is governed by Art. 166 of the present Limitation Act, and the second application by Article 181—*Makar Ali* v. *Sarfuddin*, 50 Cal. 115 (120-122), A.I.R. 1923 Cal. 85, 70 I.C. 606, 27 C.W.N. 183; *Balwant* v. *Bala*, 46 Bom. 833, A.I.R. 1922 Bom. 205, 67 I.C. 360; *Veeraraghavayya* v. *Venkataraghavamiddi*, I.L.R. (1948) Mad. 522, (1947) 2 M.L.J. 468, A.I.R. 1948 Mad. 226 (F.B.); *Ammani* v. *Sabapathi*, A.I.R. 1948 Mad. 301, (1948) 1 M.L.J. 422, 1948 M.W.N. 469.

Under O. 21, rule 89, C. P. Code, the judgment-debtor may obtain a reversal of the sale by deposit of money in Court; such deposit must be made within thirty days from the date of sale, as provided by this Article—*Chaudhury Rameshwar* v. *Chaudhury Sureshwar*, 2 P.L.J. 164 (165), 39 I.C. 664; *Md. Cassim* v. *David*, 6 Rang. 490, A.I.R.

1928 Rang. 286. But it should be remembered at the same time that the *mere deposit* of money required by O. 21, r. 89 of C. P. Code cannot by itself be treated as an application to set aside the sale. There must be a separate application along with the deposit. If the deposit is made within 30 days but the application is made beyond the period, it is barred—*Ram Autar* v. *Sheo Peary*, 12 O.L.J. 137, 87 I.C. 722, A.I.R. 1925 Oudh 411; *Mathuria* v. *Ram Lal*, 9 I.C. 33 (All.). See also *Parath Veetil* v. *Ambulath Veetil*, 32 I.C. 45 (Mad.), and *Sarovi Begum* v. *Haider Shah*, 9 A.L.J. 12, 13 I.C. 404.

This Article refers to applications under the *C. P. Code*. An application to set aside a sale conducted by the Insolvency Court in realising assets of the insolvent under secs. 20 and 23 of the Provincial Insolvency Act (III of 1907) is governed by Article 181 and not by this Article—*Mir Afzal Ali* v. *Mir Aman Ali*, 107 P.L.R. 1914, 23 I.C. 397. So also, an application to set aside a sale under sec. 47 of the Chota Nagpur Tenancy Act is not governed by this Article but by the special provision of sec. 231 of that Act—*Nilmoney* v. *Roban Majhi*, 1 P.L.J. 483 (484), 20 C.W.N. 1243, 37 I.C. 683. As regards an application under sec. 173, Bengal Tenancy Act to set aside a sale in execution of a rent decree on the ground that the judgment-debtor has purchased the property in the name of another person, the Calcutta High Court now holds that the application is cognizable under sec. 47, C. P. Code and attracts the operation of Art. 166 of the Limitation Act—*Haripada* v. *Barada Prasad*, 51 Cal. 1014, A I.R. 1925 Cal. 351, 82 I.C. 322. But in an earlier case, the same High Court gave the opinion that such application did not come under Art. 166, and that as no other Article of the Limitation Act or of the 3rd Schedule of the Bengal Tenancy Act was applicable, the application fell under the residuary Article 181—*Chand Monee* v. *Santo monee*, 24 Cal. 707 (709); and exactly same view was taken by the Patna High Court in *Chandrama* v. *Maharaja of Dumraon*, 38 I.C. 209 (case under sec. 173, Bengal Tenancy Act). The Patna High Court also holds that an application under sec. 227 of the Orissa Tenancy Act (corresponding to sec. 173, B. T. Act) for setting aside a sale on the ground that the holding was purchased by the judgment-debtor himself through another person is not an application under the C. P. Code, and Art. 166 cannot apply; and as it does not fall under any of the classes of applications mentioned in Sch. III of the O. T. Act, the special rule of limitation laid down in that Act does not apply; consequently Art. 181 of the Limitation Act will apply—*Ananta Charan* v. *Nimai*, 6 Pat. 366, 101 I.C. 564, A.I.R. 1927 Pat. 177 (dissenting from 51 Cal. 1014).

670. Void sales:—If the execution sale is not binding on the judgment-debtor or is made without jurisdiction or is an absolute nullity, this Article does not apply —*Payidanna* v. *Lakshminarasamma*, 38 Mad. 1076; *Shivbai* v. *Yesu*, 43 Bom. 235, 48 I.C. 130; *Seshagiri* v. *Srinivasa*, 43 Mad. 313 (315), 56 I.C. 260; *Joggeswar* v. *Jhapal Santal*, 51 Cal. 224 (229); *Samandam* v. *Malikandi*, 26 M.L.J. 267, 23 I.C. 251; *Behari Lal* v. *Tanuk Lal*, 8 P.L.T. 28, A.I.R. 1926 Pat. 397, 97 I.C. 798; *Sundar Das* v. *Nikka*, 32 P.L.R. 440, A.I.R. 1931 Lah. 586, 132 I.C. 493; *Rajendra* v. *Debi*, 19 Pat. 393, 21 Pat.L.T. 223, AI.R. 1940 Pat. 303; *Nirode* v. *Harendra*, I.L.R. (1938) 1 Cal. 280, 42 C.W.N. 87, A.I.R. 1938 Cal. 113; *Ballabhdas* v. *Sobhaji*, I.L.R. (1947) Nag. 344, A.I.R. 1948 Nag. 52, 1947 N.L.J. 240; *Venkateswara* v. *Ayyammal*, (1950) 1 M.L.J. 22, 1950 M.W.N. 44, A.I.R. 1950 Mad. 367. In such a case, the judgment-debtor need not make any application for setting aside the sale, but may bring a suit for recovery of possession, within 12 years from the date of delivery of possession. If, however, the judgment-debtor makes any application, the application would be governed by three years' rule under Art. 181—*Behari Lal* v. *Tanuk Lal*, supra; *Merla* v. *Nallaparaju*, (1955) 2 S.C.R. 938, 1956 S.C.J. 101, A.I.R. 1956 S.C. 87. Article 166 can apply only where it is necessary to have a formal order setting aside the sale.

Where a sale is void *ab initio* for want of jurisdiction it is not necessary for an applicant to ask the Court to order the decree-holder to deliver back to him the property on the ground that he had obtained no title to it. Where the applicant makes such an application, it is governed by Art. 181 and not by Art. 166, and the mere fact that he has also asked for setting aside the sale will not affect the nature of the application—*Ma We Gyan* v. *Maung Than Byn*, A.I.R. 1937 Rang. 126. Where there is an execution sale of an insolvent's property after his adjudication and in ignorance of it, and the Official Receiver applies to have it declared void this Article does not apply. Article 181 would apply to such an application—*Motilal* v. *Nathu*, I.L.R. (1942) Nag. 377, 1940 N.L.J. 505, A.I.R. 1940 Nag. 414.

Thus, if the judgment-debtor was not a party to the suit and was not sufficiently represented by any one in the suit, the sale is not binding on him, and does not require to be set aside either by a suit under Art. 12 or by an application under Art. 166—*Payidamma* v. *Lakshminarasamma*, 38 Mad. 1076 (1081). If the property of the defendant is exonerated by the decree from liability, a sale of his property held in execution of the decree is void, and an application by the defendant to set aside the sale would be governed by Art. 181, not by this Article—*Seshagiri* v. *Srinivasa*, 43 Mad. 313 (315), 56 I.C. 260, 38 M.L.J. 62. Where a sale took place in spite of the fact that the Court had ordered a stay of the sale on a claim having been preferred by a third party to the property, the sale was a nullity, and this Article could not apply to an application for setting aside the sale—*Lakshmi Chand* v. *Phul Chand*, 11 Lah.L.J. 457, 125 I.C. 53, A.I.R. 1930 Lah. 17 (18).

The plaintiff obtained an *ex parte* decree for Rs. 86 against the defendant in 1906, and in execution thereof the defendant's house was sold and purchased by the plaintiff in 1910. Subsequently, the defendant succeeded in getting the *ex parte* decree set aside, and in having the case retried, but the result was a decree passed in 1914 in plaintiff's favour for Rs. 87. The defendant paid up the amount of the second decree and applied to have the previous sale set aside. It was held that the previous sale held under the previous decree which was set aside should be treated as a nullity, as having been no longer based on any solid foundation, and that the application was governed by Art. 181, not by this Article, and was quite in time—*Shivabai* v. *Yesu*, 43 Bom. 235 (239), 48 I.C. 130.

But a sale held without notice of the sale proclamation being given to the judgment-debtor is not a nullity, and an application to set it aside is governed by this Article —*Neelu* v. *Subramania*, 11 L.W. 59, 1919 M.W.N. 897, 53 I.C. 809. An execution sale of property which turns out not to belong to the judgment-debtor is not *void ab initio* but *voidable only*. A decree-holder auction purchaser whose decree has been recorded as satisfied cannot, upon a defect in the judgment-debtor's title appearing, reopen his decree and proceed to obtain further satisfaction of it, without first setting aside the sale under O. 21, r. 91, within the period of limitation prescribed by Art. 166 —*Jagannadha* v. *Basawayya*, 53 M.L.J. 255, 104 I.C. 614, A.I.R. 1927 Mad. 835; *Muthukumaraswami* v. *Muthusami*, 50 Mad. 639, A.I.R. 1927 Mad. 394, 100 I.C. 522.

So also, where the proclamation of sale was not published in the village in which the property was situate, the omission was an illegality, but such illegality did not make the sale a *nullity*, and an application by a judgment-debtor to set aside the sale is governed by Art. 166 and not by Art. 181—*Paramasiva* v. *Pulukaruppa*, 47 Mad. 525, A.I.R. 1924 Mad. 137, 77 I.C. 631, 45 M.L.J. 829. The mere fact that there was an illegality in the procedure does not make the sale null and void. Article 166 applies to every application to set aside a sale, whether the ground for seeking to set aside the sale is the commission of an *irregularity* or an *illegality*—*Ibid* (at p. 529). In this case Spencer, J. warned against the common practice of stigmatising any and

every illegal or irregular sale as a nullity, and remarked (at p. 530): "It is not uncommon to hear a sale described as a nullity if there is an illegality affecting the jurisdiction of the executing Court, and illegalities are commonly supposed to take applications to have sales set aside out of the scope of O. XXI, rule 90. Ever since the Privy Council in *Malkarjun* v. *Narhari* (25 Bom. 337) distinguished between a total absence of jurisdiction and an erroneous working out of a valid decree against an estate after its owner's liability is established, there should be no room for misconception. But unfortunately it is not uncommon to hear the expression 'nullity' indiscriminately applied to sales by Court, as if by that magic word the Statute of Limitation was abolished."

Where the notice under O. XXI, rule 22 has not been issued to the judgment-debtor in respect of an execution application filed more than a year after the decree, a sale held in execution is not merely voidable, but *void* as against the person to whom notice should have been, but was not, issued; such a sale does not require to be set aside; but if a party filed an application to set aside the sale either under sec. 47, C. P. Code or otherwise, the application is governed by Art. 181, not by Article 166. The party may also file a suit to recover the property within 12 years (Art. 144)—*Rajagopala* v. *Ramanujachariar*, 47 Mad. 288 (304) (F.B.), 46 M.L.J. 104, 80 I.C. 92, A.I R. 1924 Mad. 431 (disapproving *Viswanathan* v. *Somasundaram*, 45 Mad. 875, where such omission was held to be only a material irregularity not invalidating the sale); *Monmatha* v. *Luchmi*, 55 Cal. 96, A.I.R. 1928 Cal. 60, 105 I.C. 65; *Ram Kinkar* v. *Sthiti Ram*, 27 C L.J. 528, 46 I.C. 221; *Behari Lal* v. *Tanuk Lal*, 8 P.L.T. 28, A.I.R. 1926 Pat. 397, 97 I.C. 798; *Hiralal* v. *Mst. Champa*, A.I.R. 1955 All. 226.

A sale held in contravention of the terms of O. 34, rule 14 is not *void* but *voidable*, and an application to set aside the sale must be made under this Article within thirty days from the date of the sale. Even if the property is purchased by a third party and not by the mortgagee himself, the purchaser cannot bring a *suit* to set aside the sale but can only make an *application* (sec. 47, C. P. Code) to set aside the sale, and the application falls under Art. 166—*Bhaichand* v. *Ranchhoddas*, 45 Bom. 174 (186), 58 I.C. 231. An execution sale which is void as being eitirely beyond the jurisdiction of the Court does not require to be set aside at all. Any objection to such a sale is governed not by Art. 166, but by the residuary Art. 181—*Ramanand* v. *Rakhal*, A.I.R. 1936 Pat. 496, 163 I.C. 34, (55 Cal. 96 folld.); *Nirodekali* v. *Harendra*, A.I.R. 1938 Cal. 113.

671. Limitation:—Under the plain language of this Article, the period of limitation runs from the date of *sale*, and not from the date of *confirmation* of the sale—*Sitaram* v. *Asaram*, 19 N.L.R. 162, A.I.R. 1924 Nag. 108, 78 I.C. 47; *Vana* v. *Ratilal*, 28 Bom.L.R. 510, 95 I.C. 549, A.I.R. 1926 Bom. 335; *Wasudeo* v. *Hiralal*, 8 N.L.R. 177, 17 I.C. 884. The remark made by Oldfield J. in *Tirumalaisami* v. *Subramania*, 40 Mad. 1009 (at p. 1015) that the period of limitation under Article 166 is thirty days from the date of *confirmation* of the sale, is not correct. It is a mere obiter not necessary for the decision of the case.

If a sale took place on a certain date, but the sale officer did not make a declaration on that date as to who was the purchaser, but gave the information on a subsequent date, it is the latter date which must be taken as the date of sale. The mere making of a bid does not conclude the sale. For the conclusion of a sale it is necessary for the sale officer to accept the final bid and to make a declaration as to who is the purchaser and to order him to pay over 25 per cent. of the purchase-money—*Munshi Lal* v. *Ram Narain*, 35 All. 65, 17 I.C. 783.

The period of 30 days prescribed by this Article cannot be extended by the provision of sec. 5—*Umrao Singh* v. *Beni Prasad*, 92 I.C. 839 (Lah.), A.I.R. 1926 J. 100; *Ram Autar* v. *Sheo Peary*, 12 O.L.J. 137, A.I.R. 1925 Oudh 411, 87 I.C. 722. But in computing the period of limitation, the time during which the applicant had been prosecuting a suit in good faith will be deducted under sec. 14—*Ganapathi* v. *Krishnamachari*, 43 M.L.J. 184, A.I.R. 1922 Mad. 417, 70 I.C. 743.

In *Brij Behari* v. *Srinivas*, 18 Pat. 327, 20 Pat.L.T. 275, A.I.R. 1939 Pat. 248 (F.B.), the Patna High Court has held that an application for setting aside sale under Or. 21, r. 90, C. P. Code as amended by the Patna High Court unaccompanied by the deposit mentioned therein is within time under this Article if made within thirty days from the date of sale though the said application is admitted beyond thirty days on the deposit being made after thirty days. Where no deposit accompanies the application to set aside the sale, the Court has no power to reject such application forthwith.

Where the Collector sells property under the directions of the executing court under R. 211, Oudh Civil Rules, he is only a ministerial officer appointed to sell property and the sale is nevertheless by the Court and it is not completed until the Court formally accepts the bid and declares the purchaser under Or. 21, r. 84, C. P. C. Prior to such order, the bidder, whose bid has been accepted by the sale Officer at the time of the bid does not acquire any interest in the property. And limitation for an application under Or. 21, r. 89, C. P. Code begins to run only from the date on which the Court 'approves' of the sale, and not the date on which the Collector holds the sale—*Hari Shankar* v. *Mt. Amina Bibi*, A.I.R. 1935 Oudh 131, 1935 O.W.N. 208, 153 I.C. 719; *Hali* v. *Zainul*, 1940 O.W.N. 381, A.I.R. 1940 Oudh 261, 187 I.C. 603; *Ramachandra* v *Arjun*, 1938 N.L.J. 10.

672. Fraud:—If fraud is proved, the applicant is entitled to benefit of sec. 18; that is, the period of limitation runs from the date when the fraud first became known to the applicant—*Arjun* v. *Gunendra*, 18 C.W.N. 1266 (1271), 27 I.C. 294; *Ramdhari* v. *Deonandan*, 3 P.L.T. 501, 2 Pat. 65, A.I.R. 1922 Pat. 507, 77 I.C. 457. But in order to entitle the applicant to get the benefit of sec. 18, he must show not only that there was fraud, but he was by reason of the fraud *kept from the knowledge of his* right to make the application. See the cases cited under sec. 18 at pages 181, 182, *ante*. Limitation runs from the date when the fraud first becomes known, and it is immaterial that the sale has been confirmed before that date in ignorance of the fraud—*Mohendra* v. *Gopal*, 17 Cal. 769 (dissenting from *Gobind* v. *Umacharan*, 14 Cal. 679); *Golam* v. *Judhisthir*, 30 Cal. 142 (153); *Sheo Ram* v. *Ikramunnissa*, 45 All. 316, 21 A.L.J. 176, A.I.R. 1923 All. 282, 71 I.C. 631. See Note 172 under sec. 18. The initial onus is on him to show that he had no knowledge of the sale until within 30 days of the application—*Sobhan* v. *Gangadhar*, A I.R. 1944 Pat. 40, 211 I.C. 533. If no fraud in conducting the sale is made out, the question of the date of knowledge of the judgment-debtor is irrelevant—*Galstaun* v. *Syed Mahomed*, 36 C.W.N. 242, A.I.R. 1932 Cal. 627.

673. Application by minor:—Under the present Limitation Act, a minor entitled to make an application for setting aside a sale is not given the privilege of sec. 6 (which now applies only to an application for execution of a decree), but under the old Limitation Act he *was* entitled to such privilege. And a right which accrued to a minor judgment-debtor under the Act of 1877 to apply after attaining majority to set aside a sale which took place before the Act of 1908 came into force, is not taken away by the coming into operation of the later Act, that being a privilege which has been preserved by sec. 6 (*c*) of the General Clauses Act—*Fazal Karim* v. *Amada*, 15 C.W.N. 845 (847), 11 I.C. 401.

167. Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree.	Thirty days.	The date of the resistance or obstruction.

674. Scope:—The application contemplated in this Article is an application under O. 21, r. 97, C. P. Code.

A minor applicant was entitled under the Act of 1877 to make an application under this Article within one month of his attaining majority—*Vinayakrao* v. *Devrao*, 11 Bom. 473 (474). But the present Act gives no such privilege to a minor, as section 6 is restricted to applications for execution of decrees, and does not, like the corresponding section of the old Act, apply to *all* applications.

If an application made beyond the thirty days prescribed by this Article is admitted, no appeal lies against the order of an admission; but in an appeal against the final order passed under sec. 321, C. P. Code, 1882 (now O. 21, rule 99) the order of erroneous admission of the time-barred application can be objected to; and the Appellate Court is bound to entertain the objection and to dismiss the application if it is found to have been wrongly admitted by the lower Court—*Lala* v. *Narayan*, 21 Bom. 392 (393).

It is not obligatory upon the purchaser or the decree-holder to proceed to make an application complaining of resistance. The option rests with him to pursue his remedy either summarily by an application under section 328, C. P. Code, 1882 (now O. XXI, r. 97) or by a regular *suit* complaining of the obstruction and seeking possession. The two remedies are concurrent, and the fact that he has not made an application within 30 days under Article 167 is not a bar to his filing a regular suit—*Balvant* v. *Babaji*, 8 Bom. 602 (608). If the purchaser omits to make an application within thirty days as prescribed by this Article, he can bring a suit for possession, provided it is brought within 12 years from the date of his purchase—*Shoteenath* v. *Obhoy*, 5 Cal. 331 (333).

If the decree-holder purchaser makes an application within 30 days after the resistance, the application may be registered as a regular suit under sec. 331, C. P. Code and the rights of the parties will be determined as if an ordinary suit for possession has been instituted by the decree-holder against the defendant (under Article 138 or 144)—*Namdev* v. *Ramchandra*, 18 Bom. 37 (40). But if the decree-holder makes the application *more than 30 days* after the date of resistance, the application cannot be registered as a suit, but the decree-holder may file a separate regular suit—*Valliammai* v. *Shanmugam*, 7 M.L.T. 223, 6 I.C. 285.

In Madras, it has been laid down that even though the decree-holder or purchaser makes no application under Article 167 (complaining of resistance) within 30 days from the date of resistance, he is entitled to make an application for *delivery of possession*, the limitation period of which is three years (Art. 180)—*Muttia* v. *Appasami*, 13 Mad. 504 (507), followed in *Abdul Karim* v. *Timmaraya*, 24 I.C. 512 (Mad.). But the Allahabad and Bombay High Courts are of opinion that the failure to apply within 30 days of the date of resistance is a bar to an application for delivery of possession, because such application is virtually an attempt to renew the old proceedings which were allowed to fall through, and that the only remedy of the decree-holder is a regular

suit for possession—*Kesri Narain* v. *Abdul Hasain*, 26 All. 365 (367); *Vinayakrav* v. *Devrao*, 11 Bom. 473 (474).

Fresh resistance:—Where at first there was an obstruction, but no application was made by the decree-holder within 30 days from the date of the obstruction, and then the decree-holder applied for and obtained a fresh warrant for possession, but was *again resisted, held* that the decree-holder was entitled to make an application under Article 167 within one month from the date of the *second* resistance, though more than one month after the first resistance. The fact that no application was made within 30 days from the first resistance did not bar the present application—*Ramasekhara* v. *Dharmaraya*, 5 Mad. 113 (114); *Kotumal* v. *Gur Asharam*, I.L.R. (1946) Kar. 317, A.I.R. 1947 Sind 118. A separate right arises on each occasion when there is obstruction provided a fresh writ for possession has been issued and the month would run from the time of the particular resistance or obstruction in respect of which the decree-holder is complaining—*Kedar* v. *Baijnath*, A.I.R. 1939 Cal. 494. Where the decree-holder applied for possession of 19 shops decreed to him, but being resisted made an application complaining of the resistance, and the Court ordered that the decree-holder be put in possession of 15 out of 19 shops, and then the decree-holder having applied for possession of the remaining 4 shops, he was again resisted, and again made an application complaining of the resistance within 30 days from the date of the second resistance, *held* that the application was not barred—*Narain Das* v. *Hazari Lal*, 18 All. 233 (237), following 5 Mad. 113; *Surama* v. *Kiran*, 42 C.W.N. 478. See also *Official Trustee* v. *Monmothonath*, A.I.R. 1953 Cal. 499.

Where the original resistance was by a third person, and no application was made by the purchaser under Article 167 within 30 days of the resistance, and then the present obstruction is made by the judgment-debtor himself (who does not claim in any way through the third party who was the original obstructor), the purchaser may make an application for delivery of possession (Art. 180) within 3 years of the second resistance—*Vinayakrao* v. *Devrao*, 11 Bom. 473 (475).

An application for removal of obstruction filed by a decree-holder auction purchaser is an application under sec. 47, C. P. Code., and is governed by Art. 181 and not by Art. 167—*B. I. S. N. & Co.* v. *Jiwanjee & Co.*, A.I.R. 1936 Sind 11.

168. For the re-admission of an appeal dismissed for want of prosecution.	Thirty days.	The date of the dismissal.	

675. Scope:—This Article applies where the appeal is dismissed under the C. P. Code, and not where it is dismissed under the *Rules of the Court*. Thus, where an appeal is dismissed under Rule 17 of the Rules of the High Court, Part II, Ch. VIII, for failure to deposit the estimated amount of costs for the preparation of the paper book, an application for re-admission of the appeal does not fall under this Article—*Ramhari* v. *Madan Mohan*, 23 Cal. 339 (347). But the Rangoon High Court, dissenting from this view, holds that this Article makes no mention of the C. P. Code or any other Act, and therefore it applies to an application to re-admit an appeal dismissed (before the hearing) for default in payment of the costs of preparing the paper book. Such a dismissal is as much a dismissal for want of prosecution as a dismissal on the day fixed for hearing for default in payment of process-fees under O. 41, r. 18, C. P. Code—*Abdul Gamny* v. *Russell*, 8 Rang. 380 (F.B.) 127 I.C. 161, A.I.R. 1930 Rang. 228 (231).

This Article has no application where the order of dismissal is *ultra vires—Ata Mahamed* v. *Shankar Das*, 69 I.C. 618, A.I.R. 1924 Lah. 279.

This Article refers to an application under O. 41, rule 19 of the C. P. Code, which lays down that if an appeal is dismissed under O. 41, r. 11 (2), r. 17 or r. 18, the appellant may apply to the Appellate Court for the re-admission of the appeal, and if sufficient cause is shown for the default, the Court is bound to re-admit the appeal—*Somubai* v. *Shivajirao*, 45 Bom. 648 (652), A.I.R. 1921 Bom. 20, 23 Bom.L.R. 110, 60 I.C. 919.

According to the Madras High Court, this Article is not restricted to case of dismissal mentioned in O. 41, r. 19, but applies to other cases of dismissal for default; thus, if an appeal is dismissed under O. XLI, *r. 10 (2)* for failure to give security for costs, such a failure comes under the general description "want of prosecution" which includes default of appearance, failure to pay costs of process, or failure to furnish security for costs (compare Art. 163); and an application for restoration of the appeal falls under this Article—*Sirur* v. *Mythili Ammal*, 61 M.L.J. 688, 136 I.C. 45, A.I.R. 1932 Mad. 170. The Calcutta High Court has expressed a doubt whether such an application would fall under this Article, but says that such an application must be made within a reasonable time, and by analogy of this Article this time should be thirty days—*Goljan Bibi* v. *Nafar Ali*, 28 C.L.J. 163, 40 I.C. 234 (235).

Where an appeal is dismissed because the appellant fails to pay proclamation charges for the service of the unserved respondent, the appeal is dismissed for want of prosecution and as such falls within this Article—*Arjan* v. *Md. Husain*, A.I.R. 1950, E. P. 255.

If on the day fixed for the hearing of the appeal, a pleader appears for the appellant, but he cannot argue the case and applies for an adjournment on the ground that the main pleader engaged by the appellant has gone elsewhere, *held* that the appearance of a pleader who is instructed only to apply for an adjournment is no appearance; consequently, if the application for adjournment is not granted and the appeal is dismissed, such a dismissal amounts to dismissal for want of prosecution (and not a dismissal on the merits)—*Satish Chandra* v. *Ahara Prasad*, 34 Cal. 403 (417) (F.B.). *Cf. Lalta Prasad* v. *Nanda Kishore*, 20 All. 66, and other cases cited in Note 659 under Article 163. Contra—*Patinhare* v. *Vellur Krishna*, 26 Mad. 267.

Time runs under this Article from the date of dismissal of the appeal, and not when the appellant has knowledge that his appeal has been dismissed—*Bissa Mal* v. *Kesar Singh*, 1 Lah. 363 (364), 58 I.C. 789. A comparison between Arts. 163 and 168 on the one hand and Arts, 164 and 169 on the other, will show that while for a plaintiff or appellant seeking to set aside an *ex parte* decree or order limitation runs only from the date of the decree or order, the starting point of limitation in case of a defendant or respondent seeking such relief, where he has not had due notice, is the *date of his knowledge* of the decree or order—*Ibid.*

The provisions of section 6 do not apply to an application under this Article—*Sonubai* v. *Shivajirao*, 45 Bom. 648 (653), 60 I.C. 919.

The period of limitation prescribed by this Article cannot be extended under sec. 5 on any ground whatsoever—*Krishnasami* v. *Chengalroya*, 47 Mad. 171, 76 I.C. 886, A.I.R. 1924 Mad. 114; *Ma Sein* v. *S. T. R. M. Firm*, 142 I.C. 185, A.I.R. 1933 Rang. 96; *Mahi* v. *Jiwan*, 141 P.R. 1879. And so, after the expiry of 30 days from the date of the dismissal, the order of dismissal becomes final. If after the expiry of 30 days the appellant applies for re-admission of the appeal, and the appeal is re-admitted and heard, all the proceedings subsequent to such application, including the re-admission of the appeal, must be set aside as invalid—*Kabir* v. *Khwaja Md. Khan*, 44 P.R. 1882.

This Article has no application when the appellant had no notice of date of hearing of appeal and the appeal is dismissed for default. The reason is that the order of dismissal is not under Or. 41 r. 17 of the Civil Procedure Code—*Governor General in Council* v. *Mohamed Ali*, 3 D.L.R. (All.) 96; and in such a case restoration of the appeal can be done in exercise of the powers under sec. 151 of the Code—*Magraj* v. *Harnarain*, A.I.R. 1951 Rajasthan 47; *Anandi* v. *Jhamman*, A.I.R. 1950 Ajmer 6.

But though an application for re-admission of the appeal is time-barred under this Article, it is open to the Court in a proper case to deal with the application under sec. 151 of the C. P. Code, in the exercise of the inherent powers of the Court, and the statute of limitation will have no application to the exercise of such powers—*Sonubai* v. *Shivajirao*, 45 Bom. 648 (653). But the Madras High Court dissents from this view in *Krishnaswami* v. *Chengalroya*, 47 Mad. 171, 45 M.L.J. 813, A.I.R. 1924 Mad. 114, 76 I.C. 836. Where an appellant dies within thirty days of the dismissal of the appeal for default his legal representative cannot make an application for restoration beyond 30 days from the date dismissal. Sec. 151, C. P. Code does not apply—*Bhanwarlal* v. *Gyarsi*, A.I.R. 1952 Rajasthan 4.

The period of limitation for an application under this Article is 30 days; and the High Court is not entitled to make any Rule varying the period of limitation prescribed by the Limitation Act. Therefore, Rule 9 (2) of the Appellate Side Procedure of the Rangoon High Court, which prescribes a period of 8 days for an application mentioned in this Article, is *ultra vires*—*Abdul Ganny* v. *Russell*, 8 Rang. 380 (F.B.), 127 I.C. 161, A.I.R. 1930 Rang. 228 (231).

169. For the rehearing of an appeal heard *ex parte*.	Thirty days.	The date of the decree in appeal, or, where notice of the appeal was not duly served, when the applicant has knowledge of the decree.

676. Change:—The words "or where notice.....decree" have been added in 1908. In view of this change, the case of *Venkobachar* v. *Ragavendrachar*, 18 M.L.J. 96 which decided that this Article had no application where the respondent had no notice of the appeal, is no longer good law.

677. Scope:—This Article applies only to an application for the rehearing of an *appeal* heard *ex parte*. An application to set aside an *original decree* which was passed *ex parte* falls under Article 164 and not under Article 169, even though the application is made to the appellate Court—*Sankara* v. *Subraya*, 30 Mad. 535 (536).

This Article does not apply where the appeal was heard *ex parte* by reason of the non-appearance of the respondent owing to his *death*. So, if, while the appeal was being heard, the respondent *died*, and an *ex parte* decree was passed in favour of the appellant, the legal representative of the respondent would get the usual period of six [now three] months (Art. 177) for applying to be brought on the record, and Article 169 would not bar such application—*Daulat Rai* v. *Jagat Ram*, 96 P.R. 1918, 47 I.C. 962.

678. Starting point of limitation:—Where notice has not been duly served, the period of limitation runs from the time when the applicant has knowledge of the decree in appeal—*Daulat Rai* v. *Jagat Ram*, 96 P.R. 1918, 47 I.C. 962. The expression "notice of appeal" in this Article should be taken to mean notice (actual or construc-

tive) of the date on which the appeal is disposed of, and not of the filing of the appeal—*Nil Chand* v. *Hamel*, 42 P.L.R. 38, A.I.R. 1940 Lah. 49, 186 I.C. 788. Where the circumstances justifying the service of summons in the manner laid down in Or. 5 r. 17, C. P. Code do not exist and the Court, in accepting the service does not act judicially or in accordance with law by disregarding the provisions of Or. 5, r. 19, C. P. Code, there is no due service within the meaning of this Article—*Nripendra* v. *Mt. Chandramani*, A.I.R. 1952 Assam 45.

The knowledge that is referred to in the latter part of this Article must be a clear knowledge of the *ex parte* decree and not any vague information about the appeal wherein that decree is passed—*Union of India* v. *Abdul Razak*, A.I.R. 1956 Pat. 511.

The Court has no power to extend the time prescribed by this Article—*Sher* v. *Mohan Singh*, 66 P.R. 1885.

An application for rehearing of an appeal presented originally within the period of limitation but returned for amendment and again presented after amendment after the period of limitation, cannot be rejected as out of time. The amendment relates back to the original presentation—*Shama Prasad* v. *Taki Mallik*, 5 C.W.N. 816 (817).

Where the application for rehearing of an appeal has been presented after 30 days, the applicant cannot evade Article 169 by calling his application an application for review of judgment. Such a practice would make this Article a dead letter—*Santu* v. *Arjun Das*, 131 P.W.R. 1912, 13 I.C. 318. *Cf. Lal Devi* v. *Amar Nath*, 57 I.C. 15 (Lah.) and other cases cited in Note 665 under Art. 164.

170. For leave to appeal as a pauper.	Thirty days.	The date of the decree appealed from.	

679. An application for leave to appeal as a pauper must be presented within 30 days as prescribed by this Article. Even if an appeal is at first presented within time on an insufficient Court-fee and then upon demand by the Appellate Court to pay full Court-fee the appellant applies for leave to appeal as a pauper, after the period of limitation prescribed by this Article, the application will be barred—*Mahadeo* v. *Lakshman*, 19 Bom. 48 (50). So also, where a memorandum of appeal was presented to the High Court within 90 days but beyond thirty days, on an insufficient Court-fee, and upon demand made by the Court to pay the deficiency the appellant stated that he was enable to pay it and prayed that the memorandum of appeal should be treated as an application for leave to appeal as a pauper, it was held that the memorandum of appeal, not having been presented within 30 days as required by this Article, could not be treated as an application for leave to appeal as a pauper—*Gati* v. *Rachla Kunwar*, 13 A.L.J. 635, 29 I.C. 1003 (1004).

Section 5 of the Act of 1877 was not applicable to an application for leave to appeal as a pauper, so that the Court could not grant time on any sufficient cause—*Parbati* v. *Bhola*, 12 All. 79. But under the present Act, that section has been extended to an application for leave to appeal. Where the delay in filing an application, for leave to appeal in *forma pauperis* is due to the fact that copies of judgment and decree appealed from could not be obtained within the time prescribed by this Article, the delay should be excused under sec. 5 of the Act—*Ram Charan* v. *Radha Kishan Ji*, A. I.R. 1951 All. 242.

This Article applies to an application for leave to appeal as a pauper, and not to an application for leave *to file cross-objections in forma pauperis*. A cross-objection may be filed within 30 days from the date of service of the notice of the appeal (O. 41, r. 22, C. P. Code) and if the memorandum of cross-objection is presented within time,

the application for leave to file the cross-objection in *forma pauperis* may be accepted by the Court at any time—*Govind* v. *Radha Ballabh*, 15 C.W.N. 205 (211), 12 C.L.J. 173, 7 I.C. 113; *Chander Kala* v. *Dulhin Raj Kuer*, 7 Pat. 827, 10 P.L.T. 387, 119 I.C. 900, A.I.R. 1929 Pat. 31 (32).

Where an application for leave to appeal as a pauper is refused, the Court should grant a reasonable time to the appellant for paying the stamp-puty on the memorandum of appeal and if he pays the Court-fee within the time allowed, the appeal must be deemed to have been filed as on the original date of presentation of the application for leave to appeal as a pauper—*Nallavadiva* v. *Subramania*, 40 Mad. 687 (697). The Limitation Act prescribes the same period of limitation by Arts 152 and 170 respectively for the filing of an appeal itself and for the filing of an application for leave to appeal as a pauper, so that the result would often be that in every case where the pauper application happens to be refused, there would be no time to file a regularly stamped appeal within the period of limitation. Therefore the Court, while dismissing an application for leave to appeal *in forma pauperis*, should grant time to the appellant within which to file his appeal, and if he files his appeal within that period, the appeal is in time—*Bai Ful* v. *Desai*, 22 *Bom.* 849 (856); see also *Girwar* v. *Lakshmi*, 26 All. 329 (330, 331).

171. Under the Code of Civil Procedure, 1908, (V of 1908), for an order to set aside an abatement.	Sixty days.	The date of the abatement.

Articles 171 and 172 of the present Act together correspond to Art. 171 of Act XV of 1877.

680. This Article did not originally occur in the Act of 1877 but was added by the Amendment Act XII of 1879. Prior to the introduction of this Article, it was held that an application to set aside an order to abatement was governed by the three years' rule under Article 178 (now Article 181)—*Bhoyrub* v. *Doman*, 5 Cal. 139. This decision must be deemed as abrogated by this Article.

An application to set aside an order of abatement must be made within sixty days under this Article; otherwise it will be barred—*Laksmi Chand* v. *Kachubhai*, 35 Bom. 393 (395); *Bhani Ram* v. *Narain*, 1916 P.W.R. 12, 31 I.C. 697; but the period of limitation under this Article may be extended, if the applicant can show sufficient cause for the delay under sec. 5. See C. P. Code, O. 22, rule 9 (3). See also *Bhani Ram* v. *Narain*, supra; and *Kandasami* v. *Murugappa*. 16 M.L.T. 547. 26 I.C. 472. In 35 Bom. 393 (395) the application of the son of the deceased plaintiff, who died after the decree for partition was passed but before the partition was carried out in accordance with the decree, to set aside the order of abatement was dismissed as it was presented beyond the period, but the Court exercising its inherent powers to make such orders as may be necessary for the ends of justice, directed that he should be made a defendant, as it was a partition suit in which all parties should be before the Court, and the presence of the deceased plaintiff's son was necessary in order to enable the Court to effectively conduct the partition proceedings.

If no application for substitution is made within the period of six months (now three months) prescribed by Article 176 or 177, the suit will abate (*vide* O. 22, r. 4, C. P. Code); but it will be open to him to make an application under O. 22, r. 9 (2) to set aside the order of abatement (within 2 months from the date of abatement)—

Lachmi Narain v. *Md. Yusuf*, 42 All. 540 (541), 59 I.C. 903; *Secretary of State* v. *Jawahir*, 36 All. 235 (237). Where an application to set aside the order of abatement and to revive the suit was made by the legal representatives of the plaintiff more than six months (but within eight months) after the plaintiff's death, the proper procedure for the Court would be first to declare the suit to have abated, and then at once to pass an order seting aside the abatement and reviving the suit, if sufficient cause was shown for setting aside the order of abatement—*Ram Pratap* v. *Lal Chand*, 9 C.W.N. 369 (370); *Fulbahu* v. *Goculdas*, 9 Bom. 275 (277); *Lachmi Narain* v. *Md. Yusuf*, 42 All. 540 (541).

681. Application by reversioner:—The nearest reversioner to the estate of a deceased Hindu instituted a suit to declare certain alienation made by the widow as void beyond her life-time, and died pending the hearing. Within six months of his death and without hearing any others among the surviving body of reversioners, the lower Court passed an order declaring that the suit had abated. Nearly two years after, the next reversioner applied to set aside the abatement, to be brought on the record as the legal represntative of the deceased, and to be allowed to continue the suit. *Held*, that a suit brought by a reversioner is one really brought on behalf of the entire body of reversioners; if one reversioner dies, the next reversioner can continue it; the suit does not abate, because the next reversioner must be deemed to have been already a party thereto; the present application to continue the suit is not an application to set aside the abatement (because the order of abatement is invalid and need not be set aside) but an application under O. 1, rules 1 and 8 (2), and is governed not by this Article but by Article 181—*Krishnaswamy* v. *Seetalakshmi*, 1918 M.W.N. 888, 9 L.W. 166, 49 I.C. 268.

172. Under the same Code by the assignee or the receiver of an insolvent plaintiff or appellant for an order to set aside the dismissal of a suit or an appeal.	Sixty days.	The date of the order of dismissal.

This was Article 171 of the Act of 1877.

173. For a review of judgment except in the cases provided for by article 161 and article 162.	Ninety days.	The date of the decree or order.

682. Before the enactment of Article 161, an application for review of a judgment of a Small Cause Court was governed by his Article; see *Modan* v. *Purna*, 10 Cal. 297 (298). Now it falls under Article 161.

This Article applies where a review, and not a new trial, is the proper remedy—*Ibid.*

An application for a review of the High Court's decree (appellate) must be presented within 90 days of the decree, and every day's delay over that period must be duly accounted for—*Ramaswami* v. *Venkatanarasimha*, 3 L.W. 244, 32 I.C. 1000.

This Article is restricted to an application for review under the *C. P. Code*, and does not apply to an application under sec. 8 (1) of the Presidency Towns Insolvency Act, for review of judgment passed by the High Court in its Insolvency jurisdiction—*In re Nasse*, 7 Rang. 201, A.I.R. 1929 Rang. 229 (232), 118 I.C. 615. So also, this Article is not attracted to an application for review of the order of an appellate officer exercising his function under the provisions of the Bengal Agricultural Debtors Act—*Sankatara* v. *Mahomed Ibrahim*, 48 C.W.N. 492.

Even assuming that the filing of a copy of the decree is not necessary, an applicant for review would be entitled to the benefit of sec. 12 (2) if he has actually obtained and filed such a copy—*Abdul Aziz* v. *Jai Ram*, A.I.R. 1951 Him-Pra. 67.

Time runs from the date of the decree or order, and not from the date when the applicant made a discovery of a new evidence which is the ground for review. But the Court can extend the time for any sufficient cause—*Debi Dayal* v. *Ambica*, A.I.R. 1929 All. 545 (547), 119 I.C. 99. Nor does time run from the date when the applicant came to have knowledge of the decree or order. But in such a case, it would be open to the applicant to apply for an extension of time under sec. 5, if in fact he could prove that he had no knowledge of the decree or order within 90 days before the application—*Baldeo* v. *Sukhdas*, A.I.R. 1929 All. 485 (488), 121 I.C. 552.

174. For the issue of a notice under the same Code, to show cause why any payment made out of Court of any money payable under a decree or any adjustment of the decree should not be recorded as certified.	Ninety days.	When the payment or adjustment is made.

This Article corresponds to Art. 173A of Act XV of 1877.

683. The provisions of Art. 174 do not apply to a certification by a decree-holder—*Sundar Das* v. *Bishen Das*, A.I.R. 1935 Lah. 194, 15 Lah. 910, 37 P.L.R. 196, 155 I C. 315; *Abid* v. *Kunj Behari*, A.I.R. 1939 All. 581, 184 I.C. 668; *Vidyadhar* v. *Ramzan*, 1952 A.L.J. 556, A.I.R. 1952 All. 715 (F.B.); *Akbar Ali* v. *Ishwar Saran*, A.I.R. 1957 All. 622. The application referred to in this Article is an application under O. XXI, rule 2 (2) of the Civil Procedure Code, made by the *judgment-debtor*. This Article has no application where the *decree-holder* takes steps under O. 21, r. 2, (1) to report satisfaction *suo motu*—*Gopal Das* v. *Gangaram*, 1888 A.W.N. 115. The decree-holder may apply *at any time* for having the payment or adjustment certified to the Court—*Tukaram* v. *Babaji*, 21 Bom. 122 (124). This Article does not impose a time limit for a certification by the decree-holder—*Abid* v. *Kunj Behari*, supra. A judgment-debtor who pleads payment or adjustment must issue notice upon the decree-holder within 90 days of the payment or adjustment, before he can certify payment. But there is no corresponding obligation imposed upon the *decree-holder*. He may certify payment at any time before execution or he may do so in his application for execution—*Eusufzeman* v. *Sanchia*, 43 Cal. 207 (210); *Sheikh Elahi* v. *Nawab Lal*, 4 P.L.J. 159 (169), 50 I.C. 364; *Jatindra* v. *Gagan Chandra*, 46 Cal. 22 (24), 45 I.C. 903; *Balay Md.* v. *Aijanmal*, 26 C.W.N. 529, A.I.R. 1922 Cal. 30, 68 I.C. 780;

Bhajan Lal v. *Cheda Mal*, 12 A.L J. 825, 24 I.C. 215. O. 21, r. 2 contemplates that the decree-holder should certify the payment within a reasonable time in order that it might be recorded by the Court, and the judgment-debtor is protected by the provision that in the event of the decree-holder failing to certify the payment to the Court, the judgment-dector may apply to the Court under O 21, r. 2 (2) for a notice to issue to the decree-holder to show cause why the payment should not be recorded as certified, provision thereof being made under Art. 174 that such application should be made within 90 days of the payment. In view of these provis.ons, apparently, it was not thought necessary to provide any specified time within which the judgment-creditor must certify the payment under O. 21, r. 2 (1)—*Shri Prakash* v. *Allahabad Bank*, 3 Luck. 684 (P.C.), 1929 A.L J. 33, 31 Bom.L.R. 289, 33 C.W.N. 267 (273), 56 M.L.J. 233, A.I.R. 1929 P.C. 19, 114 I C. 581. But he must certify within such time as is required to save the decree from limitation. See Note 691 under Art. 181.

This Article applies to an application made by the representative of the judgment-debtor. He is bound to apply within the period prescribed by this Article—*Panduranga* v. *Vythilinga*, 30 Mad. 537 (540).

If the judgment-debtor makes any payment or adjustment towards the decree, but no application is made to get it certified within the period prescribed by this Article, the judgment-debtor will not be entitled to obtain credit for those payments or to set up the payment or adjustment as a bar to the execution of the decree. See O. 21, r. 2 (3), C. P. Code. He cannot evade the provisions of this Article by securing investigation of the same matter under section 47, C. P. Code during the execution proceedings—*Panduranga* v. *Vythilinga*, 30 Mad. 537 (540); *Golam Muzaffar* v. *Goloke Charan*, 25 I C. 884 (Cal.); *Kutubulla* v. *Durga Charan*, 16 C.W.N. 396 (397), 13 I.C. 424; *Mukunda Lal* v. *Bansidhar*, 50 Cal. 468 (473), A.I.R. 1923 Cal. 342, 76 I.C. 311; *Nistarini* v. *Kasim Ali*, 12 C L.J. 65, 7 I.C. 258; *Maroti* v. *Narayan*, A I.R. 1925 Nag. 374; *Jogendra* v. *Probhat*, 19 C.W.N. 650, 19 C.L.J. 126, 21 I.C. 926; *Monmohan* v. *Dwarka Nath*, 7 I.C. 55, 12 C.L.J. 312; *Kamini Devi* v. *Aghore Nath*, 14 C.W.N. 357, 11 C.L.J. 91; *Mulchand* v. *Champa*, 26 P.L.R. 250, A.I.R. 1925 Lah. 566, 87 I.C. 635. If he were allowed to do so, the provisions of Article 174 would be rendered nugatory—*Kamini Devi* v. *Aghore Kumar*, supra; *Mukunda* v. *Bansidhar*, supra. The Bombay High Court once took a contrary view in *Trimbak* v. *Hari Laxman*, 34 Bom. 575 (580), where Heaton, J. observed (by way of obiter) that the usual way in which the judgment-debtor informs the Court of a payment or adjustment is that when the decree-holder applies for execution, he (the judgment-debtor) pleads a payment or adjustment, and if the Court were debarred from enquiring into the payment or adjustment on the ground that it is uncertified, the effect would be to encourage fraud on the part of the decree-holder. The same view was expressed in another Bombay case—*Hansa* v. *Bhawa*, 40 Bom. 333 (336). But this view has been overruled by the Full Bench in *Mehbunnissa* v. *Mehedunissa*, 49 Bom. 548 (F.B.), 27 Bom.L.R. 403, A.I R. 1925 Bom. 309, 95 I.C. 687, where it has been said that the words of O. 21, r. 2 (3) are plain and unambiguous, and that the executing Court is debarred from considering any allegation that a payment not certified has been made.

This Article speaks of *payment*, and obviously refers only to *money decrees* and not to decrees for *possession of immoveable properties;* an application to record delivery of land made out of Court is not governed by this Article—*Sankaran* v. *Kanara*, 22 Mad. 182 (186). So also, this Article does not apply where the decree is not a decree for payment of money but a mortgage decree for sale in case the money due is not paid—*Mallikarjuna* v. *Narasimha*, 24 Mad. 512 (514). This Article refers to sec. 258, C. P. Code, 1882 (O. 21, r. 2), and that section does not apply to an application made under sec. 89, Transfer of Property Act (now O. 34, r. 5, C. P. Code); therefore the

limitation prescribed by this Article does not apply to any payment made before a final decree is made; and the defendant is not debarred from setting up the plea of payment—*Hatem Ali* v. *Abdul Guffur*, 8 C.W.N. 102 (104). But see *Nistarini* v. *Kasim Ali*, 14 C.W.N. 357, 4 I.C. 402.

Where under the terms of a decree the decree-holders remained in possession of the property, the amounts received by the decree-holders were not "money payable under a decree"; consequently these receipts need not be certified to the Court within 90 days from the date on which they were received—*Yella Reddi* v. *Syed Muhammadali*, 39 Mad. 1026 (1027); *Vaidhinathasamy* v. *Somasundaram*, 28 Mad. 473 (478) (F.B.). [Art. 174 of the old Act of 1877 provided for an application by a creditor of an insolvent judgment-debtor under sec. 353 of the C. P. Code, 1882. But after the law relating to insolvents was transferred from the C. P. Code to the Insolvency Acts, Art. 174 of the Limitation Act of 1877 was repealed. And since the Provincial Insolvency Act prescribes no period of limitation for an application by the creditor of an insolvent to be brought on the schedule of creditors, such applications are not barred by any rule of limitation, and the matter is left to the discretion of the Insolvency Court—*Jhan Bahadur* v. *Bailiff*, 5 Rang. 384, A.I.R. 1927 Rang. 263 (264), 104 I.C. 816.]

Where under the terms of an agreement for an adjustment there would be no adjustment until and unless the judgment debtor is ready to pay the whole of the agreed sum in one payment, and the judgment-debtor would not be entitled to apply for the adjustment to be certified until the amount is tendered, the agreement does not become an adjustment until tender is made, and limitation for an application to record adjustment therefore commences to run only from the date of tender and not from the date of agreement—*Gajanand* v. *Hari Bux*, I.L.R. (1943) 1 Cal. 195, A.I.R. 1943 Cal. 634, 211 I.C. 154.

175. For payment of the amount of a decree by instalments.	Six months.	The date of the decree.

This Article refers to an application made by the judgment-debtor under O. 20, rule 11 (2), C. P. Code.

This Article corresponds to Article 175A of the Act of 1877.

176. Under the same Code to have the legal representative of a deceased plaintiff or of a deceased appellant made a party.	Ninety days.	The date of the death of the deceased plaintiff or appellant.

684. By sec. 2 of the Indian Limitation and C. P. Code Amendment Act (XXVI of 1920) the period of limitation has been reduced from "six months" to "ninety days." But where an appellant had died before the Amendment Act came into operation, his legal representative would get six months' time under this Article as it stood before the amendment—*Ajit Singh* v. *Bhagabati*, 36 C.L.J. 263, A.I.R. 1922 Cal. 291, 70 I.C. 370.

It is interesting to note the changes in the period of limitation. This Article did not exist in the Act of 1871, and the period of limitation for the application was

probably 3 years under the general Article. It appeared for the first time in the Act of 1877, and the period allowed was sixty days; then in 1888 the period was extended to six months. This period was retained in the Act of 1908 until recently it has been curtailed to 90 days. The same remarks apply also to Article 177.

Applications governed by this Article are applications made *in the course of the suit*. If the plaintiff died after having obtained (under s. 88, T. P. Act) a decree for sale on a mortgage and his sons applied more than six months after their father's death, to be brought on the record in the place of the deceased and to have an order absolute for sale made in their favour, *held* that as the *suit was at an end* when the conditional decree for sale was passed, the application was not one made in the course of the suit; this Article therefore did not apply and the application was not barred—*Mehari Bibi* v. *Yakub*, 11 C.W.N. 156 (157, 158).

The words 'plaintiff or appellant' show that this Article applies to applications made in the course of a *suit* or an *appeal*, and not to applications made during *execution* proceedings. Thus, it does not govern an application made by the representative of a deceased *decree-holder* claiming admission to continue the execution proceedings commenced by the deceased. The execution proceeding does not abate on the decree-holder's death; consequently his representative may come in at any time—*Gulab Das* v. *Lakshman*, 3 Bom. 221; *Dulari v. Mohan Singh*, 3 All. 759. See also *Jaggattarini* v. *Rakhal*, 10 C.L.J. 398, 3 I.C. 324. But he must of course apply within the period of limitation prescribed by Article 182—*Dulari* v. *Mohan Singh*, supra. So also, this Article is not applicable to a revision petition as there is nothing in this Article which would attract its provisions to such an application—*Md. Saadat Ali* v. *Administrator, Corporation of City of Lahore*, A.I.R. 1949 Lah. 186, Pak.L.R. (1948) Lah. 225; *Jowala Singh* v. *Malkan*, A.I.R. 1958 Punj. 171.

So also, this Article does not govern an application made by the representatives of a plaintiff coming in to appeal, where the plaintiff has died after decree. The representative has the same period to make his appeal as the plaintiff himself would have had—*Ramananda* v. *Minatchi*, 3 Mad. 236.

Where there are two rival claimants, the right to be brought on the record vests in the one or the other rival claimant from the date of death of the deceased party. The limitation therefore begins to run against both the rival claimants and each would get barred by time at the expiry of the limitation prescribed by Art. 176. One rival claimant who has not applied to be brought on the record within the limitation period, cannot continue a suit revived by his rival's application in time as the proceedings initiated by one rival claimant can never have been intended to enure for the other's benefit. The principle is that where each claims the benefit to continue the suit exclusively to himself, the case is one of clear antagonism between them, and one cannot be said to represent the other at all in the matter of substitution of names —*Amritibai* v. *Ratanlal*, A.I.R. 1927 Nag. 343, 104 I.C. 398. But the matter would be different if both of them had a *joint* right to sue or to continue the suit in their joint names, and only one of them had sued or applied for substitution under a *bona fide* belief that he or she was or could be the sole plaintiff or sole legal representative—*Ibid.* Similarly where one party has been impleaded in time as a legal representative and it is found necessary later on to implead another person as the real legal representative and there is nothing to suggest that the earlier petition impleading the wrong person as the legal representative was not bonafide, there is no question of limitation as such which precludes the latter petition being entertained—*Vedachala* v. *Sivasankari*, (1948) 2 M.L.J. 241, 1948 M.W.N. 610.

This Article has no application to an application to add legal representatives of

deceased applicants under the U. P. Encumbered Estates Act. The reason is that the provisions of O. 22 C. P. Code, in regard to substitution and abatement are inconsistent with the provisions of sec. 50 of the Encumbered Estates Act—*Daya Ram* v. *Surendra*, 1940 O.W.N. 735, A.I.R. 1940 Oudh 394, 189 I.C. 388.

177. Under the same Code to have the legal representative of a deceased defendant or of a deceased respondent made a party.	Ninety days.	The date of the death of the deceased defendant or respondent.

This Article corresponds to Art. 175C of the Act of 1877.

685. Change:—The period of limitation has been reduced from six months to 90 days by section 2 of the Indian Limitation and C. P. Code Amendment Act (XXVI of 1920), and by the Amending and Repealing Act 1923 (IX of 1923).

Section 2 of the Act XXVI of 1920 ran as follows :—

"In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Articles 176, 178 and 179, for the word "Ditto" in the second column, the words "Ninety days," "Six months" and "Ninety days" respectively shall be substituted

It should be noted however that though this section made no mention of Article 177, its effect was to alter the period of six months provided by this Article into ninety days; for by retaining the 'Ditto' in Article 177 and changing the 'Ditto' in Article 176 to 'Ninety days," it practically prescribed 90 days for Article 177.

But as no mention was made of Article 177 in the above section, the Lahore High Court (and then the other High Courts also) held that the Amendment Act, XXVI of 1920 did not reduce the period of limitation of Article 177, as no mention of that Article was made in the body of the Amendment Act, though there might be mention of it in the Statement of Objects and Reasons—*Gobind Das* v. *Rup Kishore*, 4 Lah. 367; *Rup Kishore* v. *Bhagat Govind Das*, A I.R. 1922 Lah. 211, 69 I.C. 748; *Arjun Das* v. *Nanak Chand*, 78 I.C. 771; *Skinner* v. *Makarram Ali*, 92 I.C. 330, A.I.R. 1925 All. 77; *Subramania* v. *Shanmugam*, 49 M.L.J. 363, 92 I.C. 566, A.I.R. 1926 Mad. 65; *Rai Brijnandan* v. *Mahabir*, 97 I C. 316. The same argument was advanced by Counsel in the Calcutta High Court case of *Seodoyal* v. *Joharmull*, 50 Cal. 549, 75 I.C. 81.

In view of this interpretation, this Article has been amended by sec. 2 of the Amending and Repealing Act, 1923 (XI of 1923) as follows :—

"2. In the Third Division of the First Schedule to the Indian Limitation Act, 1908, in Articles 176, 177, and 179, for each of the entries in the second column, the entry "ninety days" shall be substituted ." See *Gazette of India*, 1923, Part IV, p. 54.

The reasons have been thus stated: "This amendment is designed to correct a drafting error which had the effect of leaving the period of limitation in Article 177 as six months though the intention was to reduce it to ninety days." "In a recent case before the High Court of Judicature at Lahore a doubt arose as to the effect of amendments made by Act XXVI of 1920 in the period of limitation prescribed in items 176, 177 and 179 of the Schedule. The object of the present amendment is to substitute for the 'Dittos' the actual periods prescribed"—*Gazette of India*, 1923, Part V, pp. 93, 94.

Moreover, to prevent further misconceptions in the future, the Amending and Repealing Act of 1923 has omitted all 'Dittos' from the 2nd columns of all the Articles of the Limitation Act, and substituted the actual periods of limitation.

686. Scope:—This Article refers to applications under O. 22, rules 4 and 11, C. P. Code, 1908 (secs. 368 and 582, C. P. Code, 1882). But it does not refer to an application under O. 22, rule 2 (sec. 362 of the old Code). Thus, where one of several respondents dies and the right of appeal survives against the surviving respondents

alone, an application for a declaration (under O. 22, rule 2) that the surviving respondents are the legal representatives of the deceased and that the appeal shall proceed against them does not fall under this Article. It would be governed by the general Article 181—*Shamanund* v. *Rajnarain*, 11 C.W.N. 186 (188).

This Article has no application to the case of the death of a person who was not a defendant in a pending suit as this Article prescribes time limit for substituting the legal representatives of a *deceased defendant*. Thus, where pending the disposal of an application to substitute A along with his brothers in the place of their father who died pending the suit, A himself dies, the suit does not abate as against A, as he was not a party defendant to the suit. An application to substitute the heirs of A is not an application for substitution but for amendment of the original application for substitution and is governed by Art. 181 and not by this Article—*Manindra* v. *Santi*, 55 C.W.N. 306, A.I.R. 1951 Cal. 518.

This Article applies to applications made in the course of a suit or an appeal, and does not apply to an application for substitution made in *execution* proceedings. Such an application may be made beyond six months, and the execution proceedings will not abate—*Amolak Ram* v. *Shanu Ram*, 174 P.L.R. 1911, 10 I.C. 405; *Sheogobind* v. *Kishunbansi*, 11 Pat. 546, 138 I C. 91, A.I.R. 1932 Pat. 222 (223). So, where after attachment of the judgment-debtor's property in execution of a decree, the judgment-debtor dies, the decree-holder is not bound to bring upon the record the legal representative of the judgment-debtor. He can execute the decree against the legal representative of the deceased, so long as execution is not barred by limitation—*Bhagwan Das* v. *Jugal Kishore*, 42 All. 570 (573), 18 A.L.J. 735, 57 I.C. 610. But this Article applies to an *appeal* from an order made in execution proceedings. Therefore, if the respondent decree-holder died pending the appeal, an application to bring his legal representatives on record should be made within 90 days as prescribed by this Article, and not within 3 years under Art. 181—*Rajah of Kalahasti* v. *Jagannadha*, 55 Mad. 1006, 63 M.L.J. 827, A.I.R. 1932 Mad. 574 (579), 139 I.C. 402; *Gangu* v. *Muthenna*, 40 L.W. 623, 151 I C. 777, A.I.R. 1934 Mad. 664.

This Article does not apply where the defendant dies *after the decree* in a suit but before any final order has been passed, and his legal representatives apply to be brought on the record in the further proceedings taken in pursuance of the decree. To such a case Art. 181 applies, and as it is an application in a 'pending suit' within the meaning of section 372, C. P. Code (for as there has not been any final order, the suit must be treated as pending) the right to apply under Article 181 accrues from *day to day* and the application is not barred, even though made more than three years after the defendant's death—*Surendra Keshab* v. *Khetter Krishto*, 30 Cal. 609 (following *Kedar Nath* v. *Harra Chand*, 8 Cal. 420). The *ratio decidendi* of the judgment is not very clear. It is difficult to understand why section 372, C. P. Code was applied instead of sec. 368, which is in fact more appropriate here, for that section refers to devolution of interest *by death*, whereas sec. 372 refers to *other cases* of devolution of interest.

In another Calcutta case it was held that if during the pendency of a suit to recover land a sole defendant died, the plaintiff's application to bring in the legal representatives of the deceased fell under section 372, C. P. Code (now O. 22, rule 10) and not under section 368 (now O. 22, rule 4) and that the applicant had three years to make the application under Article 178 (now 181) of the Limitation Act—*Benode Mohini* v. *Sarat*, 8 Cal. 837. The learned Judge in this case gave a very pedantic interpretation to the expression "right to sue" occurring in section 368, and held that the expression was used in the Code in the sense in which the term "cause of action" had an accepted meaning in the English Judicature Act, *i.e.*, it was used with

reference to personal actions for damages, for breach of contract or for tort, and did not apply to suits for recovery of land; and that if a devolution of interest took place by death in a suit relating to possession of land, the case would come not under section 368 but under the general provisions of section 372 which relate to "creations, assignment or devolution of interest." This case has been dissented from by the other High Courts in *Ojagar* v. *Niagat*, 1890 A.W.N. 21, *Jamnadas* v. *Sorabji*, 16 Bom. 27, and *Jafar* v. *Jawaya*, 76 P.R. 1884. The Punjab Chief Court points out that the expression "cause of action" or "right to sue" means any cause of action whether the suit be for damages or for personal property or for immoveable property or for some peculiar relief—*Jafar* v. *Jaiwaya*, supra. Further, since the expression used in the Judicature Act is "cause of action" whereas the C. P. Code uses the simpler expression "right to sue," this latter expression should be taken in its ordinary acceptation and not in the highly technical sense in which the former expression is used in the English Act. Moreover, as pointed out in the Bombay case, section 386 specifically provides for a case where a defendant or sole defendant *dies*, whereas sec. 372 refers to "*other cases* of creation, assignment or devolution of interest"—*Jamnadas* v. *Sorabji*, 16 Bom. 27 (28). In *Venkat Narsimhan* v. *Konda*, A.I.R. 1951 Hyderabad 55 it has been held that where one of the applicants in revision from an interlocutory order in a suit dies during the pendency of the revision and his name is struck off and the revision allowed in respect of the remaining applicants and the case sent back to the original Court for trial on merits, an application for substitution of the legal representatives of the deceased is maintainable in the original Court within reasonable time. In such a case no question of limitation arises. No question of limitation will arise if the petition for substitution was within time and an additional legal representative can always be added though his name was not disclosed in the first petition for substitution —*Reddy* v. *Reddy*, A.I.R. 1954 Hyd. 166 (F.B.).

This Article equally applies to an application for substitution made in the course of a *second appeal* as well as in the course of a first appeal, and is not restricted to applications made during first appeals only. Thus, where the respondent in a second appeal died during the pendency of the appeal, an application by the appellants to substitute his heirs on the record is governed by the six months' rule under Art. 177, and not by the three years' rule of Art. 181—*Upendra* v. *Sham Lal*, 34 Cal. 1020 (1023); *Madhuban* v. *Narain Das*, 29 All. 535 (536); *Sheikh Adam* v. *Balaji*, 10 Bom.L.R. 509. The Madras High Court, however, held that the period of limitation for bringing the legal representative of a deceased respondent in second appeal was three years and not six months—*Susya Pillai* v. *Aiyakannu*, 29 Mad. 529 (F.B.) (overruling *Vakkalagadda Narasimham* v. *Vahizulla*, 28 Mad. 498). This conflict of opinion was due to the defective language of Article 175C of the Act of 1877, the first column of which ran thus: "Under sec. 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made a defendant, or under that section and section 582 of the same Code, to have the legal representative of a deceased plaintiff-respondent or defendant-respondent made a plaintiff-respondent or defendant-respondent." Thus, the words "*plaintiff* respondent" and "*defendant* respondent" led the Madras High Court to hold that this Article was restricted to first appeals only. The language of the present Article is quite general and the word 'respondent' undoubtedly includes a respondent in second appeal.

