The Madras Law Journal.

PART II.] JULY, 1916. [VOL. XXXI.

NOTES OF INDIAN CASES.

Venkatanarayana Pillai *v.* **Subbammal**, I. L. R. 39 M. 107. (P.C.)

In this case we have an exposition from Lord Wrenbury of the doctrine of dependent relative revocation. It is really, says his Lordship, a question of intention. If by his will a testator gives property to A and by a codicil gives the same property to B and if in the event it turns out that B cannot take, it has to be ascertained from the language of the testator as found in his testamentary documents whether he intended that the gift to A should be displaced altogether or that it should be displaced only in favour of B and (if B cannot lake) the gift to A should remain. If the testator's language is that he revokes the gift to A and in lieu thereof he gives to B, it may well be that there is a revocation for all purposes. In this case it was not a valid disposition of the property by a previous will that was sought to be displaced by the later invalid disposition but an earlier authority to adopt by a later invalid disposition of property in favour of daughter's children who could not take if there was to be an adopted child. Their Lordships held the authority to adopt conferred by the previous will was not taken away by the subsequent will.

Subrahmanian Chettiar *v.* **Raja Rajesvara Dorai**, 39 M. 115. (P. C.)

In this case, their Lordships reaffirm the proposition that they laid down in *Ganesha Rao* v. *Tulajaram Rao*, [1] *viz.*, however supportable a compromise might be on other grounds it is invalid

1. (1913) I. L. R. 36 M. 295.

if it does not comply with the condition imposed by S. 462 of the Code of Civil Procedure, Their Lordships regard the provision making it necessary to obtain the leave of the Court as of great importance to protect the interests of minors. " It is not sufficient" say their Lordships quoting from *Manoher Lal* v. *Jadunath Singh* [1] " that the terms of the compromise are before the Court. There ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise and it ought to be shown by an order on the petition or in some way not open to doubt that the leave of the Court was obtained. "

The case is interesting also for the light it throws on the proper attitude to be adopted by Courts towards dealings with the trust estate by trustees. The trustees in the case had agreed to give a charge to the settlor and the charge had been utilised to give the creditor of the settlor in his turn a charge on the estate and the question was whether the charge was validly given. It was held by the High Court that the trustee had not acted in the matter in a reasonable way and therefore the charge was bad. It was contended that the giving of the charge was necessary to secure the consent of the settlor to the postponement of the charge in respect of his allowance which the proposed mortgagees insisted upon. Their Lordships repelled the argument by pointing out that there was no evidence on the one hand that the settlor would not have consented to the postponement without such promise, on the other that the mortgagees would have insisted upon such consent if the true legal position were explained to them. It was then argued that apart from the question whether the promise had proper consideration the charge in favour of the creditor could be supported as it was a proper thing to do in the circumstances the creditor having sued. This argument also their Lordships declined to accept on the ground that there was no evidence of any intention to create a charge apart from the agreement with the settlor.

---

1. (1906) I. L. R. 28 All. 585.

NOTES OF INDIAN CASES.

Budhu Singh *v.* Laltu Singh : I. L. R. 37 A. 604 (P. C.).

Between the brother's grandson and the uncle, who has the preferential title to succeed? This was the question involved in the case and opinion was sharply divided in India between the one view and the other. Logic and literal construction may be said respectively to characterise the attitude of the two schools. The Privy Council has pronounced in favour of the logical view and it seems to be idle to examine the position. The only thing that remains is to see to what extent the latest opinion of their Lordships will necessitate a re-consideration of views on kindred questions expressed in this Presidency on the basis of literal construction. But with all the deference that is due to that august tribunal, we are bound to say that we fail to perceive any conflict between *Parasara Bhattar* v. *Rangaraja Bhattar* [1] and *Surayya Buktha* v. *Lakshmi Narasamma* [2] though we welcome the decided expression of their Lordships' view that when there is a difference of opinion Judges ought to refer the question to a Full Bench. The view that the uncle comes before the brother's grand-son does not necessitate the conclusion that the brother's grand-son does not come in at all as heir. He comes in as a Sapinda after all the specified Sapindas are exhausted. On the question as to whether all persons within the limits of Sapinda relationship are entitled to come in, there does not seem to be any difference of opinion between the Calcutta High Court and the Madras High Court. Their Lordships' judgment on the other hand raises a doubt as to whether descendants beyond three degrees are entitled to come in at all and if they do, where they come in. There is no convincing explanation for the term "brother's son" not including brother's great-grand-son or is it that brother's great-grand-son also is according to their Lordships entitled to come in before the uncle? Then again, it is not quite clear whether their Lordships have over-ruled the Madras decision because that decision is partly based on the view of Devananda Bhatta who is a great South Indian authority but is not considered as such in Benares, though