An application made after passing of the Act of 1908 to bring the legal representative of the deceased respondent who had died during the second appeal while the Act of 1877 was in force, will be governed by the six (now three) months' rule under the present Article, and not by the three years' rule (which was the opinion of the Madras High Court; see 29 Mad. 529, *supra*) of the Act of 1877. This cannot

cause any hardship to the applicant, for though the new Limitation Act had been passed on the 7th August 1908, the period of its coming into operation was postponed till the 1st January 1909; and the applicant could have made his application during this intervening period. If he has not done so, his application must be dismissed as barred. Even the benefit of section 30 does not avail to the applicant as that section has reference to suits and not to applications—*Arayil* v. *Sankaran*, 34 Mad. 292, (293, 294), 20 M.L.J. 347, 5 I.C. 420.

This Article does not apply to proceedings under the Companies Act. So when a member against whom an application is made for an order for payment of the balance of contribution due from him dies pending the application, it is not necessary that his heirs should be substituted within the time prescribed by this Article—*Sumitra* v. *Sitamarhi Sugar Works, Ltd.*, 19 Pat.L.T. 214, A.I.R. 1938 Pat. 287, 173 I.C. 898.

Neither Article 176 nor Article 177 applies to an Income-Tax reference under sec. 66 (1) of the Income Tax Act of 1922 or to an application made by the Commissioner of Income-Tax for bringing the legal representatives of a deceased assessee on the record—*Commissioner of Income-Tax* v. *Varshani*, A.I.R. 1953 All. 414.

Extension of time for sufficient cause:—Under section 372A of the C. P. Code, 1882 (O. 22, r. 9, C. P. Code, 1908), sec. 5 of the Limitation Act was made applicable to applications under sec. 368A of that Code (O. 22, r. 4 of the present Code), so that an application for substitution could have been made beyond the period of six months prescribed by Article 175C, if there was sufficient cause for delay, as section 368 of the C. P. Code in express terms gave power to the Court to enlarge the period of six months for sufficient cause shown. See *Madhuban* v. *Narain*, 29 All. 535 (537); *Chajmal* v. *Jagdamba*, 11 All. 408. Thus, the appellant's ignorance of the fact of the respondent's death was a sufficient cause for not making the application within the time limited—*Gaman* v. *Baksha*, 42 P.R. 1887; *Dadu* v. *Kadu*, 113 P.R. 1907. So also, where the plaintiff acting *bona fide* brought in a wrong person as the legal representative of a deceased defendant within time, but came to know of the error more than six months after the death of the defendant, and then applied to have the right person brought on the record, his latter application would not be barred—*Syed Hossein* v. *Abdur Rahim*, 7 C.W.N. 529. But under the Civil Procedure Code of 1908, the law has been changed, for under O. 22, r. 4, if no application for substitution is made within the time limited (now three months), the suit or appeal shall abate, and that rule gives the Court no power to enlarge the time for sufficient cause. But after abatement, it is open to the plaintiff or appellant to make an application, under O. 22, r. 9, to set aside the order of abatement (within the period of two months prescribed by Article 171) on the ground that he was prevented by sufficient cause from making the application for substitution within time. See *Secy. of State* v. *Jawahir*, 36 All. 235 (237); *Lachmi Narain* v. *Yusuf*, 42 All. 540 (541), 18 A.L.J. 688, 59 I.C. 903; *Daya Singh* v. *Buta Singh*, 188 P.R. 1916, 38 I.C. 7 Where an application under O. 22, r. 4 (1), C. P. C., is made on the day on which a Court is first available, no question of the appeal having abated under O. 22, r. 4 (3) arises —*Kamala* v. *Sridam*, A.I.R. 1954 Cal. 569.

178. Under the Arbitration Act, 1940, for the filing in Court of an award.	Ninety days.	The date of service of the notice of the making of the award.

The present Article was substituted by sec. 49 and Fourth Schedule of the Arbitration Act, 1940 (10 of 1940) (with effect from 1st July, 1940).

Formerly the Article corresponded to Art. 176 of Act XV of 1877,

687. Scope of Article:—This Article applies only when an application is made by the *parties* for filing an award. The *arbitrators themselves* may file an award more than six months after it is made, because the fact of the arbitrators in handing over the award to the proper officers of Court for the purpose of filing it is not an *application* for filing an award; this Article has therefore no application to the case—*Roberts* v. *Harrison*, 7 Cal. 333 (336) (case under the article before amendment of 1940. They can simply make over the award to the Court to be filed—*Ibid* (at p. 337).

This Article may apply to an application by a party to compel an arbitrator to file his award—*Ibid* (at p. 337). This is so even under the Article as it stands at present after the amendment of 1940. The article has reference to the application made by a party to the arbitration proceedings and is not intended to apply to an arbitrator filing an award in Court—*Jhon* v. *Soomar*, I.L.R. (1942) Kar. 466, A.I.R. 1943 Sind 33; *Jayantilal* v. *Chhaganlal*, I.L.R. (1946) Bom. 113, 47 Bom.L.R. 317, A.I.R. 1945 Bom. 417; *Dwarka* v. *Pearylal*, 1948 A.L.J. 524, A.I.R. 1949 All. 234; *Gendalal* v. *Mathuradas*, A.I.R. 1951 Nag. 32; *Dasaratha Rao* v. *Ramaswamy*, (1955) 2 M.L.J. 893, A.I.R. (1956) Mad. 134, 1955 M.W.N. 832. So an award filed more than ninety days after notice of it had been served is not hit by this Article—*Keshri* v. *Megh Raj*, I.L.R. (1942) 2 Cal. 69, A.I.R. 1942 Cal. 542, 203 I.C. 269. The filing of an award is a ministerial act of the arbitrator and has nothing to do with the validity of the award excepting so far as this Article affects the question—*Ebrahim* v. *N. I. Oil Industries*, A.I.R. 1951 Cal. 230, 85 C.L.J. 176.

The 'date of the award' is the date on which it is delivered to the parties, so that they may have notice of its contents and may give effect to it, and not the date on which it is actually written and signed—*Sreenath Chatterjee* v. *Kylash Chunder*, 21 W.R. 248. When the award is not delivered to the parties till some time after it is made, limitation runs from the date of the delivery. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award from the time when he is in a position to enforce it—*Dutta Singh* v. *Dosad Bahadur*, 9 Cal. 575 (578). The date on which a draft award was made is not the date of the award. The draft award is not an award at all, and its publication is not the publication of the award. It is the date of the *final* award that is the starting point of limitation—*Kunja* v. *Banwari*, 4 P.L.J. 394 (410), 48 I.C. 711, (cases under old article).

The notice referred to in the third column of this Article, as amended by the Arbitration Act, 1940 is the notice in writing required by sec. 14 (1) of the Arbitration Act to be given by the arbitrators. Time runs only from the date of the service of the notice under sec. 14 (1) of the said Act—*Jagdish* v. *Sunder*, 27 Pat. 86, A.I.R. 1949 Pat. 393; and has no reference to the time when the arbitrators or umpire are requested to file the award—*Lachmi* v. *Gobordhan*, A.I.R. 1948 Pat. 171.

The period of limitation prescribed by this Article cannot be extended by section 5, as that section does not apply to an application for filing an award—*Ram Ugrah* v. *Achraj Nath*, 38 All. 85 (91), 13 A.L.J. 1115, 31 I.C. 899.

If an award is not made a rule of Court (*i.e.*, filed) within the period prescribed by this Article, the award does not become invalid and unenforceable. Therefore, if the plaintiff brings a suit, and the defendant meets the plaintiff's suit by producing an award (which had not been filed within the period of limitation prescribed by this Article) praying that a decree be passed in terms of the award, the Court may nevertheless pass a decree in the plaintiff's suit in terms of the award—*Thakur Din* v. *Bhagwan Din*, 124 I.C. 448, A.I.R. 1930 Oudh 51. An application filed along with

an award for making it a rule of the Court is not governed by this Article—*Jaikishen* v *Ram Lal*, 46 P.L.R. 232, A.I.R. 1944 Lah. 398; *Radha Kishen* v. *Madho Krishna*, A.I.R. 1952 All. 856.

A person in whose favour an award is made may, instead of filing an application under para. 20 of Sch. II, C. P. Code, file a regular suit, and in that case the provisions of Art. 178 have no application—*Retan Chand* v. *Rup Lal*, A.I.R. 1935 Lah. 134.

179. By a person desiring to appeal under the Code of Civil Procedure, 1908, to the Supreme Court, for leave to appeal.	Ninety days.	The date of the decree appealed from.

This Article corresponds to Article 177 of the Act of 1877.

The words "Code of Civil Procedure" were substituted for the words "same Code" by sec. 49 and Fourth Schedule of the Arbitration Act, 1940 (10 of 1940) (with effect from 1st July, 1940) and the words "the Supreme Court" were substituted for the words "His Majesty in Council" by the Adaptation of Laws Order, 1950 issued under the Constitution of India.

688. By section 2 of the Indian Limitation Act and C. P. Code Amendment Act (XXVI of 1920) the period of limitation has been reduced from 'six months' to 'ninety days'. "Delay in the conduct of Indian appeals to the Privy Council has been the subject of much adverse comment in judgment of the Judicial Committee and remedial measures have been undertaken for some time past. His Majesty's Order in Council, dated the 9th February 1920 has already been issued and the present Bill has been drafted with the object of giving legislative sanction to various further measures calculated to expedite the prosecution of those stages of these appeals whiich take place in India"—*Statement of Objects and Reasons* (Gazette of India, 1920, Part V. page 156). In introducing the Bill, Sir William Vincent observed:—"This Bill is intended to reduce the delays which have occurred in Privy Council appeals. It affects other cases in certain respects also. The question of these delays in the Privy Council has exercised the minds of the Secretary of State, the Government of India, and their Lordships of the Judicipal Committee for some years. On many occasions the Privy Council have criticized the want of expedition in these appeals with great severity, at times they have almost become plaintive about this..... This Bill therefore provides a reduction of the period within which a person must apply for leave to appeal to the Privy Council"—*Gazette of India*, 1920, Part VI, page 1000.

An application for leave to appeal under sec. 66A, Income Tax Act involves the same considerations as are involved in sec. 109 (c) of the C. P. Code; consequently it is an application under the C. P. Code, and is therefore governed by this Article and not by Art. 181—*Commissioner of Income Tax* v. *Shaw Wallace & Co.*, 59 Cal. 251 36 C.W.N. 127 (129), A.I.R. 1932 Cal. 587, 139 I.C. 236.

Where two separate appeals against the decrees of two separate suits were disposed of by the High Court in a single judgment, there should still be two separate applications for leave to appeal to the Privy Council. Where one such application was made with regard to both the suits within the period of limitation, and on the direction of the High Court to make two separate applications, two applications were

subsequently made after the period of limitation, the only remedy of the applicant was to amend the first application (which was presented within time) so as to make it cover one of the two suits—*Gopal Singh* v. *Johnstone*, 33 P.L.R. 455, A.I.R. 1932 Lah. 441 (442), 140 I.C. 17.

It would seem that this Article applies by its language directly to appeals to the Supreme Court from judgments, orders or decrees passed in Civil Proceedings—*Azambad Tea* v. *Suraj Ratan*, A.I.R. 1958 Cal. 296.

689. Extension of time:—The period prescribed by this Article cannot be extended on account of the minority of the applicants, as sec. 6 does not apply to an application for leave to appeal to the Privy Council—*Thurai* v. *Jainilabdeen*, 18 Mad. 484 (485); *Narendra* v. *Oudh Commercial Bank*, 5 O.L.J. 153, 46 I.C. 68 (70).

But an application under this Article may be admitted after the period on proof of sufficient cause under sec. 5.

The time spent in obtaining a copy of the decree or the copy of the judgment incorporating the order sought to be appealed against will be excluded under sec. 12, sub-sections (2) and (3) in computing the period of limitation. See Note 133 under sec. 12, and *Dharwar Bank* v. *Deshpande*, A.I.R. 1954 Bom. 525, *Rajasthan State* v. *Nathmal*, 1952 Raj. 180; *Paokhohen* v. *Konsam Amujao Singh*, 1956 Manipur 33 and *Baldeo Pershad* v. *Dwarika*, A.I.R. 1957 All. 334 (F.B.).

Time taken in prosecution of useless review application cannot be excluded—*Mahabir* v. *Mukhtar*, 1941 O.A. (Supp.) 880, 1941 R.D. 792; *Anant* v. *Lal Mohomad*, 1945 R.D. 405.

In computing the period of limitation for the purpose of an application for leave to appeal to the Supreme Court against a judgment of the Calcutta High Court passed in its revisional jurisdiction, it is not possible to take into account the date on which the Assistant Registrar may sign the cost sheet—*Dudhewalla* v. *Govindram*, A.I.R. 1953 Cal. 13.

180. By a purchaser of immoveable property at a sale in execution of a decree for delivery of possession.	Three years.	When the sale becomes absolute.

690. Scope:—This Article is new, and did not exist in the Act of 1877. It refers to an application under O. XXI, rule 95, C. P. Code.

According to the old Limitation Act, an application under sec. 318, C. P. Code, 1882 (O. XXI, r. 95, C. P. Code, 1908) by a purchaser at a Court sale to be put into possession fell under Art. 178 (now 181); and time ran from the date of grant of the sale-certificate—*Hanmantrav* v. *Subaji Girmaji*, 8 Bom. 257; *Kashinath* v. *Durning*, 17 Bom. 228; *Basapa* v. *Marya*, 3 Bom. 433; *Sultan Saheb Marayakar* v. *Chidambaram*, 32 Mad. 136; according to the Allahabad High Court, time ran from the date of confirmation of the sale—*Ranjit* v. *Baldeo*, 30 All. 390. But now such an application falls under this Article which specifically provides for the case, and not under the general Art. 181 —*Viswasundara* v. *Paidigadu*, 50 M.L.J. 72, A.I.R. 1926 Mad. 385, 91 I.C. 485.

Where a sale was confirmed before the Limitation Act of 1908 came into force, but the application for possession of the purchased property is made after the coming into operation of the new Act, it is governed by Art. 180 and is barred if not brought within

three years from the date when the sale became absolute—*Hussain Bux* v. *Becha*, 27 I.C. 420 (Cal.); *Arunagiri* v. *Uthando*, 12 M.L.T. 311, 17 I.C. 242.

An application by a *decree-holder* purchaser for delivery of possession of the properties purchased by him in Court auction is not an application to execute the decee under Article 182 but is governed by this Article—*Ramasami* v. *Abdul Aziz*, 19 M.L.T. 164, 32 I.C. 993 (following 32 Mad. 136). See also the recent Calcutta case *Neckbar* v. *Prakash*, 56 Cal. 608, A.I.R. 1930 Cal. 86 (87), 120 I.C. 107, where the application was by the decree-holder purchaser, and Art. 180 was held to be applicable. The Nagpur Court is of opinion that such an application falls under sec. 47, C. P. Code, *i.e.*, it is a matter relating to the execution, discharge or satisfaction of the decree, and is governed by Article 182, and not by Article 180. Where the auction-purchaser is the decree-holder himself, and he presents an application for possession, he occupies therein, in reality, a dual position. He is, from one point of view, the auction-purchaser applying to be put in possession of his property, while from another point of view he is the decree-holder claiming to have his decree fully satisfied by having, so to speak, the proceeds of the decree made over to him—*Balaji* v. *Anandrao*, A.I.R. 1927 Nag. 294, 103 I.C. 335. In *Pillay* v. *Madappan*, A.I.R. 1952 Tra-Co. 37 it has been held that this Article applies to an application for delivery of possession of immoveable property purchased at a sale held by the Civil Court in execution of a certificate issued by the Registrar of Co-operative Societies under sec. 59 (a), Travancore Co-operative Societies Act if it be held that the decision of the Registrar when it is filed in a Civil Court becomes in effect a decree of the Civil Court. As to whether such application amounts to a step-in-aid of execution, see Note 715 in Art. 182, under sub-heading *"To be put into-possession."*

This Article refers to applications; a similar *suit* is governed by Article 137 or 138. The mere fact that an application by a purchaser for delivery of possession is rejected as made beyond the period of 3 years is no bar to a suit for possession, the period for which is twelve years—*Sheo Narain* v. *Nur Muhammad*, 29 All. 463 (466); *Sêru Mohan* v. *Bhagaban*, 9 Cal. 602; the purchaser may proceed either by a suit or by an application—*Ishwar* v. *Jai Narain*, 12 Cal. 169; *Sevu* v. *Muthuswami*, 10 Mad. 53; *Kishori Mohan* v. *Chunder Nath*, 14 Cal. 644. As regards the question whether a *suit* for possession is maintainable where the *decree-holder* is himself the purchaser, see Note 581 under Article 138. The word "purchaser" includes cases of a decree-holder purchaser and a purchaser who is not a decree-holder—*Abdul Aziz Sahib* v. *Chokkan Chettiar*, A.I.R. 1935 Mad. 803, 69 M.L.J. 821, 1935 M.W.N. 926, 58 Mad. 893, 42 L.W. 375, 159 I.C. 279. Art. 180 applies to an application for possession by a decree-holder purchaser; the residuary Article 181 has no application. Art. 182 also cannot apply as the application for delivery cannot be regarded as an application for execution—*Abdul Aziz Sahib* v. *Chokkan Chettiar*, A.I.R. 1935 Mad. 803, 69 M.L.J. 821, 1935 M.W.N. 926, 42 L.W. 375: 58 Mad. 893, 159 I.C. 279; *Ramakrishnayya* v. *Venkata*, A.I.R. 1954 Mad. 831, (1954) 2 M.L.J. 89.

690A. Starting point of limitation:—In considering the meaning of the words "when the sale becomes absolute" regard must be had not only to the provisions of O. 21, r. 92 (1) of the C. P. Code, but also to the other material sections and orders of the Code including those which relate to *appeals* from orders made under O. 21, r. 92 (1). The result is that where there is an appeal from the order of the Court of first instance disallowing an application to set aside the sale, *the sale will not become absolute until the disposal of the appeal*, even though the Court of first instance may confirm the sale, as it was bound to do, when it decided to disallow the above-mentioned application—*Chandra Mani* v. *Anarjan*, 61 Cal. 945, 38 C.W.N. 901, A.I.R. 1934 P.C.

134 (136), 150 I.C. 11 (reversing *Anarjan* v. *Chandramani* 56 C.L.J. 574, 134 I.C. 1188, A.I.R. 1932 Cal. 75). The same view was taken by the Calcutta High Court in *Chhogan Lal* v. *Behari Lal*, 147 I.C. 881, A.I.R. 1933 Cal. 311. The contrary view taken in *Neckbar* v. *Prakash Chandra*, 56 Cal. 608, 120 I.C. 107, A.I.R. 1930 Cal. 86 must be deemed as overruled by the above Privy Council decision. See also *Kamakshi* v. *Arukkani*, A.I.R. 1957 Mad. 440; (1957) 1 Mad.L.J. 180. When the formal order of confirmation of an execution sale is challenged within three years by a petition under secs. 47 and 151, C. P. Code, the order itself comes into question, and the sale becomes absolute not on the date when the formal order of confirmation was passed but on the termination of the litigation commenced by the judgment debtor for having the sale set aside—*Krishnadatta* v. *Sindhuram*, A.I.R. 1950 Assam 89.

The sale to a decree-holder purchaser was confirmed in 1911. He made an application in 1913, which resulted in an order "Deliver" passed on 7-7-13, but on 30-7-13 the Court ordered on the same petition: "No one to take delivery; petition dismissed." In 1915 the purchaser again applied for delivery of possession. It was held by Abdur Rahim J. (Oldfield J. *contra*) that the order of dismissal on 30-7-13 not having been made after hearing the purchaser, it must be deemed to be a dismissal only for statistical purposes, and that the application of 1915 might be treated as one for the execution of the general order for delivery made in 1913, and being in that view a continuation of the prior proceeding, was not barred by Article 180. Oldfield J. however held that the prior application having been dismissed on account of the purchaser's default, the prior proceedings could not be held to have continued thereafter, and that the application of 1915 could not therefore be regarded as a continuation of the previous application or as an application for further execution of the general order for delivery passed in the prior execution proceeding—*Nandur Subbayya* v. *Rajah Venkatramayyah*, 1918 M.W.N. 214, 43 I.C. 155, 7 L.W. 16. The view of Oldfield J. has been followed in *Viswesundara* v. *Paidigadu*, 50 M.L.J. 72, A.I.R. 1926 Mad. 385, 91 I.C. 845; *Md. Amin* v. *Co-operative Society*, (1949) 2 M.L.J. 682, 1949 M.W.N. 727, A.I.R. 1950 Mad. 234; and in *Ramakrishnayya* v. *Venkata*, *A.I.R.* 1954 Mad. 831, (1954) 2 M.L.J. 89 and the view of Abdur Rahim J. has been supported by the recent case of *Appavoo* v. *Lakshmana*, 65 M.L.J. 305, 145 I.C. 397, A.I.R. 1933 Mad. 745 (747, 748).

The period of limitation runs from the date on which the sale 'becomes absolute.' A sale does not necessarily become absolute as soon as it is confirmed. Thus, where a sale is confirmed without opposition, but afterwards a petition is made under O. 21, r. 90 to set aside the sale, the period of limitation for an application under this Article begins to run from the date of the order disallowing the petition to set aside the sale, and not from the date of the first confirmation, because the sale does not become absolute within the meaning of this Article until the application to set aside the sale has been disallowed and the sale upheld, though the order confirming sale had been passed before the application to set aside the sale was made—*Muthukorakkai* v. *Madar Ammal*, 43 Mad. 185 (197, 198) (F.B.) virtually overruling *Arunagiri* v. *Uthando*, 12 M.L.T. 311, 17 I.C. 242. But the Calcutta High Court dissents from this view and holds that the period of limitation runs from the date of the confirmation of the sale under O. 21, r. 92, and the fact that the judgment-debtor afterwards makes an application under O. 21, r. 90 to set aside the sale, does not entitle the auction-purchaser to compute the period from the date of the final dismissal of the application; because the mere fact that the judgment-debtor has made an application for setting aside the sale does not prevent the purchaser from making his application for delivery of possession —*Neckbar* v. *Prakash*, 56 Cal. 608, A.I.R. 1930 Cal. 87 (89), 120 I.C. 107 (dissenting from 43 Mad. 185, and distinguishing *Baijnath* v. *Ramgut*, 23 Cal. 775 P.C.). In this case (56 Cal. 608) the learned Judge did not consider it necessary to decide whether the

purchaser's right to apply for delivery of possession was *suspended* during the pendency of the judgment-debtor's application to set aside the sale, because even then the application was time-barred.

An execution sale was confirmed in April 1908, but the judgment-debtor appealed and the appeal was compromised, the judgment-debtor agreeing to pay the decretal amount in June, 1910, upon which the sale was to be set aside. He paid nothing, and in July 1912 the decree-holder purchaser applied for delivery of possession. *Held* that the compromise on appeal had the effect of suspending the right of the decree-holder purchaser to apply for delivery of possession; and the right was revived on June 1910 when the judgment-debtor failed to pay under the terms of the compromise, and that therefore the present application was not barred—*Janak Prosad* v. *Net Ram*, 22 I.C. 497 (Cal.).

In computing the period of limitation under this Article, the time during which an *application* under O. 21, r. 90 for setting aside the sale is pending will be deducted, as the sale will be deemed to be absolute when such application is disallowed (43 Mad. 185); but the period of pendency of a *suit* filed by the judgment-debtor to set aside the sale, after the dismissal of the application under O. 21, r. 90, cannot be deducted—*Sornam* v. *Thiruvazhiperumal*, 51 M.L.J. 126, 96 I.C. 657, A.I.R. 1926 Mad. 857.

Under Art. 180 an application by a purchaser of immoveable property at a sale in execution of a decree for delivery of possession is to be made within 3 years from the time when the sale becomes absolute. But where the auction purchaser's application for delivery of passession is resisted by a third person, and the application is ultimately dismissed for default, and that third party obtains a declaration that the auction purchaser has obtained no right by his purchase, but the declaration is set aside on appeal whereupon the auction purchaser again applies for delivery of possession, the auction purchaser is entitled to avail of a fresh cause of action arising by reason of the removal of the cancellation of the cause of action for delivery of possession by the declaratory decree. The real effect of the first order dismissing the application for delivery of possession for default, is that the application for delivery of possession was not finally disposed of but remained pending in the eye of the law, and the second application must be treated as one for continuance or revival of the former one. Hence the second application is not barred by law although filed more than three years after the confirmation of the sale—*Jateendrachandra* v. *Rabateemohan*, A.I.R. 1935 Cal. 333.

181. Applications for which no period of limitation is provided elsewhere in this schedule or by section 48 of the Code of Civil Procedure, 1908 (V of 1908).	Three years.	When the right to apply accrues.

This Article corresponds to Art. 178 of Act XV of 1877.

691. Scope of the Article:—The operation of this Article is limited to applications made under the *Civil Procedure Code*. Since all the other applications in this division are applications under the Code, it is natural to conclude that the applications referred to in this Article are applications *ejusdem generis*, *i.e.*, applications under the C. P. Code—*Bai Manekbai* v. *Manekji*, 7 Bom. 213 (214); *Wadia* v. *Purshotum*, 32

Bom. 1; *Madhab Mani* v. *Lambert*, 37 Cal. 796; *Shiam Lal* v. *Official Liquidators*, 55 All. 912 (F.B.), 1933 A.L.J. 1203, A.I.R. 1933 All. 789; *Empress* v. *Ajudhia Singh*, 10 All. 350; *Gnanamuthu* v. *Vana*, 17 Mad. 379 (381); *Ranbir* v. *Drigpal*, 16 All. 23; *Tiluck Singh* v. *Parsotam*, 22 Cal. 924; *Rahmat Karim* v. *Abdul*, 34 Cal. 672 (674); *In re Ishan Chunder*, 6 Cal. 707 (708); *Jagdip* v. *Halloway*, 2 P.L.J. 206 (208), 39 I.C. 653. But see *Messrs. Shah & Co.* v. *Messrs. Ishar Singh Kripal Singh*, 93 C.L.J. 66, where the operation of this article has been extended to applications under sec. 33 of the Arbitration Act.

This Article should be read with sec. 48 C. P. Code. But this Article and sec. 48, C. P. Code are independant or parallel provisions, different in their scope and object—*Yeshwant* v. *Walchand*, A.I.R. 1951 S.C. 16.

An application to enforce an award by the Registrar, Co-Operative Societies, in accordance with the procedure laid down by Rule 14 (5) of the Statutory Rules framed under the Co-operative Societies Act is an application under the Civil Procedure Code and is governed by Art. 181—*Co-operative Credit Society, Arungunam* v. *Chinaswami Udayar*, A.I.R. 1937 Mad. 31, 71 M.L.J. 759, 44 L.W. 720. But a contrary view has been taken by the same High Court in *Subba Rao* v. *Co-operative Urban Bank*, I.L.R. (1940) Mad. 649, (1940) 1 M.L.J. 268, A.I.R. 1940 Mad. 635 where it has been held that Art. 182 applies and not this Article to an application for execution of an award passed under the Madras Co-operative Societies Act as under the rules framed under the said Act the Court shall enforce the award as if it was a final decree of the Court. The Bombay High Court has also held that the proper article of limitation applicable to the execution of an award under the Bombay Co-operative Societies Act by the Civil Court is Art. 182 and not this Article—*Muppanna* v. *Gajanan Urban Co-operative Bank*, I.L.R. (1947) Bom. 143, 49 Bom.L.R. 168, A.I.R. 1947 Bom. 375; *Bhim Sen* v. *Urban Bank*, I.L.R. (1947) Bom. 44, 49 Bom.L.R. 160, A I.R. 1947 Bom. 370. The reason given is that awards which have to be executed in the same manner as decrees of Civil Courts, can legitimately be regarded as "decrees of Civil Courts" within the meaning of Art. 182. An application for delivery of possession of immoveable property purchased at a sale by a Civil Court in execution of a certificate issued by the Registrar of Co-operative Societies under sec. 59 (a), Travancore Co-operative Societies Act is governed by this Article—*Pillay* v. *Madappan*, A.I.R. 1952 Tra-Co. 37.

Under sec. 12 (2), C. P. Debt Conciliation Act, a registered agreement before the Board has the force of a decree and even though it is not in fact a decree passed by the Court of Civil jurisdiction, still for the matter of enforcement that is regarded as a decree of the Civil Court. Hence limitation for an application for execution of such a registered agreement is governed by this Article—*Rukhadu* v. *Krishnarao*, I.L.R. (1948) Nag. 63, 1948 N.L.J. 24, A.I.R. 1948 Nag. 147.

This Article does not apply to application under the Probate and Administration Act or Succession Certificate Act (now incorporated in the Indian Succession Act, 1925) for probate, letters of administration or succession certificate (though of course long and unexplained delay in making an application for probate may throw doubt on the genuineness of the will)—*In re Ishan Chunder*, 6 Cal. 707 (709); *Kalinath* v. *Nagendra Nath*, 62 C.W.N. 790; *Gnanamuthu* v. *Vana Koilpillai*, 17 Mad. 379 (381); *Bai Manekbai* v. *Manekji*, 7 Bom. 213 (214); *Kashi Chundra* v. *Gopi Krishna*, 19 Cal. 48 (50); *Janaki v. Kesavalu*, 8 Mad. 207 (208); or to an application under the Religious Endowment Act—*Janaki* v. *Keshavalu*, 8 Mad. 207 (208). It has no application to proceedings taken under the Bhagdari Act (Bombay Act V of 1862)—*Collector* v. *Desai*, 7 Bom. 546 (551). It has no application to an application under the Telegraph Act—*Abdul* v. *Punjab, Govt.*, I.L.R. (1943) Lah. 677, 44 P.L.R. 275, A.I.R. 1942 Lah. 186. It does not apply to an application

made under sec. 214 of the Indian Companies Act, 1882—*Connel* v. *Himalayan Bank*, 18 All. 12 (15). It does not apply to applications for enforcement of costs by a solicitor against his client by the summary method provided by the Rules of the High Court—*Wadia* v. *Purshotam*, 32 Bom. 1; *Narendra Lal* v. *Tarubala*, 48 Cal. 817, 25 C.W.N. 800, 66 I.C. 209; *Lakhimoni* v. *Dwijendra*, 46 Cal. 249 (253), 23 C.W.N. 473. It cannot apply to proceedings to set aside a fraudulent transfer under sec. 53, Provincial Insolvency Act—*Daryai* v. *Kunj Lal*, A.I.R. 1926 Lah. 553; or to an application made by a Receiver under sec. 36 of the Provincial Insolvency Act, 1907—*Duraiya* v. *Venkatarama*, 12 L.W. 535, 60 I.C. 123. (But see *Mir Afzal* v. *Mir Aman*, 107 P.L.R. 1914, 23 I.C. 397 and *Nikka Mal.* v. *Marwar Bank*, 151 P.R. 1919, 52 I.C. 188), or to proceedings under sec. 4 of the said Act—*Ambabai* v. *Dani*, I.L.R. (1948) Nag. 506, 1948 N.L J. 264, A.I.R. 1948 Nag. 367. So also it has no application to proceedings under sec. 55 or sec. 56 of the Presidency Towns Insolvency Act—*Hurdutrai* v. *Official Assignee*, 52 C.W.N. 343. The Rangoon High Court is of opinion that this Article is not restricted to applications under the Civil Procedure Code. If the third Division of the Schedule was intended by the legislature to apply only to applications under the Code, then the express reference in certain Articles in this division to applications under the Code and the omission of such reference in other Articles seem to be inexplicable—*Jhan Bahadur* v. *Bailiff*, 5 Rang. 384, 104 I.C. 816, A.I.R. 1927 Rang. 263 (264). And so this Article has been applied by that High Court to an application under sec. 8 (1) of the Presidency Towns Insolvency Act for the review of a judgment passed by the High Court in its involvency jurisdiction—*In re L.W. Nasse*, 7 Rang. 201, A.I.R. 1929 Rang. 229 (232), 118 I.C. 615. According to the Lahore High Court also this Article is not restricted to applications under the C. P. Code but refers to all applications for the making of which the Civil Procedure Code gives authority. Thus, an application to set aside an *ex parte* order passed under sec. 150 of the Indian Companies Act (1882), is an application under O. 9, r. 13 of the C P. Code (read with sec. 141 of that Code), and is therefore an application governed by Article 181 of the Limitation Act—*Hindustan Bank* v. *Mehraj*, 1 Lah. 187 (191), 55 I.C. 820. So also, in some cases, Article 181 has been applied to an application to set aside a sale under sec. 173 of the Bengal Tenancy Act, as such application is not provided for by any other Article of the Limitation Act, or by Sch. III of the B. T. Act—*Chand Monee* v. *Santo Monee*, 24 Cal 707, (709, 710); *Chandrama* v. *Maharaja of Dumraon*, 38 I.C. 209 (Pat.); *Ananta Charan* v. *Nimai*, 6 Pat. 366, A.I.R. 1927 Pat. 177, 101 I.C. 564. So also, an application under sec. 173 (3) of the Bihar Tenancy Act for setting aside a sale is governed by this Article—*Radha* v. *Ram*, 25 Pat. 692, A.I.R. 1947 Pat. 391. This Article applies to the case of an application for pre-emption under sec. 26F, Bengal Tenancy Act, by a co-sharer tenant who has not been served with a notice under sec. 26C and his application is in time if made within three years of the sale. Time runs from the date of registration and not from the execution of the document—*Gopi* v. *Namai*, A.I.R. 1951 Cal. 551. This Article is the proper article applicable to an application by a mortgagor in case of a usufructuary mortgage to get back possession under sec. 26G, Bengal Tenancy Act. Such an application is barred if not made within 3 years of the enactment of that section—*Abinash* v *Gour*, 55 C.W.N. 489, A.I.R. 1952 Cal. 76.

But this Article does not govern an application made under an Act which is a *complete code* in itself. Therefore, it does not apply to an application under the Provincial Insolvency Act by a creditor of an insolvent to be entered in the schedule of creditors, because that Act is intended to be a complete code in itself and to prescribe its own period of limitation; and as the Prov. Insolvency Act prescribes no period of limitation for such applications, it follows that such applications are not barred by

any rule of limitation, and the matter is left to the discretion of the Insolvency Court—*Jhan Bahadur* v. *Bailiff*, 5 Rang. 384, A.I.R. 1927 Rang. 263 (264), 104 I.C. 816.

Where limitation is specifically provided for by the Rules framed by the High Court under the Indian Companies Act for filing objections to a notice served on a contributory as regards his having been placed on the list contributories, the specific provision must prevail and not the general provision in the Limitation Act—*Shanti Lal* v. *Lyallpur Bank*, A.I.R. 1935 Lah. 645.

This Article is restricted to applications made to a Court asking it to exercise powers, which unless moved by such applications, it is not bound to exercise *suo motu*. It does not apply where a Court is asked to do an act which it is bound to do and has no discretion to refuse to do. Thus, a Court is bound of its own motion to bring a decree in conformity with its judgment, under sec. 206, C. P. Code, 1882 (O. 20, r. 6); no application is necessary for that purpose; even if an application is made, it is not subject to the rule of limitation under this Article—*Darbo* v. *Kesho*, 9 All. 364 (365), (dissenting from *Gaya Prasad* v. *Sikri Prashad*, 4 All. 23); *Kalu* v. *Lalu*, 21 Cal. 259; *Shivappa* v. *Sivpanch*, 11 Bom. 284; *Dhan Singh* v. *Basant*, 8 All. 519. So also, where an order for partition has been made in a suit, it is the duty of the Court to effect the partition, and no application need be made by the plaintiff for the purpose of effecting a partition. Even if an application is made Article 181 does not apply to it, and such application is not barred by reason of the fact that it is made more than three years after a previous application. Article 182 also cannot apply, as it is a proceeding in the suit itself and not a proceeding in execution, no final decree having been made in the suit—*Dwarka Nath* v. *Barindra*, 22 Cal. 425 (434). Thus where a Court passes a decree for partition of lands assessed to the payment of revenue to the Crown under Or. 20 r. 18 (1) C. P. Code, and refers it to the Collector to carry out the partition under sec. 54, C. P. Code, the Court's duties are at an end, and a darkhast asking the Court to send the papers to the Collector is not necessary. If the same is made it is not governed by this article as there is no limitation for such an application—*Ramabai* v. *Anant*, I.L.R. (1945) Bom. 799, 47 Bom.L.R. 447, A.I.R. 1945 Bom. 338 (F.B.). An application by the mortgagor for payment of money under O. 34, r. 8 is not governed by this Article, because no application is at all necessary for the purpose—*Bhawani Prasad* v. *Ram Kanta*, 28 O.C. 261, 90 I.C. 418, A.I.R. 1925 Oudh 649. The appointment of a Commissioner is a matter which it is competent for a Court to make without being put in motion by any party to the litigation, and therefore an application by a party with reference to such matter is not governed by this Article—*Latchmanam* v. *Ramanathan*, 28 Mad. 127 (129). So also, it does not apply to an application to the Court to perform the functions of a ministerial character; *e.g.*, an application by an auction-purchaser for a certificate of sale—*Vithal Janardan* v. *Vithojirav*, 6 Bom. 586 (587) (dissenting from *Re. Khaja Pathanji*, 5 Bom. 202); *Devidas* v. *Pirjada*, 8 Bom. 377 (380) (dissenting from 5 Bom. 202 and *Tukaram* v. *Satvaji* 5 Bom. 206); *Kylasa* v. *Ramasami*, 4 Mad. 172 (173); or to an application for preparation of decree-sheet—*Rupchand* v *Kanhaya*, 42 P.L.R. 148, A.I.R. 1940 Lah. 202; it does not apply to an application made in a *pending case* (*e.g.*, an application to receive a suit in which no final order has been made); such an application is not governed by any rule of limitation—*Ramanathan* v. *Alagappa*, 53 Mad. 378, A.I.R. 1930 Mad. 528; *Ram Nath* v. *Umacharan*, 3 C.W.N. 750; *Surendra* v. *Khetter*, 30 Cal. 609; *Kedarnath* v. *Harra Chand*, 8 Cal. 420; *Madhab Moni* v. *Lambert*, 37 Cal. 796 (806); or to an application to revive a suit and restore it to the board, or to transfer a case from one board to another or to transfer a case to the bottom of the board and so forth—*Govind Chunder* v. *Rungunmony*, 6 Cal. 60 (64). This Article does not apply to an application asking the Court to pass judgment on an award filed in Court, because it is an act which the Court is bound to do—

Ishwardas v. *Dosibai*, 7 Bom. 316 (322); or to an application to bring the attached property to sale—*Phiraya* v. *Adu Ram*, 179 P.R. 1882.

An application falling under sec. 47 C. P. Code is governed by this Article—*Abdul Kadir* v. *Ambika*, 97 I.C. 697, A.I.R. 1927 Cal. 57; *Umapati* v. *Sheikh Soleman*, 54 Cal. 419, 103 I.C. 233, A.I.R. 1927 Cal. 614. Thus the title of a purchaser at a sale in execution of a mortgage decree (*e.g.*, the question whether certain lands were or were not included in a mortgage decree for sale) should be determined by an application under sec. 47, C. P. Code; such an application falls under Article 181, and the right to apply accrues at the date of sale—*Umapati* v. *Sheikh Soleman*, supra. This Article applies to an applcation alleging the Court sale as void—*Md. Umar* v. *Motichand*, A.I.R. 1952 Pat. 244; *Ventaperumal* v. *Perumal*, A.I.R. 1952, Tra-Co. 136.

This Article applies to an application for amendment of the original application for substitution by substituting the names of the heirs in place of the original heir who made the application for substitution and died pending the disposal of the application —*Manindra* v. *Santi Rani*, 55 C.W.N. 306, A.I.R. 1951 Cal. 518.

This Article does not apply to an application made to the High Court for revision of an order of a Criminal Court. There is no time limit placed upon the power of the High Court to interfere by way of revision in a criminal case—*Shah Naim* v. *Emp.*, 7 O.W.N. 663, 1930 Cr. C. 941.

Certification of payment:—The word "application" in this Article means an application *ejusdem generis* with the applications mentioned in the previous Articles; that is, an application on which the Court has to perform a judicial act or to decide some point judicially. An application by a decree-holder for certification of a payment made to him out of Court is not an application within Art. 181—*Gangaya* v. *Seshagiri Rao*, A.I.R. 1935 Mad. 922, 159 I. C. 38. A *certificate by a decree-holder* of any payment out of Court, under O. 21 r. 2 (1), C. P. Code does not raise any point on which the Court has to decide judicially, and is not therefore an application under Article 181. There is no limitation which compels the decree-holder to certify a payment or adjustment under the provisions of O. 21, r. 2 (1) within any particular time—*Prakash Singh* v. *Allahabad Bank*, 1 Luck. 428, 29 O.C. 358, 98 I.C. 353, A.I.R. 1927 Oudh 7; *Eusufzoman* v. *Sanchia*, 43 Cal. 207 (210); *Haji Abdul Rahiman* v. *Khoja Khaki*, 11 Bom. 6 (34); *Tukaram* v. *Babaji*, 21 Bom. 122 (124); *Jatindra* v. *Gagan*, 46 Cal. 22 (24); *Jalin Chand* v. *Yusufali*, 54 Cal. 143, A.I.R. 1925 Cal. 1012, 86 I.C. 1051; *Sheikh Ilahi* v. *Nawab Lal*, 4 P.L.J. 159 (161), 50 I.C. 364; *Balai Mahomed* v. *Aijanmal*, 26 C.W.N. 529, 68 I.C. 780, A.I.R. 1922 Cal. 30. A certificate of payment given by the decree-holder to the Court is a mere intimation to it that he has received a certain sum of money from the judgment-debtor. It is not an *application*, because the decree-holder has not to make any prayer to the Court that the payment should be recorded, but only gives an intimation, and on receiving the intimation the Court records the payment. The certification of payment is not governed by any rule of limitation, and the decree-holder is not bound to certify any payment before his decree is barred——*Joli Prasad* v. *Srichand*, 51 All. 237 (F.B.), 26 A.L.J. 966, A.I.R. 1928 All. 629 (635). A certification of payment is not an *application* within the meaning of this Article, even though it is in the form of a petition and is headed as an "application under O. 21, r. 2, C. P. Code." The terms of O. 21, r. 2 do not provide for any application being made by the decree-holder. The Limitation Act does not prescribe any time within which the decree-holder is to certify a payment made out of Court by the judgment-debtor—*Shri Prakash* v. *Allahabad Bank*, 3 Luck. 684 (P.C.), 6 O.W.N. 29, 33 C.W.N. 267 (274), A.I.R. 1929 P.C. 19, 114 I.C. 581. But the certification must take place within such time as is required to save the case from being barred by limitation. The decree-holder cannot postpone the certification for a long period of years

and then say that he will save the decree from being barred by certifying the payments then. That is, the certification must take place within three years before execution is applied for, to save the decree from limitation under sec. 20—*Jalim Chand* v. *Yusufali, supra*; *Bahuballabh* v. *Jogesh*, 23 C.W.N. 320 (321), 50 I.C. 242. See also *Amar Krishna* v. *Jagat Bandhu*, 59 Cal. 760 (F.B.), 35 C.W.N. 1192.

692. Applications in mortgage suits:—*Application for final foreclosure-decree*:—An application for a final decree decree in a foreclosure suit under sec. 87 of the Transfer of Property Act (O. 34, rule 3 of the C. P. Code of 1908) is governed by this Article, and time runs from the date fixed in the preliminary decree under section 86 for the payment of the mortgage money. Article 182 cannot apply, because the various clauses in the 3rd column of that Article are inapplicable to the present application. The only clause which can apply, if at all, is clause 1, but the decree or order referred to in that clause is a decree executable on the date it is passed, whereas the preliminary decree in a foreclosure suit is not executable on the date on which it is passed but only on the expiry of the date fixed therein for the payment of the mortgage money. Consequently, Article 182 is inapplicable—*Ali Ahmed* v. *Naziran*, 24 All. 542 (545, 546); *Balaram* v. *Kanhai*, 1 P.L.J. 364 (366), 38 I.C. 385; *Rajkumar* v. *Kedar Nath*, 1 Pat. 435, A.I.R. 1922 Pat. 201, 66 I.C. 97. But in *Parmeshri* v. *Mohan Lal*, 20 All. 357 such an application was held to be an application for execution of the preliminary decree for foreclosure and therefore governed by Article 182. In *Sham Sundar* v. *Md. Ihtisham*, 27 All. 501 (505), it was not not decided whether Article 181 or 182 was applicable, but Stanley C.J. gave his opinion that an application for a final decree for foreclosure was an application for *execution* of the decree *nisi*.

The Calcutta High Court is of opinion that an application for a final decree for foreclosure is not governed by this Article (nor by any other Article) because it is an application made in a *pending* suit, *i.e.*, it is an application to terminate a pending proceeding, and is in effect an application to the Court to do an act which the Court is bound to do. Consequently no question of limitation arises—*Madhabmoni* v. *Lambert*, 37 Cal. 796, (806, 807). Even if this Article applies, the right to apply may be deemed to accrue from day to day (as it is made in a *pending suit*)—*Ibid* (following 30 Cal. 609 and 8 Cal. 420).

Where the High Court on appeal modifying the decree of the lower Court for sale passed a preliminary decree for foreclosure, the period of limitation for a final decree for foreclosure ran from the date of the appellate decree of the High Court (or rather the date fixed in that decree for payment of the mortgage-money); if the other party preferred an appeal to the Privy Council, and that appeal was *dismissed for default* of prosecution, the decree-holder would not be entitled to compute the period of limitation from the date of the order of the Privy Council dismissing the appeal for default—*Rajkumar* v *Kedar Nath*, 1 Pat. 435 (441), 3 P.L.T. 565, A.I.R. 1922 Pat. 201, 66 I.C. 97. The plaintiff sued for foreclosure of a mortgage which purported to comprise five villages, but he obtained a preliminary decree in 1899 in respect of three villages only. He appealed against the dismissal of his suit as regards the other two villages, and this appeal was dismissed by the High Court in 1902. In 1903 he applied for a final decree for foreclosure. *Held* that this application was not barred by limitation, because time ran not from the date fixed in the preliminary decree for payment of the mortgage money but from the date of the decree of the High Court, because it was not until that date that there was any final decision as to the property to be foreclosed—*Sham Sundar* v. *Md. Ihtisham*, 27 All. 501 (509). Where after the plaintiff, applied for a final foreclosure decree, the day fixed in the preliminary decree for payment of the mortgage money was postponed at the defendant's request, the postpone-

ment did not amount to a dismissal of the application of the plaintiff to have a final decree passed. The application must be deemed to have remained *pending* for final orders, and the Court must be deemed to have postponed the passing of the final orders. No further application for a final decree is necessary; and any subsequent application if made in that behalf is only for the continuation of the proceeding on the original application which has been suspended. Such an application, being an application made in a *pending case*, is not governed by Article 181 or by any rule of limitation —*Chimnaji* v. *Sonaji*, 21 N.L.R. 47, 88 I.C. 901, A.I.R. 1925 Nag. 291.

Application for final decree for sale:—Before secs. 85-90 of the Transfer of Property Act were incorporated into the C. P. Code of 1908, an application under sec. 89 of the T. P. Act for an order absolute for sale of the mortgaged property was held to be an application for execution of the decree passed under sec. 88 of the Transfer of Property Act, and was governed by the rule of limitation prescribed for an application for execution, *i.e.*, Art. 182, and not by Article 181 which was limited to applications under the C. P. Code—*Mallikarjunudu* v. *Lingamurti*, 25 Mad. 244 (F.B.); *Mammali* v. *Kutti Ammu*, 39 Mad. 544; *Bhagawan* v. *Ganu*, 23 Bom. 644; *Chunni Lal* v. *Harnam*, 20 All. 302 (F.B.); *Ranbir* v. *Drigpal*, 16 All. 23; *Badri Narayan* v. *Kunj Behari*, 35 All. 178; *Oudh Behari* v. *Nageshwar*, 13 All. 278 (F.B.); *Kista* v. *Banamoyi*, 19 C.W.N. 649, 29 I.C. 120. And this was the view of the Privy Council in *Abdul Majid* v. *Jawahir*, 36 All. 350 (P.C.); *Batuk Nath* v. *Munni Dei*, 36 All. 284 (P.C.). In some cases, however, either Article 181 or 182 was held to be applicable—*Ramayyan* v. *Kadir Bacha*, 31 Mad. 68 (69); *Baldeo* v. *Ibn Haider*, 27 All. 625 (627, 628), whereas in *Tiluck* v. *Parshatam*, 22 Cal. 924, *Pramatha* v. *Khettra Mohan*, 29 Cal. 651 and *Adjudhi Pershad* v. *Baldeo*, 21 Cal 818, it was held that the application was governed by neither Article 181 nor Art. 182. In *Rungiah* v. *Nanjappa*, 26 Mad. 780 (789) the application was held to be governed by Article 181 and not 182.

After sections 85-90 have been incorporated into the C. P. Code, it has been held that an application for a final decree for sale in a mortgage suit (O. 34, r. 5) being an *application under the C. P. Code*, falls under this Article; and Article 182 cannot apply because strictly speaking the application is *not one for execution* of the preliminary decree (but is an application to obtain a further decree)—*Ahmed Khan* v. *Gaura*, 40 All. 235; *Nizamuddin* v. *Bohra Bhim Sen*, 40 All. 203 (205); *Beni Singh* v. *Berhamdeo Singh*, 19 C.W.N. 473, 28 I.C. 211; *Bala Ram* v. *Kanhai*, 1 P.L.J. 364 (366), 38 I.C. 385; *Madho Ram* v. *Nihal Singh*, 38 All. 21; *Datto Atmaram* v. *Sankar*, 38 Bom. 32; *Venkayya* v. *Sathiraju*, 44 Mad. 714 (715); *Kuppal Chetty* v. *Krishnammal*, 14 M.L.T. 194, 16 I.C. 799; *Ramji* v. *Karan*, 39 All. 532; *Gajadhar* v. *Kishan*, 39 All. 641; *Maqbul* v. *Pateshri*, 1929 A.L.J. 976, A.I.R. 1929 All. 677 (679), 118 I.C. 670; *Harjiwan* v. *Gajanan*, 25 Bom.L.R. 459, A.I.R. 1923 Bom. 420, 73 I.C. 187; *Swarnamoyee* v. *Rakhal*, 1 D.R. 59; *Buttan* v. *Saklal*, I.L.R. (1945) All. 277, A.I.R. 1945 All. 161. This Article applies to an application for a final decree for sale in a mortgage suit in the High Court. Art. 183 has no application—*Jesinglal* v. *Gangadhar*, I.L.R. (1938) Bom. 273, 40 Bom.L.R. 507, A.I.R. 1938 Bom. 354. Such an application is barred by limitation under this Article if made more than three years after the date of the preliminary decree. Such an application is not to enforce a preliminary decree and Art. 183 is, therefore inapplicable—*Sisir* v. *Srish*, 43 C.W.N. 537. An application for a final decree under O. 34, r. 2, C. P. C. for sale of the property does not fall within Art. 183 but is governed by Art. 181—*M. Chettiar Firm* v. *Maung Po Hmyin*, A.I.R. 1935 Rang. 239, 13 Rang. 325, 157 I.C. 784. Time begins to run after the expiry of the period fixed by the preliminary decree for payment of money (if there is no appeal from the preliminary decree)—*Ahmed* v. *Gaura*, 40 All. 235 (237); *Raj Behari* v. *Juman*, 4 P.L.J. 523 (524), 50 I.C. 544; *Nanhelal* v. *Gulshan*, 18 N.L.R. 58, A.I.R. 1922 Nag. 217, 68 I.C. 919. *If there*

is an appeal against the preliminary decree, time runs from the date of the appellate decree or of the decree in second appeal as the case may be (even though the appellate Court confirms the decree of the lower Court), but not from the date for payment fixed in the preliminary decree of the Court of first instance—*Fitzholmes* v. *Bank of Upper India*, 8 Lah. 253 (P.C.), 31 C.W.N. 444, 100 I.C. 22, A.I.R. 1927 P.C. 25; *Sayid Jawad Hossain* v. *Genda Singh*, 6 Pat. 24 (P.C.), 7 P.L.T. 575, 31 C.W.N. 58, A.I.R. 1926 P.C. 93 (overruling 39 All. 21 on this point); *Mahabir* v. *Kanhaiya Lal*, 21 A.L.J. 526, A.I.R. 1924 All. 99, 74 I.C. 372; *Gajadhar Singh* v. *Kishan Jiwan Lal*, 39 All. 641 (F.B.); *Nizamuddin* v. *Bohara Bhim Sen*, 40 All. 203; *Tula Ram* v. *Bhup Singh*, 47 All. 913, 89 I.C. 214, A.I.R. 1925 All. 691; *Uma Charan* v. *Nibaran*, 37 C.L.J. 452, A.I.R. 1923 Cal. 389, 75 I.C. 2; *Saiyud Jawad Hussain* v. *Genda Singh*, 1 Pat. 444, A.I.R. 1922 Pat. 205, 66 I.C. 790; *Venkayya* v. *Sathiraju*, 44 Mad. 714 (717); *Fitzholmes* v. *Bank of Upper India*, 5 Lah. 257 (259), A.I.R. 1924 Lah. 582, 81 I.C. 649; *Lallu* v. *Jot*, 21 O.C. 176, 47 I.C. 206; *Subbarajulu* v. *Sundararajulu*, 35 M.L.J. 507, 48 I.C. 185; even if it is dismissed for default or non-prosecution *e.g.*, non-compliance with an order to pay the deficient Court-fees on the appeal—*Gour* v. *Mohun*, 23 Pat. 635, 1944 P.W.N. 547. But see *Pitambar* v. *Ramrup*, 1946 A.L.W. 587. Where the appellate Court affirms the preliminary decree passed by the trial Court, the period of three years begins to run from the expiry thereafter of the period allowed to the mortgagors under the preliminary decree to make the payment, even though the appeal Court does not expressly allow the same period for payment—*Pitambar* v. *Rupram*, 1946 A.L.W. 587; but not from the date of the order of the Privy Council dismissing the Privy Council appeal for *default of prosecution*—*Abdul Majid* v. *Jawahir*, 36 All. 350 (P.C.); *Sachindra* v. *Maharaj Bahadur*, 49 Cal. 203 (P.C.), 48 I.A. 335, 26 C.W.N. 858, A.I.R. 1922 P.C. 187, 74 I.C. 660. Where a preliminary decree is modified after the passing of the final decree, an application for preparation of a fresh final decree is barred if made more than three years after the preliminay decree as modified by the appellate Court—*Ram Nath* v. *Deohinandan*, I.L.R. (1947) All. 40, A.I.R. 1947 All. 83. If an appeal against the preliminary decree is withdrawn and the Court passes the order "appeal is withdrawn, it is dismissed with costs" and there is a direction by the appellate Court as to the distribution of costs, the preliminary decree becomes merged in the appellate decree, and the time for applying for a final decree runs from the date of the appellate decree and not from the date of payment of the mortgage money fixed in the preliminary decree—*Jujesti Mahapatro* v. *Magata Patro*, 56 Mad. 520, 64 M.L.J. 695, A.I.R. 1933 Mad. 442 (446), 143 I.C. 412. Time runs from the date of withdrawal of appeal for non-payment of Court fees on memorandum of appeal—*Sona* v. *Bhola*, 25 Pat. 431, A.I.R. 1947 Pat. 225.

Where on the application to set aside an *ex parte* preliminary decree passed in a mortgage suit a conditional order is passed and the application is dismissed on failure of fulfilment of the condition imposed, the right to apply for a final decree accrues on the date of the dismissal of the application inspite of the appellate order remanding the application to the trial Court for hearing, where it is dismissed for default—*Velaguru* v. *Suppa*, I.L.R. (1944) Mad. 791, (1943) 2 M.L.J. 678, A.I.R. 1944 Mad. 209.

The fact that there was a clerical error in the decree in the statement of the amount due would not entitle the decree-holder to count limitation from the date on which the error was corrected, as the correction of the error did not make any alteration in the decree, and the decree as corrected could not be said to be a new decree—*Ram Chandra* v. *Jai Mal*, 20 A.L.J. 640, A.I.R. 1923 All. 22, 69 I.C. 199.

Where the preliminary mortgage decree was passed against separate sets of defendants for separate amounts decreed against them, and some of them appealed while

others did not, *held* that the period of limitation for an application for a final decree for sale against the non-appealing defendants began to run from the expiry of the date fixed in the preliminary decree for payment of the amount, and not from the date of the decree in appeal, because the appeal was not an appeal against the whole decree but was limited to that part of the decree which affected the appealing defendants only—*Gyan Singh* v. *Ata Husein*, 43 All. 320 (323, 324). Where the preliminary decree for sale was passed against all the *members* of the family, and some of the members only appealed but the appeal was preferred in the interest of and *on behalf of the whole family*, the period of limitation for an application for a final decree for sale would run from the date of the appellate decree—*Tula Ram* v. *Bhup Singh*, 23 A.L.J. 867, A.I R. 1925 All. 691, 89 I.C. 214.

If the preliminary decree, purporting to be in terms of the compromise of the parties provides for payment of the mortgage-amount by instalments payable on fixed dates, the right to apply for a final decree accrues on the date of default in the payment of an instalment—*Nanku* v. *Paramatmanand*, 1931 A.L.J. 58, A.I.R. 1931 All. 340 (341), 130 I.C. 487. Where in such a case it is also provided that in case of default of 'any one kist' the plaintiff shall have the option to have a final decree, the right to apply for a final decree is not restricted to the first default. It will arise, as well, on subsequent breaches of conditions of the compromise decree—*Ram Dutta* v. *Mahpal*, 1938 O.W.N. 360, A.I.R. 1938 Oudh 112; *Rohan Singh* v. *Badri Prasad*, A.I.R. 1955 All. 254. There is nothing to indicate that the decree holders' right to apply for a final decree accrues only once. Where a preliminary decree for sale provides for payment in instalments, a new cause of action to apply for a final decree accrues on each default under this article—*Buttan* v. *Sakhal*, I.L.R. (1945) All. 277, A.I.R. 1945 All. 161; *Gopal* v. *Alagirisami*, I.L.R. (1942) Mad. 770, (1942) 1 M.L.J. 532, A.I.R. 1942 Mad. 581. A contrary view has been taken in *Bhagwati* v. *Sant Lal*, I.L.R. (1946) All. 570, A.I.R. 1946 All. 360, where it has been held that where no option is contained in the decree the right to apply for final decree accrues when the plaintiff or applicant becomes *first* entitled to apply.

Where the preliminary decree was passed in 1897 and the decree-holder after making several applications between 1898 and 1907, made a final application for a final decree for sale in 1909 when the new C. P. Code was passed, it was held that the right to apply accrued when the new C. P. Code conferred the right in 1909, and the application was therefore not barred. Prior to the passing of the C. P. Code of 1908, the right which decree-holder possessed was a right to enforce his judgment not by means of an application for a final decree but by means of an application for an order absolute, and to this application Article 182 was held to apply; it was the C. P. Code of 1908 that for the first time conferred on the mortgagee decree-holder the right to apply for a *final decree for sale*, and therefore the right to apply for the final decree accrued on the day on which the new C. P. Code came into operation, *viz.*, 1st January 1909—*Narsingrao* v. *Bandu*, 42 Bom. 309 (319, 320), 20 Bom.L.R. 481, 46 I.C. 107.

Application under O. 34, rule 6:—An application for a supplementary decree under sec. 90 of the T. P. Act (O. 34, r. 6 of the C. P. Code of 1908), though an application in an execution proceeding, is not an application for the execution of a decree or order; Article 182 is inapplicable, and the application is governed by Article 181—*Md. Iltifat* v. *Alimunnissa*, 40 All. 551, 47 I.C. 562; *Ram Sarup* v. *Ghurani*, 21 All. 453; *Gajadhar* v. *Alliance Bank of Simla*, 28 All. 660 (663); *Venkatasubba* v. *Shanmugam*, 1913 M.W.N. 867, 21 I.C. 530; *Chunni Lal* v. *Tikomdas*, 13 N.L.R. 76, 39 I.C. 854.

An application for personal decree against a mortgagor is not a mode of enforcing

preliminary decree or the final decree in the mortgage suit, but is an application for a new decree imposing liability upon the mortgagor personally, such an application is, therefore, governed by Art. 181 and not by Art. 183—*A. Chokalingam Chettiar* v. *Maung Tun Yin*, A.I R. 1935 Rang. 187, 13 Rang. 305, 156 I.C. 707.

In *Rahamat Karim* v. *Abdul Karim*, 34 Cal. 672 (674), Article 181 was held inapplicable to an application under sec. 90, T. P. Act because that Article is limited to application under C. P. Code and does not apply to applications under the T. P. Act. But now that sec. 90 of the T. P. Act has been incorporated into the C. P. Code, the ruling in 34 Cal. 672 is no longer good law. In *Bishwambhar* v. *Ramsundar*, 42 Cal. 294 (299) Article 181 was held to be inapplicable even to an application under O. 34, r. 6 of the C. P. Code. In a later Full Bench case (overruling the above two cases) the Calcutta High Court has laid down that an application under O. 34, r. 6 is governed by Article 181—*Pall* v. *Gregory*, 52 Cal. 828 (F.B.), 29 C.W.N. 678, A.I.R. 1925 Cal. 834, 89 I.C. 1; *Sailen* v. *Promode*, 53 C.W.N. 631.

As regards the time when the right to make such application accrues, the decisions are not unanimous. In some cases it has been held that the right to apply accrues when it is found that the sale proceeds are insufficient to satisfy the debt—*Gajadhar* v. *Alliance Bank*, 28 All. 660 (664); *Md. Iltifat* v. *Alimunnissa*, 40 All. 551 (552); *Raj Narain* v. *Santi Lal*, 21 A.L.J. 37, 79 I.C. 85, A.I.R. 1923 All. 203; this means that the right to sue accrues on the date on which the sale is confirmed (and not the date of sale), because it is on the date of confirmation of the sale that the Court is in a position to ascertain whether the net proceeds are insufficient to pay the amount within the meaning of O. 34, r. 6—*Krishna Bandhu* v. *Panchkari*, 58 Cal. 741, 35 C.W.N. 231 (232), A.I.R. 1931 Cal. 166; *Prodyumna Kumar* v. *Gopendra*, 60 Cal. 19, A.I.R. 1933 Cal. 251; *Kempegowda* v. *Annegowda*, A.I.R. 1951 Mysore 48. But there are several other decisions to the effect that it is not necessary that the applicant should make his application within 3 years of the date of the confirmation of the mortgage sale; it is the date of the *suit* and not the date of the application which must be looked to; if he had his personal remedy at the date of the institution of the suit on the mortgage, *i.e.*, if the suit on the mortgage had been brought within 6 years from the due date of the mortgage (Art. 116), the application for personal decree is not barred, though made more than 3 years after the date of sale. When an application is made under O. 34, r. 6, C. P. Code, the Court has to consider, if any question of limitation arises, whether the personal remedy was barred at the date of the institution of the suit, and not whether it would be barred at the date of the application under O. 34, r. 6—*Rahmat Karim* v. *Abdul Karim*, 34 Cal. 672 (675), following *Purna Chandra* v. *Radha Nath*, 33 Cal. 867 (873); *Hamid-ud-din* v. *Kedar Nath*, 20 All. 386; *Sheo Charan* v. *Lalji*, 18 All. 371 (372); *Chattar Mal* v. *Thakuri*, 20 All. 512; *Jangi Singh* v. *Chandra Mal*, 30 All. 388 (389); *Gulam Hussein* v. *Mahamadalli*, 34 Bom. 540 (545); *Peria Tiruvadi* v. *Muthammel*, 2 L.W. 66, 27 I.C. 770 (771); *Amratlal* v. *Mulji*, 46 Bom.L.R. 851, A.I.R. 1945 Bom. 169, see also *Bishambar* v. *Ram Sundar*, 42 Cal. 294 (297). If a mortgage was executed in 1908, and there were several payments on account of the mortgage debt which were made down to the year 1916, and the mortgage suit was instituted in 1920, *i.e.*, within six years of the last of those payments, but the proceeds of the sale held in execution of the mortgage decree being insufficient to pay off the whole mortgage debt, the plaintiff made an application under O. 34, r. 6, C. P. Code, the application was held not barred—*Dharanidhar* v. *Indranarayan*, 36 C.W.N. 117 (118).