1. (1880) I. L. R. 2 M. 202. 2. (1882) I. L. R. 5 M. 291.

the remarks of their Lordships as to the value of the enunciation in the Smriti Chandrika seem to be of general application. We are not also certain that the Privy Council intend that the spiritual efficacy theory is to be introduced in places where the Viramitrodaya is not an authority. To say that under the Mitakshara generally, capacity to offer funeral oblations is the test to be applied in discovering the preferential heir when Vijnaneswara never for once refers to that test but distinctly states that propinquity is the test, would be a curious perversion of things.

Madar Saheb *v.* **Kader Moideen :** I. L. R. 39 M. 54.

Holding a tenant-in-common in occupation of a house liable for the rent of the house, in the absence of exclusion can be justified only by an extension of the principle of *Watson & Co.* v. *Ramchand Dutt* [1], to all cases of occupation by a tenant-in-common, whether for making profit or for mere occupation purposes and whether it involves an exclusion or not. The case in *Watson & Co.* v. *Ramchand Dutt* [1], which came up for decision again on the question of limitation in (*Robert Watson & Co.* v. *Ramchand Dutt* [2]) was a case of profitable use of land by one co-owner in exclusive but lawful occupation. Anyhow that does not seem to be the English law. *Teasdale* v. *Sanderson,* [3] *Wheeler* v. *Horne,* [4] *M'Máhon* v. *Burchell* [5]. Lindley on Partnership, p. 47. If however the extension is permissible, then, apart from any difference that the circumstance that there was a previous lease should make, Art. 120 would seem to be the appropriate article of limitation applicable to the case, for Art. 62, the only alternative article that can be thought of is applicable only to cases of receipt of money. But in this case, we should think that the circumstance that there was the previous lease must make a difference. In the absence of any evidence to show that the defendant had performed his duty under the lease to deliver possession, his possession should have been regarded as wrongful and either Art. 36 or 39 ought to

1. (1890) I. L. R. 18 C. 10 (P. C.)
2. (1896) I. L. R. 23 C. 799.
3. (1864) 33 Beav. 534 : 55 E. R. 476.
4. Willes. 208.
5. (1846) 2 Phillips. 127 : 41 E. R. 889.

have been applied. It was equally open to the plaintiff to rely upon Art. 115 and claim damages for non-delivery. The applications of any of these articles would exclude Art. 120.

Baiznath Lala *v.* **Ramadoss** : I. L. R. 39 M. 62.

We think that the application of Art. 62 in this case is justified though it does not follow that cases like *Ramasami Chetty* v. *Harikrishna Chetty* [1] are wrongly decided. Art. 62 is obviously not intended to apply to all actions coming within the category of actions for money received to the use of the plaintiff. A suit for an existing consideration which has failed would, for instance be action of that kind under the English law (See *Mahomed Wahib* v. *MahomedAmeer* [2])but is provided for in a separate article here. That article can appropriately be applied only to cases where an action could be maintained at the date of the receipt of the money. See *Ramasami* v. *Anda Pillai* [3]. Restriction of the class of suits coming within an article by reference to the third column is supported by high judicial authority. See *Rangiah Goundan* v. *Nanjappa Rao* [4]. It may also be doubted if actions in the nature of actions for restitution can properly be held to be within the category of actions for money had to the use of the plaintiff.

Annamalai Chetti *v.* **Velayudha Nadar**, I. L. R. 39 M. 120. (F. B.)

This case overrules the decision in 29 M. 212. Under the ruling of the Full Bench, a contemporaneous agreement to give time is pleadable in bar of an action on a promissory note payable on demand and time begins to run under article 80 only after the expiry of the period. The wording of article 73 would seem to support the conclusion on the question of limitation and the analogy of Ss. 62 and 63 of the Contract Act (because those sections directly apply only to subsequent agreements) and the wording of S. 32 of the Negotiable Instruments Act would seem

1. (1911) 21 M. L. J. 705.
2. (1905) I. L. R. 32 C. 527 at 533.
3. (1896) I. L. R. 18 M. 347.
4. (1903) I. L. R. 26 M. 780.

to support the conclusion on the other question. An agreement not in writing would not be provable in view of S. 92 of the Evidence Act. A question might arise whether limitation for the action by a *bona fide* holder in due course without notice who would not be bound by the agreement would also commence at the same time. We fancy not, because though article 73 might not be applicable to the case, as he could sue even within the period fixed in the agreement, under Art. 80 so far as he is concerned time should run from the date of the note. As no man would take a note which upon its face is barred, such a conclusion would not lead to any hardship in practice. Another point which though it has not been considered in the case (the note having been admitted in evidence by the Lower Court) may have a material bearing upon the question is as to the stamp duty. Are not the two documents to be read together and stamped as a promissory note payable after the time fixed? The case in 19 M. 368, discusses that aspect of the case and the question before the Full Bench can hardly be said to be finally decided till that question also is answered.

NOTES OF INDIAN CASES.

Venkatasubba Rao *v.* The Asiatic Steam Navigation Company: I. L. R. 39 M. 1. (F. B.)

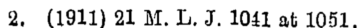
The conclusion arrived at in this case seems to be right though it is difficult to agree with some of the reasoning on which it is based. A suit for possession could not, in the nature of things, lie against a person not in possession, and in this case, the Railway Company not being in possession of the goods sued for, and in the absence of any case of conversion against them, the only relief that could be claimed against them, was damages for loss or non-delivery and both these cases being provided for in special articles of limitation, it was hopeless to contend that any other article relating to tort could apply to such a case. It was a different question, however, whether Art. 115 should not apply. The language of Art. 31 being wide enough to cover cases of action framed *in contract*, we do not think it was permissible to go behind the plain words of the article on a presumption against unscientific tinkering with the scheme of the Act by the Legislature, a presumption which in the case of no legislature, at all events with the Indian legislature, can be particularly strong. One of the reasons given for excluding Art. 49 is that suits for specific movable property will not lie except in the circumstances enumerated in S. 11 of the Specific Relief Act. We are afraid that their Lordships are here confusing suits for "specific movable," with suits for "specific delivery of movables." While S. 10 of the Specific Relief Act says that a person entitled to specific movable property may recover the same, S. 11 enumerates the cases in which specific delivery of particular articles of movable property may be directed. Though the Court cannot make an order for specific delivery, the suit is none the less a suit for specific movable property and the defendant shall have complied with the claim by an offer to deliver the specific article.

Vijayabhushanammal *v.* **Evalappa Mudaliar**: I. L. R. 39 M. 17.