Where after a final decree for sale in a mortgage suit, it is found in a suit filed by a third party wherein the mortgagee is impleaded as a defendant, that the mortgaged property did not belong to the mortgagor, the right to apply for personal decree

accrues to the mortgagee when it is finally decided in appeal that the mortgagor had no title to the property—*Kamakshi* v. *Ananthanarayana*, I.L.R. (1947) Mad. 731, (1947) 1 M.L.J. 142, A.I.R. 1947 Mad. 33. The *terminus a qua* dates from the first accrual of the right to apply, provided it is definite and absolute. But where the very basis of the accrual of right is itself in litigation in an appellate Court, the person entitled to the right, has the option but not the duty to exercise the right till the question on which the right accrued is finally adjudicated upon—*Sailen* v. *Promode*, 53 C.W.N. 631.

Where after the sale of the mortgaged property in execution of the mortgage-decree, the sale is set aside and the mortgagee is required to refund the proceeds to the purchaser, he can apply under O. 34, r. 6, and the time for making such application runs from the date on which he refunded the purchase money to the purchaser (and not when the decree for setting aside the sale was passed)—*Badal Singh* v. *Debi Saran*, 49 All. 506, 101 I.C. 775, A.I.R. 1927 All. 395.

Application under O. 34, r. 8:—Where a preliminary decree for redemption is passed, but the mortgagor fails to pay the decretal amount on or before the fixed date, the Court may extend the time under O. 34, r. 8, proviso [now O. 34, r. 7 (2)], and the mortgagor is entitled to pay into Court within the extended time and apply for a final decree. The application for a final decree for redemption is governed by this Article, and the period of limitation runs from the date on which the mortgagor pays the money—*Moru* v. *Gangabai*, 50 Bom. 730, 98 I.C. 943, A.I.R. 1927 Bom. 32. The rights under Or. 34, r. 7 (2) and r. 8 (1), C. P. Code, are available to a mortgagor in the case of redemption of a usufructuary mortgage also. The mortgagor is not bound to take out an application within three years of the time fixed for payment under the preliminary decree, and he can deposit the amount at any time so long as a final decree has not been passed and this article has no application—*Angammal* v. *Mahomed*, (1945) 2 M.L.J. 239.

If a preliminary decree for redemption is passed by the lower Appellate Court, against which a second appeal is preferred to the High Court, which eventually dismisses the appeal, the period of limitation for an application for a final decree for redemption runs from the date of the decision of the High Court and not from the date of decision of the lower Appellate Court. The decision of the High Court is a decision after hearing the merits of the case, and supersedes the decree of the lower Appellate Court—*Venkatarama* v. *Doddachariar*, 58 M.L.J. 207, A.I.R. 1930 Mad. 353 (354), 125 I.C. 95. The fact that the second appeal was dismissed by the High Court on the ground that there was no question of the law does not make the decision of the High Court any the less a decision on the merits. But the matter would have been different if the High Court had dismissed the appeal summarily as time-barred or for default of appearance or want of prosecution or some similar reason. In such a case the period of limitation would have run from the date of the decree of the lower Appellate Court—*Ibid.*

693. Application for execution:—This article is a residuary article and cannot be applied if the case falls within Art. 182—*Sahule* v. *Arunachalam*, I L.R. (1945) Mad. 80, (1944) 2 M.L.J. 192, A.I.R. 1944 Mad. 561; *Sooramma* v. *Venkanna*, (1939) 2 M.L.J. 271, A.I.R. 1939 Mad. 441. Applications for execution are generally governed by Article 182, and the period of limitation runs from the various points of time enumerated in the several clauses of the 3rd column of that Article. But sometimes it may happen that the various points of time enumerated therein will not apply to a particular application; in such a case, the application will fall under Article 181. Article 182 is not exhaustive of applications for execution of

decrees, and Article 181 may sometimes be applied to such an application. The law has been thus stated: "The true criterion in determining whether Article 181 or 182 applies to a particular application is to ascertain whether any one of the several points of time specified in col. 3 of Art. 182 is applicable to it; and if none of them is applicable, it is only then that Art. 181 will apply"—*Rungiah Goundan* v. *Nanjappa*, 26 Mad. 780, *Hameed* v. *Arunachalam*, (1944) 2 M.L.J. 192, A.I.R. 1944 Mad. 561, I.L.R. (1945) Mad. 80. A decree (passed under sec. 88, Transfer of Property Act) directed the sale of the mortgaged property in default of payment of the mortgage-money on or before a date fixed in the decree. On default of payment the decree-holder applied for execution of the decree. It was held that Article 182 could not apply, because none of the points of time enumerated in the various clauses of that Article was applicable to the application: thus, clause 1 did not apply, because the decree was not executable on the date of the decree but only at some future time if default was made; clause 7 also did not apply, because the decree as such did not direct the payment of any money on a particular date, but directed the sale of the property if a particular sum was not paid by a given time. Consequently, Article 181 was the proper Article applicable to the case—*Rungiah Goundan* v. *Nanjappa*, 26 Mad. 780 (789). Where a foreclosure decree provides that it should not be executed till the expiry of a certain period, none of the clauses of Art. 182 applies to an application for execution of such decree. Consequently, Art. 181 applies, and time runs from after the expiry of such period—*Thakur Das* v. *Shadi Lal*, 8 All. 56 (67). A decree for possession of a property was passed subject to the condition that if the judgment-debtor paid to the decree-holder year by year so long as he might live an allowance of Rs. 200 per year for his maintenance the decree for possession would not be executed, but if the judgment-debtor made default in payment of any year's allowance, the decree-holder would be entitled to delivery of possession of the property in execution of that decree. A default having occurred, the decree-holder applied for possession under the above decree. *Held* that Article 182 could not apply; for it was quite clear that clause 7 of that Article was inapplicable, since the application was for possession and not to enforce a payment of money; and that the other clauses of Article 182 were inapplicable. Consequently, Article 181 governed the application—*Muhammad Islam* v. *Muhammad Ahsan*, 16 All. 237 (239). In this case it was further held (at p. 238) that the decree-holder was not bound to execute his decree upon the occurrence of the first default, but might execute it on occasion of a subsequent default; thus, in this case, a default took place in 1878, and then another in October 1889, and the decree-holder applied in March 1892; it was held that the application was not barred, as time ran from October 1889 and not necessarily from 1878.

Decree not in existence:—The Limitation Act, in so far as it applies to execution, requires that there must be some decree in existence which can be executed. No application for execution of any decree can be entertained unless an executable decree exists. So a preliminary decree for sale cannot be executed—*Ramnath* v. *Deokinandan*, I.L.R. (1947) All. 40, A.I.R. 1947 All. 83. An execution application was filed on 1st September 1921; on the 16th September 1921 a suit was filed to set aside the decree, and the next day an injunction was granted restraining the decree-holder from executing the decree. The injunction expired on 26th August 1922, but meanwhile the decree had been set aside, and it was only on 6th April 1925 that the order setting aside the decree was reversed, and an execution application was filed on 26th June 1925. *Held* that the application was not barred, because from the 17th September 1921 to the 6th April 1925, the decree-holder was either restrained by an injunction from executing the decree or there was no decree whatever to execute—*Ram Ghulam* v. *Raj Kumar*, 6 Pat. 635, 102 I.C. 327, A.I.R. 1928 Pat. 86.

Decree incapable of immediate execution:—Where the decree is not capable of immediate execution, and the right to apply for execution depends upon the fulfilment of certain contingencies provided for in the decree, Art. 182 does not govern the application, for none of the several clauses of that Article can be applied to it; the only Article that can apply is Art. 181—*Rameshwar Singh* v. *Homeshwar Singh*, 6 P.L.J. 132 (136) (P.C.); *Narain* v. *Brij Narain*, 1931 A.L.J. 319, A.I.R. 1931 All. 326 (327), 131 I.C. 559. A decree prohibiting the defendant from obstructing the village path is not capable of execution on the date it is passed, or in other words, until an obstruction is caused there is nothing to execute. The cause of action arises as soon as any obstruction is caused and the Court's order in that behalf is breached. This article applies in such a case and the decree-holder's right to apply for the enforcement of the decree accrues when the obstruction is caused—*Shyam* v. *Ramdas*, 25 Pat. 397, A.I.R 1946 Pat. 392. A decree which was passed in 1894 directed that the plaintiff would be entitled to get possession upon payment of Rs. 750 to the defendant in *any* year in the month of *Jeth*. The money was deposited in 1915 and the application for execution was made in 1916. It was held that the decree in this case being indefinite as to the date on which the payment of Rs. 750 was to be made, was not capable of execution on the date on which it was passed; therefore Art. 181 applied and not Art. 182, and the right to apply for execution accrued when the payment was made in 1915; the application was therefore not barred—*Rukmina* v. *Sheo Dat*, 17 A.L.J. 841, 51 I.C. 576. In this case the decree gave an option to the plaintiff decree-holder to pay the money *in any year*. But where under the decree the decree-holder's right to recover possession of some property from the defendant was made contingent upon the decree-holder paying certain sums of money to the defendant but *no date* for payment was specified, it was held that the decree-holder was entitled to pay the money on the date when the decree was passed, and to ask for possession immediately after the payment had been made. The right to apply for execution accrued to the decree-holder immediately the decree was passed and he was not entitled to prolong the date of payment by his inaction or laches. The decree-holder's application for execution made more than 3 years after the date of decree was held to be barred—*Narain* v. *Brij Narain*, *supra*. So also where a decree for possession is passed conditional on payment of a sum of money on a future date, this article applies and the time begins to run from the date of the decree or at any rate on the date fixed for payment of the amount —*Gopal* v. *Dnyanu*, I.L.R. (1938) Bom. 649, 40 Bom.L.R. 512, A.I.R. 1938 Bom. 367. But if no time is fixed for payment of the amount this article does not apply. In such a case the decree-holder is entitled to deposit the money within a period of twelve years or within such period which falls short of the period necessary for the judgment-debtor to acquire an independant title to the property—*Jugal* v. *Lochan*, I.L.R. (1944) All. 717, 1944 A.L.J. 449, A.I.R. 1945 All. 10.

In a suit against E and J of whom J died *pendente lite*, a decree was passed in 1906 which did not provide that E should be personally liable but declared that the decretal amount should be realised by the sale of the property of J in E's possession. E for the first time obtained possession of J's property in 1914, and the decree-holder applied in the same year to execute the decree. *Held* that in as much as the decree was not capable of immediate execution in 1906, and the application for execution could not be made till E got possession of J's property; the Article applicable was Art. 181, and the right to apply accrued in 1914 when E obtained possession of J's property—*Rameshwar Singh* v. *Homeshwar Singh*, 6 P.L.J. 132 (139) (P.C.), 25 C.W.N. 337, 59 I.C. 636, A.I.R. 1921 P.C. 31.

A pre-emption decree is incapable of execution until the decree-holder pays the pre-emption price into Court, and consequently clause 1 of Art. 182 is inapplicable; and

no other clause in Art. 182 being under the circumstances applicable, the general Art. 181 would apply, and the time for an application for execution of the pre-emption decree commences to run when the price is paid—*Chhedi* v. *Lalu*, 24 All. 300; *Chandika* v. *Kalu*, 22 O.C. 82, 52 I.C. 156.

Where by mistake of Court, the name of the judgment-debtor has been omitted from the decree, the decree is incapable of execution until it is amended and the name of the judgment-debtor brought on the record; the right to apply (under Art. 181) for execution accrues from the date of amendment—*Debi Baksh* v. *Shambhu Dial*, 48 All. 281, 24 A.L.J. 266, A.I.R. 1926 All. 384, 94 I.C. 877 (following 17 All. 39).

Where a decree is not executable at once as regards certain matters but leaves them to be subsequently ascertained, the period of limitation would run (under this Article) from the date when they are ascertained, as the decree becomes capable of execution as regards those matters only then—*Ratnachalam* v. *Venkatarama*, 29 Mad. 46 (47). When a decree is one for payment of a certain sum of money composed of three items, one of which has to be ascertained, limitation, for execution of the whole decree runs (under this Article) from the date of ascertainment of the unspecified sum —*Vydianatha* v. *Subramania*, 36 Mad. 104 (107).

Where a money decree was by its terms not capable of execution till after the expiry of six months from the date of the decree, because the judgment-debtor had been allowed the option of paying the decretal money without interest within that period, *held* that Art. 181 applied, and the period of limitation ran after default was made in the payment of the money, *i.e.*, after the expiry of six months from the date of the decree-*Surajman* v. *Anjori Shukul*, 46 All. 73 (74), A.I.R. 1924 All. 263, 79 I.C. 605, 21 A.L.J. 861, following *Rameshwar Singh* v. *Homeshwar*, 6 P.L.J. 132 (P.C.). Where a decree, dated July 1882, directs the plaintiff to deliver certain lands to the defendant in January 1883, before he can recover certain lands from the defendant, limitation runs from January 1883 and not from July 1882—*Narayan* v. *Vithal*, 12 Bom. 23 (25). Where a decree for redemption provided that the plaintiff would be put into possession upon payment by him to the defendant of the mortgage amount and the value of the improvements to be determined in execution, the decree became a complete decree on the date when the Court determined the value of improvements, and limitation (Art. 181) ran from that date—*Krishnan* v. *Nilakandan*, 8 Mad. 137 (139).

Decree for perpetual injunction:—Order 21, rule 32, C. P. Code only prescribes the mode for the execution of a decree for injunction. If, however, the Court is moved to enforce execution of the decree under this provision of law, the application must be made within limitation as prescribed by Art. 181 of the Limitation Act. When a person has obtained an injunction forbidding the defendants from building their house in such a way as to interfere with the passage of light and air through the ventilators in his house, and the defendants violate the injunction by building a wall against the ventilators, the plaintiff may file an application for execution of his decree within three years of the breach. The building of the wall is not a continuing wrong and sec. 23 has no application—*Moti Ram* v. *Hans Raj*, A.I.R. 1935 Lah. 702, 37 P.L.R. 576. When a decree for perpetual injunction has been granted, the decree may be enforced on each successive breach of it. An application for execution of the decree falls under this Article and must be made within three years of the date of the particular breach which is the occasion for the application. But the decree-holder is not bound to take action in case of every petty infringement; and the fact that he does not enforce his rights on a petty breach will not deprive him of the fruits of his decree if a serious infringement were afterwards made—*Venkatachellam* v. *Veerappa*, 29 Mad. 314 (317). See also *Ram Saran* v. *Chatar Singh*, 23 All. 465 (466), where it is held that Art. 182 is

inapplicable to an application to enforce an injunction upon its disobedience. It was held in *Sadagopachari* v. *Krishnamachari*, 12 Mad. 356 (364), and *Goswami Gordhan* v. *Goswami Makandan*, 40 All. 648 (651) that an application for execution of a decree for injunction was to be brought within 3 years of the date of the breach of the injunction, but no Article was mentioned in the judgment.

694. Revival or continuation of previous application for execution: —An application for execution of a decree may be treated as one in continuation or for revival of a previous application for execution similar in scope and character, the consideration of which had been interrupted by objections and claims subsequently proved to be groundless or had been suspended by reason of an injunction or like obstruction.

Section 15 contemplates the filing of an application for execution and does not in terms apply to any other application. If, therefore, an application is made by the decree-holder, after the removal of the bar to execution, to revive or continue an application for execution which could not have been, by reason of the bar, proceeded with, such an application not being in terms a fresh application for execution does not come within section 15—*Kristo Kamini* v. *Girischandra*, A.I.R. 1936 Cal. 239,—(*Chattar Singh* v. *Kamal Singh*, A.I.R. 1927 All. 16, 49 All. 276 (F.B.) followed on this point).

Where an execution case is still pending, but cannot be proceeded with further by reason of an injunction, and has been 'struck off the file', or is removed by an order which does not terminate it finally but has the effect of only removing it from the list of pending cases, the decree-holder is not bound to apply for revival of the same proceedings after the removal or discharge of the injunction. His application in substance only conveys to the Court the information that bar has been removed. It is also the duty of the Court to have in sight all undisposed of cases and when the bar is removed to direct the party to take necessary steps for further progress of the case. Such an application of the decree-holder is not a fresh application for execution, and Art. 181 has no application. To an application of this nature there is no rule of limitation prescribed—*Kristo Kamini* v. *Girishchandra*, A.I.R. 1936 Cal. 239. Where an execution petition has been closed erroneously by a Court either for statistical purposes or under an error and the decreeholder is free from blame, the injured decree-holder has got a right to have that old execution petition revived and proceeded with from the stage immediately before the error, and a subsequent execution petition filed by him is only to be treated as reminder to the Court to revive the old execution petition irregularly and erroneously closed by it and no question of limitation arises—*Satyanarayana* v. *Nagabhushanam*, (1950) 2 M.L.J. 647, 1950 M.W.N. 800, A.I.R. 1951 Mad. 429. The Patna High Court has, however taken a contrary view and has held that the subsequent application cannot be taken as a continuation of the previous one even though dismissed as a result of Court's mistake. The reason is that such an order operates as *res judicata* between the parties unless set aside—*Anis* v. *Daughter of Jamunabai*, A.I.R. 1949 Pat. 117. Where an application though in form is under Or. 21, r. 11, but in reality is one under sec. 39, C. P. Code, is returned for amendment and for filing certain unnecessary papers, which is not complied with, a second application by the decree holder under sec. 39 C. P. Code is to be treated as a request that the earlier application be proceeded with—*Peary* v. *Shessaran*, A.I.R. 1939 Oudh. 118, 1939 O.W.N. 267. So also where the application for execution is for the time being "filed" owing to an order of the superior court staying sale in execution and for no fault of the decree-holder, a later application after the stay order is vacated to continue the application is not a revival application and is not governed by any article of the Limitation Act. In fact no such application is necessary on the part of the decree-holder, as the Court is bound to watch the proceedings and to continue the proceed-

ings after the obstacle is removed of its own motion—*Pandurang* v. *Rameshwar*, I.L.R. (1948) Nag. 320, 1948 N.L.J. 262, A.I.R. 1948 Nag. 284.

An application for execution, which is in effect an application for revival of a previous execution application, although filed after 12 years of the decree is governed by Art. 181, Limitation Act, and not by sec. 48, C. P. Code—*Saukhi Singh* v. *Thakur Prasad*, A.I.R. 1937 Pat. 43.

A distinction should be made between a *new* application for execution of a decree and an application which amounts to a *revival* or *continuation* of a previous one. And it is now an established rule of law that if the application is to initiate a *new* execution, it would be governed by Art. 182, and not by Art. 181; but if it is intended merely to *revive* or carry through a pending execution, it would fall under Art. 181 and not Art. 182—*Subha Chariar* v. *Muthu Veeran*, 36 Mad. 553 (556); *Chalavadi* v. *Poloori*, 31 Mad. 71 (75); *Raghubans* v. *Sheo Saran*, 5 All. 243 (245); *Akshay* v. *Abdul Kader*, 57 Cal. 860, 34 C.W.N. 102 (105); *Maharaj Kishore* v. *Raja Ram*, I.L.R. 32 Pat. 540, A.I.R. 1954 Pat. 164.

Whether a subsequent application is to be treated as a *new* application or as a *continuation* of a prior application is a question of fact to be decided with reference to the circumstances of the case. It is really a question of fact—*Saco* v. *Sheo*, 1942 O.A. (Supp.) 429, 1942 R.D. 699; a question of the intention of the decree-holder as to what he wants; it is not a question of pure law. In deciding this question, the substance of the application will have to be looked to, and not the form of it—*Chattar Singh* v. *Kamal Singh*, 49 All. 276 (F.B.), A.I.R. 1927 All. 16, 25 A.L.J. 201, 100 I.C. 692; or on the interpretation of the order passed and the inference to be drawn from it as to Court's intention—*Mangal* v. *Court of Wards*, A.I.R. 1952 Repsu. 52.

The principle is, that where the proceedings in respect of an application for execution have been interrupted by the intervention of objections and claims subsequently proved to be groundless, or have been suspended by reason of an injunction or like obstruction, a subsequent application for execution, *similar in scope and character*, may be treated as one in continuation or revival of the previous application—*Madhabmani* v. *Lambert*, 37 Cal. 796 (804); *Ajodhya Nath* v. *Srinath*, 26 C.W.N. 338, A.I.R. 1921 Cal. 472, 68 I.C. 207.

The mere fact that a prior application is *dismissed* does not necessarily render the subsequent application a *fresh* application, so as to make Article 182 applicable to it. For, sometimes orders of dismissal are loosely made on applications with the object of removing cases, in which no immediate proceedings can be taken, from the list of pending cases. If the order of dismissal is of this character, a subsequent application is not to be considered as a *fresh* application for execution under Article 182 but as a continuation of the previous application and governed by Article 181—*Lal Govind* v. *Bhikar Sahu*, 20 I.C. 439 (441) (Cal.); *Kaniz Zohra* v. *Boondi Sahu*, 2 P.L.J. 115 (117), 39 I.C. 89; *Ajodhya Nath* v. *Srinath*, supra. The dismissal by the Court of an execution application without notice to the parties and without removing the attachment is no more than a direction to the officers of the Court to remove the proceedings from the pending list, and has not the effect of closing the proceedings. The proceedings initiated by the decree-holder are pending, and a subsequent application which merely asks for sale of the properties already under the prior application is a continuation of the first—*Chalavadi* v. *Poloori Alimelammah*, 31 Mad. 71 (74).

The dismissal of an application only for administrative or statistical purposes amounts only to a suspension of the proceedings and not to a termination of the proceedings; consequently, a subsequent application is to be treated as a continuation of the

prior application—*Ayissa* v. *Abdulla*, 19 L. W. 613, A.I.R. 1924 Mad. 178, 76 I.C. 126; *Pattanayya* v. *Pattayya*, 50 M.L.J. 215, A.I.R. 1926 Mad. 453, 92 I.C. 782.

The mere fact that an execution application is struck off does not by itself indicate the final determination of the execution proceedings—*Manorath* v. *Ambika*, 13 C.W.N. 533 (540), 1 I.C. 57, 9 C.L.J. 443; *Prem Narain* v. *Ganga Ram*, 1931 A.L.J. 436, A.I.R. 1931 All. 458, 133 I.C. 316. An order made by a Judge upon an application which is still pending, that it be 'struck off' or 'sent to the record room' made either without notice to the decree-holder or without giving him an opportunity of being heard, is a ministerial order, and cannot be regarded as a judicial disposal of the application on the merits—*Chattar Singh* v. *Kamal Singh*, 49 All. 276 (F.B.), 100 I.C. 692, A.I.R. 1927 All. 16; *Kristokamini* v. *Girishchandra*, A.I.R. 1936 Cal. 239. The application must be treated as still pending and the next application must be regarded as one asking for revival of the execution which has thus been suspended—*Baij Nath* v. *Ram Bharos*, 49 All. 509 (F.B.), A.I.R. 1927 All. 165, 104 I.C. 116. Where the order of the Court on an execution application is merely an order of striking off and not an order finally disposing of it, a subsequent application for execution must be treated as one to revive and carry through the pending execution proceeding which was merely suspended, and is not an application to initiate a *new* execution—*Qamaruddin* v. *Jawahir*, 27 All. 334 (338) (P.C.). Thus where the application for execution is stayed owing to a claim being preferred and is consigned to the record room the order does not finally dispose of the case and the subsequent application is one for revival and carrying through of a pending execution application and not an application to initiate a new one—*Babulal* v. *Ramji*, A.I.R. 1950 M.B. 71. So also, where an application for execution is struck off as old and the decree-holder is awarded costs, the case is removed from pending file. So a subsequent application for execution is a continuation of the previous one —*Priya* v. *Sudhir*, 69 C.L.J. 288, 43 C.W.N. 519, A.I.R. 1939 Cal. 471. Where the dismissal of an application for execution is a mere routine dismissal, the execution petition must in eye of law be treated as still pending, though the records of the case are consigned to the record-room. A subsequent application is to be treated as a continuation of the prior application—*Sudhansu* v. *Balabhadra*, 26 Pat. L.T. 155, A.I.R. 1945 Pat. 276, 220 I.C. 134. If the execution petition is "struck of," "lodged," "recorded" or 'closed," while yet the reliefs prayed for, or some of them, remain undisposed of, without being covered by final orders either granting or refusing those reliefs, then the petition will continue to be on the file of the Court despite its being "struck off," "lodged," "recorded" or 'closed'—*Muthuveeranna* v. *Muthuvenkatarama*, (1951) 1 M.L.J. 196, A.I.R. 1951 Mad. 711.

If an application for the execution of a decree is struck off or suspended for no act or default of the decree-holder, the latter has a right to ask the Court to revive and carry through the execution proceedings, and the subsequent application is considered as a revival of the previous one—*Madho Prasad* v. *Draupadi*, 43 All. 383 (385); *Bhagwanta*, v. *Zamir Ahmed*, 3 Pat. 596, A.I.R. 1924 Pat. 576, 78 I.C. 766; *Akhtar Hussain* v. *Qudrat Ali*, 26 O.C. 206, 80 I.C. 775, A.I.R. 1924 Oudh 31; *Qamaruddin* v. *Jawahir*, 27 All. 334 (P.C.); *Majibulla* v. *Umad Bibi*, 30 All. 499 (504); *Rajani Bandhu* v. *Kali Prasanna*, 74 I.C. 279, A.I.R. 1924 Cal. 419; *Jawahar* v. *Md. Rafiq*, 212 I.C. 628, A.I.R. 1944 Pesh. 17. And the order of revival is not without jurisdiction, even though is was passed without notice to the judgment-debtor—*Girdarilal* v. *Ram Charan*, 24 A.L.J. 437, 94 I.C. 613, A.I.R. 1926 All. 331.

Where execution proceedings were stayed at the instance of the judgment-debtor, and the case was struck off the file "for the present" and for the convenience of the Court, a second application for execution was one in continuation of the former proceedings—*Baikantha* v. *Aughore Nath*, 21 Cal. 387 (391); *Babu* v. *Ramji*, A.I.R. 1950

M.B. 71. Where on account of an order passed by the Board under sec. 25 of the Punjab Relief of Indebtedness Act, execution is stayed, the second application is a continuation of the previous application—*Vishan v. Chandi*, A.I.R. 1947 Lah. 36, 228 I.C. 607. Where the sale in execution could not take place owing to absence of bidders, and the decree-holder was ordered to pay fees for fresh sale-proclamation, which the decree-holder did not pay, and thereupon the application for execution was struck off "for the present," *held* that the words "for the present" in the Judge's order showed that the proceedings did not come to an end but were merely kept in abeyance, that the attachment still continued, and that the next application for execution made by the decree-holder would be treated as one for revival of the former proceedings. Further, as the decree-holder was not bound by law to pay the costs of the fresh sale proclamation, the dismissal of the previous application could not be said to be a termination of the proceedings in consequence of the decree-holder's omission to do something which he was bound to do, and therefore the subsequent application could not be treated as a fresh application for execution—*Majibulla* v. *Umad Bibi*, 30 All. 499 (502, 504). But see contra—*Dhukhiram* v. *Jogendra*, 5 C.W.N. 347 (349). Where on account of the absence of the decree-holder on the date of sale, the Court passed an order "the decree-holder takes no steps. Dismissed for default", it was held that though in form the order was one for dismissal for default, it was in substance an order removing the case from the pending file of cases and that a subsequent application must be treated as a continuation of the previous one—*Sarada* v. *Jabbar*, 43 C.W.N. 429, 69 C.L.J. 165, A.I.R. 1939 Cal. 331, 184 I.C. 151.

Where the judgment-debtor applied for setting aside an *ex parte* decree and rehearing of the case and then the decree-holder applied for execution of that decree, but the execution Court passed an order staying the execution proceedings until the rehearing be disposed of and recording an order "struck off" such an order did not amount to a dismissal of the execution application, and an application for execution made within three years from the date when the proceedings relating to the rehearing of the case were finally disposed of on appeal was within time—*Radhaballav* v. *Peary Lall*, 58 Cal. 1113, 35 C.W.N. 540, A.I.R. 1931 Cal. 939.

Where an application to execute an *ex parte* decree was struck off the file on the application of the judgment-debtor to set aside the decree, and the decree-holder filed another application after the rejection of the judgment-debtor's application for rehearing of the suit, it was held that the decree-holder's second application for execution was only a continuation of the previous proceedings that had been suspended—*Chandra* v. *Gopi Mohan*, 14 Cal. 385 (387).

If a prior application is *dismissed for default* of appearance, or default in filing processes, or owing to the decree-holder taking no steps, a second application is a new application, and not a continuation of the first one—*Ahmad Khan* v. *Gaura*, 40 All. 235 (237); *Langtu* v. *Baijnath*, 28 All. 389 (390); *Kartik Chandra* v. *Nilmani*, 20 C.W.N. 686, 32 I.C. 931 (933); *Fateh Bahadur* v. *Parmeshwar*, 6 Pat. 694, A.I.R. 1928 Pat. 145 (146), 108 I.C. 430. Where the previous execution proceedings had been struck off upon satisfaction being entered on the decree, a second application for execution was not a continuation of the previous application, because the former proceedings had been properly and finally disposed of—*Khairunissa* v. *Gauri*, 3 All. 484 (487). But where in consequence of a suit being brought by certain persons who objected to the attachment, the application for execution was struck off and the sale of the attached property was postponed, *held* that the application was merely suspended and a subsequent application by the decree-holder after the termination of the suit was a continuation of the previous application—*Sheo Prasad* v. *Indar*, 30 All. 179 (180). So also where after the full satisfaction of the decree by sale, the sale is set aside at

the instance of a mortgagee of the properties sold, the subsequent application for sale of the very same property by the decree-holder is a continuation of the previous application. The reason being the order setting aside the sale results in setting aside of orders consequent of sale including the order dismissing the first execution case on full satisfaction—*Kamalshwar* v. *Hari*, 22 Pat.L.T. 992, A.I.R. 1942 Pat. 112, 197 I C. 708.

Where a decree-holder applied for the sale in execution of five villages of his judgment-debtor, and two villages were sold and the decree satisfied, but subsequently at the nstance of another the sale was held to be a nullity, whereupon the decree-holder made another application for sale of the remaining three villages, praying that as the sale of the two villages had been declared to be a nullity, the prior application should be proceeded with, and that the three villages which it was not then necessary to sell by reason of the sale-proceeds of the two other villages being sufficient to satisfy the decree, should now be sold, *held* that this was in substance an application to take proceedings in continuation of the previous application and was governed by Article 181, and not by Article 182. Time ran from the date when the sale was declared to be a nullity—*Bihari* v. *Jagannath*, 28 All. 651 (653). An application for execution of a decree was made in 1917, and two properties were sold in 1918; but in 1919 a third person F sued the decree-holder and the judgment-debtor and got the sale set aside in respect of one of the properties, and in 1920 the judgment-debtor got the sale of the other property set aside on the ground of irregularity. The decree-holder again applied in 1921 for execution of his decree. *Held* that by reason of the litigation which took place after the sale the execution proceedings could be said to have been revived, and the present execution application must be regarded as a continuation of the previous execution proceedings. Art. 181 applied, and time ran from the date on which the sale was set aside either in 1919 or 1920, and in either case the application was in time —*Radha Kishun* v. *Kashi Lal*, 2 Pat. 829 (832), A.I.R. 1924 Pat. 273, 76 I.C. 927; *Issuree* v. *Abdul Khalek*, 4 Cal. 415.

Where a previous application for execution was dismissed because of a successful application under O. 21, r. 90, a subsequent application for execution is one in continuation of the previous application. But where a previous application was made against *one* only of several judgment-debtors and has been dismissed for that reason, a subsequent application made against *all* the judgment-debtors *cannot* be treated as an application in continuation of the previous application; the previous application being *ab initio* a bad application, the subsequent application is not one made in continuation of it—*Kamfal Nain* v. *Kesho Prasad*, 1 Pat. 701 (704), 4 P.L.T. 226, A.I.R. 1922 Pat. 310, 68 I.C. 638.

Where upon application being made for the execution of a decree a property was sold, but the sale was set aside at the instance of the judgment-debtor, a second application for execution by sale of the identical properties is one in continuation of the previous application—*Kaniz Zohru* v. *Boondi Sahu*, 2 P.L.J. 115 (116), 39 I C. 89; *Kameshwar* v. *Harichand*, 22 P.L.T. 992, A.I.R. 1942 Pat. 112.

Where an application for execution of a rent decree was made and the sale took place, but on the application of the judgment-debtor the sale was set aside, and the execution case was dismissed *for default as the decree-holder took no further steps*, it was held that the execution proceeding came to an end, and a subsequent application for execution field by a decree-holder was *not a continuation* of the previous application as there was no continuity between the two applications—*Midnapore Zemindary Co.* v. *Dinanath*, 22 C.W.N. 766, 45 I.C. 712.

Where the original decree-holder died pending his application for execution, leaving a major and a minor son, and the major son applied to execute the decree as the

legal representative of the deceased decree-holder, but he too died pending his application, and the execution application originally preferred by the decree-holder was struck off on the report of the decree-holder's vakil that he had no instructions, and more than three years thereafter the minor son made an application for execution in continuation of the previous execution application, it was held that as the original application for execution was dismissed as infructuous, the order of dismissal had disposed of the whole matter for the time being, and that the second application was a *fresh* application for execution (and not in continuation of the previous one) and, having been presented more than three years after the disposal of the prior application, was barred—*Rati Ram* v. *Naidar*, 41 All. 435 (439, 440), 17 A.L.J. 649, 49 I.C. 990.

In order that the subsequent application may be treated as a continuation of the previous one, it is necessary that the second application must be *similar in scope and character* to the previous one—*Madhabmoni* v. *Lambert*, 37 Cal. 796 (804); *Ibrahim* v. *Sheo Pratap*, A.I.R. 1926 Pat. 129, 89 I.C. 886. So, a subsequent application cannot be treated as a revival of the prior application, if the relief claimed in the two applications are entirely different. Thus, where the second application was for *arrest* of the judgment-debtor while the previous application had proceeded against his *property*, it was held that the second application was a fresh application and could not be regarded as a continuation of the previous proceeding, as it was perfectly distinct in its nature from the former one—*Virasami* v. *Athi*, 7 Mad. 595 (597); *Krishnaji Raghunath* v. *Anandram Ballal*, 7 Bom. 293 (296); *Lalumia* v. *Mazhur*, 95 I.C. 718, A.I.R. 1926 Mad. 698; *Ram Shivendra* v. *Awadh Behari*, 4 P.L.T. 295, 68 I.C. 629, A.I.R. 1923 Pat. 159; *Har Sarup* v. *Balgovind*, 18 All. 9 (11). If the second application for execution asks for the attachment of properties *other than those* which were proceeded against in the proceedings instituted by the previous application, the second application is to be treated as a *new* application and not as a continuation of the previous one—*Chalavadi Kotiah* v. *Pallori*, 31 Mad. 71 (73); *Raghunandan* v. *Bhugoo*, 17 Cal. 268; *Sreenath* v. *Yusoof*, 7 Cal. 556 (558); *Baikantha* v. *Aughorenath*, 21 Cal. 387 (391). Thus where an execution petition was filed giving a list of properties and praying for attachment and appropriate relief, a subsequent application giving a fresh list of properties against which the decree is sought to be executed, is a fresh application, and not a continuation of the earlier one—*Krishna* v. *Kunjan*, A.I.R. 1951 Tra-Co. 184. So also a second application for execution praying for execution of crops in plots different from those mentioned in the previous application is not a continuation of the previous application but is a fresh one—*Tirkha* v. *Nazeer*, 1941 A.L.J. (Supp.) 19, 1941 O.A. (Supp.) 129, 1941 R.D. 105. A landlord decree-holder applied for execution of a rent decree, when the executing Court held that the execution should proceed as on the basis of a money decree, and not as a rent decree. It proceeded in that way, and certain property of the judgment-dobtor was hold. *The* sale was however set aside on the application of the judgment-debtor under O. 21, 90, C.P. Code. The decree-holder than applied once more to execute his decree as a rent decree. *Held* that the second application should be treated as a continuation of the preceding application, being *of the same character*, in as much as the prayers in both were to execute the decree as rent decree—*Deo Narayan* v. *Ram Prasad*, 7 P.L.T. 410, 90 I.C. 799, A.I.R. 1926 Pat. 143. The fact that the first execution contained a prayer for attachment which is absent in subsequent execution is not in itself a ground for holding that they were different in character and scope—*Md. Ummal* v. Md. *Ummal*, A.I.R. 1951 Tra-Co. 179. Where the first application for execution was against rents and moveables but was executed against rents only and the decree was not fully satisfied, the second application is made for execution against moveables, it is not a fresh application as it is similar in scope and character—*Mohabee Ali* v. *Chhotey*, 1940 R.D. 533, 1941 A.L.J. (Sup.) 5.

When execution proceedings were stayed by *injunction or prohibitory order*, it was held under the Act of 1877 that a second application for execution made after the removal of the injunction was to be regarded as an application for revival of the former proceedings under Art. 181 and not as a fresh application under Art. 182, and the period of limitation for this subsequent application would run from the date of removal of the injunction—*Basant Lal* v. *Batal Bibi*, 6 All. 23; *Amulya* v. *Preo*, 7 I.C. 886; *Madhab Mani* v. *Lambert*, 37 Cal. 796; *Ghulam Nashiruddin* v. *Hardeo*, 34 All. 436 (441); *Sakina* v. *Ganesh*, 3 P.L.J. 103 (105), 44 I.C. 560; *Bibi Hajo* v. *Harsahai*, 7 P.L.T. 39, 89 I.C. 992, A I.R. 1926 Pat. 62; *Kalyanbhai* v. *Ghanesham*, 5 Bom. 29; *Narayan* v. *Sono*, 24 Bom. 345; *Chintaman* v. *Balshastri*, 16 Bom. 294; *Issuree* v. *Abdul*, 4 Cal. 415; *Lutful* v. *Shumbhudra*, 8 Cal. 248; *Hurronath* v. *Chunni*, 4 Cal. 877; *Chandra* v. *Gopimohan*, 14 Cal. 385 (387); *Ashrafuddin* v. *Bipin Behari*, 30 Cal. 407 (411); *Gurudeo* v. *Amrit*, 33 Cal. 689; *Ruddar* v. *Dhanpal*, 26 All. 156 (159); *Lakhmi* v. *Ballam*, 17 All. 425 (427); *Rangiah Goundan* v. *Nanjappa*, 26 Mad. 780. *Contra*—*Rajaratnam* v. *Shivalayammal*, 11 Mad. 103 (105). It should be noted that many of these cases were decided under the Act of 1877, in which section 15 applied only to *suits* and *did not apply to an application for execution* of a decree; under the present Act all the cases relating to injunction cited here would fall under Article 182, and the time during which the execution was stayed by the injunction or prohibitory order would be excluded from computation under section 15, which now applies to applications for execution of decrees. See 34 All. 436, at p. 442. But applications for revival of a previous application for execution would be governed by Article 181, as before. This subject has been elaborately discussed in the Full Bench case of *Chhattar Singh* v. *Kamal Singh*, 49 All. 276 (F.B.) cited in Note 159 under sec. 15.

Similarly, where the execution of a decree was ordered to be stayed pending an appeal from the decree and the execution proceedings struck off, a subsequent application for execution of the decree after dismissal of the appeal was regarded as one for the revival of such proceedings, and was held to be governed by this Article—*Buti Begam* v. *Nihal Chand*, 5 All. 459 (461); *Raghubans* v. *Sheo Saran*, 5 All. 243.

Where the decree-holder is obstructed by violence or fraud, and a litigation is necessary to get rid of such obstruction, the execution is suspended owing to such litigation, and a second application made after the termination of such litigation would be a continuation of the first—*Kartick* v. *Nilmoni*, 20 C.W.N. 686, 32 I.C. 931 (932).

Where a property attached in execution is released on the claim of a third party against whom the decree-holder has to institute a regular suit, an application for execution against that property made by the decree-holder after succeeding in the suit is to be regarded not as a fresh application, but as a revival of the previous proceedings and governed by Article 181, and the period of limitation runs from the date of the decree in the claim suit and not from the date of the previous application—*Paras Ram* v. *Gardner*, 1 All. 355 (357) (F.B.); *Baboo Pyaroo* v. *Syad Nazir*, 23 W.R. 183; *Rudra Narain* v. *Panchu Maiti*, 23 Cal. 437 (440). This principle applies equally to the case of an attachment before judgment. Thus, where certain properties of the defendant in a money suit were attached before judgment, and after a decree was obtained in that suit, a claim petition was put in by a third party and allowed, and the decree-holder consequently filed a suit to establish his right to sell the properties in execution and obtained a decree in his favour, an application by the decree-holder for the sale of the properties attached before judgment was governed by Art. 181 and not by Art. 182, and the period of limitation ran from the date of the decree in the latter suit, and not from the date of the decree under execution—*Surayya* v. *Venkataratnam*, 47 Mad. 176 (179, 180), 45 M.L.J. 822, 79 I.C. 779, A.I.R. 1924 Mad. 210. But the same High Court has overruled this decision in the Full Bench case of *Hameed*

v. *Arunachalam*, (1944) 2 M.L.J. 192, I.L.R. (1945) Mad. 80, A.I.R. 1944 Mad. 561 and has held that where execution proceedings were interrupted and it became necessary for the decree-holder to get his right of sale declared before starting the execution proceedings does not take the case out of Art. 182 and relegate it to the residuary Art. 181. An attachment before judgment does not operate to keep alive the subsequent decree until the attachment is removed, however lengthy may be the interval. For its continuance beyond three years from the date of the decree an application for execution must be filed within that period, otherwise the decree-holder loses his remedy. See also, *Lakshmi* v. *Venkayya*, (1950) 2 M.L.J. 670.

But where the objector's claim to two-thirds of the attached property having been allowed, the attachment of two-thirds of the property was raised and the decree-holder filed a regular suit against the objector, but he was unsuccessful in that suit, and then he made a second application for execution, praying for attachment of the one-third share which was not released from attachment, it was held that as the property sought to be attached and sold in the second application was one which the decree-holder might have proceeded against, notwithstanding the order in the claim proceedings, the second application was held not a continuation of the previous proceeding for execution —*Raghunandan* v. *Bhugoo*, 17 Cal. 268 (271).

Where the decree-holder has failed to remove the obstacle (*i.e.*, the claim put in by the third party) to his executing the decree, the second application cannot be treated as a revival or legal continuance of the first—*Shivram* v. *Sarasvatibai*, 20 Bom. 175 (178); *Khairunnissa* v. *Gouri Shankar*, 3 All. 484; *Gunpat* v. *Mehra*, 30 P.R. 1882.

An application for execution by the assignee of a decree was dismissed on the objection of the judgment-debtor that the assignment was for the benefit of the judgment-debtor and that the assignee was therefore not entitled to execute the decree. The assignee thereupon brought a suit to establish her claim that the assignment was for *her* own benefit, and she obtained a decree declaring that she had obtained a valid assignment and establishing her right to execute the decree. She then applied again to execute the decree. It was held that the second application was one to revive or continue the previous application—*Suppa Reddia* v. *Avudai Ammal*, 28 Mad. 50 (53) (F.B.).

In June 1892, an application was made for execution of a decree and was dismissed, the applicant being relegated to a suit to establish his rights. He did not sue, but in September 1892 he put in a fresh application to execute, which was dismissed, as he had not chosen to bring the suit as directed. He then sued, and in March 1895 a decree was passed in his favour. He now put in a petition in October 1895 praying that his petition of September 1892 be revived or continued. It was held that as the last application of September 1892 had not been merely suspended but finally and properly dismissed, the present petition should be treated as a fresh application (and not as a continuation of the first) and therefore barred—*Suryanarayana* v. *Gurunada*, 21 Mad. 257 (260).

Within 3 years from the time fixed in a preliminary decree for sale on a mortgage, the decree-holder made an application for a final decree, but the application was returned for a correct statement of the amount due and for a proper description of the mortgaged property. No time was fixed for the amendment and the decree-holder presented his amended application more than 3 years after the time fixed in the preliminary decree. *Held* that this application was a continuation of the previous application and was not barred—*Kallu Mal* v. *Kashi Nath* 20 A.L.J. 580, A.I.R. 1922 All. 446, 68 I.C. 175.

694A. Limitation in respect of such application:—It has been held in some cases that where an application is made to continue proceedings in a *pending* execution, the application is not governed by Art. 181 or by any other Article of this Act; the right to apply accrues from *day to day* and will not be barred until 3 years have elapsed after the proceedings have *ceased to be pending—Subha Chariar* v. *Muthuveeran*, 36 Mad. 553 (557); *Puttayya* v. *Puttanayya*, 47 M.L.J. 608, 84 I.C. 897, A.I.R. 1925 Mad. 152; *Chalavadi* v. *Poloori Alimelammah*, 31 Mad. 71 (76); *Pattanaya* v. *Pattayya*, 50 M.L.J. 215, A.I.R. 1926 Mad. 653, 92 I.C. 782; *Kedar Nath* v. *Harra Chand*, 8 Cal. 420; *Ikbal Narain* v. *Jagrani*, 28 O.C. 158, A.I.R. 1925 Oudh 552, 85 I.C. 450; *Bhan* v. *Thesa*, I.L.R. (1940) All. 246, 1940 A.L.J. 180, A.I.R. 1940 All. 151 (F.B.). So long as the execution case is pending, an application to continue it is not barred by any Article (181 or 182) of the Limitation Act. It may be that where a bar to the further progress of execution proceedings has been created by an order of a Court of competent jurisdiction, such proceedings may only be revived by an application under Art. 181 after the removal of the bar; but in a case where the Court intended to and did as a matter of fact maintain an application for execution on its *pending file*, and stopped proceedings for the time being and did not finally dispose of the application, an application made to the Court for the sole object of drawing its attention to the pending file, so that it may proceed with it, is not governed by any Article of the Limitation Act. When an application is as a matter of fact pending, the decree-holder has a right every moment to ask for further progress in the matter of the application—*Ikbal Narain* v. *Jagrani*, 28 O.C. 158, 85 I.C. 450, A.I.R. 1925 Oudh 552 Thus, the decree-holder applied for execution of the mortgage decree in 1925 but the decree-holder and judgment-debtor then compromised the suit in April 1926 on condition that the latter would pay the money in three months, and if he failed to pay, execution would proceed. The comprimise was filed in Court in May 1926, and thereupon the Court passed an order striking off the execution proceedings on the ground that the matter had been compromised; at the same time the Court put it on record that the execution could proceed if the judgment-debtor did not pay within 3 months. The judgment-debtor not having paid the money within 3 months which expired on 24th July 1926, the decree-holder again applied for execution on 24th July 1929. It was held that this Article did not apply, and the application was not barred, because the previous application must be considered as pending; even if this Article applied, still as the second application was made within 3 years of the date (24th July 1926) when the right to apply accrued, the application was just in time—*Prem Narain* v. *Ganga Ram*, 1931 A.L.J. 436, 133 I.C. 316, A.I.R. 1931 All. 458; see also *Venkataro* v. *Bijesingh*, 10 Bom. 108 (111).

In cases where the previous application is not treated as pending, the subsequent application is governed by Article 181, and time runs when the right to apply accrues. Where a sale held in execution of a decree was set aside, and the decree-holder was ordered to refund the purchase-money, a second application for execution of the decree was governed by this Article and time ran not from the date on which the sale was set aside but from the date on which the decree-holder was ordered to refund the purchase-money to the purchaser, for it was on this date that his right to apply accrued, and till then he had no right to call upon the judgment-debtor to pay his judgment-debt a second time—*Ramineedi Venkata* v. *Lakhoju China*, 30 Mad. 209 (212). In execution of a mortgage-decree, the mortgaged property was sold and the judgment-debtor purchased it *benami*. The decree-holders made an application in November 1891, to set aside the *benami* purchase and resell the property. The first Court found that the purchase was not *benami* and confirmed the sale on 12th April 1892, but this decision was reversed on appeal in 1893. The decree-holders thereupon made another application for execution and re-sale of the property in December 1894,

It was held that this application might be regarded as a continuation of the application of November 1891 for re-sale of the property; and as the decree-holders were precluded by the first Court's finding of 12th April 1892, from asking for sale until it was reversed on appeal in 1893, the application was in time under this Article—*Raghunath* v. *Lalji*, 23 Cal. 397 (402).

The words "when the right to apply accrues" mean when the right to apply *first* accrues. Where the sale held in execution of a decree was set aside at the instance of the judgment-debtor, and then the *auction-purchaser* filed an appeal against the order setting aside the sale, and the appeal was dismissed and the order setting aside the sale was confirmed, the decree-holder's second application for execution must be filed within three years from the *date on which the sale was set aside*, and not from the date of the dismissal of the appeal preferred by the auction purchaser. The prior execution proceeding had terminated on the date on which the sale was set aside, and the right to revive the execution proceeding accrued on that date. The general principles of suspension of limitation apply only to those cases where the plaintiff or the decree-holder is prevented from taking action in pursuance of his rights; but in this case the appeal by the *auction purchaser* (who was a third party) did not prevent the decree-holder from making a fresh application for execution after the sale was set aside. Consequently limitation was not suspended during the appeal—*Akshoy Kumar* v. *Abdul Kader*, 57 Cal. 860, 34 C.W.N. 102 (105), A.I.R. 1930 Cal. 329, 126 I.C. 268. So also where in a case there is no option contained in a decree, the limitation under this Article for an application for preparation of a final decree runs from the date when the plaintiff or applicant becomes first entitled to make the application—*Bhagwati* v. *Sant Lal*, I.L.R. (1946) All. 570, A.I.R. 1946 All. 360; *Ram Charan* v. *Sant Ltd.*, 1946 A.W.R. (H.C.) 558. The Bombay High Court has taken the same view in *Chunilal* v. *Shivram*, 52 Bom.L.R. 250, A.I.R. 1950 Bom. 188 (F.B.) and has held that once the right to enforce the default clause accrues to the decree-holder for the first time, time begins to run from the date of such accrual and would not be stopped by reason of subsequent defaults. So an execution application to enforce the default clause filed more than three years from the date of such accrual would be barred under this Article. Where however, the instalment decree does not provide clearly that the decree-holder has no option but to execute the entire decree on the happening of a default, the decree-holder is entitled to execute the decree for any of the instalments that are not barred—*Hardeo* v. *Bimraj*, I.L.R. (1943) Nag. 334, 1943 N.L.J. 108, A.I.R. 1943 Nag. 170.

If the judgment-debtor prefers an objection to the attachment of the property, the period of limitation in respect of the decree-holder's second application for execution runs as soon as the judgment-debtor's objection is dismissed, whether by the Court of first instance, or on appeal. If the judgment-debtor's objection is allowed by the Court of first instance, but is dismissed on appeal, the right of the decree-holder to apply for a second time accrues from the date of the appellate decree recognizing his right to execute the decree—*Suppa Reddiar* v. *Avudai*, 28 Mad. 50 (53) (F.B.). If the judgment-debtor's objection is dismissed on appeal, limitation would run from the date of the appellate decree, and the fact that the judgment-debtor has preferred a second appeal to the High Court will not postpone the running of time—*Chalavadi Kotiah* v. *Poloori*, 31 Mad. 71 (73); *Kartick* v. *Nilmoni*, 20 C.W.N. 686, 32 I.C. 931. If the judgment-debtor's objection is dismissed by the Court of first instance, time runs from the date of the decree of that Court, and the pendency of an appeal by the judgment-debtor from such decree cannot give the decree-holder a right to defer execution until the disposal of such appeal, because the filing of an appeal by the objector could not operate as a bar to the decree-holder taking out fresh execution—*Ibrahim* v. *Sheo Pratap*, A.I.R. 1926 Pat. 129, 89 I.C. 886.

So also, if a third party prefers an objection to the attachment and the objection

is allowed, in consequence of which the decree-holder has to institute a suit against him, the period of limitation runs as soon as the decree-holder gets a decree in his favour in that suit; and the subsequent application must be made within three years from that period. The fact that that person has preferred an appeal and that appeal has been dismissed will not entitle the decree-holder to count the period of limitation from the date of the appellate decree—*Desraj* v. *Karam*, 19 All. 71 (72). But in another Allahabad case, where the objector's suit was dismissed by the Court of first instance, but decreed on appeal, and was finally dismissed by the High Court in second appeal, it was held that the final decision of the High Court in decree-holder's favour had the effect of reviving the decree-holder's previous application for attachment and sale —*Sheo Prasad* v. *Indar*, 30 All. 179 (181). But this was merely an *obiter*. If, however, the order of the Court of first instance is irregular and opposed to rule, time runs from the date of the Appellate order confirming the first Court's order—*Narayan* v. *Sona*, 24 Bom. 345 (349).

Where a decree-holder himself purchased the property of the judgment-debtor in execution of the decree, but he lost possession of the same as the result of a suit brought by a third party, his next application, for satisfaction of the decree might be treated either as an application for execution (Art. 182) or as a revival of the prior execution proceedings (Art. 181), and in either case the right to apply arose when the third party's suit was decreed by the Court of first instance or in any case when the decree-holder was actually dispossessed by virtue of that decree, but not on the date when an appeal preferred against that decree was dismissed by the Appellate Court—*Saling Ram* v. *Lachhman*, 50 All. 211, 107 I.C. 42, A.I.R. 1928 All. 46 (49). Where there is an obstacle to the execution proceedings, for instance possession of the property by a third party, as soon as that obstacle is swept away by a Court of competent jurisdiction declaring the title of the judgment-debtor to the property as against that party, the duty arises upon the decree-holder to take execution proceedings within three years notwithstanding appeal preferred by that party—*Kanwar* v. *Munshi*, 40 P.L.R. 481, A.I.R. 1938 Lah. 695.

A final decree for sale was passed on the 7th June 1913, and an application for execution was made on 4th January 1916. While the execution was pending a suit was filed on the 13th November 1916 to obtain a declaration that the property ordered to be sold was not liable to be sold in execution of the decree. On the same day the Court granted an injunction restraining the decree-holder from proceeding with the execution. The suit was dismissed by the trial Court, but was decreed in appeal, but on second appeal the suit was dismissed *in toto* by the High Court on 6th July 1920. *Held* that the obstacle to the execution of the decree was removed on the 6th July 1920, and an application for revival of the execution proceedings filed within 3 years of this date was within time—*Chattar Singh* v. *Kamal Singh*, 49 All. 276 (F.B.), 100 I.C. 692, A.I.R. 1927 All. 16. But it has been held by some cases of the same High Court that where execution is stayed by an injunction, limitation will commence to run as soon as the order granting the injunction is withdrawn. If the injunction comes to an end by the order of the Court of first instance, limitation will run from the date of the order of that Court, and the fact that an appeal has been preferred by the other party from that order will not entitle the decree-holder to deduct the time of pendency of the appeal—*Balwant* v. *Budh Singh*, 42 All. 564 (566); *Madho Prasad* v. *Draupadi*, 43 All. 383 (*per* Piggot J.; Walsh J. *contra*). If the injunction comes to an end by the order of the appellate Court, the time for making a fresh application runs from that date, and the fact that there is a second appeal to the High Court will not entitle the decree-holder to calculate the period from the date of the decree of the High Court confirming the lower appellate Court's order—*Ruddar* v. *Dhanpal*, 26 All. 156 (161).

An application by a party to the suit to recover possession of properties which had been taken delivery of under a void execution sale would be in time under this Article, if it was filed within three years of his dispossession. It is not until the purchaser acting under colour of sale interferes with his possession that the person whose properties have been sold is really aggrieved, and what gives him right to apply under this Article is such interference or dispossession and not the sale—*Merla* v. *Nallaparaju*, (1955) 2 S.C.R. 938, 1956 S.C.J. 101, A.I.R. 1956 S.C. 87.

695. Other applications:—Where a money decree-holder and his judgment-debtor agreed that the amount of the decree should be payable by instalments and that if default was made in payment of any one instalment the whole decree should be executed and the Court sanctioned this agreement, an application by the decree-holder for recovery of the whole amount, upon a default being made, was one to enforce the agreement rather than an application for execution of the decree in the strict sense of the term, and therefore Article 181, and not Article 182, applied. Time ran from the date of the default—*Sham Karan* v. *Piari*, 5 All. 596.

Where an instalment decree *nisi* was passed in a mortgage suit, and it provided that a certain sum should be paid every year in *Jeth*, and that if default were made for three years in succession in the payment of the instalments the decree-holder would be at liberty to recover at once whole amount, *i.e.*, to apply for an order absolute for sale of the property, *held* that none of the clauses (not even clause 7) in the third column of Article 182 applied to the case, and that Article 181 was the proper Article applicable to an application for enforcement of the instalment decree by an order absolute for sale; and the right to apply for an order absolute for sale accrued on the occurrence of the third consecutive default—*Badri Narayan* v. *Kunj Behari*, 35 All. 178, 18 I.C. 731.

An application by a judgment-debtor for restoration of immoveable property seized by the decree-holder in excess of what has been decreed is governed by this Article, and not by Art. 165, because that Article does not apply to an application by a *judgment-debtor—Abdul Karim* v. *Islamunnissa*, 38 All. 339. See this case and several other cases cited in Note 668 under Art. 165. Time runs when the property claimed by the judgment-debtor has been wrongly delivered to the other party—*Jilan* v. *Abdul Rahman*, 4 Luck. 209, A.I.R. 1929 Oudh 76 (79), 115 I.C. 444.

This Article applies to an application for resale of property by the decree-holder under Or. 21 r. 86, C. P. Code—*Sivasubramanian* v. *Murugesa*, (1940) 1 M.L.J. 537, A.I.R. 1940 Mad. 566.

An application for leave under Or. 21 r. 50 (2), C. P. Code, although an application in execution, is not an application for execution and consequently does not come under Art. 182 or Art. 183. It is governed by this Article—*Jagannath* v. *Kaniram*, 48 C.W.N. 280. So also an application to enforce a security bond against the sureties to whom the judgment-debtor's properties were entrusted after attachment in execution of a decree is not an execution application. So this Article applies to such an application which must be made within three years after the date on which the seruties failed to produce the property and the right to enforce the bond accrued—*Annamalai* v. *Sundaresa*, (1943) 2 M.L.J. 444. So also where a security bond is executed by the guardian of the minor, this Article applies to an application by the minor on attaining majority for its enforcement—*Ramamurthy* v. *Tirupatiraju*, (1948) 2 M.L.J. 287. The Calcutta High Court has taken a contrary view and has held that such an application is an application for execution of a decree and as such is governed by Art. 182—*Harendra* v. *Gurupada*, 41 C.W.N. 1099, A.I.R. 1937 Cal. 452.

On the death of a plaintiff who filed a representative suit on behalf of himself and others having the same interests as members of the community, the suit does

not abate, and any person on whose behalf also the suit was filed can apply to the Court to be added as a plaintiff for continuing the suit. Art. 181 may be applied to such an application—*Mahomed Kanni* v. *Naina Mahomed*, 54 Mad. 770, 132 I.C. 289, 60 M.L.J. 659, A.I.R. 1931 Mad. 590 (591), following *Krishnaswami* v. *Seethalakshmi*, 9 L.W. 166, 1918 M.W.N. 888, 49 I.C. 268. See Note 681 under Art. 171.

An application by the legal representatives of a deceased decree-holder for reviving the execution proceedings dismissed for default on the death of the decree-holder, is not governed either by this Article or by Art. 182. The Court will exercise its inherent powers if it considers that justice requires its exercise if it is satisfied that there are no such laches on the part of the applicant which would disentitle him to relief—*Ananda v. Sushil*, 46 C.W.N. 326, 75 C.L.J. 114, A.I.R. 1942 Cal. 390. But in *Puttamma* v. *Hammia*, A.I.R. 1950 Mysore 18 it has been held that this Article is applicable for fixing the time within which an application can be filed by the decree-holder's legal representatives or the assignee decree-holders to be brought on record and to proceed with the execution.

Where pending an appeal to the Privy Council, some of the parties died, and their legal representatives were not brought on the record before the decree, an application to add the representatives as parties to the decree falls under this Article, and the right to apply accrued from the date of the decree—*Kalyani* v. *Tiruvengadaswami*, 47 Mad. 618, 47 M.L.J. 154, A.I.R. 1924 Mad. 695, 80 I.C. 85.

Where a sale held in execution of a decree was set aside at the instance of the judgment-debtors, and possession was restored to them, an application made by them to recover compensation for the period during which they were kept out of possession is governed by this Article, as it is an application under the C. P. Code (sec. 144) or at least contemplated by the C. P. Code, and must be made within three years from the restoration to possession—*Jagdip* v. *Holloway*, 2 P.L.J. 206 (208), 39 I.C. 653; *Suryapal* v. *Bijai*, 1938 R.D. 182. The limitation commences to run from the date on which the sale is set aside—*Gopal* v. *Harihar*, 51 C.W.N. 302, A.I.R. 1948 Cal. 37.

When the sale is void *ab initio* and not voidable, an application to set aside the sale is governed by this Article and not by Art. 166—*Nirode* v. *Harendra*, I.L.R. (1938) 1 Cal. 280, 42 C.W.N. 87, A.I.R. 1938 Cal. 113; *Rajendra* v. *Debi*, 21 Pat.L.T. 223, A.I.R. 1940 Pat. 303; *Ettu* v. *Ayyamal*, (1950) 1 M.L.J. 22, A.I.R. 1950 Mad. 367; *Md. Umar* v. *Motichand*, A.I.R. 1952 Pat. 244; *Ventaperumal* v. *Perumal*, A.I.R. 1952 Tra-Co. 136. Thus where no notice under Or. 21 r. 22, C.P. Code is issued an application to set aside the sale as void is governed by this Article as the sale is a nullity—*Venkata* v. *Kanakaraju*, (1950) 2 M.L.J. 290, A.I.R. 1950 Mad. 801. But where a sale is held without service of notice under Or. 21 r. 66, C. P. Code on the judgment-debtors treating them as minors though they were in fact majors the sale is not a nullity and an application for setting aside the sale is not governed by this Article but by Art. 166—*Ghulam* v. *Negapathinam*, (1950) 1 M.L.J. 432, A.I.R. 1950 Mad. 460. So also, where an application is made by the judgment-debtor for setting aside the sale on the ground that he has no saleable interest in the property sold, the application is not governed by this Article but by Art. 161 as the sale is not a nullity—*Muthaluru* v. *Chundi*, I.L.R. (1948) Mad. 522, (1947) 2 M.L.J. 468, A.I.R. 1948 Mad. 226 (F.B.). Where a decree is against the assets of the deceased judgment-debtor, and the property sold is claimed as the personal property of the applicant, an application by him for setting aside the sale on that ground is not governed by this article as the sale is not a nullity—*Chakku* v. *Nemai*, A.I.R. 1940 Pat. 192.

An application by a creditor of an insolvent to prove his debt and to have his name inserted in the Schedule is governed by this Article as it is an application

under sec. 352 of the C. P. Code of 1882; the right to apply accrues from the declaration of the insolvency—*Parshadi Lal* v. *Chuni Lal*, 6 All. 142 (144).

An application by a creditor under sec. 37 of the Provincial Insolvency Act (1907) for a declaration that a sale made by the insolvent within 3 months prior to the application for adjudication is null and void as against the Official Receiver, is governed by this Article, and the starting point of limitation would be the date on which the debtor was adjudicated an insolvent—*Nikka Mal* v. *Marwar Bank Ld.*, 151 P.R. 1919, 52 I.C. 188. But it is doubtful whether Article 181 would apply, as it is not an application under the *C. P. Code*. See *Pirthi* v. *Basheshar*, 69 I.C. 403, A.I.R. 1924 Lah. 331. So also an application by an official receiver for declaration that an execution sale held after adjudication is void is governed by this Article—*Motilal* v. *Nathu*, 1940 N.L.J. 505, A.I.R. 1940 Nag. 414. When a property is sold during the insolvency proceedings, the official receiver's application for possession of the property sold is governed by this Article and the right to apply commences from the date of adjudication and not from the date of the sale or application for insolvency—*Bhalchandra* v. *Palsule*, 1946 N.L.J. 597, I.L.R. (1946) Nag. 937, A.I.R. 1946 Nag. 76.

Application to bring decree in conformity with judgment:—Where a decree is not drawn up in accordance with the judgment, an application to the Court to make a decree in accordance with the judgment is not subject to any rule of limitation—*Monmatha* v. *Matilal*, 33 C.W.N. 614 (617).