We think their Lordships rightly held in this case that there was a splitting up of the mortgage and the plaintiff was entitled to recover only his moiety of the amount. It has been held for instance, that when a suit for redemption by one member of the family has been dismissed, the other members can recover only their shares. *Sundar Lal* v. *Chitammal* [1]. If in a suit between two mortgagees the priority is determined in one way and in a subsequent suit by another mortgagee, the priorities are determined to lie in a different way, the conflicting decisions are reconciled by utilising the priority declared by the later decision as between the parties to the prior suit in the manner declared therein. The same rule has been applied to solve difficult questions as to conflicting priorities raised by the Registration Acts in England—see Ghose on mortgages p. 429. Bar by limitation of the claim of one of the co-obligees has been held in some cases to effect a severance. See *Doraisami* v. *Nandisami* [2]. We do not see why the same principle should not apply where by reason of a prior litigation the interest of one of the parties entitled has been judicially determined and given effect to. On the other point decided in the case, that is to say the method of appropriating the amount paid we take leave to doubt the correctness of their Lordships' decision. S. 76 cl. (*h*) of the Transfer of Property Act and O. 34 R. 13 distinctly point to the contrary and S. 60 of the Contract Act applies only to *distinct debts* and not to portions of the same debt though becoming payable at different times. See I. L. R. 28 A. 25. Any how, it cannot apply when the principal has become due or there is no separate covenant for the payment of interest at stated periods.

---

1. (1906) I. L. R. 29 A. 215. 2. (1911) 21 M. L. J. 1041 at 1051.



NOTES OF INDIAN CASES.

Manilal Gangadas *v.* Secretary of State for India, I. L. R. 40 B. 166.

We are not sure if the learned judges have not placed too broad an interpretation on the word "misapplication" in S. 42 of the Bombay District Municipalities Act, when they hold that it will cover a case of embezzlement by Municipal servants. The corresponding provision in the Madras Act (S. 259) uses wider language by declaring the Councillors liable for 'the loss, waste, or misapplication' of Municipal Funds 'if such loss etc. is a direct consequence' of their neglect or misconduct.

On the question of limitation, it is not quite clear that the case cannot be brought under S. 10 of the Limitation Act. As laid down in *Parr* v. *The Attorney-General* [1], and *The Attorney-General v. Aspinall* [2], the Councillors may well be said to be trustees in whom Municipal funds are vested in trust for specific purposes. The provisions in the Indian Acts for the Government suing the Councillors would appear to be a substitute for (or perhaps a cumulative provision alongside of) the right of the Attorney-General (the Advocate-General in India) to sue on behalf of the public. If, however, some rule of limitation is to be applicable to the action, the case certainly does fall within the language of Article 149, for the article is not restricted to suits relating to property *belonging* to Government. In this view a somewhat peculiar position will arise under the Madras Act which gives the right of suit to the Municipal Council or the Secretary of State. So far as a suit by the Municipal Council is concerned, it will be governed by Article 36 of the Limitation Act, and it will be anomalous that a suit for the same purpose should be maintainable by the Secretary of State at any time within sixty years.

Wasappa *v.* Secretary of State for India, I. L.R. 40 B. 200.

The soundness of this decision does not appear to us beyond doubt. The principle of 12, Madras. 105, namely, that rights created by a statute should be enforced in the manner indicated by the statute, has, of course, no appplication to the case; but beyond referring to the decision in 9, Bombay. 131, the learned Judges give no reason for holding that orders under S. 523

1. (1842) 8 Cl. & F. 409, p. 413. 2. (1837) 2 My. and C., p. 616.

and 524, of the Criminal Procedure Code are always subject to the result of a Civil suit. It may be assumed that a person whose goods have been taken under S. 523 is not bound to make a claim under these sections; and where no claim is made, the declaration in S. 524 'that the property shall be at the disposal of the Government' may not affect his title to the property or his right to recover the same from the Government in the ordinary course. It may also be taken that a Magistrate is not *bound* to make an enquiry as to the *title* and any order that he may make without such enquiry will not prejudice the rights of the real owner. But if the owner does come in under the section and the Magistrate, after investigation, holds that his claim is not established, we are not quite sure if the matter can be re-agitated in a regular suit. Neither in the case in 9 B. 131 nor in the English cases therein referred to was the Civil Court called upon to reconsider a claim adjudicated on by the magistrate; and this apparently was the distinction that the learned Judges who decided *Secretary of State* v. *Vakhasangji* [1], had in mind, though they express it (somewhat unhappily) as a distinction between cases under S. 523 and those under S. 524. The express provision for an appeal against orders under S. 524 and the absence of any provision (as for instance in S. 522) reserving a right of suit are, at any rate, some indications that an adjudication under S. 524 is not merely summary or temporary. It is too much to assume as a matter of course that no authority but a Civil Court can ever adjudicate on rights to property and that a suit is the only way in which such questions can be tried and adjudicated; nor can it be said that the order under S. 523 and 524 is necessarily restricted to the question of possession as distinguished from title.

Janaki Nath *v.* Hore Prabhasini Dasee, I. L. R. 43 C. 178.

Two questions of practice dealt with in the case deserve to be noticed; and as to one of them, we are, with all respect, unable to agree with the learned judges. The simpler question—and one sufficiently clear as we should think—is as to the points open on an appeal or review, when the bench admitting the case admits it only on a certain point. As regards appeals, the statutory right extends to the whole case and though it is open to an admission bench to reject or admit the appeal, there is no power in it

1. (1894) I. L. R. 19 B. 668.

to circumscribe the scope of the appeal (See *Lukhi Narain* v. *Ramchandra* [1]. In cases of review, however, the matter lies almost entirely in the discretion of the Court; and, though the Code does not expressly so provide, it would seem open to the Court to restrict the review to particular points: whether such restriction was intended or not is a matter to be decided with reference to the circumstances of each case.

The other question is as to the necessity for notice to the opposite party when an appellant seeks a review of a dismissal of his appeal under O. 41, R. 11. The learned judges say (and it was also so stated in the course of the argument in *Abdul Hakim Chowdhury* v. *Hem Chandras Dass* [2]) that it has not been the practice in the Calcutta High Court to issue notice in such cases. We are not aware of any such established practice in Madras and we do not know what the practice in such cases is in Bombay and Allahabad. But we venture to think that the express provision as to notice in O. XLVII, R. 4 applies as much to the case in question as to other cases. The decision in *Joy Kumar Dutt Jha* v. *Esharu Nand Dutt Jha* [3] proceeded on the footing that the order for admission was an *order on an application*, which by its very nature was an ex parte application; but it is now settled that a dismissal under Order XLI, rule 11 is not a mere refusal to entertain an appeal but has the effect of substituting the decree of the Appellate Court in place of the decree appealed against (as for instance for purposes of affording a starting point for execution, for applications to the Appellate Court for amendment of the decree and so on). This means that the respondent is a party to the appellate decree and there is therefore not difficulty in understanding who the 'opposite party' in such a case is; and the respondent is certainly interested in supporting the decree of dismissal. No doubt so far as the real question in the appeal is concerned, it would make no difference whether the respondent is heard in opposition to the review application or in the appeal itself. But the argument of the learned judges overlooks the fact that the respondent may successfully oppose the review as much on the ground of limitation or (in the case of a first appeal) on the ground of non-compliance with sub-clause (*b*) of Order XLVII, rule 4 (2).

1. (1911) 15 C. W. N. 921. 2. (1914) I. L. R. 42 C. 433.
3. (1872) 18 W. R. 475.

It is noteworthy that in Order IX, the Code provides for notice to defendant of an application for restoration after a dismissal under rule 8 but not after a dismissal under rules 2 and 3. But this can furnish no safe analogy, for while Order IX provides for different kinds of legal consequence in the two classes of dismissal, there is no such difference between a dismissal under order XLI, rule 11 and a dismissal after notice. It may also be pointed out that Rule 19 of Order XLI which provides for re-admission of an appeal dismissed for default makes no distinction between default before notice to the respondent (rule 11 (2)) and default after notice to the respondent (rule 17 (1)). Of course there is no express provision in either case requiring notice of the restoration application to be given to a respondent but we presume it will scarcely be suggested on that account that no notice is necessary even in the latter case.