Application for extension of time to pay mortgage debt:—An application for extension of time for payment of the mortgage debt made either by the mortgagor who has obtained a redemption decree or by a person to whom the decree has been assigned by the mortgagor, is not provided for elsewhere, and falls under this Article; the right to apply accrues on the date of the decree or at the latest on the expiry of the period fixed for the payment of the mortgage-debt—*Vasudeb* v. *Gopal*, 43 Bom. 689 (699, 700).

Application for refund of money:—An application by a purchaser for refund of purchase-money, where the sale has been set aside as void upon a suit brought by the judgment-debtor, falls under this Article, and time runs from the date of the final order (passed by the High Court in second appeal setting aside the sale—*Girdhari* v. *Sital Prasad*, 11 All. 372 (374). In *Veeraswami* v. *Nammayya*, (1941) 2 M.L.J. 121, A.I.R. 1941 Mad. 751 a point was raised but not decided as to whether this Article or Art. 182 would apply to an application under Or. 21 r. 93, C. P. Code by the auction purchaser for refund of pourdage fee on a sale being set aside.

So also, an application by an auction-purchaser, who has failed to obtain possession of the property purchased owing to the judgment-debtor having no saleable interest in the property, for refund of the purchase money after setting aside the sale, is governed by Article 166 so far as the setting aside of the sale is concerned, and by Art. 181 in respect of refund of purchase-money—*Makar Ali* v. *Sarfuddin*, 50 Cal. 115 (see this case cited in Note 669 under Article 166).

Certain persons obtained shares in rateable distribution on the basis that they held money decree. Subsequently, on appeal it was held that one of them was not entitled to a money decree but only to a charge decree. On the application by one of the other persons obtaining shares for refund of assets wrongly paid to the other, it was held that either this Article or Art. 183 would apply—*Suryarao* v. *Chalamayya*, (1947) 1 M.L.J. 87, A.I.R. 1947 Mad. 339.

Where an *ex parte* decree, under which the decree-holder realised the decretal amount, was afterwards set aside, and after retrial of the suit another decree was passed by which the original decretal amount was reduced by a certain sum, an

application by the judgment-debtor for refund of the excess amount (*i.e.*, the difference between the sum realised by the decree-holder and the sum finally decreed) fell under this Article. The right to apply accrued upon the passing of the latter decree—*Bithal* v. *Jamna*, 30 All. 476 (478).

The judgment-debtors against whom a decree had been executed, applied for refund of the money which they alleged had been recovered in execution by the decree-holder in excess of what was actually due. Upon this application an account was taken by order of the Court. The judgment-debtor then applied to the Court for an order upon the judgment-creditor to refund the excess. It was held that this Article applied to the application, and time began to run when the account was taken (and not when the excess amount had been paid to the decree-holder)—*Mula Raj* v. *Debi Dihal*, 7 All. 371 (372). An application by the judgment-debtor under sec. 47 C. P. Code for the refund of excess amount paid by him by mistake is governed by this Article. The right to apply accrues on the date the mistake is discovered—*Daulat* v. *Gurbakhsh*, 30 P.L.R. 294, A.I.R. 1949 E.P. 213.

696. Application for ascertainment of mesne profits:—When a decree for possession of immoveable property awarded mesne profits which were left to be ascertained in execution under secs. 211, 212 of the C. P. Code 1882, an application for ascertainment of the mense profits was not governed by any rule of limitation either under Article 181 or Article 182. Article 181 was inapplicable, because it was the duty of the Court to ascertain the mesne profits awarded by a decree, without any application being made. Article 182 was not applicable, because the proceedings for determining the amount of mesne profits were not proceedings in execution of a decree in regard to any fixed sum but merely a continuation of the original suit and carried on in the same way as if a single suit were brought for mesne profits by itself—*Puran Chand* v. *Roy Radhakishen*, 19 Cal. 132 (136, 138) (F.B.); *Waliya Bibi* v. *Nazar Hasan*, 26 All. 623; *Md. Umarjan* v. *Zinet*, 25 All. 385. But it was pointed out by the Madras and Bombay High Courts that since sec. 244 of the old C. P. Code expressly directed that the mesne profits *should be ascertained in execution*, an application for the ascertainment of mesne profits was consequently an application in execution and the rule of limitation applicable to such application was the same as that applicable for execution applications—*Ramana Reddi* v. *Babu Reddi*, 37 Mad. 186 (195, 196, 198); *Gangadhara* v. *Balakrishna*, 45 Bom. 819 (826, 828); *Usuf Ali* v. *Papa Miya*, 47 Bom. 778 (781), 25 Bom.L.R. 810, 73 I.C. 233, A.I.R. 1923 Bom. 366 (following 45 Bom. 819).

But the ascertainment of mesne profits is now provided in O. 20, r. 12 of the new C. P. Code of 1908, and has been made a part of the suit, and in continuation thereof —*Rudra Pratap* v. *Sardar Mahesh Prasad*, 47 All. 543. Such a proceeding is no longer a separate proceeding, and an application for ascertainment of mesne profits is no longer an application in execution; consequently Article 182 is not applicable; but it is assumed that Article 181 would now apply to such applications—*Harakhpan* v. *Jagdeb*, 4 Pat. 57, 5 P.L.T. 626, A.I.R. 1924 Pat. 781 (782), 84 I.C. 272; and as O. 20, r. 12 requires that the decree shall direct an enquiry to be made for the ascertainment of rent or mesne profits from the institution of the suit until the delivery of possession to the decree-holder or the relinquishment of possession by the judgment-debtor or the expiration of three years from the date of the decree, whichever event first occurs, it is clear that the right to apply arises not from the date of the decree, but will arise either when the delivery of possession is actually given or three years expire from the date of the preliminary decree—*Ibid.*. In two other cases the Patna High Court has expressed the opiniin (following 19 Cal. 132 F.B.) that an application for ascertainment of mesne profits being an application in the suit itself is not governed by any

provision of the Limitation Act—*Kamakhya Narayan* v. *Akloo*, 8 Pat. 482, 10 P.L.T. 762, 117 I.C. 647, A.I.R. 1929 Pat. 368; *Bhatu Ram* v. *Fogal Ram*, 5 Pat. 223, 7 P.L.T. 340, A.I.R. 1926 Pat. 141 (143), 92 I.C. 629. Where a decree for mesne profits has been passed, and an application has been made for ascertainment of the mesne profits, it is not competent to the Court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed, and it is always open to the decree-holder to ask the Court to ascertain the mesne profits, in as much as an application for mesne profits is an application in the suit itself. The law of limitation has no application to it so long as the suit is a pending suit—*Bhatu Ram* v. *Fogal Ram*, supra. The same view has been taken by the Bombay High Court—*Shanker* v. *Gangaram*, 52 Bom. 360, 30 Bom.L.R. 503, 109 I.C. 734, A.I.R. 1928 Bom. 236 (237). The Madras High Court is of opinion that such application is governed by Art. 181 and must be made within 3 years from the date of the preliminary decree for possession—*Timmaraju* v. *Narasimha*, 54 M.L.J. 665, A.I.R. 1928 Mad. 522, 109 I.C. 528. But in a later case the same High Court has held that the word application in sub-rule (3) of r. 12 of Or. 20, C. P. Code, added by the Madras High Court, should be read as meaning a motion entirely free from the mischief of Art. 181. It is not obligatory on the decree-holder to file an application asking for an enquiry into mesne profits awarded by the appellate decree and for passing of a final decree, within three years of the final decree as required by Art. 181. There is no question of limitation in such a case—*Ramasubramanya* v. *Karimbil*, I.L.R. (1940) Mad. 372, (1940) 1 M.L.J. 54, A.I.R. 1940 Mad. 124 (F.B.) Even where a preliminary decree in a partition suit directs "that the mesne profits due to the plaintiff be determined on a separate petition by the plaintiff in execution" the application filed by the plaintiff for ascertainment of mesne profits cannot be treated as an application coming under this Article—*Chandra Kantam* v. *Chandramowliprasada* (1948) 2 M.L.J. 206, 1948 M.W.N. 617.

697. Application in pending suit:—An application in a *pending suit* desiring the Court to proceed to judgment is not governed by any rule of limitation. Thus, where in a suit for dissolution of partnership, a preliminary decree has been passed dissolving the partnership, appointing a commissioner to examine the report and accounts, and directing the defendant to collect outstandings and to account to the other partners for the same, an application to the Court to pass a final decree in pursuance of that direction is an application in a *pending* suit, and is not governed by Article 181 or by any other Article. Consequently it is not barred (if brought more than 3 years after the date of the preliminary decree—*Ramanathan* v. *Alagappa*, 53 Mad. 378, A.I.R. 1930 Mad. 528 (533), 59 M.L.J. 102. Where a decree for partition has been passed, an application for the appointment of a commissioner to work out the shares recoverable under the decree is a step in the suit itself, and not subject to any rule of limitation—*Srinivasa* v. *Ramasami*, 2 L.W. 693, 1915 M.W.N. 725, 30 I.C. 238. See also *Kedar Nath* v. *Harra Chand*, 8 Cal. 420. The suit cannot be dismissed for failure on the part of the plaintiff to take further steps. A party need not make an application to make the preliminary decree final. It is no doubt usual for the plaintiff to make an application for the appointment of a commissioner, but there is no legal bar to the Court appointing the Commissioner *suo motu* and asking the plaintiff to deposit the commission fee. There is no limitation for making the decree final in such cases and this Article does not apply—*Bhusan* v. *Chhabimoni*, 53 C.W.N. 582, A.I.R. 1948 Cal. 363.

Application for restitution:—See Note 718 under Article 182. An application for restitution under sec. 144 of the C. P. Code has been treated by some Courts as an application for execution of the decree as restored by the order of restitution, and governed by Art. 182 and not by Art. 181—*Somasundaram* v. *Chockalingam*, 40 Mad.

780 (782); *Kurgodigowda* v. *Ningangowda*, 41 Bom. 625 (630); *Muthukarappan* v. *Annamalai*, 11 Rang. 275, A.I.R. 1933 Rang. 180 (182); *Hamidalli* v. *Ahmedalli*, 45 Bom. 1137; *Chandika Singh* v. *Bithal Das*, 7 O.W.N. 1153, A.I.R. 1931 Oudh 51 (52); *Kochu* v. *Mariayam*, A.I.R. 1952 Tra-Co. 40. But the other High Courts are of opinion that whatever might have been the nature of an application for restitution under sec. 583 of the old C. P. Code of 1882, as sec. 144 of the new C. P. Code has not been placed in the chapter of the Code relating to execution but has been put in a chapter relating to miscellaneous matters, it is clear that the Legislature has not intended an application for restitution to be treated as an application for execution and consequently such an application is governed by Art. 181 and not by Art. 182—*Saroj Bhushan* v. *Debendra*, 59 Cal. 337, 35 C.W.N. 1294 (1297); *Hari Mohan* v. *Parameshwar*, 56 Cal. 61; *Balmukund* v. *Basant Kumari*, 3 Pat. 371 (387) (F.B.) (overruling 2 Pat. 277); *Chandra Singh* v. *Bishen Singh*, 76 I.C. 501, A.I.R. 1924 Lah. 166, 5 Lah. L.J. 389; *Jiwa Ram* v. *Nand Ram*, 44 All. 407; *Brij Lal* v. *Damodar*, 44 All. 555; *Bhabaranjan* v. *Nibaran*, 43 C.W.N. 515, 69 C.L.J. 293, A.I.R. 1939 Cal. 349; *Telu* v. *Raja Ram*, 40 P.L.R. 692, A.I.R. 1938 Lah. 456; *The Punjab National Bank* v. *Nanhe*, I.L.R. (1938) Lah. 571, 41 P.L.R. 208, A.I.R. 1939 Lah. 73; *Ujagar* v. *Likha*, A.I.R. 1941 All. 28, 1940 O.A. 1166, 1940 A.W.R. (H.C.) 579; *Khaja Allawalli* v. *Kesarimal*, I.L.R. (1947) Nag. 176, 1947 N.L.J. 197, A.I.R. 1947 Nag. 239; *Mela Ram* v. *Dharam Chand*, A.I.R. 1958 Punj. 132 (F.B.). In the above-noted Nagpur case it has been held that an application under sec. 144, C. P. Code is made for the purpose of having an executable order or decree and therefore it can not be an application for execution. The Calcutta High Court has held that an application under sec. 144, C. P. Code, to have restitution in consequence of an order of His Majesty in Council is governed by this Article. Such an application cannot be regarded as one for *enforcement* of the final judgment or decree within the meaning of Art. 183, but is one for relief which is *consequential* upon the appellate Court's decree of reversal—*Birendra* v. *Surendra*, I.L.R. (1940) 1 Cal. 486, 44 C.W.N. 438, 71 C.L.J. 127, A.I.R. 1940 Cal. 260.

Time runs from the date when the appellate Court for the first time gave the applicant the right of restitution, and not from the date on which a second appeal from the order of restitution was dismissed by the High Court—*Saroj Bhushan* v. *Debendra*, supra; *Hari Mohan* v. *Parameshwar*, supra; *Bhabaranjan* v. *Nibaran*, supra, *The Punjab National Bank* v. *Nanhe*, supra; *Ujagar* v. *Likha*, supra; *Kishan* v. *Harman*, 48 P.L.R. 138, A.I.R. 1946 Lah. 416. But the Rangoon High Court holds that time runs from the order of the final Court of appeal—*Muthukarappan* v *Annamalai*, 11 Rang. 275, A.I.R. 1933 Rang. 180 (182).

But an application for restitution not under sec. 144, C. P. Code, but as the result of a decree passed in a *separate suit* brought for the purpose of obtaining restitution, is an application for execution of that decree, and is governed by Art. 182, clause (6).

Application by Government:—Government is not entitled to exemption from the provisions of the Limitation Act relating to applications. Therefore an application by the Government under sec. 441 of the Code of Civil Procedure (1882) to recover the amount of Court-fees from a party ordered by the decree to pay the same is subject to the provisions of this Article—*Appaya* v. *Collector of Vizagapatam*, 4 Mad. 155 (156).

Application by minor:—Section 6 refers only to an application for the execution of a decree, and does not apply to an application under this Article. Consequently, a minor, in making an application for a final decree for sale on a mortgage (which is now governed by this Article) cannot get the privilege of section 6—*Nizamuddin* v. *Bohra Bhim Sen*, 40 All. 203 (205); *Vinayakrao* v. *Baijnath*, 15 N.L.R. 36, 48 I.C. 934.

182. For the execution of a decree or order of any Civil Court not provided for by Article 183 or by section 48 of the Code of Civil Procedure, 1908 (V of 1908).	Three years; or where a certified copy of the decree or order has been registered, six years.	1. The date of the decree or order, or 2. (where there has been an appeal) the date of the final decree or order of the Appellate Court, or the withdrawal of the appeal, or 3. (where there has been a review of judgment) the date of the decision passed on the review, or 4. (where the decree has been amended) the date of amendment, or 5. (where the application next hereinafter mentioned has been made) the date of the final order passed on an application made in accordance with law to the proper Court for execution or to take some step in aid of execution of the decree or order, or 6. (in respect of any amount, recovered by execution of the decree or order, which the decree-holder has been directed to refund by a decree passed in a suit for such refund) the date of such last mentioned decree or, in the case of an appeal therefrom, the date of the final decree of the appellate Court or of the withdrawal of the ap-

peal, or

7. (where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.

Explanation I.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 5 of this Article shall take effect in favour only of such of the said persons or their representatives as it may be made by. But where the decree or order has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.

Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But, where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them or against his or their representatives, shall take effect against them all.

Explanation II.—"Proper Court" means the Court whose duty it is to execute the decree or order.

This Article corresponds to Art. 179 of Act XV of 1877. Clause 4 did not exist in the old Act. Clauses 5, 6 and 7 correspond to clauses 4, 5 and 6 respectively of Article 179 of the old Act.

Change:—Clauses 5 and 6 have been amended by the Indian Limitation (Second Amendment) Act, 1927 (IX of 1927). For amendment of clause 5, see Note 709 below. Clause 6 is entirely new; see Note 718.

698. The law of limitation applicable to proceedings in execution is not the law under which the suit was instituted, but the law in force at the date of the application for execution. Therefore, where the suit had been instituted under the Act of 1871, but the application for execution of the decree was made when the Act of 1877 came into operation, the application would be governed by the latter Act—*Gurupadapa* v. *Virbhadrapa*, 7 Bom. 459; *Kuppu* v. *Saminath*, 18 Mad. 482; *Becharam Dutta* v. *Abdul Wahed*, 11 Cal. 55 (dissenting from *Behari Lal* v. *Gobardhan*, 9 Cal. 446); *Jagmohun Mohto* v. *Luchmessur Singh*, 10 Cal. 748.

698A. Sec. 48, C. P. Code:—This Article and sec. 48, C. P. Code should be read together as this Article expressly refers to the section. But they are independant

or parallel provisions, different in their scope and subject. Sec. 48 (2), C. P. Code extends the 12 years' period of closure by a further period of similar duration but the necessity of resort of this Article is not thereby obviated. The decree-holder must have been taking steps to keep the decree alive except in the case of existence of fraud under sec. 18 of the Act—*Yeshwant* v. *Walchand*, A.I.R. 1951 S.C. 16. By reason of of sec. 8, C. P. Code sec. 48 of the Code does not apply to a decree passed by a Presidency Small Cause Court, whether it is being executed by that Court itself or by some other Court of original jurisdiction. So where a decree of a Presidency Small Cause Court is transferred for execution to a Court of original jurisdiction an application for execution filed in the latter Court beyond 12 years of the decree will not be barred by the limitation under sec. 48 C. P. Code, but will be in time if filed within 3 years of the last execution as provided by this Article—*Ranganadhan* v. *Ponnacharamma*, 23 Pat. L.T. 87, A.I.R. 1942 Pat. 128. The same view has been taken by the Madras High Court in *Gopalaswami* v. *Thaigarajaswami*, A.I.R. 1950 Mad. 504, (1950) 1 M.L.J. 437, 1950 M.W.N. 265, 5 D.L.R. (Mad.) 187 (F.B.).

698B. Construction:—The provisions of this Article should receive a fair and not too technical a construction. Its language ought not to be strained in favour of the judgment debtor who has not paid his debt and the words should be liberally interpreted in favour of the decree-holder—*Annapurnamma* v. *Venkamma*, (1938) 1 M.L.J. 135, A.I.R. 1938 Mad. 323. This Article should receive a fair and liberal construction so as to enable the decree-holder to reap the fruits of his decree—*Akshoy* v. *Nalini*, 54 C.W.N. 815, A.I.R. 1950 Cal. 493.

699. Applications under this Article:—

Execution by a co-sharer:—An application for execution of a decree for a sum not exceeding Rs. 500 obtained by a co-sharer landlord for his share of the rent is governed by this Article and not by Article 6, Schedule III of the Bengal Tenancy Act. The latter provision is not applicable to the case, because the Bengal Tenancy Act (sec. 188) does not contemplate a suit by *one* co-sharer only but only contemplates a suit brought by *all* the joint landlords acting together or by their authorised agent—*Kedar Nath* v. *Ardha Chaundra*, 29 Cal. 54 (58).

Application under Or. 21, r. 50, cl. (2), C. P. C.:—An application under Or. 21, r. 50, Cl. (2), C. P. Code for leave to execute the decree against the partners of a firm who were not personally served in the suit is merely an ancilliary application in the application for execution and is not barred so long as the decree against the firm is alive. Such an application is governed by Art. 182, and not by Art. 181—*Kuppuswami* v. *Rathilal S. & Co.*, A.I.R. 1935 Mad. 926, 1935 M.W.N. 849, 158 I.C. 907; *Seeomal* v. *Lahnibi*, I.L.R. 1939 Kar. 589, A.I.R. 1939 Sind. 161 (F.B.).

Execution of order of contribution:—After the winding up of a company, and the passing of an order of contribution, an application for enforcement of the order of contribution against a contributory is governed by this Article, in as much as the order of contribution must be enforced in the same manner as a decree of Court—*People's Industrial Bank* v. *Mahesh Charan*, 1 Luck. 153, 93 I.C. 631, A.I.R. 1926 Oudh 289.

Application for enforcement of awards under the Co-operative Societies Act:—The proper article governing an application for the enforcement of an award by the Registrar under the Co-operative Societies Act is this Article—*Subba* v. *Co-operative Urban Bank*, (1939) 1 M.L.J. 695, A.I.R. 1939 Mad. 304; *Anjuman* v. *Imam*, 48 P.L.R. 538, A.I.R. 1947 Lah. 269.

Application by Government:—Government is bound to make an application for execution within the same time as any private person—*Collector* v. *Sreehury*, 22 W.R. 512; see also *Appaya* v. *Collector*, 4 Mad. 155.

Art. 182 governs applications to execute decrees of Revenue Courts in the Punjab —*Sardar Ali* v. *Budhu Ram*, 14 L.L.T. 15.

700. Application by minor:—This Article provides several points of time from which the period of three years shall begin to run, and for the purposes of this Act the period which begins from each point is a separate period, and if the person entitled is under a disability at the time when any one of such period commences, the operation of this Act is suspended during the continuance of the disability by the operation of sec. 6. Therefore, a step taken in aid of execution by a minor during his minority more than three years after a previous step-in-aid of execution taken by him, is not barred—*Lolit Mohun* v. *Janoky*, 20 Cal. 714 (716). But the prohibition contained in sec. 48, C. P. Code is not modified by virtue of this article read with sec. 6 of the Limitation Act as this article only applies in cases not covered by sec. 48, C. P. Code—*Nathu* v. *Jai Karan*, 46 P.L.R. 24, A.I.R. 1944 Lah. 68.

700A. Applications not under this Article:—Where there is a specific article, Art. 181, applicable to a case, this article can have no application and can not be invoked—*Ambujammal* v. *Singarammal*, (1945) 2 M.L.J. 444, A.I.R. 1946 Mad. 67. So also, where the application is not an application for execution, this article does not apply. Thus, where in a partition suit, an order is made decreeing partition of lands assessed to Government revenue and directing the parties to be put into possession and referring it to the Collector to carry out the partition, an application is made to Court to send the papers to the Collector, that application is not an application in execution as by that application the Court is asked to do a ministerial work. There is no article of the Limitation Act relating to an application of that sort and this article does not apply to such an application—*Jacinto* v. *Fernandez*, 41 Bom.L.R. 921, A.I.R. 1939 Bom. 454. This article does not apply to an application filed in the Court after the partition decree is sent to the Collector for execution under sec. 54, C. P. Code for deciding who are the legal representatives of the decree-holder—*Gendmal* v. *Laxman*, I.L.R. (1944) Nag. 852, A.I.R. 1945 Nag. 86.

701. Clause 1:—Under clause 1, time runs from the date of the decree; it therefore applies only to those cases where the decree is executable from the very date on which it is passed. If the decree is not so executable and the other clauses of this Article are also inappropriate to the case, then this Article cannot apply and Article 181 will govern the application. See Note 693 in Article 181 under heading "Applications for execution". As observed by the Privy Council, this clause contemplates only a decree or order made in such form as to render it capable of being enforced in execution; if a further application is necessary to make the decree executable then Article 181 applies to such further application—*Rameshar Singh* v. *Homeshwar*, 6 P.L.J. 132 (139) (P.C.), A.I.R. 1921 P.C. 31, 59 I.C. 636.

When in a redemption decree no time is fixed for payment, the decree can be executed from the date on which it is passed, and an application to execute the decree (*i.e.*, redeem the mortgage) is governed by the rule of limitation under clause 1 of this Article—*Krishna Chandra* v. *Jakeral*, 10 C.L.J. 115, 1 I.C. 71; *Maloji* v. *Sagaji*, 13 Bom. 567; *Narain Das* v. *Udham*, 68 P.R. 1913, 44 P.L.R. 1913, 18 I.C. 48.

An application for execution of a decree allowing redemption of mortgage on payment of a certain sum of money by the decree-holder and fixing no period within which the sum is to be paid is governed by Art. 182 and not by general Art. 181—*Budhu Ram* v. *Mustoq Shah*, 158 I.C. 517.

Even though the redemption decree fixes a time for payment, the decree is executable by the decree-holder (mortgagor) from the date of the passing of the decree, because it is open to the mortgagor to pay the decretal amount on the very date of the decree. An application to execute the decree is governed by this Article—*Etyati Pooparambil* v. *Matalakot Krishna*, 28 Mad. 211; *Maruti* v. *Krishna*, 23 Bom. 592.

In 1908, a decree was made *ex parte* against three brothers D, U and G. In 1912, G applied for an order to set aside the *ex parte* decree. In 1913 the Court granted the application so far as G was concerned. On the rehearing of the case against G, no notice was given to D and U, and in September 1913, the suit was dismissed against G and decreed *ex parte* against D and U. The decree-holder applied in July 1916 for execution of the decree of Steptember 1913 against D and U. *Held* that the decree of Steptember 1913 against D and U was neither an amendment nor a review of the original decree of 1908, and hence clause (3) or (4) did not apply; that the decree of September 1913 was a mere surplusage and a nullity; that the decree of 1908 had remained untouched throughout and had from that date remained enforceable throughout; that the present application must be deemed to be one for the execution of the decree of 1908, and therefore barred under this clause—*Umesh Chandra* v. *Akrur*, 46 Cal. 25 (29, 30), 50 I.C. 15.

An application for execution of an *ex parte* decree, against which no appeal is preferred, is governed by clause (1), and the time taken by the defendant in prosecuting his application for setting aside the *ex parte* decree cannot be deducted—*Jabar Khan* v. *Rahim Khan*, 18 N.L.R. 190, A.I.R. 1922 Nag. 197, 68 I.C. 728.

A pre-emption decree is incapable of execution until the decree-holder pays the pre-emptive price in Court, and consequently clause 1 is inapplicable; and no other clause of Article 182 being under the circumstances applicable, Article 181 would apply to an application for the execution of such decree—*Chhedi* v. *Lalu*, 24 All. 300; *Chandika* v. *Kalu*, 22 O.C. 82, 52 I.C. 157. Mr. Rustomji is of opinion that such decree is capable of immediate execution, as it is open to the decree-holder to pay the price on the day the decree is passed, and therefore an application for execution comes within clause 1 of Art. 182: Rustomji's Limitation, 3rd Edn., p. 723. Where there was a direction in a pre-emption decree that the purchase money should be deposited in Court within 31 days from the date of its being final, the decree did not become final until the time for the appeal allowed by law had expired, or, if appealed from, had been decided by the ultimate appellate Court—*Shaikh Ewaz* v. *Mokuna Bibi*, 1 All. 132; *Ramshahai* v. *Gaya*, 7 All. 107.

702. Date of the decree:—The date of the decree is the date on which the judgment is pronounced (O. 20, rule 7 of the C. P. Code) and not the date on which the decree is actually prepared and signed by the Court—*Afzal* v. *Umda*, 1 C.W.N. 93; *Rakhhal* v. *Jogendra*, 10 C.L.J. 467, 3 I.C. 391; *Surajdeo* v. *Musahroo*, 20 C.W.N. 950, 1 P.L.J. 359, 34 I.C. 504; *Hiralal* v. *Jamuna Prosad*, 5 P.L.J. 490, 1 P.L.T. 394, 51 I.C. 531; *Golam* v. *Goljan*, 25 Cal. 109; *Narsingrao* v. *Bando*, 42 Bom. 309 (317); *Rasdas* v. *Gangasagar*, 24 Pat. 421; *Ramachandra* v. *Bhabu*, A.I.R. 1950 Orissa. 125 (F.B.); and the fact that the Court-fee required to be paid in order to validate the decree (which was passed in a suit for accounts) was not paid till some months later would not give a different starting point; nor would the payment of Court-fee constitute a step-in-aid of execution within the meaning of clause 5—*Bhajan* v. *Girish*, 17 C.W.N. 959, 19 I.C. 410. The same principle applies to decrees passed in partition suits—*Ram* v. *Maharaj*, A.I.R. 1940 Lah. 337; *Banwari* v. *Ramhari*, A.I.R. 1942 Pat. 335; *Venkatappa* v. *Venkatappa*, I.L.R. (1944) Mad. 266, (1943) 2 M.L.J. 112, A.I.R. 1943 Mad. 650, or to decrees for mesne profits—*Md. Idris* v. *Md. Kafir*, A.I.R. 1950 Pat. 524. Where a decree provides that the decree-holder should pay the

deficit Court-fee on the decretal amount before its execution the decree is not a conditional one in the sense that some extraneous event is to happen on the fulfilment of which alone it can be executed—*Yeshwant* v. *Walchand*, A.I.R. 1951 S.C. 16.

Where, however, the decree-holder is supplied with a copy of a decree bearing a date on which it is drawn up instead of the date of the pronouncement of the judgment and the decree-holder files an application for execution within three years from the date of the decree as stated in the copy supplied, the application is not time-barred as the decree holder cannot be prejudiced by mistake of the Court—*Kali* v. *Bibi Aziz*, A.I.R. 1938 Pat. 149.

Time runs from the date of the final decree. Thus, a decree for sale on a mortgage was passed against several defendants jointly on the 25th August 1900, and made absolute on the 21st December 1901. As against one of the defendants the decree was *ex parte*, and it was set aside as against her on the 11th March 1902. Subsequently a decree was passed on the merits against her also on November 16, 1904 and it was made absolute on November 27, 1905. *Held* that the latter decree supplemented and completed the decree previously passed, and limitation for execution ran from the date of the latter decree (Nov. 27, 1905), that being the "date of the decree" under this clause—*Ashfaq Hussain* v. *Gouri Sahai*, 33 All. 264 (P.C.).

Where in a suit an interlocutory judgment is passed against one out of two persons and a final judgment later on against both limitation begins to run from the date of the interlocutory judgment so far as the former party is concerned as if there have been two decrees, one bearing the former date—*Hock Sein* v. *Kyaiklat Municipality*, A.I.R. 1936 Rang. 313.

The date of award under rules of the Co-operative Societies Act does not mean the date written therein but the date on which such award is officially communicated to the person or persons affected thereby—*Lakshmi* v. *Lalit*, I.L.R. (1940) 2 Cal. 460, A.I.R. 1941 Cal. 152. In case of awards under sec. 15 of the Arbitration Act (IX of 1899) the date of decree is the date of filing the award into Court as it acquires the incidents of a decree when it is filed in Court—*Albuquerque* v. *Catholic Bank*, (1946) 1 M.L.J. 244, A.I.R. 1946 Mad. 352.

703. Clause (2)—Appeal:—A decree-holder is entitled to wait until the decision of the lower appellate Court before applying for execution of the decree of the Court of first instance, and the period of limitation runs from the date of the decree of the lower Appellate Court—*Krishna Lal* v. *Satyabala*, 51 Cal. 342, 81 I.C. 569, A.I.R. 1924 Cal. 686. If there is a second appeal to the High Court, time runs from the date of the judgment of the High Court—*Nagendra* v. *Ambica*, 35 C.W.N. 958 (959). Time is to be calculated from the date of the appellate decree, whether that decree affirms or modifies or sets aside the original decree—*Md. Mehdi* v. *Mohini Kanta*, 34 Cal. 874; *Kristnama* v. *Mangammal*, 26 Mad. 91 (95); *Sahu Nandlal* v. *Sahu Dharam*, 48 All. 377, A.I.R. 1926 All. 440, 94 I.C. 961.

The words "where there has been an appeal" mean an appeal from the decree sought to be executed, and not an appeal from another decree, though made in the suit—*Jacinto* v. *Fernandez*, 41 Bom.L.R. 921, A.I.R. 1939 Bom. 454. So also it does not cover appeal from an order passed in a collateral proceeding or having no direct or immediate connection with the decree under execution—*Bhawanipur Banking Corp.* v. *Gauri*, A.I.R. 1950 S.C. 6; *Subba Iyer* v. *Metal Corporation of India*, 93 C.L.J. 255, A.I.R. 1954 Cal. 169; *Shah Sankal* v. *Punamchand*, A.I.R. 1954 Raj. 273; *Narayanan* v. *Lakshmi*, A.I.R. 1953 T.C. 220 (F.B.); *Ratikanta* v. *Ramesh*, A.I.R. 1953 Orissa 85.

The words "where there has been an appeal" mean 'where a memorandum of appeal has been presented to the proper Court' and not 'where the memorandum has

been presented *and admitted*'. Therefore, if a memorandum of appeal was *rejected* for non-payment of additional Court-fees declared to be leviable thereon, limitation would still run from the date of the Appellate Court's order of rejection—*Rup Singh* v *Mukhraj Singh*, 7 All. 887; *Basanta Kumar* v. *Manjuri*, 74 I.C. 679, A.I.R. 1924 Cal. 349. But the Calcutta High Court has taken a contrary view in *Prodyot* v. *Mathura*, 42 C.W.N. 698, A.I.R. 1938 Cal. 533 and has held that the order of the appellate court rejecting a memorandum of appeal for non-payment of requisite court fees within the time allowed has not the effect of a decree and it does not deal judicially with the appeal at all which never came into existence. Consequently limitation will run from the trial court's decree and not from the order of the appellate court rejecting the memorandum of appeal. The Allahabad High Court has also taken the same view in the Full Bench Case of *Harihar* v. *Beni*, 1951 A.L.J. 824, A.I.R. 1951 All. 79. But where an appeal is preferred on insufficient court fees and is duly registered as an appeal and numbered as such but subsequently rejected after notice to the parties and after hearing them, the time for execution begins to run from the date of the order of the appellate court—*Krishna* v. *Radhey*, 19 Pat.L.T. 243, A.I.R. 1938 Pat. 79. Where the matter is carried in appeal, the date of the final order is the date of the appellate order—*Abhe Ram* v. *Bholar*, A.I.R. 1935 Lah. 203, 37 P.L.R. 257, 157 I.C. 604.

It is sufficient that an appeal has been presented and heard, to bring the case under this clause, although the appellate Court may have decided that no appeal would lie—*Wazir Mohan* v. *Lalit Singh*, 9 Cal. 100. Even though an appeal is incompetent on the ground that no appeal lies, the order dismissing the appeal would give a fresh starting point of limitation under this clause—*Thandavaroya* v. *Arumugha*, (1945) 1 M.L.J. 421, A.I.R. 1945 Mad. 261. (But the Allahabad High Court holds contra in *Sahu Nandlal* v. *Sahu Dharam*, 48 All. 377). So also, a decree of the Appellate Court dismissing the appeal as barred by limitation will give a fresh starting point of limitation —*Akshoy* v. *Chunder Mohan*, 16 Cal. 150. Similarly, an order of the Appellate Court dismissing the appeal for non-payment of printing costs or by reason of the appellant not pressing the appeal is an appellate order within the meaning of this clause— *Raghu Prasad* v. *Jadunandan*, 6 P.L.J. 27, A.I.R. 1921 Pat. 6, 2 P.L.T. 28, 59 I.C. 896; *Fazlur Rahman* v. *Shah Mahammad*, 30 All. 385. So also, an order dismissing an appeal for want of prosecution is an appellate order within the meaning of this clause —*Bijaya* v. *Kesho Prasad*, 1938 P.W.N. 449, A.I.R. 1938 Pat. 401.

The intention of the Legislature in enacting clause (2) of this Article is that if an appeal in any way imperils the decree sought to be executed, then the date of the final disposal of the appeal should be the date from which the period of limitation ought to be computed. A preliminary mortgage decree was passed in 1921. There was an appeal against this decree to the High Court; during the pendency of this appeal the mortgagee decree-holder obtained a final decree for sale on 28th October 1922. The appeal to the High Court against the preliminary decree was dismissed on 29th October 1925. *Held* that for an application for execution of the final decree limitation ran from 29th October 1925, because the final decree for sale which was made during the pendency of the appeal against the proliminary decree was clearly imperilled by the appeal, and the decree made by the High Court clearly supplemented and completed the decree of the 28th October 1922. The words "where there is an appeal" should not be interpreted to mean "where there has been an appeal against a decree or order *for the execution of which the application* is made"—*Somar Singh* v. *Deonandan*, 6 Pat. 780, 102 I.C. 811, A.I.R. 1927 Pat. 215. The same view has been taken by the Allahabad High Court in *Bugain* v. *Chhotey Lal*, 1943 A.L.W. 40 and by the Madras High Court in *Veeran* v. *Koya*, I.L.R. (1939) Mad. 828, (1939)

2 M.L.J. 86, A.I.R. 1939 Mad. 735. But the Bombay High Court has taken a contrary view in *Mahadeo* v *Fatumiya*, I.L.R. (1948) Bom. 521, 50 Bom. L.R. 221, A.I.R. 1948 Bom. 337 where it has been held that the word "appeal" means appeal from the decree or order sought to be executed; therefore, an appeal from the preliminary decree is not competent to extend the limitation for the execution of the final decree passed during the pendency of the appeal from the preliminary decree.

The language of this clause is sufficiently wide to include an appeal the result of which may affect the decree or order which it is sought to execute in such a way as to render the execution proceedings in connection with such decree or order infructuous. Where therefore after an order for restitution was obtained by the respondent, the appellant continued litigation in various courts and at last his final appeal failed, an application for execution of the order of restitution filed within three years from the date of the order in such final appeal but more than three years after the order for restitution was made, is not barred by limitaton—*Saraswati* v. *Dwarik*, 44 C.W.N. 859.

The word "appeal" in col. (2) which is no doubt a general word must bear a meaning restricted by its context and it means "an appeal from a decree or order of the nature mentioned in cls. 1, 3 and 4; that is to say an appeal from the original decree or order, an appeal from a decree following a review of judgment, an appeal from the amended decree." The true test is that the decree of the appellate Court in the appeal must be the decree which is sought to be executed. This irresistibly follows from reading col. 3 along with col. 1 of the Article—*Sivaramachari* v. *Anjaneya*, (1951) 2 M.L.J. 245, 1951 M.W.N. 636, 64 M.L.W. 742, A.I.R. 1951 Mad. 962 (F.B.); *Balkishan* v. *Dhanraj*, A.I.R. 1956 Nag. 200. The word "appeal" means not only an appeal from the original decree but also an appeal against an order passed in review of the original judgment—*Narsing* v. *Madhu*, 4 All. 274, *Ramesh Chandra* v. *Ghansiam Dass*, A.I.R. 1955 All. 552, 1955 All.L.J. 501; *Birendra* v. *Shyam*, A.I.R. 1955 Pat. 333. Sub-clause (2), Art. 182 does not refer exclusively to appeals against a decree, it refers to an appeal of any sort, and covers an appeal against an order allowing an application for review—*Narayan Ganpati* v. *Radhabai Krishnaji*, A.I.R. 1936 Bom. 162, 38 Bom.L.R. 215, 162 I.C. 223, 57 Bom. 388, 60 Cal. 1 (P.C.) folld. But it does not contemplate an appeal against an order of dismissal of a petition for review of judgment, because such an appeal does not lie—*Ram Ratan* v. *Upendra*, A.I.R. 1923 Cal. 288, 68 I.C. 727. So also, the word 'appeal' does not contemplate an appeal from an order dismissing an application made by the judgment-debtor to set aside the original decree (which was passed *ex parte*); because the infructuous efforts of the defendant to set aside the *ex parte* decree obtained by the plaintiff cannot have the effect of extending the period within which the plaintiff is allowed by law to execute his decree—*Jivaji* v. *Ramchandra*, 16 Bom. 123; *Sheo Prosad* v. *Anrudh*, 2 All. 273; *Raj Brijraj* v. *Nauratan*, 3 P.L.J. 119, 44 I.C. 575; *Baikantha* v. *Aughore*, 21 Cal. 387; *Mulkh Raj* v. *Gurditta*, 30 P.L.R. 283, A.I.R. 1929 Lah. 283, 120 I.C. 179; *Jabarkhan* v. *Rahim Khan*, 18 N.L.R. 190, A.I.R. 1922 Nag. 197, 68 I.C. 728; *Harischandra* v. *Dinesh*, I.L.R. (1946) 1 Cal. 637, 50 C.W.N. 667, 82 C.L.J. 226, A.I.R, 1946 Cal, 375; *Kunwar* v. *Sheo Shankar*, A.I.R. 1950 All. 327; *Rameshwar* v. *Parmeshwar*, A.I.R. 1951 Pat. 1 (F.B.); *Sivaramachari* v. *Anjaneya*, supra; *Chandmal* v. *Baburmal*, A.I.R. 1951 Rajasthan 150; for an appeal from an order dismissing an application under Or. 9 r. 9 C. P. Code for restoration of proceedings dismissed for default—*Bhawanipur Banking Corp.* v. *Gouri*, A.I.R. 1950 S.C. 6. When an *ex parte* decree was passed, and an application was made by the judgment-debtor to set aside the *ex parte* decree under O. 9, r. 13, C. P. Code, and the Court having refused to set aside the *ex parte* decree, the judgment-debtor appealed against the order of refusal, and this appeal was

dismissed, *held* that this order of dismissal did not give a fresh starting point of limitation for an application to execute the *ex parte* decree. The "decree of the Appellate Court" means the decree on appeal from the decree sought to be executed; but here the appellate decree was not passed on an appeal from the *ex parte* decree sought to be executed; because the appeal was not preferred against the *ex parte* decree but against the order refusing to set aside the *ex parte* decree. Moreover, the application to set aside the *ex parte* decree did not keep the decree open, and could not be regarded as an appeal from the *ex parte* decree itself—*Fakir Chand* v. *Daiba Charan*, 54 Cal. 1052, A.I.R. 1927 Cal. 904, 104 I.C. 466. The contrary view taken in *Lutful* v. *Sumbhudri*, 8 Cal. 248 has been disapproved of in almost all the above cases and is no longer good law. The Madras High Court has also taken a contrary view and has held that the word "appeal" means an appeal in the suit which is likely to affect the decree sought to be executed. So an appeal from an order dismissing an application for setting aside the *ex parte* decree is included within the word "appeal"—*Ramachandra* v. *Venkateswara*, I.L.R. (1939) Mad. 252, (1938) 2 M.L.J. 1048, A.I.R. 1939 Mad. 157. The same view has been taken by the Bombay High Court in *Narmadabai* v. *Hidayatalli*, A.I.R. 1949 Bom. 115, 50 Bom.L.R. 696, and by the Patna High Court in *Kaviraj Basudevanand* v. *Raghubir Saran*, A.I.R. 1955 Pat. 284. A contrary view has also been taken in *Rahati* v. *Ghulam*, A.I.R. 1952 J. & K. 16, the reason being cl. (2) does not state in its strict grammatical construction that the appeal must be against the decree in the suit.

There is no warrant for reading into the words "where there has been an appeal" any qualification as to the character of the appeal or as to the parties to it; the words mean just what they say. So where an appeal is remanded with costs for *de novo* trial the limitation for execution of the order for costs runs from the date of appeal after remand and not from the date of passing the order for costs—*Krishna* v. *Sohan*, 18 Luck. 68, 1942 O.W.N. 315, A.I.R. 1942 Oudh 464.

The word "appeal" does not mean any appeal which only affects the decree-holder's right to execute it at a particular time and a particular circumstance. So, an appeal against an order dismissing an application by the judgment debtor to record satisfaction of the decree, which would leave the decree valid and without modification, can not be regarded as an 'appeal' within the meaning of this clause for purposes of extending limitation—*Seetharama* v. *Abdul*, (1940) 2 M.L.J. 371, 1940 M.W.N. 898, A.I.R. 1941 Mad. 40; affirmed in Letters Patent Appeal in *Seetharama* v. *Abdul*, I.L.R. (1941) Mad. 703, (1941) 1 M.L.J. 614, A.I.R. 1941 Mad. 616. So also an appeal from an order passed on an application to cancel or modify an order recording satisfaction of a decree and to revive it is not an 'appeal' within the meaning of this clause—*Moideen* v. *Subramanya*, A.I.R. 1939 Mad. 892, 1939 M.W.N. 996.

An order of the High Court in *revision* modifying the decree of the first Court is an order in appeal, according to the Calcutta High Court, and time runs from the date of the order—*Gurupada* v. *Tarit Bhusan*, 22 C.W.N. 158, 44 I.C. 141. But the rejection of a revision petition without summoning the respondent cannot enlarge the time, because such an order is not an appellate order—*Mastan* v. *Pahlwan*, 81 P.L.R. 1909, 4 I.C. 629. On the other hand, the Madras High Court has in the Full Bench case of *Chidambara Nadar* v. *Rama Nadar*, A.I.R. 1937 Mad. 385, 45 M.L.W. 457, 1937 M.L.J. 453, 168 I.C. 561, held that the word 'appeal' in cl. (2) of Art. 182, is not used in a restricted sense so as to exclude civil revision petitions, and that the expression appellate Court is not confined to a Court exercising appellate jurisdiction as opposed to revisional powers. See also *Abubaker* v. *Muhammad*, A.I.R. 1954 T.C. 97. Consequently when a revision petition is filed before the High Court fresh starting point of limitation runs from the date of the order (even if the order be one of dismissal) on that petition for the execution of the decree concerned. The

same view has been taken by the Allahabad High Court in *Ajodhya* v. *U. P. Government*, I.L.R. (1947) All. 191, A.I.R. 1947 All. 390.

An appeal not against the original decree but against an order passed in execution is not contemplated by this clause and will not save limitation. If, however, the order in the appeal is in the nature of a decree and capable of execution, time will run from the date of the appellate order—*Hulasi* v. *Maiku*, 5 All. 236.

An order under Or. 41, r. 17, C. P. Code, dismissing an appeal for default is a final order within the meaning of Cl. (2) in Col. 3, Art. 182—*Bank of Upper India* v. *Sri Krishna Das*, A.I.R. 1935 Lah. 771, 16 Lah. 564, 37 P.L.R. 727. An order dismissing an appeal for want of prosecution is a judicial order disposing of the appeal. Since no further appeal is provided against such an order, it is a final order within the meaning of this clause—*Ram Kumar* v. *Rudra*, 1950 A.L.J. 565, A.I.R. 1951 All. 493. See also *Bijaya* v. *Kesho Prasad*, 1938 P.W.N. 449, A.I.R. 1938 Pat. 401.

The plain meaning of Cl. (2) of Art. 182 is that the time for execution runs from the final order of the Appellate Court, whether that be an order for dismissal for default of prosecution or an order passed on the appeal on merits—*Budhu Ram* v. *Mushtaq Shah*, A.I.R. 1935 Pesh. 129, 158 I.C. 517.

It has been determined by the Privy Council that an order of a final Appellate Court holding that the appeal had abated and refusing to set aside the abatement is a "final order of the Appellate Court" within the meaning of this clause, since it deals judicially with the matters before the Court and has the effect of finally disposing of the appeal. Such an order gives a new starting point for the period of limitation prescribed by this Article—*Abdulla Asghar Ali* v. *Ganesh Das*, 60 Cal. 662 (P.C.), 37 C.W.N. 412 (416), A.I.R. 1933 P.C. 68, 142 I.C. 326. The Calcutta High Court also laid down that an order declaring that an appeal had abated would come within cl. (2) of Art. 182, and time would run from the date of such order, and not from the date of the original decree—*Gohur Bepari* v. *Ram Krishna*, 32 C.W.N. 387 (391), 104 I.C. 566, A.I.R. 1927 Cal. 760; *Ramgati* v. *Nagendra*, 1 C.L.J. 17n. The same view was taken by the Allahabad High Court in *Mahammad Razi* v. *Karbalai*, 32 All. 136 (dissenting from 20 All. 124); and not from the date of death—*Ajodhya* v. *U. P. Government*, I.L.R. (1947) All. 191, A.I.R. 1947 All. 390. The contrary view taken in *Fazl Husen* v. *Raj Bahadur*, 20 All. 124 and *Tikait Krishna* v. *Wazir Narain*, 5 P.L.J. 731, must be deemed as overruled. The same view has been taken in *Bhimanna* v. *Elhara*, A.I.R. 1950 Hyderabad 46. Where during the pendency of the appeal, one of the respondents (decree-holders) died, but no substitution of his legal representative was made and the appeal against him abated, *held* that in an application for execution by the legal representative of the deceased decree-holder, time ran from the date of the appellate decree, and not from the date of the original decree. The fact that the judgment-debtors allowed their appeal against the deceased decree-holder to abate cannot prevent his representatives from taking the benefit of the date of the appellate decree—*Hira Lal* v. *Gamu*, 4 Pat. 844, A.I.R. 1925 Pat. 585, 91 I.C. 308.

The word 'Appellate Court' in this clause means a *proper* Appellate Court, *i.e.*, a Court having jurisdiction to hear the appeal; and therefore where an appellant preferred an appeal to a *wrong* Court and the appeal was returned for presentation to the proper Court, the decree-holder is not entitled to calculate the time for the execution of his decree from the date of such return, as the starting point. Such an order returning an appeal is neither a final order of an Appellate Court nor a withdrawal of the appeal—*Mahomod Abdul Kadir* v. *Samipandia*, 43 Mad. 835 (837), 39 M.L.J. 441, 60 I.C. 267. The order of the Appellate Court contemplated in this clause is an order which disposes of the appeal *on the merits* in some form, and not simply one which intimates to the

party that the appeal should be filed elsewhere—*Ibid* (p. 841). But see 7 All. 887, 16 Cal. 250, 6 P.L.J. 27 and other cases cited above where the dismissal of an appeal on the ground of non-payment of court-fee or for default of prosecution was held to be an appellate order, although the order did not dispose of the appeal *on the merits.*

Appeal from amended decree:—See 33 C.W.N. 958 in Note 706 below.

Appeal to Privy Council:—The word "appeal" included an appeal to the Privy Council and the term "Appellate Court" included the Judicial Committee of the Privy Council sitting for the purpose of hearing appeals from orders passed by Courts in India—*Gopal* v. *Joyram*, 7 Cal. 620; *Narsingh* v. *Narayan*, 2 All. 763; *Kishen* v. *Collector of Allahabad*, 4 All. 137. See also *Somar Singh* v. *Premdei*, 3 Pat. 327, A.I.R. 1925 Pat. 40, 5 P.L.T. 21, 79 I.C. 794. In such a case the only order capable of execution is the order of the Privy Council, and the period of limitation is 12 years under Art. 183. See Note 722 under Art. 183. There is a distinction between an appliiation for leave to appeal to the Privy Council and the appeal itself. Hence the date of dismissal of an application for leave to appeal to the Privy Council even if filed along with the memorandum of the proposed appeal to the Privy Council, cannot be taken into account as marking the commencement of the limitation for the execution application. The final order in such a case is the dismissal of the appeal by the High Court—*Rupai* v. *Gashain*, I.L.R. (1951) 2 All. 210, 1950 A.L.J. 286, A.I.R. 1952 All. 391.

But an order of the Privy Council dismissing an appeal *for want of prosecution* is not a judicial determination of the matter in suit; therefore it is neither to be treated as a decree or order of the Appellate Court, nor does it amount to an affirmance of the decision appealed from; and in such a case the only decree capable of execution is the decree appealed against, *i.e.*, the decree of the High Court—*Abdul Majid* v. *Jawahir*, 36 All. 350 (353) P.C. (reversing *Abdul Majid* v. *Jawahir*, 33 All. 154); *Batuk Nath* v. *Munni Dei*, 36 All. 284 (288) (P.C.); *Sachindra Nath* v. *Maharaj Bahadur Singh*, 49 Cal. 203 (213) (P.C.).

703A. Appeal as to part of the decree:—Though an appeal is preferred in respect of only a part of the decree, limitation will be saved as regards the entire decree—*Imam* v. *Dasaundhi*, 1 All. 508. The intention of the Legislature is to treat the *decree as a whole*, although only a part of the decree may be the subject of an appeal—*Vydianatha* v. *Subramania*, 36 Mad. 104 (106). Thus, where the plaintiff preferred an appeal against a part of the decree which was adverse to him (*e.g.*, as regards a part of the claim which was disallowed) and then being defeated in the appeal, made an application to execute the unappealed portion of the decree, time began to run from the date of the appellate decree—*Kristo Churn* v. *Radha Churn*, 19 Cal. 750 (754); *Abdul* v. *Maidin*, 22 Bom. 500; *Kristnama* v. *Mangammal*, 26 Mad. 91 (93) (F.B.) (dissenting from *Muthu* v. *Chellappa*, 12 Mad. 479). Where a plaintiff claims several reliefs, but the Court passes a decree granting some of such reliefs and refusing the others, and an appeal is preferred only against a portion of the decree regarding a particular relief, limitation for the execution of the other unappealed reliefs also runs from the date of the appellate decree—*Kanniamal* v. *Balkrishna*, A.I.R. 1935 Mad. 557, 1935 M.W.N. 329, 156 I.C. 1029. As observed by the Calcutta High Court, the Court executing the decree need not go into questions so complicated as those which must sometimes arise in determining whether in such a case the whole decree was or might have become or became imperilled in the Court of Appeal. The Court should follow the plain meaning of the words of Article 182, *viz.*, that the period of limitation runs from the date of the decree or order of the Appellate Court, whenever there has been an appeal—*Kristo Churn* v. *Radha Churn*, supra; *Kristnama* v. *Mangammal*, 26

Mad. 91 (93). The word 'appeal' in this Article does not mean only an appeal against the *whole* decree and by which the whole decree is imperrilled; it means any appeal by any party. The words of this Article must be construed in their natural sense as permitting an extension of time whenever an appeal is preferred—*Abdul Rahiman* v. *Maidin*, 22 Bom. 500 (505, 508). In any case in which there has been an appeal from a decree, limitation shall begin to run from the date of the decree on appeal, irrespective of whether the decree was appealed from in whole or in part. When a portion of the decree is appealed from, and a portion is not appealed from, the appellate Court, in adjudicating on the appeal affirms the portion of the decree to which no exception has been taken, and though the appellate decree does not in terms affirm that portion, it must be construed as so doing; and limitation runs from the date of the decree on appeal—*Kristnama* v. *Mangammal*, 26 Mad. 91 (92, 93). When a person obtains a decree for only a portion of the amount or the properties claimed by him and prefers an infructuous appeal as regards the disallowed portion, limitation for execution as regards the portion allowed will run from the date of the appellate decree. Here there is but one decree, for it cannot be argued that in this case there was one decree so far as the plaintiff's claim was allowed, and another and separate decree so far as the plaintiff's claim failed—*Harkant* v. *Biraj Mohan*, 23 Cal. 876 (883); *Abdul Alim* v. *Abdul Hakim*, 53 Cal. 901, 31 C.W.N. 262, A.I.R. 1927 Cal. 89, 97 I.C. 838; *Sakhalchand* v. *Velchand*, 18 Bom. 203 (205). When a decree is appealed against, even though the appellant appeals against only a portion of the decree, the whole decree of the first Court is superseded by or becomes merged in the decree of the Appellate Court, and there is no part of the first Court's decree that remains to be executed. No part of the decree of the first Court can be held to be in separate existence after an appeal in the suit has been decided. Hence time for execution of the part of the decree not appealed against runs from the date of the Appellate Court's decree—*Abdul Alim* v. *Abdul Hakim*, 53 Cal. 901, 31 C.W.N. 262 (264), A.I.R. 1927 Cal. 89, 97 I.C. 838. The words "where there is an appeal" mean that once there was an appeal, time ran from the date of the decision in the appeal, and there is no suggestion that it would be material as to whether all or only some of the parties appealed or whether the whole or only a part of the decree was challenged. Though the decree may decide a number of matters in controversy, there is only one decree and not a number of decrees. The Appellate Court deals with the decree as a whole; and after appeal the only decree that can be executed is the decree of the Appellate Court whether it reverses, modifies or confirms the decree of the lower Court—*Ibid.* Where certain plaintiffs obtained a decree for pre-emption in respect of four villages and the defendants appealed but the lower Appellate Court dismissed the appeal, and the defendants again appealed to the High Court, but, in this appeal they questioned the decision of the Lower Appellate Court in respect of two of the villages in suit and in the second appeal the plaintiff's suit was dismissed as to one of the villages with regard to which the appeal was preferred and the defendants' appeal was dismissed as to the other village; it was held that in respect of all the three villages as to which the final decree stood in favour of the plaintiffs limitation began to run from the date of the decree in second appeal, and not as to two of them from the date of the lower appellate court's decree—*Badunnissa* v. *Shamsuddin*, 17 All. 103 (105). [It should be noted that in all these cases the parties in the original suit and the parties in the appeal were the same].

Appeal against some of the defendants:—The plaintiff brought a suit against A and B. The suit against A was decreed, but it was dismissed as against B. The plaintiff appealed against the dismissal but did not implead A as a party respondent in the appeal. His appeal was dismissed. *Held* that the period of limitation for the execution of the decree against A ran from the date of the appellate order of dismissal—*Satis Chandra* v. *Girish Chandra*, 47 Cal. 813, 60 I.C. 915. But in *Raghunath* v. *Abdul Hye*, 14 Cal.

26, it was held that in such a case time ran from the date of the original decree. In *Muthu* v. *Chellappa*, 12 Mad. 479, it is laid down that even though A is made a party respondent in the appeal, the time for applying for execution against A would run from the date of the original decree, because A was not a necessary party to the appeal, and the original decree as against A was *not* imperilled by the appeal preferred by the plaintiff against B.

Appeal against decree for partition:—Where a final decree for partition directed one set of defendants to pay the costs of another set of defendants, but the decree was appealed against by the plaintiffs, and the different sets of the defendants were all made parties to the appeal, and the appeal was dismissed, the period of limitation for the recovery of the costs awarded to the one set of defendants against the other, ran from the date of dismissal of the appeal; because when the appeal against the final decree was filed by the plaintiffs in the partition suit the entire partition was under review, and if it so happened that any relief had been given to the plaintiffs in that appeal, the necessary consequence would have been that the whole partition decree would have had to be altered—*Kashi Prasad* v. *Matkura Prasad*, 48 All. 6, 23 A.L.J. 878, 89 I.C. 286, A.I.R. 1926 All. 145.

703B. Appeal by some of the defendants:—If the decree passed against the defendants was a *joint one*, and an appeal was preferred by some of the defendants, the appeal would imperil the whole decree, and the time for execution against the non-appealing defendants would run from the date of the appellate decree, and not from that of the original decree—*Gopal* v. *Gosain*, 25 Cal. 594 (F.B.); *Mullick Ahmed* v. *Md. Sayed*, 6 Cal. 194; *Loke Nath* v. *Gaju*, 20 C.W.N. 178, 31 I.C. 426; *Pancho Bania* v. *Anand Thakur*, 2 Pat. 712 (714), A.I.R. 1924 Pat. 160, 77 I.C. 357; *Shivaram* v. *Sakharam*, 33 Bom. 39; *Basant Lal* v. *Najmunnessa Bibi*, 6 All. 14 (15). Cf. *Gauri* v. *Ashfak*, 29 All. 623 (626). (But see *Abdul Khadir* v. *Ahmmad*, 38 Mad. 419, 423 (obiter), where White, C. J. observes that it would be inequitable that a judgment-debtor should be deprived of the benefit of the prescribed limitation by reason of acts of his joint judgment-debtor over whom he has presumably no control, and for whose action he is not responsible. See also *Rangamma* v. *Rangamma*, A.I.R. 1952 Mys. 121.

Where a decree is passed *severally* (not jointly) against several defendants individually (though in form there is but one decree contained in one piece of paper) and an appeal is preferred only by some of the defendants on a ground not common to all the defendants, the time for execution against the non-appealing defendants will run from the date of the original decree, and not from that of the appellate decree, and this clause will not apply; because, in such a case the rights of the non-appealing defendants would not be affected by the appeal, nor would their liabilities be extended or varied—*Mashiatunnissa* v. *Rani*, 13 All. 1 (F.B.); *Wise* v. *Rajnarain*, 10 B.L.R. 258; *Raghunath* v. *Abdul Hye*, 14 Cal. 26 (32); *Sangram Singh* v. *Bujharat Singh*, 4 All. 36 (37). Where the decree is for separate sums found to be due from separate defendants, and only one defendant appeals, execution as against the non-appealing defendants can only be of the original decree, because in such a case, the whole decree is not in peril and the plaintiff might execute his decree against the non-appealing defendants without waiting for the decision of the appeal—*Abdul* v. *Moidin*, 22 Bom. 500 (507); *Raghunath* v. *Abdul Hye*, 14 Cal. 26 (32, 33); *Sangram Singh* v. *Bujharat*, 4 All. 36 (37). Where a decree was passed against two persons and one of them appealed, but the circumstances of the case were such that the whole decree was imperilled by the appeal, *held* that the time for an application for execution against the non-appealing defendant would run from the date of the appellate decree and not from the date of the original decree—*Nundun Lal* v. *Rai Joy Kishen*, 16 Cal. 598 (602);

Nur-ul-Hasan v. *Md. Hasan*, 8 All. 573 (575); *Viraraghava* v. *Ponnammal*, 23 Mad. 60 (67).

Therefore, in dealing with the question of limitation for an application for execution of a decree, where there has been an appeal, the Court should see whether the original decree was a joint decree or an incorporation of several decrees, and whether the appeal against it imperilled the whole decree or not—*Christiana Sens Law* v. *Benarasi Prasad*, 19 C.W.N. 287 (289), 22 I.C. 685; *Pancho Bania* v. *Anand Thakur*, 2 Pat. 712 (714), A.I.R. 1924 Pat. 160, 77 I.C. 357.

In some cases, however, the Judges are unwilling to draw a distinction between a joint and a several decree, and they refuse to enter into such subtle points as to whether the decree is imperilled or not by the appeal of one defendant only. Thus, in a Madras case it has been remarked that even though all the judgment-debtors do not appeal, no question arises as to whether the decree as against the remaining judgment-debtors is imperilled by the appeal or not. The words of clause 2 of this Article are clear and should be followed by the Courts, *viz.*, that whenever an appeal is preferred, the period of limitation runs from the date of the final decree of the Appellate Court; whether all the judgment-debtors or some only of them have appealed, makes no difference. There is only one decree that can be executed, and that is the final decree of the Appellate Court—*Viraraghava* v. *Ponnammal*, 23 Mad. 60 (67) (dissenting from *Muthu* v. *Chellappa*, 12 Mad. 479). In a more recent case the same High Court observes that the question of limitation ought not to be made to depend upon the difficult and doubtful point whether an appeal by one of the defendants as against a part of the decree of the first Court imperils the decree passed against the other defendants or the other portion of the decree. Such subtle distinction not warranted by the language of the Legislature should not be introduced by the Courts—*Ari Chetty* v. *Theerthamalai*, 3 L.W. 521, 34 I.C. 791. See also, *Sooranna* v. *Venkanna*, (1939) 2 M.L.J. 271, A.I.R. 1939 Mad. 441. In the Full Bench case of *Mashiatunnissa* v. *Rani*, 13 All. 1, the minority of the Judges (Mahmud and Broadhurst JJ.) have expressed the view that the words "decree" in clause 2 of Article 182 should not be qualified by any such epithet as "joint' or "several," that the words of Article 182 are so clear and distinct that they scarcely admit of any such distinction being drawn, and that the Article contains nothing as to whether the appeal shall have been made by all the parties or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. The same opinion has been expressed by Maclean C.J. in the Calcutta Full Bench case of *Gopal Chandra* v. *Gosain*, 25 Cal. 594 (599, 602), and has been approved of in the recent Calcutta case, *Abdul Alim* v. *Abdul Hakim*, 53 Cal. 901, 31 C.W.N. 262 (263, 268). This view was also taken in an earlier Allahabad case, *Nurul Hasan* v. *Muhammad Hasan*, 8 All. 573 (575, 576). A recent case of the Patna High Court also seems to support this view —*Somar Singh* v. *Premdei*, 3 Pat. 327 (336), 79 I.C. 794, A.I.R. 1925 Pat. 40; and the Punjab Chief Court was also of the same opinion in *Anwar Ali* v. *Inayat Ali*, 32 P.R. 1907. In *Shivram* v. *Sakharam*, 33 Bom. 39 (43), the Bombay High Court has held that the plain words of clause 2 of Article 182 should not be disregarded; and therefore if there is an appeal by some of the defendants, the period of limitation for execution against all the defendants including those who have not appealed, runs from the date of the appellate decree. This case has been followed in another recent case where the period of limitation for execution against the sureties of the defendants has been held to run from the date of the Appellate decree, even though the sureties were not parties in the appeal—*Cholappa* v. *Ramchandra*, 44 Bom. 34 (40, 42), 21 Bom.L.R. 861, 53 I.C. 187. Whatever the nature of a decree, whether a decree proceeds upon a ground common to the defendants or not, and whether one defendant appeals from such

decree in so far as it affects his own interest or whether all the defendants appeal from only a part of the decree, and whether the parties against whom execution is sought were parties to the appeal or not, the period of limitation under this clause commences to run only from the date of the appellate decree—*Pandurang* v. *Kunwarlal*, 1940 N.L.J. 571, A.I.R. 1941 Nag. 19.