Some light is thrown on the present questions by the provision in rule 7 (2) of Order XLVII, dealing with the restoration of a review petition dismissed for default. If in such a case notice of the restoration application is necessary—and sub-clause 3 expressly makes it necessary—it is difficult to follow the argument of 'needless harassment' of the respondent relied on by the learned judges. The Code allows the respondent an opportunity of objecting to the restoration of a review application whether or not notice of the review application had been issued to him; and after all such opposition must relate only to the grounds alleged for the restoration and not to the grounds for review—which will remain to be dealt with later, and later still, the case itself (if the review should be granted).

It is another question whether the grant of review without notice to the opposite party will make the order a nullity as held in *Abdul Hakim* v. *Hem Chandra* [1] or it may not be sufficient to allow the respondent when he appears on the review to take exception to the order granting the review. Even if the latter view should prevail, we are not aware of any principle or statutory provision which requires that the objection should be taken only before the Bench which granted the review. It may be a matter of convenience, and if so, that consideration will be best served by directing the case to be reheard by the same Bench.

1. (1914) I. L. R. 42 C. 133.

NOTES OF INDIAN CASES.

Sukumari Ghose *v.* Gopi Mohan Goswami: I. L. R. 43. C. 190.

It is of course not for us to say anything as to the discretion of a judge in certifying under the last clause of S. 22 of the Presidency Small Cause Courts Act that a suit was one 'fit to be brought in the High Court.' But we are unable to agree with the view of Imam, J. that the first clause of S. 22 was inapplicable to the case before him. In holding that the suit was not cognisable by the Small Cause Court, it is not quite clear whether the learned judge drew a distinction between a suit for account generally (without a claim for a specific sum as the result of the account) and one in which the plaintiff is able to appraise the value of his claim at the time of instituting the suit or, having regard to the very nature of a suit for account, he meant to lay down broadly that such a suit would not lie in the Small Cause Court. Unlike the Provincial Small Cause Courts Act, the Presidency Courts Act does not enact a general exclusion of all suits for account from the cognisance of the Court; and we are not aware of any legal provision warranting a distinction between cases in which a plaintiff is able to value his claim beforehand and cases in which he is not able to do so. Even when a suit for account is instituted in that Court on the plaintiff approximately valuing his claim at an amount below Rs. 2,000 it may nevertheless happen on the taking of accounts that a larger amount is found due and we do not see why on the principle of the decisions relating to the jurisdiction of ordinary Civil Courts in such cases (see *Arogya Udayan* v. *Appachi Rowthan* [1] and *Sudarshan Das Shastri* v. *Ram Parshad* [2]), the Presidency Small Cause Court should not pass a decree for the amount actually found due. The limitation in S. 18 is only with reference to the institutional value and not in respect of the amount for which a decree can be passed. Even if this view is incorrect *Golap Singh* v. *Indra Kumar Hajra* [3], the proper course in such a case may be for the Court to Act under S. 19-A; and there is nothing to justify the conclusion that a suit for account is not cognisable by the Small Cause Court. If the suit is one cognisable by that Court the punitive provision in S. 22 has

1. (1901) I. L. R. 25 M. 543. 2. (1910) I. L. R. 33 A. 97.
3. (1909) 9 C. L. J. 367.

to be applied with reference to the amount decreed and not with reference to the facility or otherwise of valuing the claim in the plaint and if a plaintiff chooses to go to the High Court direct, there is nothing unreasonable in requiring that he must take the risk of his claim turning out to be less than he imagines.

Eusuffzeman *v.* Sanchia Lal Nahata.—I. L. R. 43 C. 207.

There is no doubt, some little difficulty in reconciling the view taken in this case with the strict letter of O. 21, R. 2, of the Code; but in the absence of any time limit for the decree-holder certifying a part payment, there is nothing unreasonable in holding that a statement of the part payment in the execution application is sufficient compliance with the rule, and that no separate application for the purpose is necessary. The same view was taken by the Madras High Court in *Rajam Iyer* v. *Anantaratnam Iyer* [1] following *Lakhi Narayan* v. *Felamani Dasi* [2]. It must, however, be borne in mind that when a decree-holder is relying on an alleged part payment to escape the bar of limitation, the statement of payment is not really one against his interest and does not, as such, carry with it the probability of its being true. The principle on which a short period is fixed by Article 174 of the Limitation Act for an application by the judgment-debtor to record an alleged payment will, therefore, equally apply to such a case, but that is a matter for the legislature to provide for.