704. Withdrawal of appeal:—The words "or the withdrawal of the appeal" did not exist in the Act of 1877, and were for the first time introduced into the Act of 1908 to remove the conflict of decisions which existed under the Act of 1877 as to whether the withdrawal of an appeal did or did not give a fresh starting point for limitation. In the case of *Ramanuja* v. *Lakshmi*, 30 Mad. 1 (F.B.) it was held that the withdrawal of the appeal gave a fresh period; whereas the contrary opinion was expressed in the case of *Patloji* v. *Ganu*, 15 Bom. 370; *Chudasama* v. *Mohant Iswargar*, 16 Bom. 243, *Abdul* v. *Moidin*, 22 Bom. 500 (506), *Bhagwan* v. *Mohan Lal*, 54 P.R. 1908, and *Kandra* v. *Govind*, 1 M.L.J. 745. These 5 cases are now superseded.

Where an appeal is filed against the decree but withdrawn, an application to execute the decree made within three years of the date allowing withdrawal of the appeal is not time-barred—*Ram Chandra* v. *Nazir Ali*, 24 A.L.J. 544, 94 I.C. 390, A.I.R. 1926 Jour. 153.

705. Clause 3—Review of judgment:—Owing to the absence of any provision in the old Act as regards amendment of decree, it was held in some cases that the term "review of judgment" in this clause included amendment of decree—*Kali Prasanna* v. *Lal Mohan*, 25 Cal. 258; *Venkata Jogayya* v. *Venkata Simhadri*, 24 Mad. 25 (26). Under the present Article a separate provision has been made in clause 4 for *Amendment of decree*. See Note 706 below.

In order to save limitation there must have been actually a review; a mere application for review or a refusal of the application for review cannot give a fresh starting point—*Kurupam* v. *Sadasiva*, 10 Mad. 66; *Mastan* v. *Phalwan*, 81 P.L.R. 1909, 4 I.C. 629. The words "where there has been a review of judgment" cover only the cases where the application for review has been allowed and do not cover cases where the application for review has been rejected—*Bengali Mal* v. *Baijnath*, 1942 A.L.J. 352, A.I.R. 1942 All. 338; *Mahomed* v. *Alauddin*, 22 Pat.L.T. 26, A.I.R. 1941 Pat. 213; *Laxman* v. *Dagdu*, I.L.R. 1954 Bom. 1038, 56 Bom.L.R. 563, A.I.R. 1954 Bom. 457. So only where the application for review is granted limitation runs from the date of the decree substituted on review and in cases where the application for review is rejected limitation runs from the date of the original decree—*Bengali Mal* v. *Baijnath*, supra; *Mahomed* v. *Alaudin*, supra. An order dismissing an application for the rehearing or review of a suit which has been dismissed for default is not a review of judgment—*Raj Brijraj* v. *Nauratan*, 3 P.L.J. 119, 44 I.C. 575. An application under Or. 9 r. 13, C. P. Code is not an application for review within the meaning of this clause and an order thereon does not give a fresh start of limitation—*Ramakrishna* v. *Srinivasalu*, (1950) 1 M.L.J. 648, 1950 M.W.N. 380, A.I.R. 1950 Mad. 552. So also an application under Or. 9 r. 9 C. P. Code for restoration of a proceeding under sec. 36 of the Bengal Money Lenders' Act dismissed for default is not a review of the final decree. If there is a review at all, it is of the order dismissing the judgment-debtor's application under sec. 36 for default. Consequently, the execution of the final decree is not saved by this clause—*Bhawanipur Banking Corp.* v. *Gauri*, A.I.R. 1950 S.C. 6. An application for restoration is not an *application contemplated* by this clause—*Kunwar* v. *Sheo Shankar*, A.I.R. 1950 All. 327. But the Patna High Court held in *Dodhraj* v. *Bhagwan*, 16 Pat. 306, 18 Pat.L.T. 231, A.I.R. 1937 Pat. 337 that such an application amounts to "review" within the meaning of this clause, but this decision has

been over-ruled by the Full Bench decision in *Rameshwar* v. *Parmeshwar*, A.I.R. 1951 Pat. 1.

As in the case of appeal, so in the case of review or amendment of decree, it may be said that if only a part of the decree is sought to be reviewed or amended, limitation is saved as regards the whole decree. The intention of the Legislature is to treat the decree as a whole, although only a part may be the subject of an appeal or an application for review or amendment. Limitation runs with respect to the execution of the whole decree, only when the proceedings in appeal, review or amendment come to an end—*Vydianatha* v. *Subramania*, 36 Mad. 104 (106).

The words in Art. 182 (3) "decision passed on review" mean a decision passed in review proceedings, and whatever such a decision is it gives a fresh starting point of limitation.

706. Clause 4—Amendment of decree:—This clause has been introduced for the first time into the Act of 1908, to set at rest the conflict of opinion which existed as to the question whether, when a decree was amended, limitation ran from the date of the decree or from the date of the amendment. In some cases an amendment of the decree was regarded as a review of judgment and therefore time ran under clause 3 from the date of amendment—*Kali Prasanna* v. *Lal Mohan*, 25 Cal. 258; *Kishen Sahi* v. *Collector*, 4 All. 137 (141); *Venkata Jogayya* v. *Venkata Simhadri*, 24 Mad. 25; *Vishvanathan* v. *Ramanathan*, 24 Mad. 646. This view was however doubted in another Calcutta case, *Rakhal* v. *Jogendra*, 10 C.L.J. 467, 3 I.C. 391. Another Allahabad case went so far as to say that as there was no clause of this Article applicable to amendment of decrees, *Article 181 applied* and time ran from the date of the amendment—*Muhammad Suleman* v. *Muhammad Yar*, 17 All. 39. This divergence of opinion is now set at rest by the specific provision contained in the present clause.

This clause cannot be invoked to find the starting point for the twelve years period under sec. 48 C. P. Code—*Mt. Dulhin* v. *Harihar*, 18 Pat. 395, 20 Pat.L.T. 932, A.I.R. 1939 Pat. 607. See also *Ramachandra* v. *Parasuramayya*, I.L.R. (1940) Mad. 349, (1940) 1 M.L.J. 235, A.I.R. 1940 Mad. 127 (F.B.).

If a decree has been amended, time runs under this clause from the date of the amendment—*Narotum* v. *Sukhraj*, 3 Luck. 719, A.I.R. 1928 Oudh 442 (448), 116 I.C. 49. The 'date of amendment' means the date of the judgment ordering the amendment (on the analogous principle that a decree bears the date on which judgment is delivered) and not the date on which the decree in actually amended—*Nirit* v. *Kalananda*, 36 I.C. 533 (Patna); *Venkataswami* v. *Venkatasubba*, 49 Mad. 807, 50 M.L.J. 554, 95 I.C. 196, A.I.R. 1926 Mad. 747.

This clause does not specify the nature of the amendment, and therefore it must be said to include all kinds of amendment, whether an amendment of a clerical error under sec. 152, or an amendment under O. 47, C. P. Code or any other provision of law—*Aditya Kumar* v. *Abinash*, 34 C.W.N. 1002 (1007). According to the Patna High Court an amendment of a decree giving a fresh starting point of limitation under this clause must be an amendment in the real sense of the term, that is, of some substance affecting the rights of the parties, and not merely the correction of a clerical error, or a trifling arithmetical mistake such as the Court might at any time correct of its own motion—*Rameshwar* v. *Raghunandan*, 16 Pat. 453, 18 Pat.L.T. 679, A.I.R. 1938 Pat. 57. The same High Court has held in *Kesho Singh* v. *Bhuneshwari*, 1942 P.W.N. 179, A.I.R. 1942 Pat. 478 that if the alteration in the decree amounts to an amendment within the meaning of this clause, limitation will begin to run from the date of the amendment even though amendment has been made more than three years

from the date of the original decree. But if the alteration does not amount to an amendment within the meaning of this clause, time will run from the date of the original decree. Thus where a decree is drawn up in the name of a wrong person and is amended after the lapse of three years from the original decree, limitation runs from the date of amendment—*Gauri* v. *Rambilas*, A.I.R. 1948 Pat. 158, 2 D.L.R. 647.

Where a decree was incapable of execution at the time when it was passed (in as much it did not at all specify the relief granted or did not contain the names of the judgment-debtor and decree-holders), time ran from the date of amendment, even though the *amendment was made more than* 3 *years* after the decree was passed—*Mohamaya* v. *Abdul Hamid*, 18 C.W.N. 266 (268), 21 I.C. 615; *Sanatan* v. *Dinabandhu*, 34 C.L.J. 397, A.I.R. 1921 Cal. 89, 64 I.C. 622. In other words, a barred decree is revived by amendment, and time for execution runs from the date of amendment, provided that the decree was *incapable of execution* before the amendment. If, however, the decree was capable of execution before the amendment, and contained a mere orthographical or clerical error (*e.g*, where a person's name was wrongly written as Jwala Prosad instead of Joti Prasad, which may be easily mixed up in Urdu writing, or where the decree was passed against a dead person, through a clerical error, but the decree-holder knew who the legal representatives of the deceased were), an application for execution made more than three years after the date of the decree is barred, and the decree-holder cannot take advantage of such slight errors and claim an enlarged period of limitation because of the amendment—*Maharani* v. *Debi Das*, 1929 A.L.J. 427, 115 I.C. 118, A.I.R. 1929 All. 253 (254); *Anandram* v. *Nityananda*, 32 I.C. 744 (Cal.); *Rabiuddin* v. *Ram Kanai*, 59 I.C. 186 (Cal.); *Sureshwar* v. *Maharaj Bahadur Singh*, A.I.R. 1937 Cal. 581. Where an amendment in an *ex parte* rent decree consisted merely in a correction of the rate of rent, the amount of rent decree remaining the same, such amendment could not revive a barred decree and provide a fresh starting point, for the amendment was made merely in an ancillary part of the decree. Here it could not be said that the decree was incapable of execution before the amendment—*Kalanand* v. *Rajkumar*, 2 P.L.J. 286 (287), 39 I.C. 624.

The words of the Article 182 (4) must be given their plain meaning. And for an application for execution of a final decree which has been amended, 3 years' limitation runs from the date of amendment. It is not open to the judgment-debtor to plead that the application is time-barred on the ground that on the date of application for amendment of the earlier final decree it was time-barred, or on the ground that the amendment was unnecessary—*A. Lakshmikanta* v. *N. Ramayya*, A.I.R. 1935 Mad. 97, 40 M.L.W. 896, 154 I.C. 847, 58 Mad. 743, 67 M.L.J. 904.

In a Calcutta case it has been stated that if a decree has been amended, the period of limitation should run, according to the plain language of this clause, from the date of the amendment irrespective of the question whether the amendment was properly made or whether the decree was capable of execution at the time when it was passed, or whether the Court was wrong in making the order of amendment. It is not for the executing Court to enquire into these questions, because that Court does not sit as a Court of appeal over the Court which has passed the decree or made the amendment. What the executing Court has to see is whether the decree has been amended and whether the application for execution has been prescribed within three years of the date of the amendment. To introduce other considerations as regards the correctness or propriety of the amendment would be to usurp the functions of a Court of appeal—*Durga Prasad* v. *Kedar Nath*, A.I.R. 1929 Cal. 650 (651). Once the decree is amended the executing Court has got to take the amended decree as it stands and allow execution of it provided the application for execution is made within three years from the date of the amended decree—*Manohar* v. *Sudhi*, 41 C.W.N. 1330, 65 C.L.J. 455. Following the ruling reported in A.I.R. 1929 Cal. 650, the Patna High Court has observed

(after reviewing all the cases on this point) that if the application for amendment had been made within three years from the date of the decree, and the application for execution has been made within three years from the date of the amendment, the execution is not barred, although the amendment was made by the Court more than three years after the date of the decree. The execution Court is not entitled to introduce other considerations into the case, such as the validity of the amendment or whether the decree was capable of execution before amendment—*Bhagwati* v. *Narsingh*, 11 P.L.T. 181, A.I.R. 1930 Pat. 286 (288), 125 I.C. 785, 9 Pat. 782; *Maganlal* v. *Sitaram*, 16 Pat. 290; *Rameshwar* v. *Raghunandan*, A.I.R. 1938 Pat. 57, 16 Pat. 453, 18 Pat.L.T. 679. The Bombay High Court has held that there is no warrant for holding that the date of the amendment given in the third column of this clause refers only to cases where the decree is still capable of execution at the date of amendment. It has further held that an amendment, whether formal or substantial, gives a fresh starting point of limitation—*Baswachambasawraj* v. *Somashe*, 49 Bom.L.R. 557, A.I.R. 1948 Bom. 49. The same view has been taken by the Allahabad High Court in *Ballabh* v. *Shiva*, 1951 A.L.J. 184, A.I.R. 1951 All. 245 (F.B.) (overruling *Haidri* v. *Bhawani*, A.I.R. 1934 Oudh. 43); this will be so even if a former application for execution of the unamended decree has been dismissed as barred by limitation—*Ghafoor* v. *Ram Nath*, 1950 A.L.J. 676, A.I.R. 1950 All. 655. It is not the function of the executing Court to question the correctness or the propriety of the amendment of the decree even though the amendment was made at a time when the decree was not a subsisting one—*Iman* v. *Peoples' Instalment and Saving Bank Ltd.*, I.L.R. (1941) Lah. 659, 43 P.L.R. 11, A.I.R. 1941 Lah. 131.

When an application for amendment of a final decree is allowed, the period of limitation for execution of that final decree runs from the date of the order allowing amendment—*Bahal Singh* v. *Mt. Chameli*, A.I.R. 1935 All. 606.

But where an application for execution of a final decree is filed more than three years after the date of the final decree, but the decree is subsequently amended, the amendment does not enure to the benefit of the decree-holder, and time runs from the date of the final decree, and not from the date of the amended decree—*Administrator-General, Madras* v. *Thotta Radhakrishna*, A.I.R. 1936 Mad. 434, 70 M.L.J. 700, 161 I.C. 969 (57 Mad. 795 Dist.). Here the application was filed before the amendment and was for execution of the decree as originally passed, and not of the amended decree.

Where a decree is amended on account of the scaling down order under the Madras Agriculturists Debt Relief Act, limitation will begin to run from the date of the amendment even though the order for scaling down the debt in respect of one of the debtors was passed more than three years before the application for execution—*Parasa* v. *Stayanarayanamurthi*, (1945) 1 M.L.J. 39, A.I.R. 1945 Mad. 147. So also where a decree is amended under sec. 8 of the U. P. Debt Redemption Act, limitation begins to run from the date of the amendment and not from the original decree—*Bashir* v. *Wajid*, A.I.R. 1947 All. 249. Under sec. 24, Cochin Agricultural Relief Act, scaling down of the debt covered by a decree is an amendment of the decree and the amendment gives a fresh starting point of limitation for execution—*Vasudevan* v. *Neelakantan*, A.I.R. 1951 Tra-Co. 79.

Appeal against amended decree:—Where a decree was amended, on the application of the decree-holder, and then the judgment-debtor appealed against the amended decree to the District Judge and finally to the High Court, which dismissed the appeal, *held* that time ran from the date of the judgment of the High Court, and not from the date of the amendment, because there was an appeal against the *decree as amended*. An appeal from an amended decree stands on the same footing as an appeal from any other decree, and gives a fresh starting point for limitation—*Nagendra* v. *Ambica*, 33 C.W.N. 958 (960), 50 C.L.J. 12, A.I.R. 1929 Cal. 676.

707. Clause 5:—Scope:—The wording of this clause shows that it refers to an application for execution where there has been a previous proceeding in execution in Court. The other clauses of the article do not deal with such a question. Those clauses deal with the question as to the time from which limitation begins to run in the case of the first application—*Latafat* v. *Kalyan*, I.L.R. (1938) All. 342, 1938 A.L.J. 117, A.L.R. 1938 All. 210.

Application:—The defence by the decree-holder of an appeal preferred by the judgment-debtor in an execution proceeding is not an *application* to take a step-in-aid of execution—*Baij Nath* v. *Hari Charan*, 48 I.C. 187 (Pat.). This clause requires that the decree-holder should make a direct and independent application for execution of his decree on his own account; a resistance by him to the execution of another man's decree cannot be a step-in-aid of execution of his own decree—*Shib Lal* v. *Radha Kishen*, 7 All. 898.

There must be an *application* by the decree-holder to take some step-in-aid of execution. In the absence of any evidence to the effect that such an application was made, a mere order by the Court that the decree-holder should take the necessary steps will not bring the next application for execution within time—*Kara Pasi* v. *Ramnath*, 8 P.L.T. 670, A.I.R. 1927 Pat. 323, 103 I.C. 37. But where an order made in aid of execution is of such a nature that the Court could not have made it without an application by the decree-holder, it may be *presumed* that due application (possibly an oral one) had been made for it—*Trimback* v. *Kashinath*, 22 Bom. 722; *Mulchand* v. *Jamanbi*, 27 Bom.L.R. 671, A.I.R. 1925 Bom. 443, 89 I.C. 228; *Adimuthu* v. *Adiappa*, 12 Bur.L.T. 113, 52 I.C. 656. Thus, where there was an order of the Court to the effect that the service of notice to the judgment-debtor was proved and that a warrant be issued for his arrest, *held* that the order showed conclusively that the Court must have acted on some application (possibly oral) made by the decree-holder—*Mohan Lal* v. *Kasimuddin*, 47 C.L.J. 362, A.I.R. 1928 Cal. 302, 108 I.C. 588; *Somasundaram* v. *Ma Shwe*, 7 Rang. 132, A.I.R. 1929 Rang. 152 (153), 117 I.C. 578.

In the absence of any application, the mere appearance of the decree-holder in a proceeding under O. 21, r. 90, C. P. Code, cannot amount to a step-in-aid of execution and save limitation in respect of a subsequent application—*Baldeo* v. *Lachman*, 6 Pat. 280, A.I.R. 1927 Pat. 113, 99 I.C. 869.

It is necessary that the prior application must have been made by the *decree-holder;* where an application was made by the *judgment-debtor* for postponement of the sale, and the decree-holder consented to the postponement, *held* that there was no application by the *decree-holder* and the consent of the decree-holder to the postponement could not be treated as an "application" made by him so as to save the bar of limitation—*Sreenivasachariar* v. *Ponnusamy*, 28 Mad. 40.

This clause contemplates an *application* to take a step, and not a *suit*. A suit by a decree-holder for a declaration that the property released from attachment on the claim of a third party is liable to be attached, and an appeal to the High Court from the decision of the lower Court, are not steps-in-aid of execution—*Raghunandan* v. *Bhugoo*, 17 Cal. 268; *Sadakshara ppa* v. *Karlingawa*, 47 Bom.L.R. 848; *Sadaksharappa* v. *Karlingawa*, I.L.R. (1945) Bom. 893, 47 Bom.L.R. 795, A.I.R. 1946 Bom. 187; *Maung* v. *Chettyar Firm*, 1940 Rang. L.R. 82, A.I.R. 1939 Rang. 296; *Rajaram* v. *Paiku*, I.L.R. (1940) Nag. 334, 1938 N.L.J. 336, A.I.R. 1938 Nag. 534; *Gumti* v. *Jugal*, I.L.R. (1939) 2 Cal. 33, 69 C.L.J. 543, 43 C.W.N. 604, A.I.R. 1939 Cal. 399; *Ram Subbayya* v *Thimmiya*, (1941) 2 M.L.J. 754, A.I.R. 1942 Mad. 51; *Samshudin* v. *Jan Mahomed*, I.L.R. (1946) Kar. 412, A.I.R. 1947 Sind 48; *Ram Swarup* v. *Dulraj*, 1946 A. M.L.J. 13. But in *Laxmiram* v. *Bhalashankar*, 39 Bom. 20, 26 I.C. 262, it was held that an

appeal by the decree-holder against an order adjudging the judgment-debtor an insolvent was a step-in-aid of execution. See also *Sheo Ram* v. *Ram Bharosey*, 26 O.C. 71, A.I.R. 1923 Oudh 9, 69 I.C. 660, where the word 'application' was held to be a comprehensive term so as to include a suit.

The prosecution of an appeal from an order made in the course of a proceeding in execution of a decree cannot be looked upon as an application in accordance with law for execution or to take some steps-in-aid of execution—*Nand Kishore* v. *Sipphi Singh*, 26 All. 608; *Kristo Coomar* v. *Mahabat Khan*, 5 Cal 595; *Govinddas* v. *Ganapatdas*, 47 Bom. 783, 25 Bom.L.R. 518, A.I.R. 1923 Bom. 431, 73 I.C. 1030.

708. Oral application:—The application mentioned in this clause need not be in writing; an oral application will satisfy its requirements—*Trimback* v. *Kashinath*, 22 Bom. 722; *Mulchand* v. *Jamanbi*, 27 Bom.L.R. 671, A.I.R. 1925 Bom. 443, 89 I.C. 228; *Maniklal* v. *Nasia*, 20 Bom. 179; *Mohan Lal* v. *Kasimuddin*, 47 C.L.J. 362, A.I.R. 1928 Cal. 302, 108 I.C. 588; *Abdul Kadir* v. *Krishnamalammal*, 38 Mad. 695; *Amar Singh* v. *Tika*, 3 All. 139; *Surjamal* v. *Sarjoog*, 2 P.L.J. 5, 38 I.C. 540; *Gulzari Lal* v. *Ram Bhajan*, 22 O.C. 76; *Narayan* v. *Balkrishna*, A.I R. 1923 Nag. 11, 67 I.C. 889, *Krishna Aiyar* v. *Veetil*, A.I.R. 1922 Mad. 30, 70 I.C. 80, 15 L.W. 14; *Somasundaram* v. *Ma Shwe*, 7 Rang. 132, 117 I.C. 578, A.I.R. 1929 Rang. 152; *Adimuthu* v. *Adiappa*, 12 Bur.L.T. 113, 52 I.C. 656; *Ram Lal* v. *Udit Narain*, 2 Luck. 419, 100 I.C. 308. A.I.R 1927 Oudh 134; Contra—*Masilamani* v. *Sethhuswami*, 41 Mad. 251 (*per* Ayling, J. at pp. 253, 254, dissenting from 38 Mad. 695).

Thus, an oral application to the Court to enter partial satisfaction of the decree is a step-in-aid of execution—*Adimuthu* v. *Adiappa*, supra; an oral application made to the Court to proceed with the sale is one in aid of execution and saves limitation—*Gulzari Lal* v. *Ram Bhajan*, 22 O.C. 76; an oral application asking the Court to issue a warrant of attachment and sale of certain property in order that the decretal amount might be satisfied from the sale proceeds is a step-in-aid—*Ram Lal* v. *Udit Narain*, (supra); an oral application for an adjournment of the hearing of a previous execution application, in order to enable the decree-holder to produce an encumbrance certificate in respect of the attached property is a step-in-aid of execution which would save limitation—*Abdul Kadir* v. *Krishnamalammal*, 38 Mad. 695.

The Madras High Court has further laid down that where the C. P. Code requires a written application for execution, a mere oral application would not be a step-in-aid of execution; and where a written application is filed as required by the Code, an oral application is a mere superfluity, and such *superfluous* oral application cannot save limitation. In order that the oral application may be effective as a step-in-aid of execution, the application must be one which it is *necessary* to make in order to get the main relief sought for in the execution petition. It must be of such a nature that if the application were not made, further proceedings in execution could not be taken either by reason of the specific prayer not being contained in the execution application, or by reason of the Code or the Rules of practice regarding further acts to be done before the main relief prayed for in the execution application could be granted or enforced—*per* Kumaraswami Sastry, J. in *Masilamani* v. *Sethuswami*, 41 Mad. 251 (255), 41 I.C. 701, 33 M.L.J. 219.

Where in execution proceedings there was an application for arrest and warrants had been issued which proved ineffective and the decree-holder thereupon orally requested to issue fresh warrants, it was held that the oral request was not a superfluity but a definite and necessary act, and as such was a step-in-aid of execution—*Hanumankala* v. *Sheonarayan Sonar*, A.I.R. 1935 Nag. 131; 31 N.L.R. 333, 156 I.C. 114.

709. "Date of final order passed on an application":—These words have been substituted by the Indian Limitation Second Amendment Act (IX of 1927), in place of the words "date of applying." Previously, it was the date of making the previous application for execution or to take some step-in-aid of execution, which gave a fresh starting point of limitation, and not the date on which it was heard and an order passed thereon—*Saratkumari* v. *Jagat Chandra*, 1 C.W.N. 260; *Thakur Ram* v. *Katwaru*, 22 All. 358; *Raj Behary* v. *Kalihar*, 10 C.L.J. 479, 3 I.C. 336; *Trimback* v. *Kashinath*, 22 Bom. 722; *Treilokya* v. *Jyoti Prokas*, 30 Cal. 761 (770); *Mochai* v. *Meseruddin*, 13 C.L.J. 26, 9 I.C. 213; *Annapurna* v. *Dhirendra*, 24 C.W.N. 55, 54 I.C. 1; *Bhagwanta* v. *Zamir Ahmed*, 3 Pat. 596, A.I.R. 1924 Pat. 576, 78 I.C. 766; nor the last day or any other day on which the application was pending—*Fakir* v. *Gulam*, 1 All. 580 (F.B.). As a result of the Amendment, the period will run from the date of the order passed on the application. This amendment has been made in pursuance of a recommendation of the Civil Justice Committee to extend the period of limitation under this clause. See *Gazette of India*, 1927, Part V, p. 13; *Civil Justice Committee Report*, p. 403.

According to Art. 182, cl. 5, as amended in 1927, limitation is to be reckoned *not from the date of the application*, but *from the date of the final order* passed on an application to the Court to take some step-in-aid of execution. And, consequently, an order of the Court which merely directs the office to prepare a certificate cannot be considered to have finally disposed of the application which prayed that the certificate be transmitted. That application should be considered to have been finally disposed of only when the required certificate was prepared and handed over to the decree-holder who had undertaken to present it before the transferee Court—*Hafizuddin* v. *Parshadilal*, A.I.R. 1935 All. 757, 1935 A.L.J. 370, 154 I.C. 718; or ordered to be sent under the seal of the judge—*Mahidhar* v. *Kalyani*, 23 Pat. 707, A.I.R. 1945 Pat. 71. See also, *Kesho Ram* v. *Suraj*, 1949 A.L.J. 309, A.I.R. 1949 All. 741.

The date of the final order is not the date when the order is written but the date when it is pronounced—*Venkatappiah* v. *Seetharama*, (1944) 1 M.L.J. 454, A.I.R. 1944 Mad. 371. The date of the final order is the date of the final order of the final Court of appeal in case of an appeal being preferred—*Nacharmmal* v. *Veerappa*, (1945) 2 M.L.J. 197, A.I.R. 1945 Mad. 485; *Ahmad* v. *Masiti*, 211 I.C. 114; *Golum* v. *Arifunnessa*, 51 C.W.N. 316; *Harit* v. *Anil*, A.I.R. 1950 Cal. 370.

Where the decree-holder receives part payment of his decree and grants the judgment-debtor two months' time to pay the balance and files a petition to that effect before the Court and the Court in consequence passes an order recording dismissal on part satisfaction of the decree the time for filing a fresh application runs from the date of the order of the Court dismissing the application on part satisfaction and the period of grace allowed by the decree-holder to the judgment-debtor cannot be taken into account—*Mahesprasad* v. *Shyamlal*, A.I.R. 1935 All. 909, 1935 A.L.J. 1087, 158 I.C. 273.

"Final order" :—The word "final" does not mean last in point of time. The words "final order" imply that the proceeding has terminated so far as the Court passing it is concerned. It need not be an order on the merits or a judicial determination of the matter involved in the application—*Muthu* v. *Motilal*, supra. The words involve the notion of putting an end to something; and an order cannot be called a final order unless it puts an end to something or other—*Chidambaram* v. *Murujesam*, supra. The words mean only the order by which an execution application is finally disposed—*Alagappa* v. *Rama*, (1941) 2 M.L.J. 493, A.I.R. 1941 Mad. 858. The question whether an order is a 'final order' is not to be judged by reference to what the court passing the order thought at the time nor by the language employed by it. It is for the court

before which the nature of this order is properly in question at a later stage which has to deal with the matter and to consider the legal character of the earlier order and the decision must be arrived at on an independant consideration of the correct rule of law as applied to the true facts—*Ghulam* v. *Viswanathayyar*, I.L.R. (1943) Mad. 357, (1942) 2 M.L.J. 768, A.I.R. 1943 Mad. 297. The substance of the order and not the form is to be considered—*Annapurnamma* v. *Jagannadham*, (1949) 2 M.L.J. 836, A.I.R. 1950 Mad. 298; *Kaliappa Reddiar* v. *Thangamuthu*, (1956) 2 Mad.L.J. 301. When an order is made returning a petition, it contemplates a final order to be passed at a subsequent stage, when the defects are remedied and the petition is re-presented—*R. Kesavuloo* v. *Official Receiver, West Tanjore*, A.I.R. 1936 Mad. 613, 71 M.L.J. 336, 163 I.C. 354; *Muthu* v. *Motilal*, I.L.R. (1938) Mad. 326; A.I.R. 1938 Mad. 113; *Chidambaram* v. *Murugesam*, I.L.R. (1940) Mad. 60, (1939) 2 M.L.J. 671, A.I.R. 1939 Mad. 841; *Official Receiver* v. *Narayanaswami*, (1941) 2 M.L.J. 1018, A.I.R. 1942 Mad. 216; *Ghulam* v. *Viswanathayyar*, I.L.R. (1943) Mad. 357, (1942) 2 M.L.J. 768, A.I.R. 1943 Mad. 297; *Arjuman* v. *Mahomed*, 46 P.L.R. 68, A.I.R. 1944 Lah. 158; even though the order is wrong—*Anjuman* v. *Mahomed*, supra; *Krishnamachari* v. *Chengalareya*, (1939) 2 M.L.J. 469, A.I.R. 1940 Mad. 281.

In *Mowlavi Kholiloor Rahaman* v. *Collector of Etwah*, A.I.R. 1934 P.C. 14, 55 All. 993 the Judicial Committee seem to regard the result of an application as being synonymous with the final order passed upon it.

Where the Court intends to dispose of the matter completely and no longer keep it pending on its file, and does not merely suspend the execution or consign the record to the record room for the time being, the order must be deemed to be a final order which will give a fresh start for purpose of limitation, and that the proceeding not being pending, there would in such a case be no question of revival—*Md. Taqi* v. *Raja Ram*, A.I.R. 1936 All. 820 (F.B.) where an order passed in the following terms without notice to the parties, namely, "execution struck off for partial satisfaction of the decree costs on the judgment-debtors" was construed as a final order on an application made as referred to in cl. (5), Art. 182, Limitation Act. See also *Ram Dahin* v. *Raghunandan*, A.I.R. 1952 Assam 172.

An order dismissing an application for execution for default in compliance with the directions of the court is a final order—*Seshagiri* v. *Subbarami*, I.L.R. (1945) Mad. 684, (1945) 1 M.L.J. 270, A.I.R. 1945 Mad. 154 (F.B.); the contrary view taken in *Sundarabala* v. *Avudai*, (1942) 1 M.L.J. 542, A.I.R. 1942 Mad. 495 seems to be overruled; *Parankusa* v. *Ayyanna*, (1943) 1 M.L.J. 445, A.I.R. 1943 Mad. 517; *Nataraj* v. *Narayanaswami*, A.I.R. 1947 Mad. 385, (1947) 1 M.L.J. 393; so also an order rejecting an application represented beyond the time fixed by the court with or without any petition to excuse the delay amounts to a final order—*Gopalswami* v. *Executive Officer*, (1945) 1 M.L.J. 428, A.I.R. 1945 Mad. 347; *Muthuvenkatasubba* v. *Thangavel*, (1948) 1 M.L.J. 327, A.I.R. 1948 Mad. 462, I.L.R. (1949) Mad. 88; *Ramabadra* v. *Ramachandra*, A.I.R. 1954 Mad. 74; but see *Ghulam* v. *Viswanathyyar*, supra, where a contrary view has been taken; even if the application for execution is not admitted or numbered—*Seshagiri* v. *Subbarami*, supra; *Ramachandra* v. *Muthu*, (1943) 1 M.L.J. 236, A.I.R. 1943 Mad. 340; *Veerabhadraiah* v. *Seshiah*, (1948) 2 M.L.J. 369, A.I.R. 1949 Mad. 250; a contrary view has been taken in *Kuppuswami* v. *Rangaswami*, (1948) 2 M.L.J. 374, A.I.R. 1949 Mad. 217; so also an order rejecting an application which is not taken back though ordered for representation after making amendments—*Parankusa* v. *Ayyanna*, supra; *Seetharama* v. *Muthukrishna*, (1947) 2 M.L.J. 553, A.I.R. 1949 Mad. 43; an order dismissing an application for decree-holder's *default* is a final order—*Shankarlal* v. *Mahadeo*, I.L.R. (1942) Nag. 245, 1940 N.L.J. 418,

1944 Mad. 43; an order reciting that the execution case came before the court to be mentioned as "settled" is a final order even though the word "dismissal" or "final disposal" is not included in the order—*Nagappa* v. *Lakshmanan*, (1948) 1 M.L.J. 350, A.I.R. 1949 Mad. 80. An order stating that the appeal has abated is a final order—*Kunjithapatham* v. *Suraswathi*, (1941) 2 M.L.J. 66, A.I.R. 1941 Mad. 671; *Murlidhar* v. *Mahabir*, I.L.R. (1942) All. 658, 1941 A.L.J. 480, A.I.R. 1941 All. 371. Where on the application of the decree-holder a decree is transferred, and an application is made in the transferor court for execution, an order is passed "copy of decree has not been received from the transferee court. Returned," it is held that such an order is a final order—*Kandasami* v. *Gokuldas*, (1941) 1 M.L.J. 837, A.I.R. 1941 Mad. 731.

An order sending the application for rateable distribution to the Court executing the decree under which the properties were attached, is not a final order—*Mangi Lal* v. *Raghubar*, A.I.R. 1952 Rajasthan, 66.

An order passed on an execution petition as "recorded" is not a final order—*Govindarajulu* v. *Lakshmana*, (1948) 1 M.L.J. 437, A.I.R. 1948 Mad. 362; so also, a mere order for attachment is not a final order—*Venkatappayya* v. *Venkata*, A.I.R. 1951 Mad. 274, (1950) 2 M.L.J. 261; an intimation by the transferee court to the transferror court of non-execution or non-satisfaction due to default of decree-holder to take steps does not amount to a final order—*Krishna* v. *Ganga*, A.I.R. 1947 Pat. 388; an order *prima facie* disposing of an execution application obtained by means of fraud of some official of the Court, is not a final order—*Sheoraj* v. *Kamalay*, I.L.R. (1945) All. 213, 1945 A.L.J. 92, A.I.R. 1945 All. 172. During the pendency of an appeal against an order rejecting the objection of the judgment-debtor, some of the judgment-debtor's properties were sold, and the executing Court dismissed the execution case on part satisfaction; the appellate Court remanded the execution case, and the lower Court again rejected the objection and an appeal against that order was also dismissed for default; the executing Court passed an order "No steps taken. Case disposed." It was held that the order of the appellate Court was the final order and not that of the executing Court, though it was the "last" order in the execution case—*Rameshwar* v. *Rajendra*, 30 Pat. 388, A.I.R. 1952 Pat. 8.

The Amendment Act came into operation from 1st January 1928, and all applications made after that date would be governed by this Act, because the law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding, unless there is a distinct provision to the contrary. If the petitioner's application for execution had not been barred before the new law came into force, the application made after the Amendment Act would be governed by the new law—*Kanai Lal* v. *Purna Chandra*, 34 C.W.N. 733 (734). Thus, where an application for execution was at first made on 24th April 1925 and dismissed on 8th August 1925, and the next application was made on 8th August 1928, *held* that the new Act applied, and the application was not barred, as it was made within 3 years from the date of the final order passed on the previous application (8th August 1925). The Amendment Act will not disturb vested rights. The Act came in force from 1st January 1928 and on that date the decree-holder was still within time under the old Act. The application made on 8th August 1928 was governed by the Amendment Act, and as no right had vested by 1st January 1928, there was nothing to impede the operation of the Amending Act—*Sapani* v. *Damodar*, A.I.R. 1930 Pat. 207; *Kanai Lal* v. *Purna Chandra*, supra. It was further contended in the Patna case that the words "date of final order" referred only to the words "for execution" and not to the words "to take some step-in-aid of execution", for the stage of taking a step-in-aid must necessarily precede the "final order" in the execution case; and it was suggested that the period limited by the amendment is three years from the final order in cases

in which no steps-in-aid are taken, and in cases where steps are taken, three years from the last step-in-aid of execution. This contention was over-ruled, as it was too theoretical and did violence to the plain language of the clause as amended, under which time runs from the date of the final order passed on an application for execution or on an application to take some step-in-aid of execution—*Sapani* v. *Damodar*, supra.

710. "Proper Court":—An application although it is a step-in-aid of execution will not save limitation unless it is presented to the *proper* Court—*Penugonda* v. *Korasika*, 31 M.L.J. 90, 35 I.C. 237.

In Explanation II, "proper Court" has been defined as a Court whose duty it is to execute the decree or order.

The expression 'proper Court' means "the Court whose duty it is to execute the decree"—*Khushi Ram* v. *Ram Sumer*, A.I.R. 1935 Oudh 430 (431).

Where a decree is obtained in a Small Cause Court and execution is pending in that Court and a suit for a declaration is filed in a Munsif's Court that judgment-debtor's property is liable to attachment in execution of the decree, but the decree has not been transferred to the Munsif's Court when the plaint is filed, the Munsif's Court is not a proper Court within the meaning of Art. 182 and cl. (5) of that Article does not apply for the purposes of saving limitation—*Khushi Ram* v. *Ram Sumer*, A.I.R. 1935 Oudh 430, 1935 O.W.N. 672, 155 I.C. 505.

The Collector is not a Court when he acts under r. 14 (5), framed under sec. 43 (1), Co-operative Societies Act—*Abdul Razack* v. *Kilpathi Co-operative Society*, A.I.R. 1936 Mad. 150. The Collector acting under sec. 59 (1) (b) of the Bombay Co-operative Societies Act is some agency for carrying out an award, different from Court. Hence an application to the Collector to enforce an award under the aforesaid section cannot be regarded as an application made to a Court—*Maratha Co-operative Credit Bank* v. *Kashab*, 40 Bom.L.R. 889, A.I.R. 1938 Bom. 424.

If, as a result of execution, a decree has been satisfied and if the decree-holder is competent to refund or restore the property as a result of proceedings taken subsequently by the judgment-debtor or by a third party, the satisfied decree revives on the refund or restoration of the property and an application to execute the revived decree would be competent within three years from the time when the right to apply accrued to the decree-holder. The starting point for an application would be the date when the decree-holder is compelled to refund the amount or restore the property—*Akbar Ali* v. *Meher Ali*, A.I.R. 1935 Lah. 166, 158 I.C. 5.

An application made under sec. 28 (2) of the Provincial Insolvency Act for leave to execute the decree is not an application made to the "proper Court". The Insolvency Court which is entirely a creature of the Provincial Insolvency Act is a different Court from a Court which is to execute a decree obtained independently of the Insolvency Act, and the mere fact that the Judge is the same person will not make the two Courts the same—*Rarichan* v. *Kunhamu*, 57 Mad. 808, 67 M.L.J. 762, A.I.R. 1934 Mad. 392, 150 I.C. 113. See also, *Nandlal* v. *Ram Datta*, 1940 N.L.J. 605, A.I.R. 1941 Nag. 60.

When a decree is transferred from one Court to another, the "proper Court" within the meaning of this clause is the *Court to which the decree is transferred*, until it has made its return to the Court which made the decree; and any application made to the Court which passed the decree would be insufficient to save limitation—*Manorath* v. *Ambika*, 13 C.W.N. 533 (540), 9 C.L.J. 443, 1 I.C. 57; *Abu Begam* v. *Mirzaffar*, 20 All. 129; *Maharaja of Bobbili* v. *Narasaraju*, 39 Mad. 640 P.C. (affirming 37 Mad. 231); *Jnanendra* v. *Jogindra*, 2 Pat. 247, 74 I.C. 608, A.I.R. 1923 Pat. 384; *Syed Mohd.*

Shakir v. *Jugal Kishore*, 28 O.C. 169, A.I.R. 1925 Oudh 492, 85 I.C. 455. An application for execution made to the Court which has transferred the decree to another Court for execution and which has not received a certificate of non-satisfaction from the Court to which the decree has been transferred is not one made to the "proper court"—*Bishundeo* v. *Raghunath*, 19 Pat. 354, 1940 P.W.N. 504, A.I.R. 1940 Pat. 677; *Kamakhya* v. *Kali Podo*, 20 Pat.L.T. 356, A.I.R. 1939 Pat. 289; *Rameshwarlal* v. *Tilokkchand*, 23 Pat. 729, 1945 P.W.N. 15, A.I.R. 1945 Pat. 129; *Krishna* v. *Ganga*, 25 Pat. 790, A.I.R. 1947 Pat. 388. The transferee court is bound to execute the decree and a darkhast presented in that Court is one made to the proper Court—*Tejaji* v. *Motilal*, 48 Bom.L.R. 583; notwithstanding that rules 5 and 8 of Or. 21, C. P. Code have not been complied with at the time of transfer of the decree as non-compliance with those rules is a mere irregularity and does not affect jurisdiction—*Inderdeo* v. *Deonarayan*, 25 Pat. 50, A.I.R. 1946 Pat. 301. An application for execution made to a Court to which the decree has *not been transferred* is not an application made to the proper Court—*Jugal Kishori* v. *Butto Krishto*, 55 Cal. 608, 32 C.W.N. 192 (193), 104 I.C. 668, A.I.R. 1927 Cal. 952. When a decree is transferred from Court A to B, then until the Court B has returned the decree to Court A, any application for a further transfer of the decree to any other Court C must be made to the Court B; if made to Court A, it will be insufficient to save limitation—*Rangasami* v. *Sheshappa*, 47 Bom. 56 (64), 24 Bom.L.R. 798, A.I.R. 1922 Bom. 359, 68 I.C. 506. But a contrary view has been taken in *Govind* v. *Lakman*, 23 N.L.R. 126, A.I.R. 1928 Nag. 29; *Muthurama* v. *Motilal*, I.L.R. (1938) Mad. 326, 1937 M.W.N. 943, A.I.R. 1938 Mad. 113; *Radheysham* v. *Devendra*, A.I.R. 1952 Pat. 213. The reason given is that by transfer of the decree to another court for execution, the court does not divest itself of all its jurisdiction and retains control of the execution proceedings. On the same principle it has been held that an application to the transferring court after transmission of the decree for transmission to the same transferee court is an application made to the proper court—*Kandasami* v. *Gokuldas*, (1941) 1 M.L.J. 837, A.I.R. 1941 Mad. 731; *Ramlal* v. *Ratanlal*, I.L.R. (1943) Bom. 7, 44 Bom.L.R. 830, A.I.R. 1943 Bom. 1. In *Radheshyam* v. *Devendra*, A.I.R. 1952 Pat. 213 (F.B.) the Patna High Court, after reviewing all the cases has held that where a decree is transferred for execution to another Court, the question whether an application for execution of the decree made to the transferor Court before the transferee court has sent a certificate under sec. 41 Civil Procedure Code is an application to the 'proper court' depends upon the relief applied for. If it is one which the transferor Court can grant, the application is made to the 'proper Court.' So also, an application made to the transferor court to recall the proceedings from the transferee court is made to a proper court—*Dwarkadas* v. *Saligram*, 17 Pat. 617, 20 Pat.L.T. 353, A.I.R. 1939 Pat. 144.

When a money decree has been transferred by the Court which passed it for execution to another Court, an application to the first Court (*a*) to execute the decree, (*b*) to transfer it to another Court for execution, and (*c*) to transfer it for execution to the same Court is a valid application, even if such an application is made before the proceedings taken in the other Court have first been reported and certified by that Court, and such an application is a step-in-aid of execution so as to save limitation provided by Art. 182, Sch. 2, Limitation Act—*Kanti Narain and others* v. *Madan Gopal*, A.I.R. 1935 Lah. 465 (F.B.), 37 P.L.R. 636, 157 I.C. 488. (*Per* Jai Lal and Rangi Lal, JJ. *Contra*—Skemp, J).

Where a decree passed by the Sub-Court of Tanjore was transferred to the District Court for execution, but the decree-holder not having made any application for execution within six months, the District Court returned the decree to the Sub-Court (under the Civil Rules of Practice), and then the decree-holder applied to the District Court for execution, when he was informed that the decree had been returned to the original

Court, *held* that this application was not made to the proper Court—*Mir Mahomed Noorulla* v. *Hasarath*, 51 M.L.J. 554, A.I.R. 1926 Mad. 1209, 98 I.C. 455.

If a decree is transferred from one Court to another, an application for substitution of names of the legal representatives of the deceased decree-holder may be made to the latter Court, because that Court has jurisdiction to substitute the names—*Mohan Singh* v *Jagat Singh*, 50 All. 621, 109 I.C. 412, A.I.R. 1928 All. 299 (300), 26 A.L.J. 417. In *Deputy Commissioner* v. *Newazish*, 20 Luck. 449, 1945 O.W.N. 210, A.I.R. 1945 Oudh. 298 it was held that where a court transfers a decree to another court for execution and the decree has not been returned to the transferring court with the certificate of non-satisfaction, the transferring court is the "proper court" for purposes of making applications for substitution of parties or for setting aside substitutions made. Such an application must be made to the court which passed the decree—*Daulat* v. *Khem Raj*, A.I.R. 1951 Ajmer. 31. Where a decree has been transmitted from one Court to another, the notice required to be issued under O. 21, r. 22 must be issued by the Court to which the decree has been transferred; consequently an application for the issue of such notice if made to the Court which *passed* the decree ,is not an application in accordance with law, as it is not made to the proper Court—*Hazari Lal* v. *Baidyanath*, 26 C.W.N. 292, A.I.R. 1922 Cal. 3, 63 I.C. 116.

Where the area of the property, over which the Court which passed the decree had local jurisdiction at the time of passing it, was, by reason of alteration of the local jurisdiction of the Court, transferred to the jurisdiction of another Court at the time of presenting the application for execution, the proper Court for applying for execution within the meaning of this clause is the Court which passed the decree—*Seeni Nandan* v. *Muthuswami*, 42 Mad. 821 (F.B.); *Jagannath* v. *Ichharam*, 27 Bom.L.R. 649, A.I.R. 1925 Bom. 414, 89 I.C. 87. The reason of this decision is that "otherwise a decree-holder when he decides to apply for execution, possibly at the last moment, will be bound to stop and enquire whether the limits of the territorial jurisdiction of the Court which passed the decree have been altered, and if so, whether the immoveable property which is the subject of the suit or the place where the cause of action arose is within the limits of the transferred area, on pain of losing his right to execute under this Article if he omits to make these enquiries or comes to a wrong conclusion in making them. This is so unreasonable and involves such hardships to the decree-holder in a country like India with a stringent law of limitation that we should hesitate to impute such an intention to the Legislature"—*per* Wallis, C.J. in 42 Mad.821 (F.B.). A contrary view was taken in two earlier cases of the Madras High Court—*Penugonda* v. *Korasika*, 31 M.L.J. 90, 35 I.C. 237 and *Seshadri* v. *Ananthayee*, 1917 M.W.N. 788, 42 I.C. 671. These two cases are now practically overruled by the Full Bench case cited above. The Calcutta High Court has held that assignment of business under sec. 13 (2) of Civil Courts Act is not transfer of business within the meaning of sec. 150, C. P. Code. Consequently, where an application for execution of a mortgage decree is filed in a Court other than the Court which passed the decree on the ground that subsequent to the passing of the decree the particular area where the mortgaged property is situated has been assigned to that Court under sec. 13 (2) of the Civil Courts Act, such an application is not made to the "proper Court"—*Nasrab* v. *Deb Nath*, 75 C.L.J. 255.

Where a decree was passed by the third Court of Additional Subordinate Judge, an application filed by the decree-holder for execution in the third Court of the Sub-ordinate Judge is not an application to the 'proper Court'—*Sam Narain* v. *Raghubans*, A.I.R. 1952 Pat. 4.

An application for execution made to the Court which passed the decree can be said to have been made to the proper Court, even though the presiding officer of the

Court at the time of the application may not have pecuniary jurisdiction to try the suit in which the decree was passed—*Ishwari Prasad* v. *Farkat Hossein*, 2 P.L.J. 113, 39 I.C. 63. So also, an application for arrest of the judgment debtor made to a court which had on the face of it jurisdiction is made to the proper Court even though the judgment debtor lived outside the jurisdiction—*Chettyar* v. *Than*, A.I.R. 1939 Rang. 345. The Calcutta High Court has held that in order to constitute an executing Court the "proper Court", it is essential that the Court must possess both precuniary and territorial jurisdiction, apart from being otherwise competent—*Prasanna* v. *Kamrup Co-operative etc.*, 48 C.W.N. 821.

An appeal to the High Court against an order made in an execution proceeding is not an application to the proper Court for execution, for the High Court is not a Court whose duty it is to execute decrees passed by the lower Courts—*Gobinddas* v. *Ganapatdas*, 47 Bom. 783 (784), A.I.R. 1923 Bom. 431, 25 Bom.L.R. 518, 73 I.C. 1030.

A Conciliator appointed under the Deccan Agriculturists' Relief Act is not a Court, and an application for execution made to him does not save limitation—*Manohar* v. *Gebiapa*, 6 Bom. 31.

An application made to a Criminal Court to restrain the parties from acting contrary to the terms of a decree is not a step-in-aid of execution—*Sadappachari* v. *Krishnamachari*, 12 Mad. 356 (364).

Transfer of decree from British Court to Native State Court and vice versa :— Where a decree of a British Indian Court is sought to be executed in a Court in a Native-State (*e.g.*, Travancore) which is not established or continued under the authority of the Governor-General, the application made by the decreeholder to the Court in the Native State for execution does not give a fresh starting point in computing the period for a subsequent execution of the decree in the British Court, because an application to a Foreign Court is not application "in accordance with law to the proper Court." The 'proper Court' contemplated by this clause is a Court in British India, and not a Court in a Native State. The expression 'in accordance with law' means in accordance with the law of British India, and cannot be extended to an application made to a Foreign Court to execute a decree of a British Court under powers conferred upon it by the legislative authority of that Foreign State. Moreover, if the decreeholder applies to the British Court for a certified copy of the decree and other necessary papers to be transmitted to the Court in Native State, it is not a step-in-aid of execution, because the execution sought in this case is execution in a Foreign Court and not execution in a British Indian Court. Consequently such an application cannot give a fresh starting point in respect of a subsequent execution of the decree in British Court—*Pierce Leslie* v. *Perumal*, 40 Mad. 1069 (1079, 1080) (F.B.) (*per* Wallis, C.J.). This view was also taken in an earlier case of the Punjab Chief Court—*Nawab Saadat Ali Khan* v. *Nawab Md. Ali Khan*, 107 P.R. 1881.

The latter part of the ruling in this Full Bench case (40 Mad. 1069) has been strongly disapproved of in a converse case recently coming up before a Division Bench of the same High Court. In this case a decree had been passed in 1911 by a District Court in Mysore State, and after various fruitless attempts at execution, the decreeholder applied to the Mysore Court in 1916 to transmit the decree to the High Court at Madras for execution. The Mysore Court ordered the decree to be transmitted to the Madras Court in 1919. Thereupon the decree-holder applied in the Madras Court for execution of the decree, and the question arose whether the application made by the decree-holder in 1916 to the Mysore Court for transmission of the decree to the Madras Court was an application in accordance with law so as to be treated as a step-in-aid of execution. *Held* that "an application in accordance with law" means an application in accordance with the law of the place where the application is made,

i.e., the law of Mysore, in the present case; and as according to the law of Mysore an application to transmit a decree from a Mysore Court to a British Court is a step-in-aid, the application of 1916 must be deemed to be a step-in-aid of execution according to the Limitation Act of British India—*Sreenivasa* v. *Narayan*, 45 Mad. 1014, 69 I.C. 932, A.I.R. 1923 Mad. 72. In this case Schwabe, C.J., disapproving of the Madras Full Bench case (40 Mad. 1069) cited above, remarked: "The difficulty arises owing to the fact that a converse case of the transmission of papers from this Court to a Native State for the purposes of obtaining the assistance of the Court of that Native State in executing a decree of a Court in this Presidency came up before a Full Bench of this Court in *Pierce Leslie* v. *Perumal*, 40 Mad. 1069, and it was there held that such a step was not a step-in-aid of execution. We, therefore, have the anamalous position that in interpreting statutes in identical terms, the Chief Court in Mysore has held that an application to transmit the papers in a Mysore case to this Court is a step-in-aid of execution, while this Court has held that the application to transmit the papers in a Madras case to Travancore is not a step-in-aid of execution .....I do not agree with that decision. It has been strongly disapproved of by a Division Bench in *Janardan* v. *Narayan*, 42 Bom. 420. The point has been argued before us, and the inclination of my mind is to agree with the Bombay decision and not with that of the Full Bench of Madras and if the same point arises again, I should wish to have it reconsidered by a Full Bench" (pp. 1019, 1021). See also *Prabhulingappa* v. *Gurunath*, 45 Bom. 453 (458), A.I.R. 1921 Bom. 256, 22 Bom.L.R. 1389, 59 I.C. 747, where it has been held if a decree passed by a Court in a Native State is transferred to a Court in British India, all proceedings taken in the Court which passed the decree must be regarded as having been taken in a "proper Court" within the meaning of this clause to save limitation.

The above Madras Full Bench case (40 Mad. 1069) has been dissented from in *Janardan* v. *Narayan*, 42 Bom. 420 (428, 429) where Beaman J. expressed the view that the rather curiously-worded phrase "step-in-aid of execution" was comprehensive enough to include an application made to the British Indian Court to transfer its decree to a Court in a Native State for execution.

A fortiori, where there is an agreement between the British Government and the Government in a Native State, that they shall execute each other's decrees, an application by the decree-holder to transfer the decree of the British Indian Court to the Court of the Native State for execution, and *vice versa*, is an application in accordance with law to take a step-in-aid of execution—*Janardan* v. *Narayan*, 42 Bom. 420 (431), 20 Bom.L.R. 421, 46 I.C. 56; *Fatehchand* v. *Jitmal*, 53 Bom. 844, 31 Bom.L.R. 1105, A.I.R. 1929 Bom. 418.

After the Constitution of India, the difference between Courts in British India and in Native States does not exist as there is no such thing as "British India" or "Native States."

711. "In accordance with law":—It is well-settled that the words "in accordance with law" mean in accordance with the law relating to the execution of the decrees—*Govind Prasad* v. *Pawankumar*, 70 I.A. 83, A.I.R. 1943 P.C. 98. The expression "in accordance with law" does not mean an application prescribed or required by law. An application would be in accordance with law, even though it is not required by law, provided it does not contravene any express provision of law or conflict with any principle of law. The expression cannot be restricted to cover only such applications as fall under some express provision of the Code of Civil Procedure. The fact that there is no specific provision in the Code of Civil Procedure to cover an application in execution would not render it one not in accordance with law—*Hassomal* v. *Lalchand*, I.L.R. (1948) Kar. 371: A.I.R. 1947 Sind 149. See

also *Krishna* v. *Krishna*, A.I.R. 1955 Pat. 187; *Daroji* v. *Kameshwar*, A.I.R. 1957 Pat. 299. Thus, although the C. P. Code nowhere lays down that an application to bring the legal representatives of a deceased judgment-debtor is a necessary preliminary step to the making of an application for execution of the decree against the deceased's representatives, still such an application is one in accordance with law, because there is nothing in the C. P. Code which prohibits a Court from entertaining such application. Merely because the decree-holder, instead of asking the Court to execute the decree against the legal representatives after service of notice under O. 21 r. 22, asks the Court to first complete the array of parties and thereafter makes an application for execution, he cannot be said to have acted in a manner which does not accord with law—*Ramchandra* v. *Uka*, 24 N.L.R. 36, 103 I.C. 279, A.I.R. 1927 Nag. 308 (309). So also the C. P. Code does not require that the transferee of a decree-holder should make an application for substitution of his name in place of the original decree-holder, but only requires that the transferee should make an application for execution after giving notice to the transferor and the judgment-debtor. Still if the transferee makes an application for recognition as transferee, and the judgment-debtor makes no objection thereto, the application must be taken as one made in accordance with law—*Annamalai* v. *Ramier*, 31 Mad. 234 (235).

Where the prior application for execution which was barred by time admitted by the executing Court and execution was ordered to issue thereon, the order though erroneously made was nevertheless valid, unless reversed on appeal, and the application was in accordance with law and a step-in-aid of execution. The judgment-debtor cannot object to a subsequent application for execution on the ground that the previous application was barred by time, the matter being *res judicata*—*Desaiappa* v. *Dundappa*, 44 Bom. 227, 22 Bom.L.R. 76, 55 I.C. 329; *Gulappa* v. *Erava*, 46 Bom. 269 (271), A.I.R. 1922 Bom. 118, 63 I.C. 844; *Mungal Pershad* v. *Grijakant*, 8 Cal. 51 (59) (P.C.); *Jago Mahton* v. *Khirodhar*, 2 Pat. 759, A.I.R. 1924 Pat. 122, 74 I.C. 130; *Lakshmanan* v. *Kuttayyan*, 24 Mad. 669; *Prabhulingappa* v. *Gurunath*, 45 Bom. 453 (459). But although the matter is *resjudicata* between the parties, it is open to a third party to dispute the correctness of the prior adjudication allowing a time-barred application. So, a judgment-dobtor who was not a party to a previous application for execution of a decree or to any order made upon it, is not precluded from showing that the said application was barred by limitation and that therefore it was not in accordance with law—*Harendralal* v. *Sham Lal*, 27 Cal. 210 (213). Whether the previous application for execution was in accordance with law can not be agitated for the first time in appeal —*Prabha* v. *Hans Raj*, A.I.R. 1951 J. & K. 8.

Where a decree gives certain reliefs, and the application for execution seeks some or all of them, and the Court after going into the merits of the application and considering all the circumstances of the case, comes to the conclusion that the particular relief or reliefs shall not be granted, *held* that such an application would still be an application in accordance with law provided it meets in substance the requirements of the C. P. Code or any law relating to execution—*Bando* v. *Narsinha*, 37 Bom. 42, 17 I.C. 210 (212); *Subramanian* v. *Ramaswami*, 49 M.L.J. 753, A.I.R. 1926 Mad. 179, 91 I.C. 11. Thus where a decree contains a personal liability, but the arrest of the judgment debtor is no longer possible because of his discharge in insolvency proceedings subsequent to decree, an application for execution asking for arrest of judgment debtor is not one not in accordance with law—*Ayyamma* v. *Thanlavan*, (1945) 1 M.L.J. 355, A.I.R. 1945 Mad. 352. But if the judgment debtor is not personally liable an application for execution praying for arrest of the judgment-debtor is not in accordance with law—*Bhola Nath* v. *Parmeshwar*, I.L.R. (1944) All. 183, 1943 A.L.J. 607, A.I.R. 1944 All. 35. But the Madras High Court has held that even though a decree

does not make the judgment-debtor personally liable but only against the family properties in his hand, an execution application praying for his arrest is in accordance with law—*Naujunda* v. *Lakshmanan*, (1940) 2 M.L.J. 502, A.I.R. 1941 Mad. 30. The Patna High Court has held that an application for execution praying for arrest of the heirs of the deceased judgment debtor is not in accordance with law—*Mahidhar* v. *Kalyani*, 23 Pat. 707, A.I.R. 1945 Pat. 71. Where an application asks partly for a relief granted by the decree and partly for a relief totally outside the decree, the application may be void as to the latter, but all the same it is good in law as to the former, and therefore in "accordance with law"—*Bando* v. *Narsingha*, (supra).

An application for execution would be in accordance with law, if it is in accordance with the rules of procedure prescribed therefor, and it does not cease to be such an application even though on an adjudication on the merits of the case the court rejects the relief for which it prays—*Gobardhan* v. *Jang Bahadur*, 1 Luck. 569, 3 O.W.N. 749, 98 I.C. 33, A.I.R. 1926 Oudh 616. The fact that subsequent enquiry may show that the execution application must fail is no reason for holding that it is not in accordance with law, when on the face of it, it is so—*Virumal* v. *Chellaram*, I.L.R. (1942) Kar. 448, A.I.R. 1943 Sind 29.

Where a decree directs that the decree-holder shall be entitled to a certain relief *in a certain event* or on a certain condition, and the decree-holder applies for that relief before the happening of that event or before fulfilling that condition, it does not follow that he has applied for a relief which is outside the decree and that therefore the application is not one in accordance with law—*Bando* v. *Narsinha*, supra; *Nathubhai* v. *Pranjivan*, 34 Bom. 189, 5 I.C. 601. Thus, where a decree ordering partition directs that the plaintiff shall not be entitled to execute (*i.e.*, recover his share) until he has paid the amount of Court fee leviable on his claim, an application for execution unaccompanied with the Court fee is still an application in accordance with law—*Nathubhai* v. *Pranjivan*, 34 Bom. 189, 5 I.C. 601.

If a person irregularly executes a decree with the Court's permission—a permission which the Court is authorised to give—it cannot be said that he is not doing so in accordance with law. Thus, where a decree is transferred (really or nominally), and the *ostensible transferee* executes the decree with the permission of the Court (given after due notice to the judgment-debtor and decree-holder), the proceedings taken and the application on which they are based are in accordance with law as between him and the judgment-debtor, although he is a *benamidar*, and the decree is kept alive—*Balkishen* v. *Bedmati*, 20 Cal. 388 (394, 395). So also an application for execution asking for transmission of the decree under the mistaken impression that the property sought to be proceeded against is situated outside the jurisdiction of the Court which passed the decree and the Court also passes transmission order under the same mistaken belief, is an application in accordance with law—*Arunachala* v. *Rajagopala*, (1948) 1 M.L.J. 389, A.I.R. 1948 Mad. 338. Such a mistake is a mistake of fact and not of law—*Santhappa* v. *Siddalingayya*, (1939) 1 M.L.J. 827, A.I.R. 1939 Mad. 378; *Bisundeo* v. *Raghunath*, 19 Pat. 354, A.I.R. 1940 Pat. 354; *Ayyanna* v. *Tandavan*, A.I.R. 1945 Mad. 352.

An application for execution by some only of the decree-holder's legal representatives, though not purporting to be on behalf of the other representatives, is sufficient to save limitation—*Vasudevpatta* v. *Narayanapanigrahi*, 1916 M.W.N. 112, 31 I.C. 853. But an application for execution by a stranger to the decree is not in accordance with law even though it can be shown that the person making the application has a fair claim of right. Such an application will not avail the proper legal representative of the deceased decree-holder—*Unichira* v. *Ramu*, (1951) 1 M.L.J. 51, A.I.R. 1951 Mad. 674. But where the stranger files an application for execution praying that both he

and the widow of the deceased decree-holder should be brought on record as the legal representatives of the deceased decree-holder and the decree should be executed for their joint benefit, such application is deemed to be on behalf of the widow, the real legal representative and is in accordance with law—*Annapurnnamma* v. *Venkamma*, (1938) 1 M.L. J. 135, A.I.R. 1938 Mad. 323.

An application for execution by the legal representative of a deceased decree-holder without bringing his name on the record is an application in accordance with law—*Alagirisami* v. *Venkatachellapathy*, 31 Mad. 77; *K. Somayajulu* v. *Annappa*, A.I.R. 1957 Andhra 66 (F.B.)

An application by a decree-holder, after assigning his decree, for transfer of the decree, is an application made in accordance with law—*Jethanand* v. *Bherumal*, I.L.R. (1943) Kar. 88, A.I.R. 1943 Sind. 108; *Atma Ram* v. *Shyama*, 22 Luck. 217, A.I.R. 1948 Oudh 176.

Where an application for execution of a decree is made by a person who, at the time of making it, was on the face of the decree the only person entitled to execute it, the application does not cease to be an application in accordance with law merely because it is afterwards decided that that person had no title to execute the decree—*Hari Krishnamurthi* v. *Suryanarainamurthi*, 43 Mad. 424. A decree-holder filed an application for execution of two decrees against the same judgment-debtor, but the application being defective with respect to one of the decrees, was rejected without issue of any notice to the judgment-debtor. Another application for execution of one of the decrees (with respect to which the previous application was in order) was filed within 3 years of the previous application, but after more than 3 years after the passing of the decree. It was contended, *inter alia*, that the application was time barred. This contention was overruled, and it was held that the application was within time: a new start for limitation arose from the order rejecting the previous application—*Md. Shakir Dad Khan* v. *Sahu Nand Kishore*, A.I.R. 1936 All. 467, 1936 A.L.J. 571, 163 I.C. 841.

A decree having been obtained against a minor represented in suit by his mother as guardian, the decree-holder erroneously took out execution against the mother personally and not as the guardian of her son. The application was granted and a property belonging to the minor was attached. It was held under the circumstances that the application was one in accordance with law notwithstanding the technical defect therein —*Hari* v. *Narayan*, 12 Bom. 427.

An application for execution of a decree against a minor represented by his mother, without any application to the Court for an order appointing the mother as guardian *ad litem*, is an application in accordance with law—*Keshwa Surendra* v. *Mulukrani*, 4 P.L.J. 35, 48 I.C. 415. There is no provision in Or. 21, C. P. Code, that such an application should be made and that he should get himself appointed as next friend. It is in the execution application that he has to describe himself as next friend and file an affidavit or application to get himself recognised as next friend. Therefore, an application presented by a person as next friend of a minor is in accordance with law though the applicant does not get himself appointed as next friend—*Muthukrishna* v. *Viswalinga*, 1940 M.W.N. 547, A.I.R. 1940 Mad. 893.

Where a decree granted simple interest, and an application for execution was made in which the interest calculated was compound interest, *held* that the mere mistake in calculating more interest than what was due did not prevent the application from being one in accordance with law. Although the relief claimed had been exaggerated by the extra amount of interest, it would be competent to the Court to treat the extra interest as a surplusage and to strike it out and then grant relief—*Jamiluunnissa* v. *Mathura Prasad*, 43 All. 550, A.I.R. 1921 All. 208, 19 A.L.J. 509, 63 I.C. 362. The

mere fact that more money is claimed than what is due would not render the application one not in accordance with law—*Muthukrishna* v. *Viswalinga*, 1940 M.W.N. 547, A.I.R. 1940 Mad. 893; *Subramanian* v. *Muthuswami*, 1941 M.W.N. 171, A.I.R. 1941 Mad. 578.

Where a decree is erroneously passed in favour of a firm in the name of an agent, and applications for execution are put in by its other agents not named in the decree, such applications are in accordance with law and sufficient to keep the decree alive —*Lachman* v. *Patni*, 1 All. 510. An application for execution filed against a firm is in accordance with law even though no leave of Court is taken under Or. 30, r. 9, C. P. Code as leave of the Court is not made a condition precedent to the maintainability of execution proceedings under the same rule—*Jaychand* v. *Waman*, 52 Bom.L.R. 205, A.I.R. 1950 Bom. 184 (F.B.).

An application for execution, in which no notice is taken out under sec. 148 (g), Bihar Tenancy Act, is still one in accordance with law as the service of notice under sec. 148 (g) is not a condition precedent to the starting of an execution case or to the executing Court obtaining jurisdiction to proceed with the execution itself—*Sayeeda* v. *Bishun*, 24 Pat. 153, 1946 P.W.N. 61, A.I.R. 1945 Pat. 268.

A decree in a redemption suit directed the plaintiff to recover possession of the mortgaged property on payment of a certain amount, but the decree did not fix the time within which the payment was to be made. The decree-holder applied for execution of the decree but the application was dismissed on the ground that he had not paid the decree-amount. In a subsequent application the question arose whether the prior application was in accordance with law. It was held that though the payment of the amount was a condition precedent to the making of an order for the delivery of the property, it was not a condition precedent to the making of an application for a conditional order; and the prior application for execution of the decree without paying the amount was an application in accordance with law—*Syed Hussain* v. *Rajagopala*, 30 Mad. 28.

An application for execution of a decree dependent on the payment by the decree-holder of a sum of money was an application for execution made in accordance with law even though the money had not been deposited—*Budhu Ram* v. *Mushtaq Shah*, A.I.R. 1935 Pesh. 129, 158 I.C. 517; *Nacharammal* v. *Veerappa*, (1945) 2 M.L.J. 197, A.I.R. 1945 Mad. 485.

An application for execution is in accordance with law if it complies with the requirements of Or. 21, rr. 11 to 14, C. P. Code. And the absence of succession certificate does not make such an application as one not in accordance with law. The want of succession certificate no doubt deprives the applicant of his remedy, namely, the execution of his decree, but that cannot vitiate the application itself—*Pilwasao* v. *Mt. Khairun Nissa*, A.I.R. 1935 Nag. 1, 31 N.L.R. 126, 153 I.C. 955.

An application for execution made against persons whose whereabouts are not known is an application in accordance with law—*Mahmud Hosain* v. *Enayat*, 36 All. 482.

An application for execution of a decree, which was made while the decree was under attachment and was dismissed on that ground, is an application in accordance with law which would save limitation—*Gopala Menon* v. *Manavikraman*, 22 M.L.J. 146, 13 I.C. 179; *Adhar* v. *Lalmohan*, 24 Cal. 778.

An application which omits to mention an uncertified payment made out of Court is, notwithstanding such omission, an application in accordance with law—*Marimuthu* v. *Ramaswami*, 10 L.W. 66, 51 I.C. 114.

An application for execution of a decree against a dead person under the influence

of *bona fide* mistake, though that application could not be acted upon, is nevertheless an application in accordance with law and is a step-in-aid of execution—*Bepin* v. *Bibi Zohra*, 35 Cal. 1047 (1049); *Samia* v. *Chokkalinga*, 17 Mad. 76. An execution application filed bona fide within the time prescribed by law against a dead person, though it cannot be acted upon, is nevertheless a step in aid of execution, which has the effect of saving the decree from being barred—*Subramania Desika Ganasambana P. Sannadhi* v. *Rangaswami Chettiar*, A.I.R. 1935 Mad. 161, 68 M.L.J. 261, 1935 M.W.N. 15, 155 I.C. 327. A contrary view has been taken in *Gulabsingh* v. *Nathu*, I.L.R. (1944) Nag. 419, 1944 N.L.J. 200, A.I.R. 1944 Nag. 145 where it is held that such an application is not in accordance with law and the good faith of the decree-holder is immaterial and cannot affect the position. So also, an application for execution in which owing to a *bona fide* mistake the minor judgment-debtor was described under the guardianship of a dead person, is a step-in-aid of execution—*Puran Mal* v. *Dilwa*, 4 P.L.T. 54, 72 I.C. 1003, A.I.R. 1924 Pat. 333. An application for execution against a wrong person is one in accordance with law, where the decree itself is wrongly passed against that person—*Devi Baksh* v. *Shambhu Dayal*, 48 All. 281, 24 A.L.J. 266, A.I.R. 1926 All. 384, 94 I.C. 877. An application made against persons who are not the legal representatives of the deceased judgment-debtor is valid if the decree-holder *bona fide* believes that they are the legal representatives—*Ganeshwar* v. *Than Mull*, 8 P.L.T. 217, A.I.R. 1927 Pat. 92, 99 I.C. 501; *Balkishen* v. *Bedmati*, 20 Cal. 388 (396). Where a petition for execution is filed within time bona fide against a wrong legal representative, in spite of the mistake, it will still be an application to take a step in aid of execution—*Subramania Desika Gnanasabanda P. Sannadhi* v. *Rangaswami*, A.I.R. 1935 Mad. 161, 68 M.L.J. 261, 1935 M.W.N. 15, 41 L.W. 178, 155 I.C. 327. In an Allahabad case, however, it has been held that an application for execution of a decree against persons alleged to be the legal representatives of the deceased judgment-debtor is not a good application and cannot save limitation, if those persons are subsequently found not to be the legal representatives of the judgment-debtor—*Gyanendra* v. *Rani Nihalo*, 32 All. 404 (409). Where a decree was passed against certain persons as trustees, but they have been removed from the trustee-ship after the decree, an execution petition against them will not be invalid as a step-in-aid so long as the decree-holder *bona fide* believes that they are still the proper judgment-debtors—*Parakkat Devaswam* v. *Venkatachalam*, 50 M.L.J. 153, A.I.R. 1926 Mad. 321, 92 I.C. 709. But a wrong application made under an ignorance of law is not an application in accordance with law. Thus, where the judgment-debtor died, and the decree-holder was aware of it, but instead of bringing the legal representative of the deceased judgment-debtor on record, the decree-holder made an application for attachment, assuming that he had a decree *in rem* which he could proceed to execute against the estate without bringing on record the representative of the deceased judgment-debtor, *held* that the application was not one in accordance with law—*Madho Prasad* v. *Kesho Prasad*, 19 All. 337 (339).

An application for execution filed, not with any real intention of proceeding with it, but solely for the purpose of keeping the decree alive, is in accordance with law if all the requirements of Or. 21, r. 11, C. P. Code are satisfied—*Kodumal* v. *Assudomal*, I.L.R. (1942) Kar. 428. An execution application which is filed not with the idea of proceeding with the execution but only to save limitation will nonetheless be an application in accordance with law and save limitation if it complies with the provisions of Or. 21, r. 11, C. P. Code—*Mahomed* v. *Ramji*, 4 D.L.R. (All.) 208. Even if the application for execution is not numbered or registered it does not cease to be an application in accordance with law if it is so when presented—*Mahalakshmi* v. *Subramania*, (1943) 2 M.L.J. 513, A.I.R. 1944 Mad. 43; *Seshagiri* v. *Subbarami*, I.L.R. (1945) Mad. 684, (1945) 1 M.L.J. 270, A.I.R. 1945 Mad. 154 (F.B.). When the application for execution is in accordance with law, the decree-holder's *bona fides* are

not to be looked at—*Maung* v. *Shahul*, 1939 Rang.L.R. 587, A.I.R. 1938 Rang. 433; *Lokumol* v. *Dhanamil*, I.L.R. (1946) Kar. 450, A.I.R. 1947 Sind. 152.

An application would be in accordance with law, even though it is *not made in good faith, i.e.*, even though the applicant does not really wish to obtain the execution for which he has asked. The *mala fides* may stand in the way of a litigant being granted relief, but it would not render the application an application not in accordance with law. Where the decree-holder makes his application to the proper Court in proper form, and demands, the remedy to which he is entitled, his intention is immaterial—*Ruqya* v. *Prag Tewari*, 3 Luck. 580, 5 O.W.N. 353, 110 I.C. 704, A.I.R. 1928 Oudh 337 (338)[1] And in a recent Privy Council case the Judicial Committee have laid down that for the purposes of this Article it is sufficient to show that an application was made in accordance with law to the proper Court for execution or to take some step-in-aid of execution, but it is not necessary to show that such application had been made *with a bona fide intention* of obtaining execution of the decree or to take such step, and is not a mere colourable application for the purpose of gaining time and keeping the decree alive—*Khalilur Rahman* v. Collector of Etah, 11 O.W.N. 41 (P.C.), 38 C.W.N. 229, A.I.R. 1934 P.C. 14, 147 I.C. 323. It is sufficient if the application is in accordance with law. It is immaterial whether the application is made in good faith for the purpose of executing the decree or merely for the purpose of keeping the execution proceedings alive—*Hanumanlala* v. *Sheonaryan Sonar*, A.I.R. 1935 Nag. 131, 31 N.L.R. 343, 156 I.C. 114. It is not proper for the execution Court to hold any inquiry as to the intention with which the application might have been filed. It is wrong to read in this clause any requirement of good faith and due diligence—*Kayastha Co., Ld.* v. *Sita Ram*, 52 All. 11 (F.B.), 1929 A.L.J. 982, 118 I.C. 17, A.I.R. 1929 All, 625 (631, 650) The contrary view taken in *Sheo Prasad* v. *Naraini*, 48 All. 468, A.I.R. 1926 All. 95, 90 I.C. 938 must be deemed as overruled by the above Privy Council case.

712. Defective application.—An application must be in accordance with law in order that it may be regarded as an application for execution or a step-in-aid of execution; but it is not every defect that would invalidate an application and take it out of this clause; it is only *material* defects that can vitiate an application. An application containing merely defects of a *minor character* (*e.g.*, mistake in the right number or description of suit and date of decree) is one in substantial compliance with law, and can save limitation—*Gopal Chunder* v. *Gosain Das*, 25 Cal. 594 (597-598) (F.B.); *Keshawesarindra* v. *Debendra Bala*, 4 P.L.J. 213 (233); *Abdul Rafi* v. *Maula Bakhsh*, 37 All. 527 (528), 13 A.L.J. 706, 29 I.C. 479; *Brindaban* v. *Monmath*, 42 C.W.N. 842; the Madras High Court has however, taken a contrary view in *Naidu* v. *Naidu*, (1939) 2 M.L.J. 864, A.I.R. 1940 Mad. 215; *Satyanarayana* v. *Kajireddi*, (1945) 2 M.L.J. 427, A.I.R. 1946 Mad. 61. So also, an application for execution wherein the judgment-debtor's name is wrongly recorded is in accordance with law—*Narayanan* v. *Chitraru*, A.I.R. 1950 Tra-Co. 79. Where a decree is transmitted to another Court for execution giving incorrect number of suit and names of judgment-debtors, the mere fact of such mistake in the certificate of non-satisfaction of the decree or omission of the decree-holder to have the mistake corrected does not render the application one not in accordance with law—*Kameshwar* v. *Lalu* 1938 P.W.N. 73, A.I.R. 1938 Pat. 513. An application for execution which is defective only in omitting *immaterial* particulars is still an application "in accordance with law." These words should be taken to mean that the application though defective in some particulars is such upon which execution can issue. If the omissions are such as to make it impossible for the Court to issue execution upon it, it is not in accordance with law. But where it is such as to enable the Court to take further steps in execution, it cannot be said that such an application, if not defective in material and substantial particulars, is not

an application in accordance with law—*Pitambar* v. *Damodar*, 53 Cal. 664, 30 C.W.N. 918 (923), 98 I.C. 166, A.I.R. 1926 Cal. 1077; *Atma Ram* v. *Shyama*, 22 Luck. 217, A.I.R. 1948 Oudh 176; *Kanmal* v. *Govind*, I.L.R. (1946) Nag. 563, 1946 N.L.J. 354, A.I.R. 1946 Nog. 365. In each case it is a question of fact as to whether the execution application is so defective as not to be an application according to law at all—*Ibid*; *Gopal* v. *Gosain*, 25 Cal. 594 (597) (F.B.); *Durga Prasad* v. *Jokhu Ram*, 28 O.C. 382, 2 O.W.N. 70, A.I.R. 1925 Oudh 399 (400), 86 I.C. 591. The onus is on the decree-holder to show that the requirements of law are complied with—*Bansari* v. *Rabindra*, 76 C.L.J. 35, A.I.R. 1943 Cal. 131. An application, which requires amendment in some *minor* particulars, such as calculation of interest and statement of costs incurred in the previous execution proceedings, and which has not been amended by the decree-holder although it was returned to him for amendment, is an application in substantial compliance with the law, and gives a fresh starting point for limitation—*Ramanadan* v. *Periatambi*, 6 Mad. 250 (251); *Pitambar*, v. *Damodar*, 53 Cal. 664, 30 C.W.N. 918 (923); *Seetharama* v. *Muthu*, (1947) 2 M.L.J. 553, A.I.R. 1949 Mad. 43. When the right to apply exists, a mere omission to give correctly the amount of interest due or the date of the previous application or the names of the parties, is a mere irregularity and does not affect the legality of the application and the application is in accordance with law—*Fulchand* v. *Pal Marian*, I.L.R. (1943) Nag. 584, 1943 N.L.J. 391, A.I.R. 1943 Nag. 296. An application for execution giving all the particulars under Or. 21, r. 11 (g), C. P. Code and asking for attachment and sale of properties within the jurisdiction of another Court without expressly praying for transfer of the decree does not make it not in accordance with law—*Kammal* v. *Govind*, supra. So also, an application which is irregular by reason of an omission to state the previous applications and their result, and which has not been amended by the decree-holder, although it was returned to him for amendment, is still an application in accordance with law, the defect being of a minor character—*Ram* v. *Varada*, 16 Mad. 142 (143); a contrary view has been taken in *Dularam* v. *Mulomal*, A.I.R. 1939 Sind 272, 185 I.C. 835. An application which was not accompanied with an encumbrance certificate (as required by the Rules of Practice) and a draft proclamation of sale, and which, having been ordered to be returned to the decree-holder for amendment, was neither taken back by him nor amended, was still an application in accordance with law, as the defects were merely formal and did not affect the validity of the application—*Natesa* v. *Ganapathia*, 40 Mad. 949 (951); *Ghulam* v. *Visvanathayyar*, I.L.R. (1943) Mad. 357, (1942) 2 M.L.J. 768, A.I.R. 1943 Mad. 297. Where the execution petition as made is in accordance with law but is dismissed for persistent refusal of the decree-holder to carry out certain directions which are necessary for effectual execution, the application is still in accordance with law—*Venkataraman* v. *Rama Kottayya*, (1945) 2 M.L.J. 152, A.I.R. 1945 Mad. 511. Thus in the case of an application for execution of an equitable mortgage decree the omission of the decree-holder to comply with the order of the Court directing him to file the documents of title mentioned in the decree is not such a defect in the application which would prevent the Court from proceeding with it and the application is in accordance with law—*Bansari* v. *Rabindra*, 76 C.L.J. 35, A.I.R. 1943 Cal. 131.

But if the defects in the application are of a *material* character, and the Court cannot proceed to execution unless they are amended, (*e.g.*, if the application does not comply with the requirements of O. 21, rr. 11-14), the application is not one made in accordance with law; and if it is not amended within the period fixed by the Court, it cannot give a fresh starting point for limitation—*Gopal Sah* v. *Janki*, 23 Cal. 217 (223); *Bhagwat* v. *Dwarka*, 2 Pat. 809 (811), A.I.R. 1924 Pat. 23, 74 I.C. 174.

Thus, an application for execution by attachment of property of the judgment debtor, if it is unaccompanied by an inventory of the properties to be attached is

defective in *material* particulars, and is not an application in accordance with law—*Abdul Rafi* v. *Maula Bakhsh*, 37 All. 527 (529); *Hira Lal* v. *Dulari*, 1892 A.W.N. 3; *Mangal* v. *Baldeo*, 1892 A.W.N. 70; *Asgar Ali* v. *Troilokya*, 17 Cal. 631 (F.B.); *Mahomed* v. *Ramji*, 4 D.L.R. (All.) 208. The Patna High Court has held that an omission to comply with Or. 21, r. 12, C. P. Code, *viz.*, failure to annex a *talika* or inventory of the property to be attached, cannot *per se* be held to render the application not in accordance with law, in the absence of anything to show whether the decree-holder in fact wants to proceed against any property belonging to the judgment-debtor not in his possession or whether any inventory of the properties is necessary at all, and it is not known in what mode the assistance of the Court is required in the application of the decree-holder. The question can not be decided merely with reference to an order dismissing such an application on the ground that no inventory was supplied within the time given, without having the application itself before the Court—*Lachmi* v. *Kapil*, 18 Pat.L.T. 954, A.I.R. 1938 Pat. 75. According to the Bombay High Court, the omission to file an inventory of the property with the application for execution is a purely technical defect, and the application is substantially in accordance with law—*Bando* v. *Narsinha*, 37 Bom. 42, 17 I.C. 210 (213); *Hasan* v. *Ramchandra*, 31 Bom.L.R. 355, A.I.R. 1929 Bom. 196, 117 I.C. 526. The Calcutta High Court has held that an application for attachment and sale of moveable properties as per list though no list is filed is in accordance with law—*Akshoy* v. *Nalini*, 54 C.W.N. 815, A.I.R. 1950 Cal. 493. The same view has been taken in *Nathmal* v. *Bal Krishna*, A.I.R. 1941 Nag. 152, 194 I.C. 641. An application in which the heading is blank, the names of the decree-holders are not mentioned, and the list of the properties sought to be attached is not given is a materially defective application and is therefore not in accordance with law—*Bhupendra* v. *Janeswar*, 7 P.L.T. 350, A.I.R. 1926 Pat. 533 (534), 90 I.C. 761. Where the application for execution did not indicate the mode in which the decree-holder wanted the assistance of the Court to execute the decree, *held* that the application was defective in an essential matter, and was not in accordance with law—*Maharaj Bahadur Singh* v. *Basiruddin*, A.I.R. 1925 Cal. 1135, 41 C.L.J. 607, 93 I.C. 364. An application which does not comply with the requirements of rules 11 to 14 of O. 21, is a materially defective application, and is not an application in accordance with law unless it is amended within the time allowed by the Court. See O. 21, r. 17 (1) (2). But an application which fulfils all the requirements of rules 11 to 14, but is defective for *some other reason* (*e.g.*, on the ground that a copy of the Record-of-Rights has not been filed, or that no Court fee has been paid on the additional interest claimed, or that the application has not been verified by all the decree-holders, etc.), is still an application in accordance with law—*Bhagwat* v. *Dwarka*, 2 Pat. 809 (811), 4 P.L.T. 513, 74 I.C. 174, A.I.R. 1924 Pat. 23; *Jogendra* v. *Mangal*, 7 P.L.T. 330, A.I.R. 1926 Pat. 160 (161), 90 I.C. 847; *Bibi Aisha* v. *Mahabir*, 6 Pat. 440, A.I.R. 1927 Pat. 324 (325), 104 I.C. 218, 8 P.L.T. 671; *Amin Chand* v. *Khiali*, 28 P.L.R. 93, 100 I.C. 475, A.I.R. 1927 Lah. 106 (107); *Marimuthu* v. *Abdul*, (1943) 2 M.L.J. 521, A.I.R. 1944 Mad. 38 (without court-fees on future mesne profits). So also, where an application for execution complies with the requirements of Or. 21, rules 11 to 13, C. P. Code, mere non production of certified extracts from collector's record does not make the application not in accordance with law—*Govind* v. *Pawan-kumar*, 70 I.A. 83, I.L.R. (1943) Kar, (P.C.) 109, I.L.R. (1943) Nag. 669, 46 Bom.L.R. 306, 1943 A.L.J. 323, (1943) 2 M.L.J. 121, A.I.R. 1943 P.C. 98, 47 C.W.N. 715 (P.C.). If an application complies with the requirements Or. 21, rules 11 to 13, C. P. Code but does not comply with the order passed under Or. 21, r. 14, C. P. Code, the application is nevertheless in accordance with law, as rule 14 is merely permissive unlike rules 11 to 13 which are mandatory—*Seshagiri* v. *Subbarami*, I.L.R. (1945) Mad. 684, (1945) 1 M.L.J. 270, A.I.R. 1945 Mad. 154 (F.B.); *Venkata* v. *Surya*,

(1949) 1 M.L.J. 320, A.I.R. 1950 Mad. 2. Where an application for execution complies with the requirements of Or. 21, r. 11, C. P. Code, it is in accordance with law even though the Court does not pass any order on such application. Thus omission of the Court to pass any order on the application of the decree-holder for arrest of the judgment debtor does not render the application not in accordance with law as the provisions of Or. 21, r. 11, C. P. Code are complied with by the application—*Vallabhdas* v. *Kantilal*, 49 Bom.L.R. 420, A.I.R. 1947 Bom. 430.

The principle deducible from all the decisions cited above is, that if the application for execution gives all the particulars required by rules 11 to 14 of Or. 21, but is defective in some *minor particulars*, the application is nevertheless an application in accordance with law, and it is immaterial that the defect *has not been amended* at all by the decree-holder, or has been *amended after the time* allowed by the Court. But if the application does not comply with any of the requirements of rules 11 to 14, O. 21, it is not an application "in accordance with law," *unless it is amended within the time fixed by the Court*. See O. 21, r. 17 (2). In a recent Madras case, however, it has been said that the word "in accordance with law" occurring in O. 21, r. 17 (2), C. P. Code should not affect the construction of the same words in clause 5 of Art. 182, Limitation Act, and therefore even though the application is defective in not giving certain particulars required by r. 11 of O. 21, and the amendment is not carried out *within the time fixed* by the Court, it is nevertheless an application *in accordance with law* within the meaning of Art. 182, clause 5—*Abdul Khadim* v. *Lakshmanaswami*, 27 L.W. 475, A.I.R. 1928 Mad. 440 (441), 112 I.C. 36, following *Kamakshi* v. *Pichu Ayyar*, 4 L.W. 103, 31 M.L.J. 561, 35 I.C. 876. Where an application for execution is returned for filing certain document and for amending the petition within the time fixed by the Court and the petition is represented after the time fixed with a prayer for condoning the delay and for granting further time and the Court passes the order "to be renewed. Rejected" it is held on the construction of the order that the delay in representation must be considered to have been excused and the application is in accordance with law—*Shanmughan* v. *Namagiri*, (1943) 2 M.L.J. 454, A.I.R. 1944 Mad. 71.

If the Court fixes no time under O. 21, r. 17 (1), for amending the material defects, and the defects are rectified after the period of limitation, the application should be held to be time-barred—*Salimulla* v. *Sainaddi*, 18 C.L.J. 538, 22 I.C. 337; and the same result happens if the Court passes the order for amendment at a time when the application has already become time-barred—*Bhupendra* v. *Janeswar*, 7 P.L.T. 350, A.I.R. 1926 Pat. 533 (535), 90 I.C. 761.

An application for execution which is returned by the Court but never represented thereafter should be treated as if it had never been presented at all—*Venkata* v. *Gomoji & Co.*, (1948) 2 M.L.J. 488, A.I.R. 1949 Mad. 363.

Other instances of minor defects:—Where a decree is passed against the estate of a deceased in the hands of the judgment-debtors (the heirs of the deceased), the decree falls under sec. 52, C. P. Code, and O. 21, r. 12 is not applicable, and no inventory is required; in such a case, an application for execution unaccompanied by an inventory is nevertheless a step-in-aid of execution—*Birdichand* v. *Badesaheb*, 28 Bom.L.R. 1322, A.I.R. 1927 Bom. 52, 98 I.C. 941.

An application which is unverified and is defective in the statement of *minor* particulars which may be easily gathered from the decree filed therewith, may be regarded as one substantially in accordance with law, if the defects are not calculated to mislead the Court or prejudice the judgment-debtor—*Ramayyan* v. *Kadir Bacha*, 31 Mad. 68 (70). But in *Raghunatha* v. *Venkatesa*, 26 Mad. 101 (103), an unverified application for execution was held to be an application not in accordance with law,

An application for execution not signed or verified by the decree-holder but by the pleader who had conducted the original proceedings and who was therefore acquainted with the facts of the case, is an application in accordance with law, as it fulfils the requirements of O. 21, r. 11 (2)—*Hasan* v. *Ramchandra*, 31 Bom.L.R. 355, 117 I.C. 526, A.I.R. 1929 Bom. 196; *Sunder* v. *Khilanda*, 197 I.C. 521, A.I.R. 1941 Pesh. 103. But the Madras High Court has held that such an application is not in accordance with law. The reason given is that the requirements laid down in Or. 21, r. 11, C. P. Code are not fulfilled—*Sanyasamma* v. *Swami*, (1944) 2 M.L.J. 224, A.I.R. 1945 Mad. 97. So also, an application for execution filed by a pleader without vakalatnama from the decree-holder is in accordance with law, if it is in order in other respects—*Kanhaiya* v. *The Panchayati Akhara*, 1949 A.L.J. 105, A.I.R. 1949 All. 367.

Where the only defect in an application for execution was that the date of a previous application (which date was *not material*) had been wrongly stated therein, but even such trivial defect was amended after a delay of only two days beyond the time allowed by the Court, such application was held to be one substantially in accordance with law so as to give fresh starting point—*Kalka* v. *Bisheshar*, 23 All. 162.

Any incorrectness or superfluity as to the relief asked for in the application does not vitiate the application to such an extent as to debar the application from being treated as a step-in-aid of execution—*Kishore Mal* v. *Jugdish Narain*, 3 Pat. 42, A.I.R. 1924 Pat. 471, 75 I.C. 312.

If the Court applied to for execution is not the Court which passed the decree, the name of the latter Court need not find a place in the application for execution. The omission to mention the name of such Court does not render the application one not in accordance with law—*Vithal* v. *Gopal Rao*, 5 N.L.R. 8, 1 I.C. 240.

An insufficiently stamped application for execution may suffice to keep the decree alive—*Ramasami* v. *Seshayyangar*, 6 Mad. 181.

An application for execution of a decree, though not accompanied with a copy of the decree, as required by the Rules of the High Court, is an application in accordance with law, because the defect has reference only to extraneous circumstances—*Ramchandra* v. *Laxman*, 31 Bom. 163; *Pachiappa* v. *Poojali*, 28 Mad. 557, and there is no obligation on the decree-holder to produce a copy of the decree under Or. 21, r. 11, C. P. Code—*Venkatarama* v. *Venkatanarasamham*, (1937) 2 M.L.J. 881, A.I.R. 1938 Mad. 144; *Arunachala* v. *Muthusadasiba*, (1949) 2 M.L.J. 617, 62 L.W. 804, A.I.R. 1950 Mad. 261 overruling the decision of Somasundaram J., in *Kamalammal* v. *Rajanathna*, (1949) 1 M.L.J. 66, A.I.R. 1949 Mad. 631 where a contrary view was taken.

An application for execution of a decree made by the legal representative of a deceased decree-holder, without the production of a succession certificate, is nevertheless one made in accordance with law—*Balkrishna* v. *Wagarsing*, 20 Bom. 76; *Mangal* v. *Salimullah*, 16 All. 26; *Hafizuddin* v. *Abdool*, 20 Cal. 755; *Bibi Aisha* v. *Mahabir*, 6 Pat. 440, A.I.R. 1927 Pat. 324 (325), 104 I.C. 218. It is sufficient if the certificate is produced and tendered in Court at any time before the Court proceeds to pass an order for execution—*Kalian* v. *Ram Charan*, 18 All. 34.

An application for execution by the assignee of a decree is in accordance with law even though he fails to produce the assignment deed—*Vinayak* v. *Ananda*, 34 Bom. 68; *Neenakshiammal* v. *Krishnaswamy*, A.I.R. 1952 Mad. 90, (1951) 2 M.L.J. 35, 1951 M.W.N. 570; or though he produces an unregistered assignment deed—*Abdul Majid* v. *Muhammad Faizulla*, 13 All. 89. The Madras High Court has held that such an application is not in accordance with law as the transfer is void *ab initio*—*Vythinatha* v *Ammalu*, (1940) 1 M.L.J. 595, A.I.R. 1940 Mad. 610. But where the assignment is not void *abinitio* but is afterwards declared void or cancelled in a separate suit as from

the date of the suit an application by the assignee is in accordance with law—*Ramchandra* v. *Vithu*, 42 Bom.L.R. 1057, A.I.R. 1941 Bom. 65. Thus an application by the assignee of a decree to the Court which passed the decree for transfer of the decree to another Court is one in accordance with law—*Bhagwandas* v. *Motilal*, I.L.R. (1946) Bom. 977, 48 Bom.L.R. 583, A.I.R. 1947 Bom. 113.

An application for execution would be in accordance with law even though unaccompanied with the Conciliator's certificate as required by sec. 47 of the Dekhan Agriculturists' Relief Act—*Sadasiv* v. *Narsingrao*, 17 Bom.L.R. 203, 28 I.C. 493. So also, an application for execution of a decree passed against a Taluqdar, although unaccompanied with a certificate of the Managing officer under sec. 29E of the Gujrat Taluqdars Act, 1888, is an application in accordance with law—*Hargovind* v. *Naja Sura*, 43 Bom. 44, 20 Bom.L.R. 872, 47 I.C. 726.

Where after a decree was transferred for execution to another Court, the interest of the decree-holder became vested by operation of law in another person, and the latter applied for execution to the Court to which the decree was transferred, without previously obtaining from the Court which passed the decree a certificate authorising him to proceed with the execution, but subsequently produced such certificate, it was held that the certificate would relate back to the time when the rights under the decree became vested in the applicant, and the application was made to the proper Court in accordance with law—*Monorath* v. *Ambika*, 13 C.W.N. 533 (537), 1 I.C. 57.

An application for execution of a decree made by one member of a firm which has obtained a decree, is no doubt defective, but it is still an application in accordance with law, being provided for by O. 21, r. 15 (1) of the C. P. Code; and the mere fact that the Court does not allow the application under rule 15 (2) but dismisses it as defective does not make it any the less an application in accordance with law—*Gobardhan* v. *Satish Chandra*, 1 Pat. 609 (611), 4 P.L.T. 263, 69 I.C. 668, A.I.R. 1922 Pat. 597. It does not cease to be an application in accordance with law merely because the Court does not pass an order under Or. 21, r. 15 (2) C. P. Code—*Shankar* v. *Damodar*, I.L.R. (1945) Bom. 463, 47 Bom.L.R. 104, A.I.R. 1945 Bom. 380. An application for execution by one of the several assignees is one in accordance with law—*Shankar* v. *Damodar*, I.L.R. (1942) Bom. 1, 43 Bom.L.R. 883, A.I.R. 1942 Bom. 29. On the same principle an application by one of the joint decree-holders for execution can be taken into consideration on the question of limitation even though the decree cannot be executed unless the provisions of Or. 21, r. 15, C. P. Code are complied with. Such an application is in accordance with law—*Adikanda* v. *Narayana*, A.I.R. 1943 Pat. 188.

An application, even though it may be so defective as not to be application *for execution*, may still be regarded as an application to take a *step-in-aid* of execution —*Sadaya* v. *Paresh Nath*, 32 C.L.J. 82, A.I.R. 1922 Cal. 44, 64 I.C. 571.

Retrospective effect of amendment of defective application:—O. 21, r. 17 (2), C. P. Code lays down that if an application, which does not comply with the requirements of rules 11-14, is amended within the time fixed by the Court, "it shall be deemed to have been an application in accordance with law and *presented on the date when it was first presented.*" This provision did not exist in the old section 245 of the C. P. Code of 1882, which simply provided that the Court might allow the defective application to be amended within the time fixed by the Court. No mention was made in that section as to the *retrospective effect* of the amendment. And so it was held that if a defective application was amended within the time fixed by the Court, the application should be deemed as presented on the date when it was *presented after amendment*, and not on the date of its *first* presentation; and consequently if it was amended at a time when the period of limitation had expired, though within the time fixed by the Court, the application was barred—*Raghunath* v. *Venkatesa*, 26 Mad. 101 (103).

In some other cases the amendment was held to relate back to the original presentation of the application—*Kalka* v. *Bisheshar*, 23 All. 162; *Jiwat* v. *Kalicharan*, 20 All. 478; *MacGregor* v. *Tarini*, 14 Cal. 124; *Hurry Charan* v. *Subadar Sheikh*, 12 Cal. 161; *Bishan* v. *Ganga Ram*, 27 P.R. 1905. Under O. 21, r. 17 (2) of the C. P. Code of 1908, the amendment relates back to the original presentation of the application, if the amendment is made *within the time fixed by the Court*. When the amendments are accepted the amendments date back to the date of the application—*Sri Narain* v. *Gur Charan*, 1949 A.L.J. 532, A.I.R. 1950 All. 177.

But so far as the defective application is treated as an intermediate application for execution or a step-in-aid of execution so as to *give a first starting point for a subsequent* application for execution, neither the date of the original presentation nor the date of the amendment is material; for this clause now distinctly lays down (as a result of the Amendment of 1927) that the starting point is the *date of the final order* passed on the application.

713. Application not in accordance with law:—The words "in accordance with law" are adjectival not only to the words "to the proper Court for execution" but also to the words "to take a step-in-aid of execution." Therefore it is necessary that the prior application which was a step-in-aid of execution was in accordance with the law of limitation, *i.e.*, was within time—*Bhagwan* v. *Dhondi*, 22 Bom. 83 (85); *Nilmoney* v. *Ram Jeebun*, 8 C.L.R. 335. If the prior application, which was made in a Native State, was time-barred according to the law of limitation in British India (being made more than 3 years after the date of the decree) though it was not time-barred according to the law of the Native State, it is incapable of saving limitation, and the execution of the decree is barred—*Nabibhai* v. *Dayabhai*, 40 Bom. 504 (508), 18 Bom.L.R. 481, 36 I.C. 369.

The expression "applying in accordance with law" means applying to the Court to do something in execution which by law that Court is competent to do. It does not mean applying to the Court to do something which either to the decree-holder's direct knowledge in fact, or to his presumed knowledge of the law, the Court was incompetent to do—*Purna Chandra* v. *Radha Nath*, 33 Cal. 867; *Chatter* v. *Newal*, 12 All. 64; *Stevens* v. *Kamta*, 10 C.L.J. 19, 2 I.C. 941; *Munawar* v. *Jani Bijai*, 27 All. 619; *Langtu* v. *Baijnath*, 28 All. 387 (389); *Khet Singh* v. *Onkar Seth*, 1 N.L.R. 61; *Bishundeo* v. *Raghunath*, 19 Pat. 354, A.I.R. 1940 Pat. 677; *Satyabati* v. *Puri Bank Ltd.*, 12 Cut.L.T. 62, A.I.R. 1947 Pat. 199; *Munnu* v. *Hari*, I.L.R. (1946) All. 856, A.I.R. 1947 All. 352. Therefore, an application for execution made to a Court which has no jurisdiction to entertain it (*e.g.*, an application to execute a Small Cause Court decree made to a Court having no small cause powers, without the decree being transferred to such Court), is not an application in accordance with law—*Ram Raj* v. *Umraji*, A.I.R. 1926 All. 345, 93 I.C. 292. So also an application made to a Court of Small Causes for execution of a money decree by attachment and sale of immoveable property is not in accordance with law—*Munnu* v. *Hari*, supra. An application to have the judgment-debtor arrested in contravention of the terms of sec. 341, Civil Procedure Code (1882), and an application to bring the mortgaged property to sale in contravention of sec. 99 of the Transfer of Property Act are not applications in accordance with law within the meaning of the clause—*Chatter* v. *Newat*, 12 All. 64. Where the judgment-debtor has applied for declaration of insolvency and proceedings in insolvency are pending on his application, no application for execution can be made by the decree-holder against the judgment-debtor or his surety. Therefore an application made against the surety under such circumstances will not be an application in accordance with law—*Langtu* v. *Baijnath*, 28 All. 387 (389); *Satyabadi* v. *Puri Bank Ltd.*, supra. So also an application for execution during the pendency of the insolvency proceeding of the judgment

debtor without leave of the Insolvency Court is not an application in accordance with law—*Nawab* v. *Fateh*, 41 P.L.R. 799, A.I.R. 1939 Lah. 270; *Nagaratnam* v. *Ramaswami*, 1939 M.W.N. 344, AI.R. 1939 Mad. 195. But the presumed knowledge of law refers to the general law and not to knowledge of any particular orders varying the pecuniary jurisdiction of Court—*Bishundeo* v. *Raghunath*, supra.

The expression "made in accordance with law" is to be read along with the concluding words "to take some step in aid of execution". As the Insolvency Court is not the proper Court for execution, it follows that any so-called steps taken in that Court do not extend the period—*Nandlal* v. *Ram Datta*, 1940 N.L.J. 605, A.I.R. 1941 Nag. 60.

Where the Court which passed the decree was abolished when the decree was put to execution, and the Court in which the decree was executed, had jurisdiction to entertain the suit, if it were filed, on the date when execution application was made, the decree executed is in accordance with law—*Mangi Lal* v. *Raghubar*, A.I.R. 1952 Rajasthan 60.

An application to transfer a decree to a Court which is pecuniarily incompetent to execute the decree is not an application in accordance with law—*Amrit Lal* v. *Murlidhar*, 1 Pat. 651 (653), 3 P.L.T. 422, 67 I.C. 538, A.I.R. 1922 Pat. 188; *Mojibunisa* v. *Kadir*, A.I.R. 1950 All. 380. Similarly, an application for execution of a decree by attachment of property beyond the local jurisdiction of the executing Court is not one in accordance with law—*Sheo Prasad* v. *Naraini*, 48 All. 468, A.I.R. 1926 All. 95, 90 I.C. 938. But see *Ghasiram* v. *Abhin*, 8 Cut.L.T. 7 where such an application has been held to be in accordance with law. So also, an application for execution of a decree by attachment of properties which does not contain a description of the property sufficient to identify it as required by Or. 21, r. 13, C. P. Code is not one in accordance with law—*Arunachala* v. *Raghava*, (1940) 1 M.L.J. 477, 1940 M.W.N. 352; *Khodaijtul* v. *Ugrah*, 23 Pat. 103, A.I.R. 1944 Pat. 214. But where the property is attached before judgment, an application for execution for sale of the attached property without giving any description of the property is an application in accordance with law as the provisions of Or. 21, r. 13 do not apply where the property has already been attached —*Baliram* v. *Sakharam*, 42 Bom.L.R. 423, A.I.R. 1940 Bom. 250.

Where a decree directs that the plaintiff should be maintained in possession of a share of a village by cancelment of the order of the settlement officer directing the entry of the defendant's name in respect of such share in the revenue registers, the Court executing the decree should not issue an order to the Collector to amend the entry in such register, but must simply forward a copy of the decree for his information. Therefore, an application for execution, which prays the Court executing the decree to order the Collector to amend such entry in the revenue record, instead of asking it to send such officer a copy of the decree for his information for the purpose of amendment, is not an application in accordance with law—*Muhammad Umar* v. *Kamila Bibi*, 4 All. 34.

The application for execution contemplated in this clause must be one made in accordance with law and asking to obtain some relief given by the decree and to obtain it in the mode that the law permits. If the application asked for a relief which the decree did not give, or if execution was asked for in a way different from that provided by the decree, it was not an application in accordance with law to execute or further the execution of the decree—*Pandarinath* v. *Lilachand*, 13 Bom. 237; *Bando* v. *Narsinha*, 37 Bom. 42, 17 I.C. 210 (212); *Nathubhai* v. *Pranjivan*, 34 Bom. 189; *Sri Ram* v. *Majiduddin*, 98 P.R. 1901. It is essential that the particulars of the mode in which the assistance of the Court is required must be one in accordance with law. If the decree holder would not be entitled to ask for the relief in the "mode" stated in the

application and the Court has no power to grant such relief, *prima facie* the application would be one not in accordance with law—*Gopal* v. *Damodar*, 45 Bom.L.R. 707, A.I.R. 1943 Bom. 353. The main test of an application being in accordance with law is whether it is possible for the Court to issue execution upon it, *i.e.*, whether it is within the power of the Court to grant the kind of relief asked for, though in a particular case, the relief may not, on the merits be granted owing to some findings of facts not to the nature of the application—*Gopal* v. *Damodar*, 45 Bom.L.R. 707, A.I.R. 1943 Bom. 353; *Akshoy* v. *Nalini*, 54 C.W.N. 815, A.I.R. 1950 Cal. 493; *Shankar* v. *Damodar*, 47 Bom.L.R. 104, A.I.R. 1945 Bom. 380. The Bombay High Court in a recent Full Bench has held that whether a particular application is or is not in accordance with law must largely depend upon the nature of the application and the circumstances under which it came to be made, and to lay down a sort of an all pervasive test to be applied to all applications would be not only unsafe but almost an impossible task —*Jaichand* v. *Waman*, 52 Bom.L.R. 205, A.I.R. 1950 Bom. 184. Thus, where an instalment decree did not provide that in default of payment of an instalment the whole amount would become due, but on the judgment-debtor making default the decree-holder applied for execution of the whole decree, *held* that the application, not being in accordance with the terms of the decree, was not one in accordance with law—*Jayanuddin* v. *Jamiluddin*, 21 C.W.N. 835, 37 I.C. 916. Where the decree-holder asked in his application that he might be put in possession of a certain house, while the decree did not provide for such thing, *held* that the application was not in accordance with law nor one to take a step-in-aid of execution as it asked for a relief outside the decree altogether—*Pandarinath* v. *Lila Chand*, 13 Bom. 237. Where the decree directed payment of a money out of the mortgaged property, an application to recover the money from the other properties of the judgment-debtor, was not an application in accordance with law—*Sri Ram* v. *Majiduddin*, 98 P.R. 1901. Where a decree creates a charge on immoveable property in respect of the decretal amount and provides for recovery of the amount by sale of the charged properties, an application in execution of such a decree praying for rateable distribution under sec. 73, C. P. Code out of sale proceeds realised in another decree holder's execution, is not an application in accordance with law—*Gopal* v. *Damodar*, supra.

An application praying for issue of notice under Or. 21, r. 22, C. P. Code is not in accordance with law as the issue of notice under Or. 21, r. 22, C. P. Code is not a mode of execution and is not a relief awarded by the decree—*Vallabdas* v. *Kantilal*, A.I.R. 1947 Bom. 430, 49 Bom.L.R. 420.

Where an application for execution is forbidden by any special enactment, it is not an application according to law—*Chatim Kushalchand* v. *Mohada Bhagaji*, 10 Bom. 91.

An application for execution which omits to mention a previous application for execution, as required by O. 21, r. 11 (*f*) is materially defective, and is not an application in accordance with law—*Sahigram* v. *Tower*, 15 S.L.R. 156, A.I.R. 1922 Sind 29, 65 I.C. 14; *Dularam* v. *Mulomal*, A.I.R. 1939 Sind 272, 185 I.C. 835.

An application made by a benamidar for execution of a decree and for substitution of his name as decree-holder is not an application made in accordance with law within the terms of this Article—*Gour Sundar* v. *Hem Chunder*, 16 Cal. 355; *Denonath* v. *Lalit*, 9 Cal. 633. Where a decree is transferred by a deed of assignment in writing the person named as the assignee is the transferee, though he is a benamdar of another person. The real or beneficial transferee is not the "transferee". An application by the real assignee for execution is not in accordance with law. The mere fact that he gets a decree in a suit declaring that he is the real assignee can not entitle him to

apply in execution or to make his application one in accordance with law—*Mohammad* v. *Bhupendra*, 17 Pat. 223, 19 Pat.L.T. 901, A.I.R. 1938 Pat. 457.

An application made by the pleader of the decree-holder after the decree-holder's death has not the effect of saving limitation, as the authority of the pleader ceases on the death of his client—*Kallu* v. *Muhammad Abdul*, 7 All. 564.

An application for execution made to the Court which passed the decree after transfer of the decree to another Court is not in accordance with law—*Ram Kishon* v. *Satya*, 43 C.W.N. 185, 69 C.L.J. 562, A.I.R. 1939 Cal. 741.

An application for partial execution of a decree is not "in accordance with law." But a judgment-debtor who did not appeal against a previous order for execution of a portion of the decree and who did not dispute the validity of such order, cannot, in the matter of a subsequent application for execution of the remaining portion of the decree, contend that the first application was not "in accordance with law"—*Dali Chand* v. *Bai Shivkor*, 15 Bom. 242; *Babagowda* v. *Tanibai*, 76 I.C. 1041, A.I.R. 1924 Bom. 112; *Nanda* v. *Raghunandan*, 7 All. 282; *Nepal Chandra* v. *Amrit Lal*, 26 Cal. 888.

If the decree-holder himself resides within the local limits of the jurisdiction of the Court, an application by a person holding a general power-of-attorney from the decree-holder is not in accordance with law, with reference to secs. 36 and 37 of the C. P. Code (1882)—*Murari* v. *Umrao*, 23 All. 499; *Kasumri* v. *Beni*, 26 All. 19.

An application for execution made by a guardian for the decree-holder who is described as a minor but is found to be a major at the time, is not in accordance with law—*Saramma* v. *Seshayya*, 28 Mad. 396.

Where the plaintiff assigned his rights to another person pending the suit, and a decree was passed in favour of the assignor, but the assignee applied for execution of the decree, *held* that the execution application was not one in accordance with law, as there was no assignment of the decree under O. 21, r. 16, C. P. Code after the decree was passed, nor did the applicant apply to the Court under O. 22, r. 10 to be made a party to the suit and get the decree passed in his favour—*Genaram* v. *Hanmantram*, 28 Bom.L.R. 761, 96 I.C. 833, A.I.R. 1926 Bom. 406. So also an application by the assignee decree-holder to the transferee Court before his assignment is recognised and the decree is transferred to that Court is not in accordance with law—*Ranga* v. *Subba*, (1948) 2 M.L.J. 461.

714. Step-in-aid of execution:—Clause 5 of Art. 182 contemplates an application in accordance with law to the proper Court, asking the Court to do one of two things, either to execute, or to take some step-in-aid of execution—*Murgeppa* v. *Basawantrao*, 37 Bom. 559, 15 Bom.L.R. 557, 20 I.C. 252.

To take some step-in-aid means to obtain an order of the Court in furtherance of the execution of the decree—*Troilokya* v. *Jyoti*, 30 Cal. 761; *Umesh* v. *Soonder*, 16 Cal. 747. After having set the Court in motion to execute a decree, any further application during the continuance of the same proceeding is an application asking the Court to take some step-in-aid of execution—*Chowdhury Poroosh* v. *Kali Puddo*, 17 Cal. 53; *Sujan* v. *Hira*, 12 All. 399 (F.B.). So an application for execution cannot be treated as a step in aid of execution, as a step-in-aid is to be distinguished from an application for execution, only those steps which are to be taken prior to the presentation of an application for execution and which will advance the execution are steps-in-aid—*Mahomed Liaq* v. *Ramji*, 4 D.L.R. (All.) 208. Therefore, an application for execution of a decree made to a wrong Court cannot be considered as a step-in-aid of execution —*Abdur Rahim* v. *Fateh Mohammad*, 40 P.L.R. 721, A.I.R. 1938 Lah. 451.

Where an application for substitution and for execution of decree is signed by a pleader and is accompanied by a Vakalatnama in which however the place meant for the name of the pleader is left blank, and the Vakalatnama does not bear any signature of the pleader showing that he has accepted it, the application as filed cannot be treated as being filed by a duly authorised person and does not save limitation—*Official Receiver, Aligarh and others* v. *Hiralal*, A.I.R. 1935 All. 727.

An execution application filed by a Vakil who had no Vakalatnama from the decree-holder is not one in accordance with law and therefore not a step-aid which will save limitation—*Midono Mahono Deo* v. *Kunja Behari*, A.I.R. 1935 Mad. 786, 158 I.C. 891.

An application, in order to be a step-in-aid of execution, must be made in the course of a *pending* execution proceeding. The words "step-in-aid of execution" appear to be intended to cover an application which is not an initial application for execution but is an application to take some step to advance an execution proceeding which is already pending. If the prior application was made at a time when no execution proceeding had been initiated, the application was not a step-in-aid of execution—*Kuppuswami* v. *Rajagopala*, 45 Mad. 466 (471), A.I.R. 1922 Mad. 79, 42 M.L.J. 303, 70 I.C. 324; *Sankara* v. *Thanganna*, 45 Mad. 202 (205) (*per* Ayling, J.); *Balaguruswami* v. *Guruswami*, 48 M.L.J. 506, A.I.R. 1925 Mad. 703, 87 I.C. 989. In some other Madras cases it has been held that an application in order to be a step need not be made in a pending execution—*Kannan* v. *Avvulla*, 50 Mad. 403, 52 M.L.J. 1, A.I.R. 1927 Mad. 288 (291), 99 I.C. 677; *Sankara* v. *Thanganna*, 45 Mad. 202 (*per* Ramesam, J.); *Krishna* v. *Seetharama*, 50 Mad. 49, A.I.R. 1926 Mad. 1178 (1180), 98 I.C. 156 (obiter). The Madras High Court in a recent Full Bench case has held that it is not necessary that the application taken as a step-in-aid of execution should be made in a pending execution petition—*Ayi Goundan* v. *Solai Goundan*, I.L.R. (1945) Mad. 468, (1945) 1 M.L.J. 47, A.I.R. 1945 Mad. 139 (F.B.). The same view has been taken in *Uttar* v. *Hamid*, A.I.R. 1938 Lah. 326, 178 I.C. 202; *Sheolal* v. *Ram*, I.L.R. (1947) Nag. 572, 1947 N.L.J. 399, A.I.R. 1948 Nag. 197; *Risal* v. *Lal*, I.L.R. (1939) All. 728, 1939 A.L.J. 746, A.I.R. 1939 All. 483.

But the Patna High Court is of opinion that Art. 182, clause 5 does not require that the application to take some step-in-aid of execution of the decree should be made in the course of execution proceedings; the application may be made in any other proceeding which may not, strictly speaking, be proceeding in execution but which affects the execution of the decree—*Jagdeo* v. *Bhubaneswari*, 7 Pat. 708, 9 P.L.T. 817, A.I.R. 1928 Pat. 612 (613), 113 I.C. 582. Any step taken by the decree-holder to remove an obstacle thrown by the judgment-debtor in the way of the execution of the decree is a step-in-aid of execution. It is not necessary that the step must be taken in the execution proceedings; the step may be taken in any proceeding which has the effect of throwing an obstacle to the execution of the decree—*Sheo Sahay* v. *Jamuna*, 4 Pat. 202, 6 P.L.T. 777, 88 I.C. 807, A.I.R. 1925 Pat. 459. Therefore the decree-holder's act of filling a list of the witnesses in a proceeding at the instance of the judgment-debtor to set aside the sale, is a step-in-aid, in as much as the proceeding to set aside the sale threw an obstacle in the way of the decree-holder's taking out execution, though there was no execution proceeding pending at that time—*Jagdeo* v. *Bhubaneswari*, supra.

In order to constitute step in execution there must be an application. So where the only prayer is made to the Court for issue of a non-satisfaction certificate of the decree without any application for that purpose, the step-in-aid of execution is valueless —*Framji* v. *Eastern Union Bank*, A.I.R. 1951 Punj. 371.

The step must be taken to "aid", *i.e.*, to advance the execution proceeding. That is, the application contemplated by this clause is one to obtain some order of the Court

in *furtherance* of the execution of the decree—*Amolakchand* v. *Hoshihar*, A.I.R. 1938 Lah. 138. So, an application merely stating that the necessary steps may be taken without making it clear what steps are required to be taken, is not an application to take step in aid of execution—*Khodajtul* v. *Ugrah*, 23 Pat. 103, A.I.R. 1944 Pat. 214. The mere appearance of the decree-holder or his pleader to oppose the proceedings taken by the judgment-debtor to set aside the execution sale is not a step-in-aid of execution, because the execution of the decree is not further advanced than it was before the appearance of the pleader—*Umesh Chander* v. *Soonder Narain*, 16 Cal. 747. So also, where a judgment-debtor filed a petition for entering satisfaction of the decree which he claimed to have discharged, and the decree-holder filed a counter-statement denying receipt of the decretal amount and asking that the petition should be dismissed, such counter-statement did not amount to a step-in-aid of execution. The counter-petition may tend to prevent the Court placing an obstacle in the way of future execution of the decree, but it does not ask the Court to take any step-in-aid of execution: for the execution of the decree is no further advanced than it was before the counter-petition was presented—*Kuppuswami* v. *Rajagopala*, 45 Mad. 466 (470), 42 M.L.J. 303, 70 I.C. 324, A.I.R. 1922 Mad. 79; *Krishna Pattar* v. *Seetharama*, 50 Mad. 49, 51 M.L.J. 480, 98 I.C. 456, A.I.R. 1926 Mad. 1178. Where an execution petition was returned by the Court for being re-presented with the sale-papers and encumbrance-certificate, and the petition was re-presented without the papers, but with a request, in the petition, for extension of time for obtaining the necessary papers, *held* that the request for extension of time could not be deemed a step-in-aid of execution, because the execution was not advanced by it in any way—*Katifi Mahamed* v. *Ghouse*, 51 M.L.J. 480, A.I.R. 1926 Mad. 1197, 89 I.C. 763. An application for an order excusing the delay in complying with the order of the Court is not a step-in-aid of execution —*China* v. *Peda*, I.L.R. (1944) Mad. 266, (1943) 2 M.L.J. 112, A.I.R. 1943 Mad, 650. So also, an application which is returned for amendment by Court but is not represented after amendment cannot be treated as a step-in-aid of execution. The proper way to deal with such an application is to treat it as not having come into existence at all—*Municipal Council* v. *Sundaresan*, (1939) 1 M.L.J. 87, A.I.R. 1939 Mad. 429; *Chidambaram* v. *Murugesam*, I.L.R. (1940) Mad. 60, (1939) 2 M.L.J. 671, A.I.R. 1939 Mad. 841; *Lakshminarasimham* v. *Gomaji & Co.*, (1948) 2 M.L.J. 488, A.I.R. 1949 Mad. 363.

An application for transfer of a decree is a step-in-aid of execution. By that application the decree-holder asks the Court which passed the decree to assist him for the purpose of carrying further proceedings to realise his decree—*Manmatha* v. *Sarada*, A.I.R. 1939 Cal. 651. The above view was recently adopted by a Full Bench of the Mysore High Court in *Sundara* v. *Appiah*, A.I.R. 1954 Mys. 1 (F.B.).

The mere fact that the application contains mistake and gives incorrect figure as to the costs of the previous application for execution does not go to show that the application is not a step in aid of execution—*Abdul* v. *Rahimuddin*, 1939 N.L.J. 596, A.I.R. 1940 Nag. 87.

In order to be a step-in-aid of execution, it is not necessary that the prior application for execution must have been a *successful* one. Therefore where an application for execution was duly made in accordance with the terms of this clause, the mere fact that the application was *dismissed* does not prevent it from furnishing a fresh starting point of limitation—*Adhar Chandra* v. *Lal Mohan*, 24 Cal. 778; *Narsingh* v. *Kalicharan*, 14 C.W.N. 486, 5 I.C. 147; *Shankar* v. *Narsingrao*, 11 *Bom.* 467, *Gulappa* v. *Eravva*, 46 Bom. 269, A.I.R. 1922 Bom. 118, 63 I.C. 844; *Appathurai* v. *Panayappan*, 57 M.L.J. 468, 122 I.C. 526. Thus, an application under O. XXI, rule 22 of the C. P. Code for execution of a decree with a prayer for substitution of the legal representatives of the

deceased judgment-debtor is a step-in-aid of execution, though it was eventually dismissed for non-payment of process-fees—*Aptabuddin* v. *Jogendra*, 31 C.L.J. 389, 55 I.C. 231. So also, an application by the transferee of a decree for execution under Or. 21, r. 16, C. P. Code, is a step in aid of execution, although such application is dismissed for non-payment of process-fees and for failure to serve notice on the judgment-debtors —*Dayalbhai* v. *Dayabhai*, 40 Bom.L.R. 411, A.I.R. 1938 Bom. 309.

An application which has been dismissed for default without any determination as to the propriety of the application is effective for the purpose of saving limitation. It is only when the order of rejection amounts to a finding that the application is not in accordance with law that the application is ineffective for the purposes of saving limitation—*Harumanlal* v. *Sheonarayan Sonar*, A.I.R. 1935 Nag. 131, 31 N.L.R. 333, 156 I.C. 114; *Chandika* v. *Kamla*, 13 Luck. 162, A.I.R. 1937 Oudh. 233; *Abdul* v. *Rahimuddin*, 1939 N.L.J. 596, A.I.R. 1940 Nag. 87.

As to an application which is *withdrawn* by the decree-holder on account of some formal defects in it, it was once held that such an application could not afford a new starting point for limitation—*Sarju Prasad* v. *Sita Ram*, 10 All. 71; *Kifayat Ali* v. *Ram Singh*, 7 All. 359; *Radha Charan* v. *Man Singh*, 12 All. 382; *Pirjade* v. *Pirjade*, 6 Bom. 681. These cases were decided by applying the principle of sec. 374, C. P. Code, 1882 (O. 23, rule 2 of the present Code) to execution proceedings. That section laid down that if suit was withdrawn and a fresh suit instituted, the plaintiff would be bound by the law of limitation in the same manner as if the first suit had not been instituted. On the analogy of this rule, it was held in the above cases, that the question of limitation with reference to a subsequent application for execution of a decree must be determined on the supposition that the previous application (which had been withdrawn) had not been made. But the authority of the above two cases has been shaken by the Privy Council decision in *Thakur Prasad* v. *Fakirullah*, 17 All. 106 (P.C.) and by the enactment of sec. 375A, C.P. Code, 1882 (O. 23, rule 4, C. P. Code, 1908) which expressly lays down that the provisions relating to the withdrawal of suits shall not apply to execution proceedings. From this it follows that a prior application for execution which is withdrawn by the decree-holder will no longer be considered as non-existent but will help to keep the decree alive, and will act as a step-in-aid of execution with respect to a subsequent application. See *Muzaraf* v. *Amir*, 15 C.W.N. 71, 8 I.C. 833.

But a mere *application* to withdraw a prior execution petition with liberty to make a fresh application in a future time for execution of the decree does not amount to a step-in-aid of execution. It is simply an application for further time to proceed with the pending execution proceeding; and the mere granting of further time to make a subsequent application cannot be said to be a step, as the taking of it does not assist the Court in executing the decree or advance the execution proceeding in any way—*Tarak Chandra* v. *Gyanada Sundari*, 23 Cal. 817 (821) (dissenting from *Ram Narain* v. *Bukhtu Kuar*, 16 All. 75).

The step-in-aid of execution has to be taken not by the applicant, but *by the Court*. An application by the legal representative of a deceased decree-holder for a succession certificate is a mere preparation or preliminary to the execution of a decree, and is not an application asking the Court to take some step-in-aid of execution—*Murgeppa* v. *Baswantrao*, 37 Bom. 559, 15 Bom.L.R. 557, 20 I. C. 252.

But the step has to be taken by the Court *at the instance of the decree-holder*. The mere act of the Court confirming a sale in execution, which act is not shown to have been performed upon any application of the decree-holder, is not a step—*Motendra* v. *Mohendra*, 10 C.L.R. 330. In the absence of any allegation and any evidence to the effect that an *application* to take some step-in-aid of execution was made

by the decree-holder, a mere order by the Court in the order-sheet that the decree-holder should take the necessary steps will not bring the application for execution within time—*Kara Pasi* v. *Ram Nath*, 8 P. L. T. 670, A.I.R. 1927 Pat. 323, 103 I.C. 37. Steps taken by a person claiming adversely to the decree-holder cannot be taken advantage of by the decree-holder as steps in execution, in spite of an agreement between the decree-holder and the rival to act in a particular manner—*Achutanand* v *Saran*, 1938 P.W.N. 652, A.I.R. 1938 Pat. 531. Thus an attachment of a decree by a creditor of the attached decree is not a step-in-aid of execution as far as the holder of the attached decree is concerned—*Anil* v. *Hemanta*, 60 Cal. 1357, A.I.R. 1934 Cal. 234; *Walchand*, v. *Yeshwant*, 51 Bom.L.R. 608, A.I R. 1949 Bom. 379. A contrary view has been taken in *Shivalomal* v. *Bhola*, I.L.R. (1945) Kar. 445, A.I.R. 1946 Sind 103 where it is held that an execution application of one creditor operates as a step in aid of execution in respect of an execution application of another decree-holder. See also *Nukamma* v. *Bansayya*, (1946) 2 M.L.J. 303, I.L.R. (1947) Mad. 515, A.I.R. 1947 Mad. 121, where this point was raised but was not decided. But it was held that such an application would enure to the benefit of the decree-holder as such an application would be treated as application for execution of the decree by the decree-holder through his representative-in-law. See also, *Arulaprakasom* v. *Inpamuthu*, A.I.R. 1952 Tra-co. 69 where it is held that an application by the State to execute the decree for costs in a *forma pauperis* suit charged on the decree is a step-in-aid of execution for the decree-holder.

Again, there must be an *application to the Court* to take some step-in-aid of execution; the mere act of the decree-holder's taking a step-in-aid will not keep the decree alive. For instance, the *mere payment* by the decree-holder of Nazir's fee for the issue of sale proclamation, unless accompanied with an application, will not extend the time—*Madan* v. *Ganga*, 17 C.L.J. 422, 13 I.C. 189 (dissenting from *Radha Prasad* v. *Sundar Lal*, 9 Cal. 644, 646); and the mere fact that the payment was made pursuant to an order of the Court on a previous application is not sufficient—*Ibid.* An application to the Collector to enforce an award under sec. 59 (1) (b) of the Bombay Co-operative Societies Act is not a step-in-aid of execution as the application is not made to a Court to take step-in-aid of execution—*Co-operative Credit Bank* v. *Kashav*, 40 Bom.L.R. 889, A.I.R. 1938 Bom. 424.

Two things are essential: there must be an application, and that application must ask *the Court to take* a step-in-aid of execution. The fact that a *party took some steps* would not be enough—*Rangachariar* v. *Subramania*, 12 L.W. 9, 58 I.C. 536. Before a judgment-creditor can get any benefit, he must show that he *asks the Court* to take some step-in-aid of execution. A step taken by the judgment-creditor himself is not sufficient—*Raghunundun* v. *Kallydutt*, 23 Cal. 690 (692).

In deciding whether any particular act is or is not an application for, or a step-in-aid of, execution, it is the nature of the act that must be looked to, and not the time at which it may be possible to do it—*Koormayya* v. *Krishnamma*, 17 Mad. 165.

715. Step, what is:—"The decided cases on the subject of step-in-aid of execution reveal an extreme conflict of view; they fail to disclose even a principle of general or uniform application. The wording is so uncertain that it leads to the spending of efforts in barren and fruitless discussion, and a good deal of time of the Court is wasted. Such a large body of case-law has now grown up on the point that the legislature may well with the aid of the decided cases catalogue the applications which in its opinion ought to serve as steps-in-aid of execution. This is a suggestion which I venture to make with a view to make the law more certain."—*Per* Venkatasubba Rao J., in *Vappu* v. *Sivakataksham*, 53 Mad. 390, 58 M.L.J. 406, A.I.R. 1930 Mad. 588 (589), 123 I.C. 577.

An application by the decree-holder praying that the judgment-debtor's property be sold subject to a mortgage of a claimant-mortgagee—*Lalraddi Mullick* v. *Kala Chand Bera*, 15 Cal. 363; an application by the son of the deceased decree-holder to be brought on the record and to have money levied and paid—*Govind* v. *Appaya*, 5 Bom. 246; *Keshavlal* v. *Pitambardas*, 19 Bom. 261; an application to the Court to issue notice under sec. 248, C. P. Code to the heir of the deceased judgment-debtor and to require him to adjust the account—*Ibid*; *Gopal* v. *Gosain*, 25 Cal. 594 (F.B.); an application made by a judgment-debtor stating that he had come to an adjustment of the decree with the decree-holder and praying that the execution case might be struck off—*Ghansham* v. *Mukha*, 3 All. 320; an application by a judgment-creditor to the Court which passed the decree for a certificate that a copy of a Revenue Register of the land is necessary as a preliminary to the execution of the decree by attaching the land—*Kunhi* v. *Sheshagiri*, 5 Mad. 141; an application by a decree-holder to the Court to which a decree has been transferred for execution, to return the decree (which has been partially executed) to the Court which passed it, for further execution—*Krishnayyar* v. *Venkayyar*, 6 Mad. 81; an application for payment out of money in court deposit—*Kannappa Chettiar* v. *Manickam Chettiar* (1957) 2 Mad. L.J. 105; these are steps-in-aid of execution. But an application by a decree-holder to the Court to which the decree had been transferred to give the partially executed decree to him is not a step-in-aid of execution—*Aghore Kali* v. *Prosonno*, 22 Cal. 827.

An application for execution presented against a deceased judgment-debtor by mistake due to negligence but honestly made is a step-in-aid of execution though it can not be acted upon—*Chinnan* v. *The Estate Manager*, (1948) 2 M.L.J. 377, A.I.R. 1949 Mad. 348; *Harbans* v. *Munshi*, 40 P.L.R. 25.

An application for execution of a mortgage decree for sale, wrongly returned for want of a certificate under sec. 238, C. P. Code, 1882 (now O. 21, r. 14), although not re-presented, is a step-in-aid of execution—*Mootha* v. *Kandan Sankunni*, 27 I.C. 811.

An application by a decree-holder to execute a decree belonging to his judgment-debtor and attached in execution of his own decree is a step-in-aid of execution of the latter decree and has the effect of keeping it alive—*Lachman* v. *Thondi Ram*, 7 All. 382; *Adhar* v. *Lalmohan*, 24 Cal. 778; *Gya Loan Office* v. *Dhirit*, 8 I.C. 675.

Where the decree-holder made an application to the executing Court that the original records of the case should be sent for as they were necessary in order to get rid of the objections raised by the judgment-debtor, and the executing Court sent for the record, *held* that the application was a step-in-aid of execution—*Raghunath* v. *Lachmi Narain*, 47 All. 667, 23 A.L.J. 422, A.I.R. 1925 All. 394, 88 I.C. 271.

A prior application will be regarded as a step-in-aid of execution so as to save limitation in respect of a subsequent application, even though the properties sought to be attached in the subsequent application are different from those attached in the prior application—*Keshaweswarindra* v. *Debendra Bala*, 4 P.L.J. 213, 48 I.C. 245.

Where a decree directs that the decretal debt shall be paid in instalments, an application for recovery of one of the instalments due is a step-in-aid of execution with regard to all the instalments then due. Thus, an application was made in 1915 to recover the instalments due for 1911, 1912 and 1913; another application was made in 1918 to recover the same instalments, and they were afterwards recovered. In 1919 an application was made to recover the instalments for 1914 and 1915. *Held* that although the present application was apparently barred in regard to these instalments the application of 1918 saved it; for that application, although an application for recovery of the instalments of 1911, 1912 and 1913, must be considered as a step-

in-aid so as to start a new period of limitation wth regard to all the instalments *then due* —*Sitabai* v. *Keshavrao*, 46 Bom. 719, 24 Bom.L.R. 284, 67 I.C. 169, A.I.R. 1922 Bom. 194. If there is an application for so much of the decree as is executable, that is a step in execution. So an application for execution of an instalment decree for the instalments then accrued due is a step-in-aid and saves limitation in respect of later application for execution of all the instalments due under the decree—*Dasharath* v. *Gopal*, I.L.R. (1940) Bom. 317, 42 Bom.L.R. 276, A.I.R. 1940 Bom. 148.

Consent:—The judgment-debtor having applied to the Court to postpone the sale of some of the attached lands until others had first been sold, the vakil for the decree-holder consented in part to this application, but insisted that certain other lands should also be sold in the first instance. It was held that this act of the vakil was a sufficient application to the Court to make some step-in-aid of execution—*Dharanamma* v. *Subba*, 7 Mad. 306. The judgment-debtor applied for two month's time on the day fixed for the sale of his property, and the decree-holder assented to postponement for that length of time only. The application was granted, and the Court thereupon struck the case off the file. This application was held to be in aid of execution—*Rajlukhy* v. *Rash Munjury*, 5 C.L.J. 515. But see *Sreenivasachariar* v. *Ponnusamy*, 28 Mad. 40.

Application for partial execution:—An application for partial execution of a decree, though not in accordance with law, is a step-in-aid of execution especially when the judgment-debtor did not object to it—*Dali Chand* v. *Bai Shivkor*, 15 Bom. 242; *Nepal Chandra* v. *Amrita*, 26 Cal. 888. Where a decree grants several reliefs based upon different causes of action, an application for execution of one of those reliefs is a step-in-aid of execution and the decree-holder is entitled to ask for limitation being calculated from the dates of the final order on that application even though the said application sought execution of reliefs other than that sought in the subsequent one—*Lakshminarasimham* v. *Suryanarayana*, I.L.R. (1948) Mad. 624, (1947) 2 M.L.J. 443, A.I.R. 1948 Mad. 246.

For recognition or substitution:—An application by the legal representatives of a deceased decree-holder, for substitution of their names in place of the deceased decree-holder is a step-in-aid of execution—*Mohan Singh* v. *Jagat Singh*, 50 All. 621, 109 I.C. 412, A.I.R. 1928 All. 299 (300); *Appaniangar* v. *Dharani*, 17 M.L.J. 475; *Tanba* v. *Chandra Shankar*, I.L.R. (1939) Nag. 367, A.I.R. 1938 Nag. 191. An application for the substitution of the name of the legal representative for that of the deceased decree-holder made to the Court which passed the decree after the transfer of the execution application filed in that Court amounts to a step-in-aid of execution—*Prayagdas* v. *Indrabai*, I.L.R. (1943) Nag. 734, 1943 N.L.J. 499, A.I.R. 1944 Nag. 80; *Nihamal* v. *Lachmibai*, I.L.R. (1947) Kar. 216, A.I.R. 1948 Sind. 110.

An application made by the transferee of a decree asking for substitution of his name in place of the name of the original decree-holder is a step-in-aid of execution—*Pitam Singh* v. *Tota*, 29 All. 301; *Bhagwanta Kuer* v. *Dewan Zamir*, 3 Pat. 596, A.I.R. 1924 Pat. 576, 78 I.C. 766; *Annamalai* v. *Ramier*, 31 Mad. 234 (235); *Rajitagiripathy* v. *Bhawani*, 47 Mad. 641, 47 M.L.J. 4, A.I.R. 1924 Mad. 673, 80 I.C. 103. An application asking for time to find out the address of the judgment-debtor and to serve notice on him of the substitution application is also a step-in-aid of execution—*Ibid.* See also *Bhubeneshwar* v. *Lokenath*, A.I.R. 1955 Pat. 234. A decree passed by one Court was transferred to another Court for execution. The decree-holder assigned the decree to another person. The assignee applied to the latter Court asking that the records be sent back to the Court which passed the decree, in order that he might be recognised as the assignee of the decree. *Held* that the application was a step-in-aid of execution for his claim as assignee could be recognised only by the Court which passed the

decree, and for that purpose it was necessary to send back the records to that Court—*Ayyiru* v. *Varadaraja*, 50 M.L.J. 116, A.I.R. 1926 Mad. 431, 92 I.C. 770; or to have his name substituted and to have intimation sent to the transferee Court, as a preliminary to and to enable him to make an execution application to the transferee Court, is a step-in-aid of execution—*Nihalmal* v. *Lachmibai*, I.L.R. (1947) Kar. 216, A.I.R. 1948 Sind. 110. An application by the judgment-creditor for substitution of the heirs of the deceased judgment-debtor is a step-in-aid of execution—*Adhar* v. *Lalmohan*, 24 Cal. 778; *Saday Chandra* v. *Paresh Nath*, 35 C.L.J. 82, A.I.R. 1922 Cal. 44, 64 I.C. 571; *Ramchandra* v. *Uka*, 24 N.L.R. 36, A.I.R. 1927 Nag. 308 (310); though against a wrong legal representative—*Harbans* v. *Munshi*, 40 P.L.R. 25; even though it contains errors in the matter of proper reliefs and is therefore not strictly in accordance with law, still it is a step-in-aid—*Varadiati* v. *Kumara Venkata*, 26 M.L.J. 83, 21 I.C. 782. Such an application made to the Court which passed the decree after transfer of decree to another Court for execution is a step-in-aid of execution—*Hasomal* v. *Lalchand*, I.L.R. (1946) Kar. 371, A.I.R. 1947 Sind. 149; *Daulat* v. *Khemraj*, A.I.R. 1951 Ajmer. 31.

An application by the transferee of a decree to bring in the legal representatives of a deceased defendant is a step-in-aid of execution, though the applicant himself has not been recognised as the transferee of the decree-holder—*Mahalinga* v. *Kuppanachariar*, 30 Mad. 541.

For payment:—An application by the judgment-creditor for payment of a fund or money attached is a step-in-aid of execution, if the money or the fund of which payment is sought has been already realised in execution as the result of the attachment—*Apurba* v. *Chundermoney*, 10 C.W.N. 354. But if the money has been realised and is lying in Court, an application for the payment of the money is an application for merely a ministerial order and does not amount to a step-in-aid of execution. See *Fazal Imam* v. *Metta Singh*, 10 Cal. 549; *Hem Chunder* v. *Brojo Soondery*, 8 Cal. 89, and other cases (as well as the contrary rulings) cited in Note 716 (sub-heading "To take out money").

For payment towards decree out of money deposited:—Where money is deposited in Court as security for the costs of the suit, and order of the Court is necessary to make it available for payment towards the decretal amount, and an application for such order is a step-in-aid of execution—*Thangi* v. *Durga Shetti*, 35 M.L.J. 575, 48 I.C. 226.

For rateable distribution:—An application for rateable distribution is one to take a step-in-aid of execution—*Gobardhan* v. *Jang Bahadur*, 3 O.W.N. 749, 1 Luck. 569, A.I.R. 1926 Oudh 616, 98 I.C. 33. Where such an application was made and distribution was granted without fixing the amounts, and another application was made for an order to be paid the money so ordered to be distributed, it was held that the second application was also a step-in-aid of execution—*Baijnath* v. *Ghanashyam*, 8 C.W.N. 382. But if the order granting the application for rateable distribution also stated the precise amounts to be paid to the decree-holders, an application for an order of withdrawal of the amounts was one for a mere ministerial order and was not a step-in-aid of execution—*Sadananda* v. *Kalishankar*, 10 C.W.N. 28.

For issue of notice:—An application by the decree-holder under sec. 248, C. P. Code of 1882 (O. 21, rule 22 of the Code of 1908) for the issue of a natice to the judgment-debtor, should be regarded as a step-in-aid of execution—*Ramchandra* v. *Krishna Lal*, 1 Pat. 328, A.I.R. 1922 Pat. 301, 65 I.C. 332; *Jogendra* v. *Mangal Prasad*, 7 P.L.T. 330, 90 I.C. 847, A.I.R. 1926 Pat. 160; *Gobardhan* v. *Satischandra*, 1 Pat. 609, A.I.R. 1922 Pat. 597, 69 I.C. 668; *Pachiappa* v. *Poojali*, 28 Mad. 557; *Ramakshi* v. *Ramaswami*,

18 M.L.J. 14; *Gobind* v. *Appayya*, 5 Bom. 246; *Gopal Chandra* v. *Gosain*, 25 Cal. 594 (599) (F.B.); *Behari* v. *Salik Ram*, 1 All. 675; *Md. Nawaz Khan* v. *Ram Das*, 22 P.R. 1905; *Shankar* v. *Zarowar*, 116 P.R. 1907; *Saday Chandra* v. *Paresh*, 35 C.L.J. 82, A.I.R. 1922 Cal. 44, 64 I.C. 571; *Keshav Lal* v. *Pitamber Das*, 19 Bom. 261; *Subramanyan* v. *Naraina*, (1938) 1 M.L.J. 710; *Satyanarayana* v. *Kajireddi*, (1945) 2 M.L.J. 427, A.I.R. 1946 Mad. 61, I.L.R. (1946) Mad. 562; *Akshoy* v. *Nalini*, 54 C.W.N. 815, A.I.R. 1950 Cal. 493. In some cases it has been held that a mere service of notice would not save the application from limitation unless there was some other proceeding in relation to the execution of the decree after the service of the notice—*Biswambhar* v. *Mahesh*, 6 Pat. 277, A.I.R. 1927 Pat. 218, 103 I.C. 39; *Sripati Charan* v. *Belchambers*, 15 C.W.N. 661, 8 I.C. 22; *Umed Ali* v. *Abdul Karim*, 35 Cal. 1060. In *Mahomed* v. *Dawood*, I.L.R. (1938) Bom. 708, 40 Bom.L.R. 676, A.I.R. 1938 Bom. 405 the point was raised but was not decided. Where an order was made for attachment of the judgment-debtor's properties after the service of notice under O. 21, r. 22, this would save a subsequent application for execution from the bar of limitation—*Biswambhar* v. *Mahesh*, supra.

A batta memorandum which mentions that batta is paid for the issue of notice to the judgment-debtor under section 248, C. P. Code, 1882 (now O. 21, r. 22) is an application to take a step-in-aid of execution—*Algamuthu* v. *Devasagaya*, 3 L.W. 34, 1916 M.W.N. 78, 32 I.C. 484.

Where a decree has been transmitted from one Court to another, the notice required under O. 21, r. 22 to be served on the judgment-debtor must be issued by the Court to which the decree has been sent; in such a case an application made to the Court which passed the decree, for issue of the notice, is not a step-in-aid of execution—*Hazari Lal* v. *Baidya Nath*, 26 C.W.N. 292, A.I.R. 1922 Cal. 3, 63 I.C. 116.

Filing affidavit of service of process:—According to the Patna High Court, the filing of an affidavit in proof of service of a process of attachment is a step-in-aid of execution—*Thakur* v. *Sheo Bhajan*, 4 P.L.J. 521, 49 I.C. 892. So also, in some Calcutta cases it has been held that the filing of an affidavit of the service of notice on the judgment-debtor (under O. 21, r. 22) is equivalent to a step-in-aid—*Mohan Lal* v. *Kasimuddin*, 47 C.L.J. 362, A.I.R. 1928 Cal. 302, 108 I.C. 588; *Pran Kishna* v. *Pratap*, 21 C.W.N. 423, 38 I.C. 536. But a contrary view has been taken in another Calcutta case—*Krishna Prasad* v. *Dhirendra*, 24 C.W.N. 55, 30 C.L.J. 518, 54 I.C. 1. The Bombay High Court is of opinion that the filing of such affidavit does not amount to a step—*Mohan* v. *Bapuji*, 11 Bom.L.R. 729, 3 I.C. 771. In a recent Patna case it has been held that where the decree-holder was ordered to file written processes as well as the identifier's affidavit as to service of notice under O. 21, r. 22, but he filed only the identifier's affidavit but not the written processes, and did not even give any explanation for his failure to do so, and accordingly the Court dismissed the execution case for default, *held* that the mere filing of the affidavit did not in the circumstances of this particular case amount to a step-in-aid of execution—*Fateh Bahadur* v. *Parmeshwar*, 6 Pat. 694, 9 P.L.T. 833, A.I.R. 1928 Pat. 145 (146), 108 I.C. 430 (distinguishing 4 P.L.J. 521).

For time:—An application asking for time to enable the applicant to adduce evidence of due service of notice under O. 21, r. 22, C. P. Code is a step-in-aid of execution—*Narasingh* v. *Kalicharan*, 14 C.W.N. 486, 5 I.C. 147. So also, an application asking for extension of time for the purpose of ascertaining the whereabouts of the judgment-debtor—*Bhairan* v. *Amina*, 38 All. 690; or an application by the decree-holder for time to enable him to ascertain the share of the judgment-debtor in the property put up for sale—*Vishvanath* v. *Narsu*, 23 Bom.L.R. 107, A.I.R. 1921 Bom. 33. 60 IC. 916; or an application for time to obtain copies of extracts required by O. 21, r. 14.

C. P. Code—*Seshadasacharya* v. *Bhimacharya*, 37 Bom. 317, 17 I.C. 969; or an application asking for time to enable the applicant to obtain copies of decree and judgment, made after presenting a darkhast to execute a decree—*Haridas* v. *Vithaldas*, 36 Bom. 638; so also, an application by the mortgagor, who has obtained a redemption decree, for an extension of time for depositing the redemption money in Court—*Sankara* v. *Thangamma*, 45 Mad. 202, A.I.R. 1922 Mad. 247, 70 I.C. 333. But an application for extension of time to enable the decree-holder to file an encumbrance certificate does not amount to a step-in-aid of execution because it does not ask the Court to take any step in furtherance of the execution of the decree—*Ramaswami* v. *Veeranna*, 53 M.L.J. 766, A I.R. 1928 Mad. 143, 106 I.C. 648; *Katifi Mahomed* v. *Ghouse*, 51 M.L.J. 489, A.I.R. 1926 Mad. 1197, 98 I.C. 163. In an earlier Madras case, however, such an application was considered as a step-in-aid of execution—*Abdul Kadir* v. *Krishnan*, 38 Mad. 695, 26 M.L.J. 433, 23 I.C. 533.

For attachment:—An application asking for attachment of the properties of the judgment-debtor is a step-in-aid of execution. Consequently, a batta application which states that batta is paid to attach the properties of the judgment-debtor is a step-in-aid—*Govindaswami* v. *Govinda*, 48 M.L.J. 678, 89 I.C. 894, A.I.R. 1925 Mad. 880. An application by way of appeal to a Court of appeal to set aside an order of the trial Court raising an attachment ordered earlier is a step-in-aid of execution of the decree. When the appeal is dismissed, a subsequent application made within three years of the date of the final order of the appellate Court would be in time—*Annamalai* v. *Valliammai*, 72 I.A. 296, 49 C.W.N. 776, 47 Bom.L.R. 956, 1945 P.W.N. 462, A.I.R. 1945 P.C. 176, I.L.R. (1945) Kar. (P.C.) 393, (1945) 2 M.L.J. 224 (P.C.) overruling *Annamalai* v. *Valliammai*, I.L.R. (1943) Mad. 485, (1943) 11 M.L.J. 95, A.I.R. 1943 Mad. 398. The contrary view taken in *Chandrabali* v. *Baidyanath*, A.I.R. 1946 Pat. 471 is no longer good law.

To issue sale proclamation—To deposit process fee:—An application to a Court to issue a sale proclamation is a step-in-aid of execution—*Ambica Pershad Singh* v. *Sardhari Lal*, 10 Cal. 851 (F.B.); *Chowdhury Paroosh Ram Das* v. *Kali Paddo Banerjee*, 17 Cal. 53; *Manek Lal* v. *Nasia*, 15 Bom. 405; *Rajkishore* v. *Gurcharan*, 9 I.C. 634; *Vijiaraghavalu* v. *Srinivasalu*, 28 Mad. 399. But the mere payment of stamps or process-fee *unless accompanied by an application* to issue the sale proclamation, will not keep the decree alive—*Vellaya* v. *Jagannatha*, 7 Mad. 307; *Thakur Ram* v. *Katwaru*, 22 All. 358; *Sheo Prasad* v. *Indar*, 30 All. 179 (180); *Malukchand* v. *Bechar Natha*, 25 Bom. 639 (F.B.); *Trimbak* v. *Kashinath*, 22 Bom 722; *Toree Mohomed* v. *Md. Mabood*, 9 Cal. 730 (731); *Arunachalam* v. *Latchumanan*, 47 M.L.J. 537, 82 I.C. 497, A.I.R. 1924 Mad. 906; *Bhawani* v. *Syid Iftikhar*, 7 I.C. 759; *Modan Mohan* v. *Ganga Charan*, 17 C.L.J. 422, 13 I.C. 189 (dissenting from *Radha Prasad* v. *Sundar Lal*, 9 Cal. 644, 646); *Peoples' Industrial Bank* v. *Mahesh Charan*, 1 Luck. 153, A I R. 1926 Oudh 289, 93 I.C. 631. So also, the deposit of additional Court-fee for service of a notice under O. XXI. r. 22 of the Civil Procedure Code is not a step-in-aid of execution when the deposit was made *after* the application to the Court and the step taken by it, and where it did not appear that any application for execution or to take a step-in-aid was made at the time when the additional Court-fee was paid—*Dwarkanath* v. *Anandrao*, 20 Bom. 179. In *Narendra* v. *Bhupendra*, 23 Cal. 374 (387) and *Bhupendra* v. *Rajendra*, 18 I.C. 455, the deposit of process fee was itself treated as an application to take a step-in-aid of execution.

To correct sale proclamation:—An application made for the purpose of having the forms of the proclamation corrected, for having a date fixed for the settlement of the terms of proclamation under O. XXI, r. 66, and for issue of notice for a specified date is a step-in-aid of execution—*Surajmal* v. *Sarjoog*, 2 P.L.J. 5, 38 I.C. 540.

For sale:—An application made for bringing to sale the property which had been handed over by the judgment-debtor to his son, is a step-in-aid of execution—*Mahna* v. *Ishar*, 41 P.L.R. 577.

For transfer of decree:—An application to the Court which passed a decree, that it may be sent for execution to another Court, is a step-in-aid of execution—*Collins* v. *Moula Baksh*, 2 All. 284; *Latchman* v. *Maddan*, 6 Cal. 513; *Rajbullubh* v. *Joy Krishen*, 20 Cal. 29; *Chundra Nath* v. *Gurroo*, 22 Cal. 375; *Suja* v. *Monohur*, 24 Cal. 244; *Rama Nath* v. *Gouri*, 2 C.W.N. 415; *Bhabani* v. *Pratap*, 8 C.W.N. 575; *Ramchandra* v. *Krishna Lal*, 1 Pat. 328, A.I.R. 1922 Pat. 301, 65 I.C. 332, 3 P.L.T. 298; *Todar Mal* v. *Bhola*, 35 All. 389; *Sahodra* v. *Bhagwan*, A.I.R. 1926 All. 473, 94 I.C. 482; *Bishundeo* v. *Raghunath*, 19 Pat. 354, 1940 P.W.N. 504, A.I.R. 1940 Pat. 677; *Sheonath* v. *Bindeshwari*, A.I.R. 1950 Pat. 518; even if no application for execution is pending—*Ramnarayana* v. *Radha Gobinda*, I.L.R. (1940) 2 Cal. 252, 71 C.L.J. 535. A.I.R. 1940 Cal. 557; *Akshoy* v. *Nalini*, 54 C.W.N. 815, A I.R. 1950 Cal. 493; *Sheolal* v. *Ram*, I.L.R. (1948) Nag. 572, 1947 N.L.J. 399, A.I.R. 1948 Nag. 197 or even if at the time of the application the judgment-debtor is dead and the decree-holder has knowledge of the same—*Radhaballav* v. *Mahendra*, 45 C.W.N. 342. But an application to transfer a decree to a Court which has no pecuniary jurisdiction to try the suit in which the decree was passed and therefore has no jurisdiction to execute the decree, is not a step-in-aid of execution—*Amir Lal* v. *Murlidhar*, 1 Pat. 651, A.I.R. 1922 Pat. 188, 67 I.C. 538; *Sita Ram* v. *Madho*, I.L.R. (1939) All. 97, 1938 A.L.J. 1128, A.I.R. 1939 All. 57. The Allahabad High Court has held in a subsequent case that an application to transfer a decree to a Court having jurisdiction as to the decree amount but not having the pecuniary jurisdiction if the original valuation of the suit was taken into consideration, constitutes a step in aid of execution—*Kashi* v. *Sajjiadi*, I.L.R. (1940) All. 318, 1940 A L.J. 381, A.I.R. 1940 All. 331. An application for transmission of the decree to another Court for execution is a step-in-aid of execution, but the transmission of the decree is not by itself an execution of the decree—*Atherton & Co.* v. *Habib*, 1929 A.L.J. 553, 115 I.C. 865, A.I.R. 1929 All. 390 (392).

"The date from which a fresh start is given is the date upon which the judicial order is made on the application as a step in aid of execution." An order made on an application for transferring a decree for execution to another Court, is a step in aid of execution and gives a fresh start to the decree-holder under Art. 182 (5)—*Bhagwant Sahay* v. *Ram Sukrit Ram*, A.I.R. 1936 Pat. 313, 162 I.C. 984, (1 Pat. 328 folld.)—Wort. J., who delivered the judgment, was personally of opinion that an application for transferring a decree from one Court to another is not in fact a step-in-aid of execution —An application for transfer of a decree amounts to a step-in-aid of execution. A decree-holder is not required to show his bonafide or to prove that the step-in-aid of execution was taken by him with a genuine intention to execute his decree—*Mansa Ram* v *L. Badri Prasad*, A I.R. 1936 All. 369, (35 All. 389, A.I.R. 1929 All. 625 fold.).

An application to a Court in British India to send a decree passed by it for execution to a Court in a Native State, there being reciprocal arrangement between that State and the Government of India whereby the decrees of the State shall be executed in British India and the decrees in the British Indian Courts shall be executed by the Courts in that State, is a step-in-aid of execution—*Chinnasami* v. *Annamalai*, I.L.R. (1941) Mad. 574, (1941) 1 M.L.J. 242, A.I.R. 1941 Mad. 309 (F.B.).

An application made to the Court which passed the decree for an order re-transferring the decree sent to another Court for execution is a step in aid of execution—*Nagi* v. *Kotamma*, I.L.R. (1948) Mad. 117, (1947) 1 M.L J. 156. A.I.R. 1947 Mad. 431. But an application to the Court which passed the decree and transferred it for execution to another Court, to recall the decree from that Court and to send it back again to that

Court for execution is not a step-in-aid of execution—*Maruti* v. *Nanjappa*, I.L.R. (1942) Nag. 539, 1942 N.L.J. 101, A.I.R. 1942 Nag. 63.

Simultaneous execution:—An application for simultaneous execution in different Courts and an order for the same without notice to the judgment-debtor is not null and void and serves as a step-in-aid of execution. The irregularity is only a mere defect in procedure—*Venkatarami* v. *Rami*, (1950) 1 M.L.J. 787, A.I.R. 1950 Mad. 582.

For fixing date of sale:—A sale of immoveable property having been adjourned, an oral application for the fixing of a fresh date for the sale is an application to enforce the decree—*Amar Singh* v. *Tika*, 3 All. 139.

For leave to bid at sale:—An application by the decree-holder for permission to bid at the sale in execution of his decree is a step-in-aid of execution. The fact that the decree-holder is prepared to bid for the property and is anxious to purchase it brings the decree within nearer distance of complete execution and satisfaction—*Dalal* v. *Umrao*, 22 All. 399; *Bansi* v. *Sikree Mal*, 13 All. 211; *Vinayakarao* v. *Vinayak Krishna*, 21 Bom. 331; *Troylokya* v. *Jyoti Praksh*, 30 Cal. 761 (769); *Safia Begam* v. *Raisunnissa*, 8 O.C. 161. Contra—*Raghunandan* v. *Kallydut*, 23 Cal. 690 (692); *Toree Mahomed* v. *Md. Mabood*, 9 Cal. 730 (732); *Moulvi Md. Shaffee* v. *Budri Mal*, 88 P.R. 1884. In another Calcutta case, it has been laid down by Mookerjee, J. that it cannot be laid down as an inflexible rule that an application for leave to bid at a sale must in every case or may not in any case amount to an aiding of the execution; if the decree-holder can show that the circumstances under which the application was made were such that the grant of leave did in fact aid, or would have aided the execution, the application would be treated as a step-in-aid—*Hira Lal* v. *Dwija*, 10 C.W.N. 209 (214, 216).

An application not merely asking for leave to bid but also praying that the amount he would bid might be set off against the decree amount due to him is a step-in-aid of execution—*Nabadip* v. *Bepin*, 12 C.W.N. 621; *Vappu* v. *Sivakataksham*, 53 Mad. 390, 58 M.L.J. 406, A.I.R. 1930 Mad. 588 (589), 123 I.C. 577. An application for re-auction of the property (there being no bid at the first auction) with a prayer for permission to bid at the re-auction is a step-in-aid—*Salig Ram* v. *Lala Rai Chand*, 60 P.R. 1912, 14 I.C. 468.

To be put into possession—An application made by the decree-holder to be put into possession of the property which he had purchased at an auction held in execution of his decree, is a step-in-aid of execution—*Moti Lal* v. *Makund*, 19 All. 477; *Kannan* v. *Avvulla*, 50 Mad. 403, A.I.R. 1927 Mad. 288, 99 I.C. 677; *Lakshmanna* v. *Kannammal*, 24 Mad. 185; *Appathurai* v. *Panayappan*, 57 M.L.J. 468, 122 I.C. 526; *Babu Ram* v. *Peary Lal*, 41 All. 479, 50 I.C. 143; *Sadashiv* v. *Vithal*, 35 Bom. 452, 11 I.C. 987; *Sariatoolla* v. *Raj Kumar*, 27 Cal. 709; *Prem Krishna* v. *Juramoni*, 13 C.W.N. 694, 1 I.C. 430; *Annoda* v. *Somoruddi*, 23 C.W.N. 926, 30 C.L.J. 135, 54 I.C. 839; *Sankara* v. *Sundra*, I.L.R. (1943) Mad. 322, (1943) 1 M.L.J. 9, A.I.R. 1943 Mad. 129 (F.B.) In 23 C.W.N. 926, Cuming J. held, to the contrary, that all steps in execution must be taken by the decree-holder *as decree-holder* and not as auction-purchaser, and therefore the application mentioned above, not being made by the decree-holder as such, was not a step. This opinion was also expressed by the Allahabad High Court in *Bhagwati* v. *Banwari Lal*, 31 All. 82 (F.B.) though the question was not definitely before the Full Bench. And this opinion is now confirmed by a recent decision of the same High Court—*Mohsin* v. *Haider*, 50 All. 670, 26 A.L.J. 498, 115 I.C. 869, A.I.R. 1928 All. 368 (369, 370) (following 31 All. 82 (F.B.) and dissenting from 19 All. 477 and 41 All. 479). See *Suraj Dei* v. *Gulab Dei*, A.I.R. 1955 All. 49 (F.B.), 1955 A.L.J. 79. The Patna High Court likewise holds that such an application is not a step,

because since the decree-holder takes possession not as decree-holder but as an auction-purchaser, the question between the judgment-debtor and the purchaser cannot be said to be one relating to the execution, discharge or satisfaction of the decree —*Kamal* v. *Kesho Prasad*, 1 Pat. 701 (705), 4 P.L.T. 226, A.I.R. 1922 Pat. 310, 69 I.C. 638; *Triloke Nath* v. *Bansman*, 2 Pat. 249, A.I.R. 1923 Pat. 22, 5 P.L.T. 30, 72 I.C. 938.

To have witnesses summoned:—An application by a decree-holder, in the course of an investigation into an objection to the attachment of property, to have his witnesses summoned is a step-in-aid of execution—*Kedar Nath* v. *Lakhi Kant*, 21 C.W.N. 868, 40 I.C. 1005; *Brojendra* v. *Dil Mahmud* 22 C.W.N. 1027, 44 I.C. 604; *Mohamed Siddiq* v. *Misri Lal*, 19 A.L.J. 843, A.I.R. 1922 All. 432, 64 I.C. 524; *Ali Muhammad Khan* v. *Gur Prashad*, 5 All. 344; *Sheo Sahay* v. *Jamuna*, 4 Pat. 202, 88 I.C. 897, 6 P.L.T. 777, A.I.R. 1925 Pat. 459; *Surajmal* v. *Sarjoog*, 38 I.C. 540, 2 P.L.J, 5; *Shugan* v. *Ramjos*, 5 I.C. 292. So also, the filing of a list of witnesses by the decree-holder in a proceeding to set aside the execution sale at the instance of the judgment-debtor, is a step-in-aid of execution—*Jagdeo* v. *Bhubaneswari*, 7 Pat. 708, 9 P.L.T. 817, 113 I.C. 582, A.I.R. 1928 Pat. 612 (614).

For issue of a seal warrant:—An application made to the Calcutta Small Cause Court for the issue of a seal warrant is an application to take a step-in-aid of execution —*Jugarnath* v. *Brojonath*, 29 Cal. 580; *Lachman Das* v. *Narain Das*, 3 A.L.J. 815.

Application to proceed with the case:—On an objection being put in by the judgment-debtor to the execution, the Court ordered the parties to produce evidence in support of their respective cases, and in the course of those objection proceedings the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with the case. It was held that the decree-holder's action implied an application on his part to the Court to take the evidence which he was prepared to adduce and repel the objection taken by the judgment-debtor, and that in effect this should be taken to be an application to the Court to take some step-in-aid of execution —*Brojendra* v. *Dil Mahomed*, 22 C.W.N. 1027, 44 I.C. 604.

To have objections dismissed:—An application to the Court executing a decree asking that certain objection to the execution of the decree be dismissed is a step-in-aid —*Tamajunnissa* v. *Najju*, 40 All. 668, 16 A.L.J. 704, 48 I.C. 38. An application by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property in execution of the decree should be disallowed, is a step-in-aid of execution—*Kewal Ram* v. *Khadim Hussain*, 5 All. 276; *Gobind* v. *Rung Lal*, 21 Cal. 23.

For arrest of surety:—An application asking the Court to execute the entire decree by the arrest of the surety who has made himself liable for satisfaction of the decree, is an application to take a step-in-aid of execution of the decree as against the original judgment-debtor—*Mahomed Hafiz* v. *Mahomed Ibrahim*, 43 All. 152, 18 A.L.J. 988, 58 I.C. 794; *Kishan* v. *Prem*, I.L.R. (1940) Lah. 223, 42 P.L.R. 723, A.I.R. 1939 Lah. 587; *Suraj* v. *Firm Narayan Rao*, I.L.R. (1939) All. 538, 1939 A.L.J. 415, A.I.R. 1939 All. 463.

For arrest of Judgment-debtor:—An application for execution of a decree by arrest of the judgment-debtor will operate to save limitation is respect of a subsequent application in which the prayer was first for the arrest of the judgment-debtor and secondly for the arrest of two persons who had become sureties for the due satisfaction of the decree by the judgment-debtor—*Badruddin* v. *Muhammad Hafiz*, 44 All. 743, A.I.R. 1922 All. 491, 77 I.C. 129. But an application for the arrest of the judgment-debtor residing outside India does not provide a step-in-execution—*Ahmad* v. *British Medical Stores*, 189 I.C. 738, A.I.R. 1940 Pesh. 27.

For re-arrest of judgment-debtor:—Where an arrested judgment-debtor was released from jail on his applying to be declared an insolvent, an application by the decree-holder for re-arrest of the judgment-debtor is a step-in-aid of execution—*Suraj* v. *Mahabir*, 33 All. 279.

For drawing up final decree:—An application in a partition suit for preparation of a formal decree on stamp paper supplied by the decree-holder is a step-in-aid of execution as the granting of the application will aid execution—*Ram* v. *Maharaj*, A.I.R. 1940 Lah. 337. But the Patna High Court opines that an application praying the Court to assess and receive the deficit Court-fees or to prepare a final decree in a suit for mesne profits, when the Court fixes the amount of mesne profits, but defers the drawing up of the decree until payment of the necessary Court-fees by the plaintiff, can not be considered to be a step-in-aid of execution. The reason given is that step-in-execution implies that there is already a decree which can be executed and in furtherance of which the step is taken—*Mahomed* v. *Mahabir*, 21 Pat. 366, 1942 P.W.N. 139, A.I R. 1942 Pat. 410. An application for a final decree made by mistake after a final decree had already been passed is not step-in-aid of execution—*The Corporation of Calcutta* v. *Majoor*, 70 C.L.J. 320, 43 C.W.N. 800, A.I.R. 1939 Cal. 488. So an application for a final decree after a compromise decree has been passed in a mortgage suit can not be called a step-in-aid of execution. The application must be regarded as a proceeding in the suit itself though entirely superfluous because the relief claimed had already been got—*Bajya* v. *Tarachand*, 1947 N.L.J. 502, A.I.R. 1948 Nag. 308, I.L.R. (1947) Nag. 683. A contrary view has been taken in *Raghunath* v. *Subedar*, 14 Luck. 453, 1939 O.W.N. 219, A.I.R. 1939 Oudh 155 on the ground that the ultimate object of such an application is to hasten the realisation of the decree debt.

For final decree for sale:—An application by the holder of a preliminary decree in a mortgage suit, for a final decree for sale, is a step-in-aid of execution—*Gulappa* v. *Eravan*, 46 Bom. 269, A.I.R. 1922 Bom. 118, 63 I.C. 844.

Compromise:—A compromise to have the rest of the decree executed on a future date is an application for taking a step-in-aid of execution—*Bindeswari* v. *Awadh Behari*, 6 I.C. 366.

Application for substituted service:—An application for substituted service is a step-in-aid of execution—*Amina* v. *Banarsi*, 36 All. 439.

For continuance of sale:—An application by the decree-holder for continuance of the sale in order to secure the attendance of more bidders is a step-in-aid of execution —*Desireddy Yellamandar* v. *Sitakolli Chinna*, 16 M.L.T. 103, 1 L.W. 573, 25 I. C. 58.

716. Step, what is not:—An application by a decree-holder asking for the release of a portion of the property from attachment, for postponement of the sale and for the striking of the case off the file, the attachment of the remainder of the property being maintained, is not an application to take some step-in-aid of execution because it does not 'aid' or advance the execution proceedings—*Abdul Hossein* v. *Fazilun*, 20 Cal. 255; *Fakir* v. *Ghulam*, 1 All. 580.

When a person goes to serve notice on the judgment-debtor as mentioned in old cl. 6, the mere fact that the decree-holder accompanied the peon to identify the judgment-debtor is not itself a step-in-aid of execution—*Jugalkishore* v. *Chintamoni*, 18 C.W.N. 1288, 27 I.C. 225; nor does the filing by the peon of an affidavit of service of the notice on the judgment-debtor amount to a step-in-aid of execution—*Annapurna* v. *Dhirendra*, 24 C.W.N. 55, 30 C.L.J. 518, 54 I.C. 1. But see page 911, *ante*.

Where a decree has been lost or destroyed, an application to the Court to reconstruct the decree is not a step, because it is needless for the decree-holder to have

the decree restored before he applies for execution. Limitation will run from the date when the judgment was pronounced—*Raj Gir* v. *Ishwardhari*, 11 C.L.J. 243, 5 I.C. 660.

An application by a decree-holder, who has himself purchased the judgment-debtor's property, to receive the amount of poundage fee from him is not a step-in-aid of execution—*Aghore Kali* v. *Prosonno*, 22 Cal. 827; *Anando* v. *Harasundari*, 23 Cal. 196.

An application by the decree-holder for return of the decree to him for the purpose of enabling him to execute his decree subsequently is not a step-*Mahalinga* v. *Narayana*, 6 M.L.J. 23; *Aghore Kali* v. *Prosonno*, 22 Cal. 827; *Rajaram* v. *Banaji*, 22 Bom. 311.

An application made by both the parties to postpone the hearing of a pending execution with a view to arrive at a compromise is not a step-in-aid of execution, because such an application is not made in furthering the execution of a decree, but on the contrary it is a step which if successful would avoid the necessity for execution. —*Vishnu* v. *Narasimha*, 25 Bom.L.R. 490, A.I.R. 1923 Bom. 461, 73 I.C. 1011.

An application by the decree-holder to be allowed to set off the purchase-money of the property purchased at auction by the decree-holder himself, against the decree, instead of paying it into Court, is not a step-in-aid of execution—*Anando* v. *Harasundari*, 23 Cal. 196. Contra—*Safia Begam* v. *Raisunnissa*, 8 O.C. 161; *Nabadwip* v. *Bepin*, 12 C.W.N. 621.

An application by the decree-holder for sanctioning an agreement to give time to the judgment-debtor for payment, and not for execution of the decree, is not a step-in-aid of execution—*Barrow* v. *Javerchund*, 19 Mad. 67.

An application by the decree-holder for a list of the properties attached in execution of his decree is not a step-in-aid of execution—*Ranga Chariar* v. *Balaramasami*, 21 Mad. 400.

An application by a decree-holder opposing the application of the judgment-debtors to sell the property in a certain order, is not a step-in-aid of execution—*Troylokya* v. *Jyoti Prokash*, 30 Cal. 761 (771).

An application by the decree-holder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution—*Kuppu Swami* v. *Rajagopala*, 45 Mad. 466 (470), 42 M.L.J. 303, A.I.R. 1922 Mad. 79, 70 I.C. 324; *Krishna* v. *Seetharama*, 50 Mad. 49, 98 I.C. 456, A.I.R. 1926 Mad. 1178 (1180). So also, an application by the decree-holder for modifying or cancelling an order recording satisfaction of the decree and to revive the decree, which according to the record stands satisfied can not be regarded as a step-in-execution of that decree, which, unless and until it is revived, has no judicial existence—*Moiden* v. *Subramanya*, 1939 M.W.N. 996, A.I.R. 1939 Mad. 892.

Where an application for execution by an assignee of a decree from an adult decree-holder who transferred the same on behalf of himself as well as his own minor brothers, was dismissed in toto, as leave of the Court was not obtained for the assignment, such application, being made by a person not entitled to make it, was not a step-*Kailasa* v. *Ramanuja*, 6 L.W. 19, 39 I.C. 950.

An application which asks for a relief beyond and outside the decree altogether is not a step-in-aid of execution—*Pandarinath* v. *Lila Chand*, 13 Bom. 237; *Bando* v. *Narasinha*, 37 Bom. 42, 14 Bom.L.R. 861, 17 I.C. 210; *Nathabhai* v. *Pranjivan*, 34 Bom. 189.

An application for an injunction restraining the defendant to transfer a portion of the mortgaged property after a final mortgage-decree is not a step-in-aid of execution as the transfer is not an obstacle in the way of the decree-holder's remedy to

execute the decree—*Risal* v. *Lal*, I.L.R. (1939) All. 728, 1939 A.L.J. 746, A.I.R. 1939 All. 483.

An application asking for time is not a step-in-aid of execution—*Kartick* v. *Juggernath*, 27 Cal. 285 (288). But under certain circumstances it may amount to a step-in-aid. See page 911, *ante*.

In the absence of an application to proceed with the sale, the mere filing of an affidavit by the decree-holder stating that there are no incumbrances over the property does not amount to a step-in-aid of execution—*Chiranji* v. *Ganga Sahai*, 22 A.L.J. 410. A.I.R. 1924 All. 811, 78 I.C. 631.

When the judgment-debtor has applied for insolvency, the resistance of the decree-holder to the judgment-debtor's application will not amount to the taking of a step-in-aid of execution—*Langtu* v. *Baijnath*, 28 All. 387 (390). So also, an application by the decree-holder to get his debtor adjudicated insolvent is not a step-in-aid of execution —*Walchand* v. *Yeswant*, 51 Bom. L.R. 608, A.I.R. 1949 Bom. 379.

Application for copy of decree:—An application by a decree-holder for a copy of the decree is not a step-in-aid of execution—*Gopilandhu* v. *Domburu*, 11 Mad. 336; *Ganga Pershad* v. *Debi Sundari Dabia*, 11 Cal. 227; *Rajkumar Banerjee* v. *Raj Lakhi Debi*, 12 Cal. 441; *Muthia Veettil* v. *Irakkat Karnavan*, 39 M.L.J. 572, 60 I.C. 117.

To bring decree into conformity with judgment:—An application to amend a decree or to bring a decree into conformity with the judgment cannot be treated as a step-in-aid of execution—*Kallu* v. *Fahiman*, 13 All. 124; *Daya Kishen* v. *Nanhi Begam*, 20 All. 304; *Ashanulla* v. *Dakkhini*, 27 All. 575. But when such amendment is made by the Court, it will give a fresh starting point of limitation for the execution of the decree under clause 4.

For stay of execution:—An application by the decree-holder for stay of the execution proceedings is not a step-in-aid of execution—*Fakir* v. *Ghulam*, 1 All. 580.

For postponement of sale:—An application by the decree-holder for postponement of sale in execution on the ground that he had allowed time to the judgment-debtor is not a step-in-aid of execution—*Mainath Kuari* v. *Debi Bakhsh Rai*, 3 All. 757. An application by the decree-holder for postponement of the sale not with a view to enable him to bring the properties to sale more advantageously to him, but on other grounds, is not a step-in-aid of execution—*Troilokya* v. *Jyoti Prokash*, 30 Cal. 761. But a joint application made by the decree-holder and judgment-debtor stating that certain payment has been made by the judgment-debtor and that the decree-holder has agreed to give time to the judgment-debtor for the payment of the balance, and praying that the sale may be postponed and time granted, constitutes a step-in-aid of execution —*Sitla* v. *Sheo Prosad*, 4 All. 60.

Certification of payment:—A Full Bench of the Calcutta High Court has decided that a certification by the decree-holder of a payment made by the judgment-debtor is not an application to the Court to take some step-in-aid of execution; consequently such certification of itself cannot afford a fresh starting point of limitation under Art. 182, clause (5)—*Amar Krishna* v. *Jagat Bandhu*, 59 Cal. 760 (F.B.), 35 C.W.N. 1192 (1201), A.I.R. 1931 Cal. 719, 134 I.C. 922, overruling *Jatindra* v. *Gagan*, 46 Cal. 22 and *Tarini* v. *Bishtoo Lal*, 12 Cal. 608. But the Bombay and Allahabad High Courts are of opinion that an application by the decree-holder to certify certain payments made by the judgment-debtor is a step-in-aid of execution, provided the payment has actually been made—*Bacharaj* v. *Babaji*, 38 Bom. 47, 21 I.C. 407; *Lecky* v. *Bank of Upper India*, 33 All. 529; *Chote Singh* v. *Iswari*, 32 All. 257, 7 A.L.J. 251; *Muhammad Husain* v. *Ram Sarup*, 9 All. 9. The Bombay High Court has however held in a

subsequent case that an application made to the Court to record a part payment or adjustment of the decretal debt under Or. 21, r. 2, C. P. Code is not a step-in-aid of execution as such an application is a mere certificate and is no application at all under Art. 181 or Art. 182—*Atmaram* v. *Malloppa*, I.L.R. (1942) Bom. 11, 43 Bom.L.R. 880, A.I.R. 1942 Bom. 7. See also *Narayana* v. *Kunhi Raman*, 20 L.W. 190, 82 I.C. 743, A.I.R. 1925 Mad. 131. As regards the effect of uncertified payment under sec. 20, see Note 205, *ante*. In a case before the Judicial Committee, their Lordships did not decide (as it was unnecessary in the case to decide) whether a certification of payment amounted to a step-in-aid—*Prokas Singh* v. *Allahabad Bank*, 3 Luck. 684 (P.C.), 33 C.W.N. 267 (274), 114 I.C. 581, A.I.R. 1929 P.C. 19. A certificate by the decree-holder certifying payment of the decretal amount by the judgment-debtor is not an application within the meaning of Art. 182—*Maheshwar* v. *Dineshwari*, A.I.R. 1936 Pat. 386, 163 I.C. 915; *Ganjsoo* v. *Hari*, 21 Pat. 481, A.I.R. 1941 Pat. 7.

An application by the decree-holder asking Court to record part payment, is not an application to the Court to take a step-in-aid of execution, and consequently such an application does not save limitation—*President, Union Board, Pentapadu* v. *Thirumala Venkata Srinivasacharyulu*, A.I.R. 1936 Mad. 118.

It was held in a Calcutta case that an application made by the *judgment-debtor* and signed by the decree-holder, to have certain payments, which were made out of Court, certified, and praying that time be allowed to pay the balance of the decree, the attachment in the meantime continuing was a step-in-aid of execution—*Wasi Imam* v. *Poonit Singh*, 20 Cal. 696. This decision must also be deemed to have been overruled by the Full Bench case of *Amar Krishna* v. *Jagat Bandhu*, 59 Cal. 760 cited above.

To take out money:—According to the Calcutta and Patna High Courts and the Punjab Chief Court, an application made by a judgment-creditor to take out of Court certain monies deposited by the judgment-debtor, or to withdraw a money awarded to him upon rateable distribution, or to take out the proceeds of an execution sale of the judgment-debtor's property, is not a step-in-aid of execution. The reason is, that so long as the money or the fund out of which payment is sought has not been realised in execution, an application for payment of the money is an application to take a step-in-aid of execution. But when the moneys have been realised and are lying in Court, an application for payment of the money is an application for merely a ministerial order, and not to take a step-in-aid of execution—*Hem Chunder Chowdhury* v. *Brojo Sundari Devi*, 8 Cal. 89; *Fazal Imam* v. *Metta Singh*, 10 Cal. 549; *Gunga Pershad Bhoomik* v. *Devi Sundari Dabia*, 11 Cal. 227; *Sadananda* v. *Kali Sankar*, 10 C.W.N. 28; *Kasu* v. *Atar Singh*, 103 P.R. 1908, 207 P.L.R. 1908 (F.B.); *Mulchand* v. *Kour Singh*, 27 P.R. 1888; *Amolakchand* v. *Hoshihar*, A.I.R. 1938 Lah. 138; *Hira Lal* v. *Mohna*, I.L.R. (1938) Lah. 586, 40 P.L.R. 494, A.I.R. 1938 Lah. 678; *Noorul* v. *Nohar*, 1941 P.W.N. 559, A.I.R. 1941 Pat. 428. But according to the other High Courts, it is a step—*Venkatarayulu* v. *Narasimha*, 2 Mad. 174; *Koormayya* v. *Krishnamma*, 17 Mad. 165; *Paran Singh* v. *Jawahir Singh*, 6 All. 366; *Kerala Verma* v. *Shankaram*, 16 Mad. 452; *Bapuchand* v. *Mugutrao*, 22 Bom. 340; *Sujan Singh* v. *Hira Singh*, 12 All. 399; *Mulchand* v. *Jamanbi*, 27 Bom.L.R. 671, A.I.R. 1925 Bom. 443, 89 I.C. 228; *Latafat* v. *Kalyan*, I.L.R. (1938) All. 342, 1938 A.L.J. 117, A.I.R. 1938 All. 210; *Sankara* v. *Sundra*, I.L.R. (1943) Mad. 322, (1943) 1 M.L.J. 9, A.I.R. 1943 Mad. 129 (F.B.).

The Madras High Court has made another kind of distinction, *viz.*, that if the monies lying in Court are the proceeds *of an execution sale*, the application by the decree-holder for payment of the money is a step-in-aid of execution; but if the monies lying in Court are not the proceeds of a sale in execution of the decree, but have been deposited by the judgment-debtor (or his agent) for payment to the decree-holder, the decree-holder's application for payment is not a step-in-aid of execution—*Balaguruswami*,

v. *Guruswami*, 48 M.L.J. 506, A.I.R. 1925 Mad. 703, 87 I.C. 989; *Appaswami* v. *Jotha Naicken*, 22 Mad. 448. See, however, *Chettiar* v. *Chettiar*, A.I.R. 1957 Mad. 665. The Bombay High Court has expressed the opinion that there is no difference between money paid into Court in satisfaction of a decree and money lying in Court which is the proceeds of a sale held in execution of the decree—*Mulchand* v. *Jamanbi*, supra.

For confirmation of sale:—As the Court is bound to confirm a sale after thirty days, in the event of no application under O. 21, r. 90, C. P. C. being made, an application to confirm the sale cannot be regarded as one in aid of execution even though it is made by the decree-holder as purchaser—*Umesh* v. *Shib Narain*, 31 Cal. 1011 (dissenting from *Gobind* v. *Rung Lal*, 21 Cal. 23 and *Kewal Ram* v. *Khadim*, 5 All. 576); *Panchanan* v. *Nrisinha*, 11 C.L.J. 356, 6 I.C. 264; *Triloke Nath* v. *Bansman*, 2 Pat. 249, A.I.R. 1923 Pat. 22, 5 P.L.T. 30, 72 I.C. 938.

For recovery of costs:—An application for realisation of costs incidental to the execution proceedings is not an application for the execution of the original decree or any part of it—*Sahu Nandlal* v. *Sahu Dharam*, 48 All. 377, A.I.R. 1926 All. 440, 94 I.C. 961. A decree was passed directing the execution of a *muchalka* by the defendant in favour of the plaintiff, and for costs. An application was made for enforcement of the decree by execution of the *muchalka*. This application was made more than 3 years after the last application for the same relief, and less than three years after the last application for realisation of the costs of certain execution proceedings. *Held* that the last application for realisation of costs was for incidental costs in execution, and was not an application for execution of the decree or any part of it. Consequently, it could not save limitation so far as the relief by way of execution of the *muchalka* was concerned—*Appu Rao* v. *Ramakrishna*, 24 Mad. 672.

717. Clause 6:—The clause is new. The old clause 6 stood as follows:—

6. (Where the notice next hereinafter mentioned has been issued) the date of issue of notice to the person against whom execution is applied for to show cause why the decree should not be executed against him, when the issue of such a notice is required by the Code of Civil Procedure, 1908.

718. Restitution:—The old clause 6 has been replaced by an entirely new clause, and this new clause is intended to set at rest the conflict of decisions as to whether an application for restitution falls under Art. 181 or Art. 182.

An application made to obtain *restitution* under a decree in accordance with section 583 of the *old* C. P. Code (1882) was held to be a proceeding in execution of that decree, and governed by this Article—*Venkayya* v. *Raghavacharlu*, 20 Mad. 448; *Nand Lal* v. *Sita Ram*, 8 All. 545. In *Karupam* v. *Sadasivam*, 10 Mad. 66, *Gangadhar* v. *Lachma*, 11 C.L.J. 541, 6 I.C. 125, and *Harish Chandra* v. *Chandra Mohan*, 28 Cal. 113, however, such an application was held to fall under Article 181. So also, the question as to whether this Article applies to an application under the *new C. P. Code* (section 144) has been the subject of conflicting decisions. In the following cases it has been held that the words "an application for execution of a decree" occuring in this Article mean an application to enforce the decree, and in case of applications for restitution on reversal of a decree, the legal obligation arising from the appellate decree itself is sought to be enforced, and not any independent obligation. Consequently an application for restitution is an application for execution of a decree and is governed by Art. 182, and not by Article 181—*Unnamalai* v. *Mathan*, 33 M.L.J. 413, 42 I.C. 530; *Somasundaram* v. *Chokkalinga*, 40 Mad. 780 (782); *Kurgodigowda* v. *Ningangowda*, 41 Bom. 625 (630), 19 Bom.L.R. 638, 41 I.C. 238; *Hamidalli* v. *Ahmedalli*, 45 Bom. 1137, 23 Bom.L.R. 480, A.I.R. 1921 Bom. 67, 62 I.C. 233; *Chandika Singh* v. *Bithal Das*, 7 O.W.N. 1153, A.I.R. 1931 Oudh 51 (52); *Kochu* v. *Mariayan*, A.I.R. 1952 Tra-Co. 40. But the other High Courts have drawn a distinction between sec. 583 of

the old C. P. Code and sec. 144 of the new Code, and are of opinion that an application for restitution under sec. 583 of the old Code was an application for execution within the meaning of Art. 182 but under the new Code of 1908, an application for restitution, unless such is expressly ordered by the Appellate Court, is not an application for execution, but is a miscellaneous application in the nature of an application for execution and falls under Article 181—*Ram Singh* v. *Sham Parshad*, 15 P.L.R. 1918, 44 I.C. 301, 61 P.R. 1918; *Chandra Singh* v. *Bishen Singh*, A.I.R. 1924 Lah. 166, 76 I.C. 501, 5 Lah.L.J. 389; *Kripa Sindhu* v. *Mahanta Balbhadra*, 47 I.C. 47, 3 P.L.J. 367 (369, 371); *Balmukund* v. *Basanta Kumari*, 3 Pat. 371 (387) (F.B.), A.I.R. 1925 Pat. 1. 78 I.C. 200 (overruling *Basant Kumari* v. *Balmukund*, 2 Pat. 277); *Saroj Bhushan* v. *Debendra*, 59 Cal. 337, 35 C.W.N. 1294 (1296); *Fazlar Rahaman* v. *Abdul Samad*, 92 I.C. 960, A.I.R. 1926 Cal. 981; *Hanifunnissa* v. *Chunni*, 19 A.L.J. 549, 63 I.C. 184 (185); *Asutosh* v. *Upendra*, 21 C.W.N. 564 (569), 38 I.C. 17; *Hari Mohan* v. *Parameshwar*, 56 Cal. 61, 32 C.W.N. 971 (972, 982), A.I.R. 1928 Cal. 646. See also *Jiwa Ram* v. *Nand Ram*, 44 All. 407; *Brij Lal* v. *Damodar Das*, 44 All. 555; *Ram Singh* v. *Dhyan Singh*, I.L.R. (1945) Lah. 1, 47 P.L.R. 201, A.I.R. 1944 Lah. 190 (F.B); *Mela Ram* v. *Dharam Chand*, A.I.R. 1958 Punj. 132 (F.B.).

According to the new clause 6 of this Article, an application for restitution (in respect of money) is treated as an application for execution; but it should be noticed that this clause applies only where restitution is applied for in pursuance of a decree obtained in a *separate suit* brought for the purpose of obtaining the restitution and not where restitution is applied for in consequence of the reversal of the original *decree* on appeal or review. The scope of this clause is limited. for sub-section (2) of sec. 144, C. P. Code expressly bars a separate suit for restitution, and allows it only where the restitution could not be obtained by an application under sec. 144.

The period of limitation runs from the date of the decree passed in the suit for restitution; if there is an appeal, time runs from the date of the order of the final Appellate Court confirming the decree of the first Court, and not from the date of the decree of the first Court. *Cf. Fazlar Rahman* v. *Abdul Samad*, 92 I.C. 960, A.I.R. 1926 Cal. 981. The starting point of limitation for an application for restitution under this Article is the date of the decree in a suit under Or. 21, r. 63, C. P. Code or if there be an appeal the date of the final decree in the appeal and not the date of the order on the claim petition—*Venkataraju* v. *Suryonarayana*, I.L.R. (1943) Mad. 411, (1942) 2 M.L.J. 791, A.I.R. 1943 Mad. 248; or when the appellate Court, while reversing the decree. remands the case with a direction to apportion the liability of the properties claimed in the suit, the starting point is not from the date of the decree of the appellate Court but from the date when the liability is fixed—*Chengal* v. *Mohammal*, (1945) 1 M.L.J. 143, A.I.R. 1945 Mad. 133. The claim for restitution must be made within three-years from the date on which the right to make the claim arises upon reversal of the decree in question. But when that is not done and the rights of the parties have to be decided afresh in the suit, the cause of action would arise on the date when a decree is passed on remand upholding the claim of the party seeking restitution—*Gampat* v. *Navrittal*, 41 Bom.L.R. 1204, A.I.R. 1940 Bom. 30.

Where an application is made to obtain restitution as the necessary result of the order of His Majesty in Council, the application is to be taken as one to *enforce an order of* His Majesty in Council, and falls under Art. 183—*Sohan* v. *Baijnath*, 50 All. 767, 26 A.L.J. 587, 112 I.C. 876 A.I.R. 1928 All. 293 (294); *Brij Lal* v. *Damodar*, 44 All. 555, 66 I.C. 545, A.I.R. 1922 All. 238.

719. Clause 7:—Instalment decrees:—When a decree is made payable by instalments, with the further provision that in default of payment of any instalment the whole of the money shall become due and be recoverable by execution, the decree

falls under this clause, because the whole amount must be held to have been *directed to be paid on a 'certain date,'* viz., *the date of such default*; and limitation for execution begins to run when the first default is made—*Mon Mohun* v. *Durga Churn*, 15 Cal. 502 (505); *Bir Narain* v. *Darpa Narain*, 20 Cal. 74; *Judhistir* v. *Nobin*, 13 Cal. 73 (75); *Zahur Khan* v. *Bhaktawar*, 7 All. 327 (330); *Dulsook* v. *Chugon*, 2 Bom. 356; *Shankar* v. *Jalpa*, 16 All. 371 (372); *Ugranath* v. *Laganmani*, 4 All. 83 (85); *Raichand* v. *Dhando*, 42 Bom. 728; *Chattar* v. *Amir*, 38 All. 204 (207); *Allah Baksh* v. *Bhawani*, 100 P.R. 1902; *Sk. Elahy Bux* v. *Nawal Lal*, 4 P.L.J. 159 (162), 50 I.C. 364. But a Full Bench of the Allahabad High Court has recently laid down that where a decree (*a*) directed payment of the decretal amount by instalments on particular dates and (*b*) also authorised the decree holder in the case of a default in the payment of two successive instalments to realise the balance of the decretal amount at once, *held* (*a*) that if the application for execution was an application under the first part of the decree to recover certain *instalments* already overdue, Article 182, cl. 7 applied and limitation ran in respect of each instalment from the date on which it became payable; (*b*) but if the application for execution was an application under the second part of the decree to recover the *entire* balance of the decretal amount at once upon default, this clause could not apply, because at the date of the decree it was *not certain* whether and when the default of two consecutive payments would occur; it was therefore impossible to say that the decree had fixed a *certain date* for the payment of the whole amount in a lump sum. Such a date was not at all certain (the word 'certain' means a date which must certainly occur). Consequently, Article 181 (the general Article) applied, and time ran from the date of the later of the last two successive instalments unpaid—*Joti Prasad* v. *Srichand*, 51 All. 237 (F.B.), 26 A.L.J. 966, A.I.R. 1928 All. 629 (634, 639), 112 I.C. 73. The same view has been taken in *Mata Din* v. *Sita Ram*, 17 Luck. 1, 1941 O.W.N. 1079 A.I.R. 1942 Oudh 33 and in *Peoples Bank* v. *Aijaz*, 17 Luck. 449, 1941 O.W.N. 1313, A.I.R. 1942 Oudh 219. See also *Sheo Lal* v. *Devidas*, A.I.R. 1952 All. 900 (F.B.).

Where a decree for money is made payable in instalments and in default of payment of any instalment the whole of the decree becomes payable immediately it is open to the decree-holder to apply, even after three years from the date of the default, to recover such of the instalments as have become due within three years of the date of his application—*Bomatu Bhadu* v. *Govardhandas Nanabhai*, A.I.R. 1936 Bom. 268, 38 Bom.L.R. 492, 163 I.C. 937; *Vehérbhai* v. *Javer Soma*, A.I.R. 1936 Bom. 17, 60 Bom. 62, 37 Bom.L.R. 942, 160 I.C. 527.

Where payments were made towards an instalment decree (which contained the usual default clause) but such payments were not certified, the Court would assume that no payments were made, and so the period of limitation ran from the date when the first instalment was due—*Chattar Singh* v. *Amir Singh*, 38 All. 204 (207); *Mithu Lal* v. *Khairati*, 12 All. 569 (570). Where an instalment decree directed that in case of failure of payment of an instalment, the decree-holder was to *wait for one year*, and that if during that time the debtor did not pay the amount of the instalment the decree-holder would be entitled to recover the whole amount, *held* that the time for the execution of the decree ran from the expiry of one year after the date of default—*Hira Chand* v. *Abu Lala*, 46 Bom. 761, A.I.R. 1922 Bom. 95, 67 I.C. 153, 24 Bom.L.R. 269.

On 30th September 1916, plaintiff obtained a decree under which certain properties were to be left in possession of the defendant, who was to pay to the plaintiff annually a sum of Rs. 2,000 in the mouth of Kason, or in default of payment of the same (Rs. 2,000 annually) the said properties would be made over to the plaintiff. On 8th October 1924, the plaintiff decree-holder filed an application for execution of the

decree against the defendant judgment-debtor in default of payment of two instalments of Rs. 2,000 each, for 1923 and 1924 respectively, and claimed, as the judgment debtor failed to pay according to the decree, that the Court might direct the delivery of the lands by the judgment-debtor to the decree-holder. It was pleaded that the execution was time-barred. *Held* that upon a true construction of the decree, each instalment as it became due was a claim originating under the decree from the date when such claim arose and that clause 7 applied; that *on the occasion of a default in each payment*, the right of the decree-holder to have the property made over to him arose and therefore the claim to the lands was not time-barred; that time did not necessarily run from the date of the *earliest default*, if any occurred before 1923—*Maung Sin* v. *Ma Tok*, 5 Rang. 422 (P.C.), 32 C.W.N. 1, 53 M.L.J. 22, 29 Bom.L.R. 1014, A.I.R, 1927 P.C. 146, 101 I.C. 736; *Mst. Parmeshri* v. *Mst. Atti*, A.I.R. 1958 Punj. 79.

Waiver:—On the application of the principle of Article 75 it has been held that even though an instalment decree provides that upon default of payment of any one instalment, the whole amount shall become due, it is open to the decree-holder to waive the default by accepting an overdue instalment (instead of putting into force the decree for the whole amount at once upon the default), and to apply for execution in respect of a subsequent instalment on a fresh default, and this application will not be barred on the ground that more than three years have elapsed after the first default—*Ram Culpo* v. *Ram Chunder*, 14 Cal. 352 (355); *Mon Mohan* v. *Durga Charan*, 15 Cal. 502 (505); *Kashiram* v. *Pandu*, 27 Bom. 1 (13) (F.B.) (virtually overruling 2 Bom. 356); *Hurri Pershad* v. *Nasib Singh*, 21 Cal. 542 (546); *Jalim Chand* v. *Yusufali*, 54 Cal. 143, A.I.R. 1925 Cal. 1012, 86 I.C. 1051; *Rajeswar* v. *Hari*, 19 Mad. 162. In an Allahabad case it has been held that since in this clause no mention is made of waiver as in Art. 75, the principle of waiver would not apply to instalment decrees. A decree-holder is therefore always bound to take out execution within 3 years from the first default—*Ugrah Nath* v. *Laganmani*, 4 All. 83 (85).

Where a decree payable by instalments provides that the decree-holder shall have *discretion* or *option*, on default being made in payment of any one instalment, to realise the full amount of the decree with interest without waiting for any future instalment, the period of limitation does not necessarily run from the date of the first default—*Janki* v. *Ghulam Ali*, 5 All. 201 (206). This clause applies only where the decree *directs* any payment to be made on a certain date. If, however, the decree provides that the decree-holder shall have *discretion* to realise the whole decretal money when the default is made, the date of default cannot be taken as being the date *directed by* the decree. In such a case, the decree-holder is not bound to execute his decree for the whole amount remaining due as soon as the first default is made, but he may waive the default by receiving the overdue instalment and execute the decree for the subsequent instalments as they become due. Time runs from the due date of each instalment—*Lachmi* v. *Sarju*, 39 All. 230 (233), 15 A.L.J. 102, 38 I.C. 634; *Nilmadhub* v. *Ramsodoy*, 9 Cal. 857 (860); *Appayya* v. *Papayya*, 3 Mad. 256; *Allah Baksh* v. *Bhawani*, 131 P.L.R. 1902, 100 P.R. 1902; *Kishen Chand* v. *Bhai Gopal*, 6 P.R. 1913, 172 P.L.R. 1912. 16 I.C. 842; *Shanker* v. *Jalpa*, 16 All. 371 (374). In such a case, the decree-holder's omission to apply for execution of the whole decree within three years of the first default, will only affect his right to recover the instalment in respect of which the default was made and to recover the whole of the decretal amount at once, but will not affect his right to recover subsequent instalments which have fallen due within three years before the application for execution—*Asmatulla* v. *Kally Churn*, 7 Cal. 56 (60); *Allah Baksh* v. *Bhawani*, supra; *Kishen Chand* v. *Bhai Gopal Singh*, supra.

Where a compromise decree directs payment of the decretal amount by instalments on particular dates and provides that in case the defendant fails to pay any instalment

at the stipulated period then the entire decretal amount might be realised by execution, an application made more than three years after the first default but relating only to instaments which fell due within three years of the application is within time." ....the correct interpretation to be placed upon the decree is that primarily it gives the decree-holders a decree for money for which the judgment-debtor is found liable but allows the judgment-debtor the indulgence of paying the amount of instalments. The provision for payment by instalments is thus a provision for the benefit of the judgment-debtor. But it makes this indulgence subject to the condition that in case the judgment-debtor commits a default he would forfeit the benefit of the indulgence, and the decree-holders will have the power to enforce payment of the entire decretal amount. This provision is therefore for the benefit of the decree-holders. If the decree-holders do not choose to enforce within limitation, this provision which was inserted for their benefit, they may be debarred from enforcing it afterwards, but they ought not to be prevented from recovering the future instalments, the claim in respect of which is made within time—*Ajodhia Prasad* v. *Bansi Lal and others*, 11 Luck. 276, A.I.R. 1935 Oudh 465, 1935 O.W.N. 837, 156 I.C. 764 (F.B.). The decree-holder cannot be compelled to take advantage of the default clause on pain of losing further instalments. There is no reason why the judgment-debtor seeking to take advantage of his own default should be allowed to require the decree-holder to prove condonation of the default. If the decree-holder says he did condone the default, then in the absence of evidence or conduct by the decree-holder proving the contrary, his statement should be accepted. Hence where the decree-holder has failed to take advantage of the default clause, his right to recover instalments due to him within three years of the application for execution is not barred—*Lekhraj* v. *Khubchand*, I.L.R. (1940) Kar. 385, A.I.R. 1939 Sind. 49.

The question whether the decree-holder may waive the benefit of the provision or must execute his decree within 3 years from the due date of the first instalment of which default is made in payment, is a question purely of construction to be decided on the terms of the whole decree in each case—*Judhistir* v. *Nobin*, 13 Cal. 73 (75); *Nirash* v. *Baldeo*, 25 Pat. 664. An instalment decree is to be construed as much as possible in favour of the decree-holder, and unless the decree clearly leaves the decree-holder no option on the happening of a default but to execute the decree once and for all for the whole amount under it, the decree-holder may execute it on the happening of the first, second or any subsequent default, and limitation will run against him in respect of each instalment separately from the time when such instalment may become due—*Shankar* v. *Jalpa*, 16 All. 371 (373); *Lachmi Narain* v. *Sarju*, 39 Cal. 230 (233); *Allah Baksh* v. *Bhawani*, 100 P.R. 1902, 131 P.L.R. 1902. The Calcutta High Court has held in a recent Full Bench case that the decree-holder has the option to take advantage of this provision or not to do so. When there is no evidence that the option has been exercised it must be deemed to have been waived. An application by the decree-holder for execution relating to subsequent instalments, as such, is maintainable and is governed by this clause. The application would be in time if it relates only to instalments which fell due within three years of the date of application, although made more than three years after the first default—*Rangalal* v. *Shyamlal*, I.L.R. (1946) 2 Cal. 552, 50 C.W.N. 735, A.I.R. 1946 Cal. 500 (F.B.).

In order to constitute waiver, there must be *payment and acceptance of an overdue instalment*. The mere silence on the part of the decree-holder, or his abstinence from suing after there has been a default, does not amount to a waiver on his part —*Hurri Pershad* v. *Nasib Singh*, 21 Cal. 542 (547); *Bir Narain* v. *Darpa Narain*, 20 Cal. 74 (78); *Kashiram* v. *Pandu*, 27 Bom. 1 (F.B.); *Chattar Singh* v. *Amir Singh*, 38 All. 204 (207). And this is so, whether the decree provides that on non-payment of an instalment the whole amount *shall* become due, or it provides that on non-

payment of an instalment the whole amount *may* be sued for—*Hurri Pershad* v. *Nasib Singh*, supra. There must be proof of payment of the overdue instalment. Where the decree-holder alleged payment of an instalment by the judgment-debtor, which the latter denied, and the payment has not been certified, *held* that there was no evidence of payment, and consequently no evidence of waiver; and therefore limitation ran from the date of the first default—*Mitthu Lal* v. *Khairati*, 12 All. 569 (571). But see *Zahur* v. *Bakhtawar*, 7 All. 327 (330); *Rajeswara* v. *Hari*, 19 Mad. 162, and *Hurri Prasad* v. *Nasib Singh*, 21 Cal. 542 (549) where it was held that the mere fact that the payment was not certified was not a ground for holding that the payment could not be recognized by the Court in evidence of waiver.

So long as there is no waiver, the decree-holder is entitled to execute the whole decree (*i.e.*, for the whole amount remaining due) as soon as a default is made; but if the decree-holder waives a default by receiving an overdue instalment, he cannot, upon a subsequent default, put in force the decree as a whole, to recover the remaining instalments that are due all at once; he can execute the decree only for those instalments which are due. Time in respect of each such instalment runs from the due date of that instalment—*Buddhu Lal* v. *Rekhab Das*, 11 All. 482 (485); *Nilmadhab* v. *Ramsodoy*, 9 Cal. 857 (860); *Radha Prasad* v. *Bhagwan*, 5 All 289 (292). In other words, the acceptance of the overdue instalments will amount to a waiver of the decree-holder's right to enforce the penalty which the decree allowed to him in the event of failure to pay the instalments—*Radha Prasad* v. *Bhagwan*, supra.

In *Ramprasad* v. *Jadunandan*, A.I.R. 1934 All. 534, 149 I.C. 598 there was a compromise decree for instalments with a clause that the decree-holder would be entitled to realise the total amount in case of default. It was held that the decree-holder had two distinct rights under this decree: (1) to receive instalments as and when they fall due, and (2) to enforce the payment of all the instalments that might remain unpaid in the event of two successive instalments remaining unpaid. That this right had become time-barred as the application to execute that right had first accrued beyond the period of three years from the date of the application, but that the bar of the second right did not necessarily bar the first right and that the decree-holder could recover such instalments as had fallen due by the date of the application for execution under Art. 182 (7). This case was considered and followed in *Hariram* v. *Himmanlal*, 1935 A.L.J. 1291, A.I.R. 1935 All. 259.

If the decree-holder wishes to execute the entire decree, owing to default in the payment of an instalment, he must bring his application within three years of the date of the first default. If he brings his application to execute the whole decree more than three years after the date of the first default, he will not be allowed, in order to save his application from limitation, to fall back upon the instalment arrangement and claim to recover the instalments that fell due within three years before the date of the application—*Bir Narain* v. *Darpa Narain*, 20 Cal. 74 (78).

So also, where the holder of an instalment decree has once applied for execution of the entire decree, upon a default being made in the payment of an instalment, and has thus elected to put an end to the instalment arrangement, he cannot subsequently fall back on the provisions of the decree relating to payment by instalments for the purpose of saving limitation. The creditor has two rights *viz.*, to recover the amount by instalment or to realise the entire amount. These two rights are inconsistent and the credtor cannot exercise both of them; corresponding to the rights are the two obligations of the debtor and on exercise of the either right, the obligation of the debtor becomes fixed—*Hanmant* v. *Gururao*, I.L.R. (1943) Bom. 55, A.I.R. 1943 Bom. 36; *Lakshman* v. *Parvatibai*, 44 Bom.L.R. 903; A.I.R. 1943 Bom. 63; *Ram Kishen* v. *Gopal*, A.I.R. 1950 Hyderabad 14. Thus, where upon the judgment-debtor's failure in

the payment of two instalments in 1900 the decree-holder applied for execution of the decree for the whole amount on the 15th May 1901, but the application having been dismissed for default of prosecution, he again applied on the 1st July 1904 for execution, for recovery of such instalments as remained unpaid, *held* that the application was barred by limitation, as it was no longer open to the decree-holder to adhere to the instalment arrangement—*Bhagwan Das* v. *Janki*, 28 All. 249 (251).

In a suit on a pronote, a compromise petition for instalment decree was filed in which there was a provision that default being made in the payment of one kist the whole amount would become due; and subsequently an instalment decree was passed in which the amount was decreed as per instalments but the condition as to the whole amount being due in default of payment of one *kist* was not stated. It was held that the decree and the compromise petition might be taken together and that the terms of the compromise should be taken as incorporated into the decree, so that the decree must be construed as one providing that the whole amount of the decree would become due on the default in payment of one *kist*—*Jayamuddin* v. *Jamiruddin*, 21 C.W.N. 835, 37 I.C. 916.

Certain date:—Where a decree directed that the amount decreed should be paid on the expiration of 5 years, the period of limitation for execution ran from the day on which the period of 5 years from the date of the decree expired; and therefore an application made within 8 years from the date of the decree was within time—*Ram Lal* v. *Natha Singh*, 45 P.R. 1882.

If in a decree a certain sum is ordered to be paid monthly or annually, it means that the amounts decreed are to be paid monthly or yearly from the date of decree, *i.e.*, on the date of each month or year corresponding to the date of the decree—*Lakshmibai* v. *Madhavrav*, 12 Bom. 65; see also *Md. Kamaruddin* v. *Piari Lal*, 13 P.R. 1892. Although a decree may not in express terms fix a specified date, yet if it can be gathered from the decree that payments are directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of this clause are satisfied—*Keveri* v. *Vankamma*, 14 Mad. 396; *Gopal* v. *Mt. Kauran*, A.I.R. 1947 Pesh 38. In the Act of 1871 the words in this clause were *"specified date"*; these words have been replaced by the words *"certain date"* in the Acts of 1877 and 1908. The substtution of the word "certain" in place of 'specified' has widened the scope of its meaning. It is no longer necessary to mention by the year, month and day the exact date in the decree. It simply requires a 'certain' date. The words 'certain' is used in contra-distinction to 'uncertain.' It obviously means a date which though not expressly mentioned or ascertained must yet be a date which must certainly occur—*Joti Prasad* v. *Srichand*, 51 All. 237 (F.B.), A.I.R. 1928 All. 629 (634), 112 I.C. 73. Thus, where a decree directed the defendant to pay maintenance to the plaintiff at a certain rate per year from the date of the plaint which was 18th July 1876, untill her death, it was held that the proper construction of the decree was that payment should be made on the 18th July 1877, 18th July 1878, and so on in every subsequent year on the corresponding date; and so the decree was one which directed payment to be made on a certain date—*Aitamma* v. *Narain*a, 30 Mad. 504. The cases of *Subhanatha* v. *Lakshmi Ammal*, 7 Mad. 80 and *Yusuf* v. *Sirdar*, 7 Mad. 84 decided under the Act of 1871 are on longer good law.

Where a money decree directs that the plaintiff should not be entitled to take out execution of the decree until after a certain event, *e.g.*, until the disposal of the petition for insolvency made by the defendants, *held* that clause 7 cannot apply, because there is no direction in the decree that any payment is to be made at the date of the disposal of the insolvency petition or on any other date—*Ashrafuddin*, v. *Bepin Behari*, 30 Cal. 407 (412).

A decree which directs the sale of the mortgaged property in default of payment of the mortgage money within the date fixed in the decree is not a decree 'directing payment of the amount to be made on a certain date' within the meaning of this clause, and an application for sale of the property upon non-payment of the money within the date fixed is not an application to 'enforce payment of the money.' This clause does not apply and the application falls under Article 181. If, however, there is also a personal decree against the mortgagor, and the application is to enforce the decree as such, limitation will run, under clause 1, from the date of the decree, if payment is enforceable under the decree from the date thereof; or, under clause 7, from a future date, if payment can be enforced only on or after such future date fixed in the decree—*Rungiah Goundan* v. *Nanjappa*, 26 Mad. 780 (784). See 16 All 237 cited in Note 693 under Article 181.

If a decree passed by the trial Court in 1911 directed payment to be made in three instalments on March 15, 1912, March 15, 1913 and March 15, 1914, and the decree was finally confirmed by the appellate Court in October, 1914, *held* that the date for payment must be taken to be 15-3-1915, 15-3-16, and 15-3-1917, as the effect of confirmation by the appellate Court was to extend the time—*Darubhai* v. *Behar*, 49 Bom. 305, 27 Bom. L. R. 96, 86 I.C. 894, A.I.R. 1915 Bom. 270.

An application by the Board of Commissioners for Hindu Religious Endowments, Madras, made to the District Judge for recovery of contributions under sec. 70 (2) of the Madras Hindu Religious Endowments Act is governed by Art. 182. And the right to apply accures only after the expiry of three months from the date of the demand made by the Board and the amount becomes only payable then—*President of the Board of Commissioners for H.R.E. Madras* v. *Shirur Mutt*, A.I.R. 1935 Mad. 217, 68 M.L.J. 200, 1935 M.W.N. 142, 41 L.W. 264, 156 I.C. 747.

An application to execute a decree for rent made in a suit between landlord and tenant to whom the provisions of the Bihar Tenancy Act apply, is an application falling under Art. 6 of Sch. III of the Act, notwithstanding that the decree is an instalment decree. This clause has no application to such a decree—*Kedar* v. *Parsidh-singh*, 24 Pat. 222, A.I.R. 1945 Pat. 398.

Such date:—The words "such date" in the clause refer to the date on which a default is made. On the occasion of each default the decree-holder would be entitled to enforce his claim—*Ainul* v. *Newaban*, 1939 O.W.N. 768, A.I.R. 1939 Oudh. 281; in other words, the date on which each instalment falls due—*Ramji* v. *Asghar*, 209 I.C. 424. Under this clause, the time from which the limitation of three years begins to run where the application is to enforce any payment which the decree or order directs to be made at a certain date is "such date". Where, therefore, under a surety bond under sec. 55, C.P. Code, the surety undertakes to pay the entire decretal amount if the judgment-debtor does not file an insolvency petition within a month or does not prosecute it, and the insolvency petition filed by the judgment-debtor is dismissed for non-deposit of certain charges, the limitation for execution application against the surety begins to run from the date of the dismissal of the execution petition—*Lakshminarasayya* v. *Appalaswami*, (1950) 1 M.L.J. 20, 1950 M.W.N. 57, A.I.R. 1950 Mad. 756. Where a decree directs that the plantiff is entitled to receive every year from the defendant half the share of the Iskel of Patwari Giri, the right to apply accrues to the decree holder each time when the amount becomes payable to the defendant by the Revenue Department and not from the date when the amount is actually received by the defendant—*Bapurao* v. *Hanumanthrao*, A.I.R. 1950 Hyderabad 48.

720. Explanation I—Separate rights and liabilities;—Where a decree is passed separately against several persons, an application for execution against one

of them is inoperative to keep the decree alive against the others—*Ghulam Muhiuddin* v. *Damber Singh*, 40 All. 206 (209). A decree which specified different sums as being realisable from three distinct tenures must be construed as three distinct decrees, and a prior application in respect of the sums decreed, so far as one of the tenancies was concerned, could not operate to save limitation for the sum due under the other tenancies —*Dhirendra* v. *Nischintapore Co.*, 36 I.C. 398 (Cal.). Where a decree was passed originally in favour of one person, and was afterwards owned by more persons than one in severalty by virtue of assignment from the original single decree-holder, it cannot be said that the decree has been "passed *severally* in favour of more persons than one" within the meaning of the first sentence of this Explanation. The rights of all the several decree-holders in this case will be treated as *joint*, and an application for execution made by one of them will keep the decree alive in favour of all—*Venkata Reddayya* v. *Yera Kayya*, 45 Mad. 35, A.I.R. 1922 Mad. 129, 69 I.C. 277.

Where a decree is obtained against a number of persons and the decree requires each judgment-debtor to pay his own share only of the decretal amount and costs, it must be considered that there are separate decrees against them individually. The rule of limitation is applicable separately against each judgment-debtor, so that time begins to run as regards him individually irrespective of the period of limitation as regards other judgment-debtors—*Umrao Singh* v. *Hafiz Mad.*, A.I.R. 1937 Lah. 949.

721. Joint rights and liabilities:—Although the C. P. Code does not allow *one* of several decree-holders to apply for execution of a *joint* decree, yet an application by one of such decree-holders for execution of the decree in respect of so much of the relief granted to all as he considers appertains to him individually, may keep alive the decree, especially when such application has been accepted by the Court and an order has been made for execution after service of notice to the parties, and the judgment-debtor has not raised any objection thereto—*Kanakaprava* v. *Dhirendra*, 32 C.W.N. 1107 (1109), A.I.R. 1928 Cal. 861; *Ponnampilath* v. *Ponnampilath*, 3 Mad. 79. According to the Allahabad High Court, however, a decree passed jointly in favour of more persons than one can be executed by one or more of such persons *as a whole*, for the benefit of all, and not partially to the extent of the interest of each individual decree-holder. An application for such partial execution is not in accordance with law, and cannot keep the decree in force—*Collector* v. *Surjan*, 4 All. 72; *Ram Autra* v. *Ajudhia*, 1 All. 231; *Banarsi* v. *Maharani*, 5 All. 27. But where an application for such part execution is made, and *no objection is taken* to execution in this form, it would save limitation as regards the whole decree in favour of all the decree-holders—*Nanda* v. *Raghunandan*, 7 All. 282.

A decree for partition is a decree in favour of both the plaintiff and the defendant; consequently an application by the plaintiff (one co-sharer) to execute it will keep it alive in respect of a subsequent application by the defendant (another co-sharer) for execution—*Sheikh Khoorshed* v. *Nubee*, 3 Cal 551; *Mohun Chunder* v. *Mohesh Chunder*, 9 Cal. 568; *Vasudeva* v. *Vithal Sastry*, 43 M.L.J. 379, 70 I.C. 296, A.I.R. 1922 Mad. 456; *Ramasami* v. *Narayana*, 42 M.L.J. 94. A.I.R. 1922 Mad. 327, 65 I.C. 990; this is so even where the decree partly grants separate possession over certain lands and partly grants joint possession over other lands—*Babu Lal* v. *Kanhai*, A.I.R. 1952 All. 303.

A father obtained a decree declaring him entitled to a share of certain property on partition, but he never executed it. Subsequently his son obtained a decree declaring him entitled to a certain share of what the father should obtain under the former decree, and applied to execute his father's decree, giving notice to his father, who refused to join in the application. Subsequently the father applied to execute his decree,

It was held that although the effect of the son's decree was not to make him and his father joint decree-holders in respect of the father's decree, the son was a transferee, by operation of law, of part of his father's decree, and was entitled to make the application he had made, which was consequently an application in accordance with law and kept the father's decree alive—*Ramaswami* v. *Anda Pillai*, 14 Mad. 252 (reviewing *Ramaswami* v. *Anda Pillai*, 13 Mad. 347).

In the case of a joint and several decree an application for execution made against any one of the judgment-debtors is a step-in-aid of execution against all—*Kamal* v. *Birjinder*, 23 Pat L.T. 734, A.I.R. 1942 Pat. 285.

Where a decree awards mesne profits against A and B jointly and costs against A, B, and C jointly, an application to execute the decree for mesne profits against A and B keeps alive the right to execute the decree for costs against C—*Subramanya* v. *Alagappa*, 30 Mad. 268, followed in *Puttayya* v. *Puttanayya*, 47 M.L.J. 608, A.I.R. 1925 Mad. 152, 84 I.C. 897.

Where a decree is jointly passed against all the defendants in one matter, and severally against different defendants with respect to other matters, the first para of this Explanation should apply to that portion of the decree which is passed severally, and the second para of the Explanation will apply to that portion of the decree which is passed jointly. In such a case, the execution of the joint portion of the decree against one of the joint judgment-debtors will not keep the decree alive so as to save from limitation an application for execution of the several portion of the decree against a judgment-debtor who was not a party to the prevous execution proceeding. Because, while the decree-holder was executing the joint portion of the decree against one of the joint judgment-debtors, there was nothing to prevent him from executing the other portion of the decree against the several judgment-debtors who were liable thereunder —*Sahu Nandlal* v. *Sahu Dharam*, 48 All. 377, 24 A.L.J. 465, 94 I.C. 961, A.I.R. 1926 All. 440. But the Madras High Court holds that a decree is a joint decree if any portion of the relief given in the decree is against the defendants jointly, even though some other reliefs may be given against each defendant separately—*Pattanaya* v. *Pattayya*, 50 M.L.J. 215, 92 I.C. 782, A.I.R. 1926 Mad. 453 (following 30 Mad. 268); *Vyravan* v. *Rayalu*, (1951) 1 M.L.J. 298, 64 M.L.W. 824, A.I.R. 1951 Mad. 844. The Patna High Court has taken the same view in *Sarju Prasad* v. *Deoki*, *A.I.R.* 1940 Pat. 147 and in *Sarju* v. *Baldeo*, 25 Pat. 95, 27 Pat.L.T. 205, A.I.R. 1946 Pat. 371 and has held that in such a case the decree must be regarded as a joint decree even though the decree provides for separate possession of some properties in a suit for partition. The Calcutta High Court has also taken the same view in *Mahomed Ishak* v. *Karunamoy*, I.L.R. (1946) 1 Cal. 184, 50 C.W.N. 155, 81 C.L.J. 207, A.I.R. 1946 Cal. 266, and has held that a decree is a joint decree within the meaning of this Explanation if any one of the reliefs given in the decree is against the defendants jointly, even though some other reliefs may be given against the defendants separately. See also, *Charu* v. *Hrishikesh*, A.I.R. 1937 Cal. 547; *Dhulesaheb* v. *The Municipal Borough*, 51 Bom. L.R. 252, A.I.R. 1949 Bom. 260 where it is held that the test to be applied is whether the separate relief given against a particular defendant is really a part of the joint decree passed against all the defendants. If it is so, then the execution of the joint decree will keep alive the separate relief also; but if it is in substance a separate decree that principle will not apply.

The Explanation lays down that where a decree has been passed jointly against more persons than one, the *application* if made against any one or more of them shall take effect as against them all. But this Explanation does not say that an *order* made on such an application is to be binding against all. Therefore, where a decree was passed against 4 persons, and an application for execution was made against two of

them after the period of limitation, but nevertheless the Court ordered execution, the *order* was not binding on the other two judgment-debtors who were not parties to the execution proceedings, and consequently they are not precluded from showing that the previous application was time-barred—*Harendra Lal* v. *Sham Lal*, 27 Cal. 210 (215, 216).

Where in a mortgage suit against the members of a joint Hindu family, it was found that a portion only of the mortgage debt was incurred for legal necessity, and in respect of such portion the usual mortgage decree was passed against all the defendants, and simultaneously a simple money decree for the balance was passed against the two executants of the bond in suit, *held* that the decree-holder's application for execution of the decree for sale would keep alive the simple decree passed against two of the defendants—*Ram Brichh Rai* v. *Deo Tewari*, 44 All. 166, 65 I.C. 358, A.I.R. 1922 All. 388. Where in a suit on a mortgage, a decree for sale in respect of the mortgaged property in respect of certain amount is passed against all the defendants and a personal money-decree for a different sum is passed against some of the defendants, the application for execution of the money portion of the decree must be filed within three years from the date of the decree as the decree was not a joint decree—*Sri Hanumanjee Idol* v. *Surajdeo*, 23 Pat. 150, 1944 P.W.N. 132, A.I.R. 1944 Pat. 188. Where in a mortgage suit a mortgage decree is passed only against the Hindu father's share in the family property and subsequently a money decree is passed against the son to the extent of his share in the said property, there is no joint decree against the father and the son within the meaning of the Explanation and the final order in an execution application against the son would not save the bar of limitation against the father—*Vyravan* v. *Rayalu*, (1951) 1 M.L.J. 298, 64 M.L.W. 824, A.I.R. 1951 Mad. 844.

A decree was passed against some major persons and two minors. Application was at first made to execute the decree against the minors. The decree as against the minors was set aside on objection being taken by them. The decree-holders thereupon applied to execute the decree against the major judgment-debtors. *Held* that the prior application against the minor only took effect against all the judgment-debtors, and helped to keep the decree alive, as the liability of the minors and of the majors was a joint liability—*Lalta Prasad* v. *Suraj Kumar*, 31 All. 309.

The latter portion of the 2nd para of the Explanation I lays down that if the judgment-creditor does something which keeps alive a joint decree as against one of the joint judgment-debtors, the decree is to be regarded as alive as against all the joint judgment-debtors, and if it is alive, it is of course capable of execution. But where one of the joint judgment-debtors has prevented the decree-holder by fraud or force from executing his decree against that judgment-debtor, he is no doubt entitled to claim extension of time against the person, but not against the other judgment-debtor who has not prevented him by force or fraud. Explanation I does not apply to this case, because the *judgment-creditor has done nothing* to keep alive the decree but relies upon something (*i.e.*, fraud or force) which one of his judgment-debtors has been doing—*Abdul Khader* v. *Ahammad*, 38 Mad. 419 (422). On the same principle it has been held that suspension of the running of limitation against one of the judgment-debtors owing to the supervening of insolvency so far as he is concerned, cannot keep the remedy of the decree-holder alive against the other judgment-debtors, because there is no bar to the decree-holder executing the decree against the other judgment-debtors during the pendency of the insolvency proceedings against one of them—*Bijoy* v. *Nageshwar*, 1938 P.W.N. 397, A.I.R. 1938 Pat. 395; *Sivalinga* v. *Srinivasa*, I.L.R. (1948) Mad. 653, (1947) 2 M.L.J. 583, A.I.R. 1949 Mad. 346; *Seethayya* v. *Venkanna*, (1951) 2 M.L.J. 299, 1951 M.W.N. 557, A.I.R. 1951 Mad. 1010.

Where the rights and liabilities are separate and several an application by one party will not enure to the benefit of the other. So where under a decree in a suit for redemption of mortgage the liability of the defendant is to surrender possession of the property on receipt of the mortgage money and that of the plaintiff to pay the costs of the defendant, the liability cannot be said to be a joint liability. Hence an execution application by the defendant for costs does not enure for the benefit of the plaintiff—*Ouseph* v. *Varki*, A.I.R. 1952 Tra-Co. 78.

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against all the representatives because the liability of all the representatives is a joint one—*Krishnaji Janardan* v. *Murarav*, 12 Bom. 48; *Ram Anuj* v. *Hinghku Lal*, 3 All. 517; *Arusupalli* v. *Marikuruthu*, 22 M.L.J. 169, 13 I.C. 313; *Akshoy* v. *Nalini*, 54 C.W.N. 815. 1950 Cal. 493. Similarly an application for execution by some only of the decree-holder's legal representatives, though not purporting to be on behalf of the other legal representatives also, is sufficient to save limitation as regards all—*Vasudevapatta* v. *Narayanapanigrahi*, 1916 M.W.N. 112, 31 I.C. 853. The term "representatives" in Explanation 1 of this Article does not apply to transferees *pendente lite—Gendmal* v. *Laxman*, I.L.R. (1944) Nag. 852, A.I.R. 1945 Nag. 86.

Execution against surety:—Where after the passing of a decree a party has stood as surety for the due performance of the decree, it may be executed against the surety in the same manner as it may be executed against the defendant, under sec-253, C. P. Code, 1882 (sec. 145 of the present Code). But that does not imply that the surety is jointly liable with the principal debtor, or that the decree is "jointly passed" against the principal debtor and surety within the meaning of this Explanation. Unless the *decree is expressly passed against both of them jointly*, no joint liability will be deduced by combining the surety bond with the provisions of sec. 253 of the C. P. Code, and an application for execution against one will not keep the decree alive against the other. In other words, the time for an application for execution against the surety runs from the *date of the decree*, and not from the date of any previous application made against the judgment-debtor—*Narayan* v. *Timmaya*, 31 Bom. 50, 8 Bom.L.R. 807; *Yusuf Ali* v. *Sayad Amin*, 47 Bom. 778 25 Bom.L.R. 810, A.I.R. 1923 Bom. 366, 73 I.C. 233; *Raghunandan* v. *Kirtyanand*, 8 Pat. 310, A.I.R. 1929 Pat. 595 (596), 120 I.C. 309; *Mahomed Cassim* v. *Jamila*,, 6 Rang. 334, A.I.R. 1928 Rang. 282 (283), 111 I.C. 479. Where the sureties had not made themselves liable for any part of their decretal amount, but had only made themselves personally liable for a certain amount, as distinct from the decree, the sureties were not co-judgment-debtors with the principal debtors and an execution, taken against them does not save limitation against the principal debtors—*Birendra* v. *Tulsi Charan*, 85 I.C. 657, A.I.R. 1926 Cal. 267.

On the other hand, the Allahabad High Court is of opinion that if a party stands surety for the payment of a decretal amount, the effect is that the decree may be said to have been passed jointly against the original judgment-dobtor and his surety. Therefore, an application for execution against a judgment-debtor or against any *one* of the sureties affords a starting point for a fresh period of limitation in respect of a subsequent application, even though this latter application is made against a *different* surety—*Badr-ud-din* v. *Muhammad Hafiz*, 44 All. 743 (744), 20 A.L.J. 726, A.I.R. 1922 All. 481, 77 I.C. 129, affirming *Muhammad Hafiz* v. *Muhammad Ibrahim*, 43 All. 152. Where a decree-holder, after executing the decree against the principal judgment-debtor and getting part satisfaction, files an application against the surety more than three years after the date of the decree, the case is governed by Art. 182 (5), Limitation Act. Explanation I to the Article does not apply to the case. The prior

execution against the principal judgment-debtor saves limitation against the surety also—*Gangaraju* v. *Subbayya*, A.I.R. 1935 Mad. 188, 68 M.L.J. 119, 1935 M.W.N. 90, 41 L.W. 148. 58 Mad. 276, 155 I.C. 864. The same view has been taken in *Bhikulal* v. *Govind*, 1951 N.L.J. 288, A.I.R. 1951 Nag. 440. The Bombay High Court has also taken the same view and has held that a decree executed against a judgment-debtor alone can be executed against the surety even though no execution was taken against him within three years from the date of the decree. The reason given is that the last sentence in this Explanation must clearly be read with the earlier part of Paragraph 2 regarding more than one judgment-debtors or persons against whom an order is passed, the expression "passed jointly against more persons than one" being in contradiction to the expression "distinguishing portions of the subject-matter as payable or deliverable by each." The first parts of the two paragraphs of this Explanation provide a clarification of or an exception to the general principle of clause (5) of this article, and the second parts of the said paragraphs must be regarded, as amounting to provisos re-affirming that general principle in cases other than those to which the said exception would apply. Therefore the scope of the Explanation can not be used in determining the scope of clause (5)—*Vyasrao* v. *Ramchandra*, 47 Bom.L.R. 434, A.I.R. 1944 Bom. 489. This decision has been followed in *Bhawani* v. *Naranibhai*, 49 Bom.L.R. 554, A.I.R. 1948 Bom. 13. Where an execution of a decree for possession is stayed on the judgment-debtor furnishing security for mesne profits during the pendency of the appeal against the decree, the application for realisation of mesne profits against the surety after the dismissal of the appeal is governed by this Article and not by Art. 181—*Nanu* v. *Amar*, 40 P.L.R. 473, A.I.R. 1938 Lah. 590. The Oudh Chief Court, however, does not admit that the decree can be said to be jointly passed against the judgment-debtor and the surety, because when the decree was, passed the surety did not appear on the scene. Art. 182 does not apply, but Art. 181, and the starting point of limitation for execution against the surety is not date of the decree, because time cannot run against the surety before he signed the surety-bond and undertook the liability. Time would run from the date of the last application for execution against the judgment-debtor—*Shyam Lal* v. *Nasiruddin*, 8 Luck. 427, 10 O.W.N. 571, A.I.R. 1933 Oudh 209 (212, 213), 143 I.C. 808.

Where a surety was liable for the principal debt only and not for interest and costs, an application for execution against the surety cannot operate to keep the decree alive in respect of a subsequent application for execution against the principal debtor to recover the interest and costs, because there was not joint liability of the surety with the principal debtor for interest and costs—*Kusaji* v. *Vinayak*, 23 Bom. 478.

Explanation II—Proper Court—See Note 710 *ante*.

183. To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an Order of the Supreme Court.	Twelve years.	When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: Provided that when the judgment, decree or order has been revived, or some part of the principal money secured

	on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors, payments or acknowledgments, as the case may be.

This Article corresponds to Art. 180 of Act XV of 1877.

The words "Supreme Court" have been substituted for the words "His Majesty in Council" by the Adaptation of Laws Order, 1950 issued under the Constitution of India.

721A. Application:—The filling of a tabular statement in accordance with O. 21 r. 11 before the Master, who is the officer of the High Court designated to receive applications, amounts to an *application* to enforce the decree of the High Court under this Article—*Atarmoni* v. *Bepin*, 55 Cal. 1341, A.I.R. 1929 Cal. 193 (195), 115 I.C. 83.

722. Order of the Privy Council:—Although an order of His Majesty in Council may confirm a decree of the Court below, that order is the paramount decision in the suit, and any application to enforce it is, in point of law, an application to execute the order and not the decree which it confirms. Article 183 applies to it, and time runs from the date of such order—*Luchman Pershad* v. *Kishun Pershad*, 8 Cal. 218; *Kamini Debi* v. *Aghore Nath*, 14 C.W.N. 357, 11 C.L.J. 91, 4 I.C. 402; *Fatteh Narain* v. *Chundrabati*, 20 Cal. 551; *Narsingh Das* v. *Narain Das*, 2 All. 763. If the preliminary mortgage-decree on which the final decree is based is affirmed by the Privy Council on appeal from the preliminary decree the effect of the order of the Privy Council is not to destroy but to affirm the final decree passed during the pendency of the appeal, and the time within which the final decree could be enforced is twelve years from the date of the order of the Privy Council by reason of this article—*Bholanath* v. *Jogendra*, I.L.R. (1939) 1 Cal. 477, 69 C.L.J. 355, 43 C.W.N. 401, A.I.R. 1939 Cal. 601.

But an order of the Privy Council dismissing an appeal for want of prosecution is not an order which judicially deals with the matter in suit; therefore it is not an order contemplated by this Article. The only decree capable of execution is the High Court's appellate decree, and not the order of the Privy Council, and consequently Article 182, and not Article 183, applies—*Abdul Majid* v. *Jawahir*, 36 All. 350 (353) (P.C.), 18 C.W.N. 963, 12 A.L.J. 624, 27 M.L.J. 17, 16 Bom.L.R. 395, 23 I.C. 649, A.I.R. 1914 P.C. 66 (reversing 33 All. 154).

An application for execution of a final decree prepared by the District Judge in pursuance of an Order in Council passed on an appeal against a preliminary decree in a mortgage suit is governed by this Article and not by Article 182, since it is really one to enforce an Order of the Privy Council and not the decree of the District Judge. The preparation of the final decree by the District Judge is purely a ministerial act to enable the order of His Majesty in Council to be enforced—*Bhagwanta* v. *Dewan Zamir Ahmad*, 3 Pat. 596 (605), 5 P.L.T. 451, A.I.R. 1924 Pat. 576, 78 I.C. 766.

Whether the order passed by His Majesty in Council be right or wrong, the Indian Courts are not competent to go behind that order, but are bound to give effect to that order, and to punctually observe, obey and carry the same into execution—*Somer Singh* v. *Prem Dei*, 3 Pat. 327 (332), A.I.R. 1925 Pat. 40, 5 P.L.T. 21, 79 I.C. 794.

722A. "Enforce":—Where a High Court in the exercise of its ordinary original civil jurisdiction passed a decree for sale under sec. 88 (old) of the Transfer of Property Act, an application under sec. 89 of that Act for an order absolute for sale of the mortgaged property was held to be an application to "enforce" the preliminary decree. "To enforce" in this article is wider than "to execute" a decree in Art. 182 and should be interpreted as equivalent to "to give full effect to"—*Jaggannath* v. *Chimanlal*, I.L.R. (1945) 1 Cal. 102, 84 C.W.N. 645, A.I.R. 1949 Cal. 113; *Ram Krishna* v. *Ratan Chand*, A.I.R. 1956 All. 32; *Shamrao* v. *Asaram*, A.I.R. 1956 Nag. 129. The word "enforce" is not limited to realisation by execution, but may have a wider meaning, *e.g.*, the passing of an order absolute for sale—*Munna Lal* v. *Sarat*, 42 Cal. 776 (779) (P.C.) (affirming *Amlook* v. *Sarat*, 38 Cal. 913). This decision was given with reference to the law as it stood before the passing of the C. P. Code, 1908. After the passing of this new Code, the application by a mortgagee decree-holder under O. 34, r. 5 is an application for a *final decree for sale* (as distinguished from an application for an *order absolute* for sale), and it is doubtful whether the above ruling would apply under the new Code. It has been held by the Calcutta High Court in *Sisir* v. *Srish*, 43 C.W.N. 537 that this article does not apply to an application for final decree in a mortgage suit as it is not one to enforce the preliminary decree. The same view has been taken in *Jesinglal* v. *Gangadhar*, I.L.R. (1938) Bom. 273, 40 Bom.L.R. 507, A.I.R. 1938 Bom. 354.

An application to enforce an order absolute for sale passed by the High Courts must be made within 12 years from the date of passing the order—*Apurba Krishna* v. *Rash Behary*, 47 Cal. 746, 60 I.C. 880. But in a recent case the Calcutta High Court has held that what is barred after 12 years under this Article is an application when that application is to enforce the High Court's judgment or decree. Where there is no such application, this Article has no operation—*Nirmala* v. *Sudhir Kumar*, 96 C.L.J. 31, A.I.R. 1955 Cal. 484. See also *Lala Baijnath* v. *Nursingdas*, 61 C.W.N. 494, A.I.R. 1958 Cal. 1.

An application for a personal decree under O. 34, r. 6, C. P. Code, is an application for a new decree, and is not an application to enforce a judgment or decree within the meaning of this Article—*Pell* v. *Gregory*, 52 Cal. 828 (F.B.), 29 C.W.N. 678, A.I.R. 1925 Cal. 834, 89 I.C. 1.

An application under sec. 144, C.P. Code for restoration to possession of property which had been taken possession of by the other party in execution of a decree of the High Court, which had since been reversed by the Privy Council, is an application to enforce an order of the Privy Council, and is governed by this Article—*Brij Lal* v. *Damodar*, 44 All. 555, 20 A.L.J. 456, 66 I.C. 545, A.I.R. 1922 All. 238; *Sohan* v. *Baijnath* 50 All. 767, 26 A.L.J. 587, A.I.R. 1928 All. 293 (294), 112 I.C. 876. The Calcutta High Court has held that such an application cannot be regarded as one for *enforce-*

ment of the final judgment or decree within the meaning of this article, but is one for relief which is *consequential* upon the appellate Court's decree of reversal. Therefore this article has no application to such an application and Art. 181 governs such an application—*Birendra* v. *Surendra*, I.L.R. (1940) 1 Cal. 486, 44 C.W.N. 438, 71 C.L.J. 127, A.I.R. 1940 Cal. 260. Where the High Court directed that the appellant should pay costs to the respondent who thereupon realised the costs, but the Privy Council on appeal directed the parties to pay their own costs, an application by the appellant under sec. 144, C. P. Code to recover the costs realised by the respondent is an application to enforce the order of the Privy Council and falls under Article 183—*Madhusudan* v. *Brij Lal*, 61 I.C. 806 (All.).

Since an application to enforce a decree is virtually an application for execution of a decree, a minor is entitled to claim the benefit of sec. 6—*Kurgodigouda* v. *Ningangouda*, 41 Bom. 625 (629), 19 Bom.L.R. 638, 41 I.C. 238.

The right to enforce a decree *prima facie* accrues from the date of judgment. The time for preparation of decree including assessment of costs cannot be deducted in computing the period for an application for execution—*Raghunath & Co.* v. *Ram Gopal*, I.L.R. (1939) Lah. 319, 41 P.L.R. 105, A.I.R. 1939 Lah. 110.

A person who has obtained a decree from the Privy Council for costs against the father since dead can enforce that decree against the sons and can proceed (under sec. 53, C. P. Code) at once against the property in the hands of the sons who are liable under the Hindu law for the payment of the debts of their deceased father. Such an application is governed by Art. 183. Art. 120 cannot apply as the proceeding is not a *suit* but an application—*Chandra Chur* v. *Shyam Kumari*, 11 Pat. 445, 13 P.L.T. 719, A.I.R. 1923 Pat. 261 (264), 139 I.C. 397.

An application for transmission of the order in Council under Or. 45, r. 15, C. P. Code is one for enforcing the Order. The transmission order is a *sine qua non* for execution proceedings—*Partap* v. *Harkishan*, 199 I.C. 46.

723. Decree of the High Court:—This Article applies to a judgment of the High Court in its insolvency jurisdiction, because such a judgment is one passed by the High Court in the exercise of its ordinary original civil jurisdiction, and not by way of special or extraordinary action—*In the matter of Condas Narrondas*, 13 Bom. 520 (533) (P.C.). So also an order passed by the High Court under sec. 186, Companies Act, is an order passed in the exercise of its Ordinary Original Civil Jurisdiction and is governed by this Article and not by Art. 182—*Banaras Bank Ltd.* v. *Jyoti*, A.I.R. 1951 All. 362. Judged by the test laid down by Lord Hobhouse in In the matter of *Candas Narrondas*, supra, the jurisdiction conferred on the Madras High Court by the Banking Companies Act, 1949, is part of its ordinary original civil jurisdiction within the meaning of this Article. That jurisdiction has to be exercised in the ordinary course of law without any special step being necessary to assume it—*Munia Servai* v. *Hanuman Bank Ltd.*, A.I.R. 1958 Mad. 418. But though by reason of sec. 164, Companies Act the District Judge has the same powers and the same jurisdiction as the High Court, yet the District Judge does not become a High Court for the purposes of this article. Hence to a payment order passed by the District Judge under powers conferred upon by sec. 164, Companies Act, this article has no application and the only article applicable is Art. 182—*Panna Lal* v. *Jain Bank*, A.I.R. 1938 Lah. 368.

A decree does not become a decree of the High Court merely because it has been transferred to that Court for execution and may have to be enforced in the same manner as a decree of the High Court—*per Trevelyan*, J. in *Jogemaya* v. *Thackomani*, 24 Cal. 473 (491). The rule of limitation depends upon the status of the Court which

passed the decree, and not upon the status of the Court executing it, and so if a decree of a mofussil Court is transferred to the High Court for execution, the limitation for execution is 3 years and not 12 years—*Tincowrie* v. *Debendra*, 17 Cal. 491. So also, a decree passed by the High Court on appeal from a mofussil Court is not a decree of the High Court within the meaning of this Article—*Kisto Kinkar* v. *Burrodacaunt*, 10 B.L.R. 101 (P.C.), 17 W.R. 192; *Ram Charan* v. *Lakhi Kant*, 7 B.L.R. 704 (F.B.), 16 W.R. 1.

Under sec. 15 of the Arbitration Act (1899), an award filed in Court is enforceable as if it were a decree of that Court and for the purposes of execution is governed by the period of limitation prescribed for execution of decree of that Court. Consequently, an award filed in the Chartered High Court under that section is governed by Article 183 of the Limitation Act—*Belvedere Jute Mills Ld.* v. *Hardwarimull & Co.*, 31 C.W.N. 1097, 104 I.C. 808, A.I.R. 1927 Cal. 853.

If a decree passed by the late Chief Court of Lower Burma is executed by the Rangoon High Court which has succeeded it, the decree does not become a decree of the High Court. Consequently, Art. 182 applies, and not Art. 183. Sec. 26 of the Burma Courts Act (IX of 1922) simply lays down that the decree passed by the Chief Court "shall be deemed for the purpose of execution to have been passed or made by the High Court." The object of this section is simply and solely to provide for the execution of decrees of the Chief Court by the High Court; it is not intended that a decree of the Chief Court should come under a different law of limitation simply because it is executed by the High Court. It does not say that the decree shall be deemed to be a decree of the High Court for all purposes—*Allibhai* v. *Md. Noormahomed*, 6 Rang. 566, A.I.R. 1928 Rang. 317, 114 I.C. 674.

724. Revivor:—The word "revivor" is a term of art, which the Legislature ought to have defined but has not defined. It is a term borrowed from English law, and in the absence of a definition in this Act, the Indian Judges and lawyers have to grope among the English authorities in the quest of a guiding principle—*Palaniappa* v. *Valiammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (254), 118 I.C. 775. In using the term 'revivor of judgment' in this Article, the Legislature had in view the procedure embodied in Order XXI, r. 22, C. P. Code, the object of which was to give notice so as to prevent undue surprise to a judgment-debtor, where more than one year had elapsed between the date of the decree and the applicatiin for execution, or when the decree was sought to be enforced against the legal representatives of the party against whom the decree was originally made—*Jogendra* v. *Shyam Das*, 36 Cal. 543. The Statute of limitation to which the judgment is subject ceases to run upon a revivor of judgment, and time runs afresh form the date of the revivor—*Ibid.* This doctrine of revivor owes its origin to the writ of *scire facias* prevailing in English and Irish Courts. By the common law of England, in the case of judgments in personal actions, if more than a year and a day passed without execution, the plaintiff was not entitled to take execution without a writ of *scire facias*; and the effect of an award of execution in pursuance of the *scire facias* was to revive the judgment. The writ of *scire facias* is now almost out of use in England, and is replaced by the equitable remedy of filing a bill of revivor.

To constitute a revivor of the decree, there must be expressly or by implication a determination that the decree is still capable of execution and that the decree-holder is entitled to enforce it. *Raja of Ramnad* v. *Velusami*, 48 I.A. 45, A.I.R. 1921 P.C. 23, *Ramnath* v. *Amarchand*, I.L.R. (1954) Bom. 377, 55 Bom. L.R. 980, A.I.R. 1954 Bom. 208. *An order for execution* of the decree made after notice to the judgment-debtor (to show cause why execution should not issue) as provided for in sec. 248

(now O. 21, r. 22), C. P. Code will operate as a revivor because it necessarily implies such a determination—*Kamini* v. *Aghore*, 14 C.W.N. 357, 11 C.L.J. 91, 4 I.C. 402; *Jagendra* v. *Shyam Das*, 36 Cal. 543, 9 C.L.J. 271 (dissenting from *Tincowrie* v. *Debendra*, 17 Cal. 491); *Tribikram* v. *Badri*, 1 P.L.J. 385, 20 C.W.N. 1051, 36 I.C. 633; *Futteh Narain*, v. *Chandrabati*, 20 Cal. 551; *Suja Hossein* v. *Monohar*, 24 Cal. 244 (247); *Umrao* v. *Lachmi*, 26 All. 361 (364); *Ashootosh* v. *Doorga*, 6 Cal. 504 (511); *Ganapathi* v. *Balasundara*, 7 Mad. 540 (543). So an order of attachment of the properties of the judgment debtors after notice to them under Or. 21, r. 22, C. P. Code amounts to a revivor of the decree, although the notice to one of the judgment debtors who is a minor is not served on the proper guardian of the minor, but on a wrong guardian—*Sarju* v. *Bhagwat*, 19 Pat.L.T. 193, A.I.R. 1938 Pat. 372. So also when a person is a minor at the date of the decree a notice served on his guardian would be sufficient and would operate as a revivor though in fact he has become a major subsequently—*Gopalarayudu* v. *Gopalakrishnayya*, (1945) 1 M.L.J. 284, A.I.R. 1945 Mad. 325. But the mere fact that an application has been made and notice has been issued to the judgment-debtor, without their terminating in an *order for execution* cannot create a revivor of the decree—*Manohar* v. *Falteh Chand*, 30 Cal. 979, 7 C.W.N. 793; *Har Narain* v. *Dayabhai*, 19 Pat. 909, 1940 P.W.N. 896, A.I.R. 1940 Pat. 596. An order for execution made after one year from date of the decree *without issue of notice to the judgment-debtor* under sec. 248, C. P. Code, has not the effect of reviving the decree—*Venkatesa Perumal* v. *Srinivasa*, 33 Mad. 187.

Where, however, an order contains a qualification as to limitation, *e.g.*, when the order is stated to be without prejudice to the contention of the judgment-debtors that the execution of the decree is barred by limitation, it can not be said to be a "positive order" that the decree-holder should be allowed to execute the decree. The Court in such a case does not determine the question whether the execution is barred or not, and such order cannot operate as revivor—*Hasan* v. *Isap*, I.L.R. (1939) Bom. 27, 40 Bom.L.R. 1180, A.I.R. 1939 Bom. 51.

Where the objection of the judgment-debtor as to limitation was overruled, and it was decided that the decree was not barred by limitation, the effect of the order was to entitle the decree-holder to proceed with the execution, and there was consequently a revivor of the decree-*Kamini* v. *Aghore*, 14 C.W.N. 357, 11 C.L.J. 91, 4 I.C. 402. But proceedings for obtaining leave under Or. 21, r. 50, C. P. Code is not an application for execution; nor does the leave granted amount to any order for execution—*Har Narain* v. *Dayabhai*, supra. An order by the High Court on an application by the decree-holder for leave under Or. 21 r. 50, C. P. Code to proceed against certain partners of a firm granting such leave does not "revive" the decree—*Firm Mohar Lal* v. *Har Krishna*, 28 Pat. 935, A.I.R. 1951 Pat. 339. A contrary view has been taken by the Calcutta High Court in *Jagannath* v. *Chimanlal*, I.L.R. (1945) 1 Cal. 102, 48 C.W.N. 645, A.I.R. 1949 Cal. 113 on the ground that such an application is ancilliary to an application for execution and is one to enforce a decree. So also, where on an application being made for execution, one of the judgment-debtors applied for adjournment and obtained leave to sue for a declaration that he was not bound by the decree on the ground that he was not a partner of the defendant firm against which the decree was obtained, and then the suit was dismissed on the ground that he was a partner, *held* that the dismissal of that suit did not amount to a revivor of the decree; the only point for determination in that suit was whether the judgment-debtor was or was not a partner of the firm; no question of the decree-holder's right to execute the decree was raised therein, and the order of dismissal could not be regarded as an order determining the question whether the decree-holder had a subsisting right to execute the decree—*Muthiar* v. *Chidambaram*, 55 Cal. 578, 32 C.W.N. 336, (341, 342), 110

I.C. 404, A.I.R. 1928 Cal. 686. See also *Nirmala* v. *Sudhir*, 96 C.L.J. 31, A.I.R. 1955 Cal. 484. See, however, *Ramnath* v. *Amarchand*, I.L.R. (1954) Bom. 377, 55 Bom.L.R. 980, A.I.R. 1954 Bom. 208. If a decree is assigned, and the Court has recognised the assignment and has passed an order *allowing the assignee to execute* it, that amounts to a revivor and gives a fresh starting point of limitation—*Palaniappa* v. *Valiammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (256), 118 I.C. 775.

An order of the Master of the High Court for transmission of a decree to another Court for execution does not constitute a revivor within the meaning of Art. 183, nor does the notice issued by the master and served upon the judgment debtor before the order for transmission operate as a revivor—*Sarju Singh* v. *Bhagwat Prasad*, A.I.R. 1936 Pat. 398, 15 Pat. 102, 17 P.L.T. 317, 163 I.C. 411.

Where an Order in Council is transmitted to a subordinate Court for execution *without any notice* being given to the judgment debtors, it would not be a revivor of the Order—*Tribikram* v. *Badri*, 1 P.L.J. 385, 20 C.W.N. 1051, 36 I.C. 633.

An application for the transfer of a decree from the High Court to the District Court is not itself an application for execution and does not amount to a revivor of the decree—*Chatterput* v. *Saita Sumari Mull*, 43 Cal. 903 (F.B.), 20 C.W.N. 889, 36 I.C. 602; *Suja Hussein* v. *Monohar Das*, 22 Cal. 921; *Khaja Sahebuddin* v. *Afzal Begum*, 28 C.W.N. 963, 84 I.C. 68, A.I.R. 1925 Cal. 23; *Narain Das* v. *Banka Behari*, 78 I.C. 1001, A.I.R. 1925 Cal. 213, affirmed by the Privy Council in *Banku Behari* v. *Narain Das*, 54 Cal. 500 (P.C.), 31 C.W.N. 589, A.I.R. 1927 P.C. 73, 101 I.C. 24; *Palaniappa* v. *Valiammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (253), 118 I.C. 775; even if upon such application an order is passed for transfer of the decree, such an order is not an order for execution; nor does it show that the Court is of opinion that the execution is not barred. Consequently, it has not the effect of a revivor—*Chatterput* v. *Daya Chand*, 23 C.L.J. 641, 11 I.C. 216; *Suja Hussein* v. *Monohar Das*, 22 Cal. 921. But if an application for transfer of a decree is made after the expiry of one year, and the Court acting under sec. 248, C. P. Code (O. 21, r. 22) issues a notice to show cause why execution should not be granted, and on no cause being shown by the judgment-debtor, the Court makes an order for the transfer of the decree and the issue of a certified copy of the decree with a certificate of non-satisfaction, the order of the Court amounts to a revivor of the decree—*Suja Hossein* v. *Monohur*, 24 Cal. 244 (247) (following 6 Cal. 504 and 20 Cal. 551); *Umrao* v. *Lachmi*, 26 All. 361 (364). If an assignee of a decree applies for transfer of the decree to another Court for execution, and the Court passes an order transferring the decree and allowing the assignee to execute the decree, the order amounts to a revivor of the decree—*Palaniappa* v. *Valiammai*, supra.

Where execution cannot proceed without leave of the Court, the granting of the leave is a revivor of the decree. But as no leave is necessary for the arrest of the judgment-debtor, the superfluous issue of a notice under section 245B, C. P. Code (O. 21, r. 37) is not a revivor—*Chatterput* v. *Daya Chand*, 23 C.L.J. 641, 11 I.C. 216; *B. K. Mitra* v. *B. L. Choudhury*, 23 Pat. 923, A.I.R. 1945 Pat. 182.

As observed before, to constitute a revivor there must be a determination that the decree is capable of execution, and that the decree-holder is entitled to enforce it; and such determination must be made by a *Court* or person duly qualified to make it. Where after issue of notice under sec. 248, C. P. Code, 1882 (O. 21, r. 22, C. P. Code, 1908) and the judgment-debtor not appearing the *Registrar* ordered execution to issue, it was held that there was no *judicial* determination of the question whether the decree was capable of execution, and consequently the order did not constitute a revivor. The order of the Registrar was merely a ministerial act—*Chatterput* v. *Saita*

Sumarimull, 43 Cal. 903 (F.B.), 36 I.C. 602; *Narain Das.* v. *Banku Behari*, A.I.R. 1925 Cal. 213, 78 I.C. 1001. O. 21, r. 16 (proviso), C. P. Code lays down that if a decree is assigned, and the assignee applies for execution, notice of the application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections, if any. If, however, such notices have been given, and those persons did not appear to prefer any objection, and then the Registrar or Deputy Registrar, acting in behalf of the Court, passes an order for execution or an order for transmission of the decree to another Court for execution, such an order is not merely a ministerial act, but an *order of the Court speaking through the Registrar*, and constitutes a revivor—*Palaniappa* v. *Valiammai*, 52 Mad. 590, A.I.R. 1929 Mad. 252 (256), 118 I.C. 775, 56 M.L.J. 555.

An order bringing on record legal representatives of decree-holder and allowing them to execute the decree is an order of revivor within the meaning of this Article—*Murugesam* v. *Kanniappa*, (1951) 2 M.L.J. 194, 64 M.L.W. 702, A.I.R. 1952 Mad. 124.

A revivor of decree against one of two-judgment-debtors would not keep the decree alive against the other judgment-debtor—*Krishnaiyah* v. *Gajendra*, 40 Mad. 1127, 33 M.L.J. 533, 40 I.C. 609; *Har Narain* v. *Dayabhai*, 19 Pat. 909, 1940 P.W.N. 896, A.I.R. 1940 Pat. 596; *Iswar* v. *Ram Kristo*, 51 C.W.N. 560; *Murugasam* v. *Kannaiappa*, (1951) 2 M.L.J. 194, 64 M.L.W. 702, A.I.R. 1952 Mad. 124. A decree was passed against two persons in 1900, in the original side of the High Court. An application was made in 1903 for execution against one judgment-debtor only, and an order was made granting execution against him. In 1914 the decree-holder applied for execution against the other judgment-debtor. It was held that this application was barred, in as much as the revivor of the decree against one of the judgment-debtors did not save the decree from being barred as against the other judgment-debtor after 12 years from the date of the decree—*McLaren* v. *Veeriah*, 38 Mad. 1102, 38 I.C. 1003.

The proviso to this article has application only if the application for execution on the face of it is made more than 12 years after the date of the decree—*Shavji* v. *Haridas*, 45 Bom.L.R. 400, A.I.R. 1943 Bom. 238.

"Payment:—A fresh starting point is given from the time of payment, *i.e.*, the date of actual payment and not the date of order of payment passed by the Court —*Subapathi* v. *Shanmugappa*, 46 M.L.J. 453, A.I.R. 1924 Mad. 638, 78 I.C. 832.

The provisions of this Article regarding acknowledgment as well as payment are self-contained, and must be read independently of secs. 19 and 20—*Tugan Mull* v. *Ladhu Lal*, 10 Pat. 213, A.I.R. 1931 Pat. 218, 12 P.L.T. 88. Thus, the payment is not required to be made either by the judgment-debtor or by some person *duly authorised* by him in that behalf. It is sufficient if payment is made by some person on behalf of the judgment-debtor. The words of sec. 20 are not to be imported into this Article —*Probappa* v. *Desikachari*, 49 M.L.J. 101, 90 I.C. 1028, A.I.R. 1925 Mad. 1131.

Moreover, the word 'payment' is used in this Article in a wider sense than in sec. 20, and is not qualified in any way as to the mode in which the payment is to be made or as to the person who is to make it. Therefore a sum of money realised in execution in partial satisfaction of the decree amounts to payment and provides a fresh starting point for limitation—*Tugan Mull* v. *Ladhu Lal*, supra.

The expression "money secured by the decree" includes costs, and so a payment made by the judgment-debtor towards costs will give rise to a fresh starting point—*Tugan Mull* v. *Ladhu Lal*, supra.

An admission of liability in respect of a decree of a High Court which amounts to an acknowledgment within the meaning of sec. 19 is sufficient to extend the period

of limitation for execution of the decree, although the admission is not made to the decree-holder—*Sree Narain* v. *Bhagwan*, I.L.R. (1939) 2 Cal. 523, 44 C.W.N. 322, A.I.R. 1940 Cal. 210; *Lala Baijnath* v. *Nursingdas*, 61 C.W.N. 494.

725. Section 48, C. P. Code:—This Article is independent of sec. 230, C. P. Code, 1882 (sec. 48, C. P. Code, 1908) and not controlled by it. According to the express provisions of this Article, the decree-holder is entitled to a fresh period of 12 years from the date of every revivor, payment or acknowledgment; therefore the limitation provisions contained in section 48, C. P. Code do not apply to cases governed by this Article—*Mayabhai* v. *Trivuban Das*, 6 Bom. 258; *Ganapathi* v. *Balasundara*, 7 Mad. 540 (544); *Futteh Narain* v. *Chandrabati*, 20 Cal. 551. The signature of the advocate on the endorsement on the brief recording a consent decree is sufficient to comply with the requirements of the proviso under this Article—*Nirmala* v. *Sudhir*, 96 C.L.J. 31, A.I.R. 1955 Cal. 484. Sec. 48, C. P. Code ought not to be so construed as to conflict with the provisions of this Article of the Limitation Act. The provisions of the two Acts ought not to be so interpreted as to contradict each other, and section 230 of the Code of 1882 cannot be taken to limit this Article—*Jogendra* v. *Shamm Das*, 36 Cal. 543. Note that section 48 (2) (*b*) of the new C. P. Code of 1908 expressly exempts this Article from the operation of that section.

SECOND SCHEDULE.

[REPEALED BY THE REPEALING AND AMENDING ACT VIII OF 1930.]

THIRD SCHEDULE.

[REPEALED BY THE SECOND AMENDING AND REPEALING ACT XVII OF 1914.]

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