Sri Rajah Simhadri Raju *v.* Secretary of State, I. L. R. 39 M. 67.

The Irrigation Cess Act has given rise to considerable difference of judicial opinion though it must be admitted, opinion is gradually settling itself. Judges have differed as to the circumstances under which the Government is entitled to levy water-cess, for instance, whether it is only when works of irrigation have been constructed or even when such works are not constructed provided the other conditions are satisfied. (See Mr. Justice Sankaran Nair's judgment in *Secretary of State* v. *Janakiramayya* [3]). But on this question, it seems now to be fairly agreed that though the preamble seems to contemplate

1. (1915) 29 M. L. J. 669.
2. (1914) 20 C. L. J. 131.
3. (1914) I.L. R. 37 M. 322.

the application of the act only to cases of new constructions, the enacting part is wide enough to cover other cases as well and its operation cannot be legitimately cut down by reference to the preamble. See *The Secretary of State for India* v. *Janakiramayya* [1], *Secretary of State for India* v. *Maharajah of Bobbili* [2]. Again Judges have differed as to what is a Government stream or water. On the one side there is the extreme view taken in *Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [3] relying on the declaration in the Land Encroachment Act, that all streams are Government streams to whomsoever the bed and banks belong. This view too has not received much support. Benson and Sundara Aiyar, JJ. in *Venkataratnamma* v. *Secretary of State* [4], Sadasiva Aiyar and Bakewell, JJ. in *The Secretary of State for India* v. *Janakiramayya* [1], Chief Justice and Seshagiri Aiyar, JJ. in *Secretary of State for India* v. *Maharajah of Bobbili* [2], have taken a different view. As the Chief Justice states in the last mentioned case, opinion seems to be fairly agreed that where both the banks belong to the Crown, the water is Government water, and it is the reverse where both the banks belong to a private owner. (See *Kalianna Mudali* v. *Secretary of State for India* [5], the case of a stream in patta land where bed was not marked Poramboke). Where only one bank belongs to a private owner, the view of Bakewell, J. is that the water is nevertheless Government water while Sadasiva Aiyar, J. thinks that so far as water drawn off from that side is concerned, the water is not Government water. This question is practically the same as that involved in *Secretary of State for India* v. *Ambalavana Pandarasannadhi* [6], and *Secretary of State for India* v. *Swami Narathee Swarar* [7], unless the latter case is differentiated on the ground that no question of a stream was involved in it. The implication of that view is that if at any point above the bed of the stream belonged to the Crown, the water will get impressed with the character of Government water which it cannot lose. This view ignores the peculiar incidents of property in flowing water and seems to be inconsistent with the view taken by the Chief Justice in *Secretary of State for India* v. *Maharaja of Bobbili* [2]. The question whether the Government could tax when the water is taken in the

1. (1915) 29 M. L. J. 389.
2. (1915) 30 M. L. J. 163.
3. (1910) I. L. R. 34 M. 295.
4. (1914) I.L. R. 37 M. 369.
5. (1915) 31 I. C. 982.
6. (1910) I. L. R. 34 M. 366.
7. (1910) I. L. R. 34 M. 21.

exercise of natural or riparian right is an open question though the language of the Land Encroachment Act would seem however to point to the contrary. If the water is Government water only subject to natural rights it is hard to say that a person exercising that right is taking Government water. There was some doubt as to the point of time at which the engagements referred to in the Act should be sought for and the length to which the engagement can be assumed to extend in particular cases and the circumstances from which an engagement could be inferred. Though there was some, by no means decided, expression of opinion that the engagement should be one that existed at the time of the Act (*Secretary of State for India* v. *The Maharajah of Bobbili* [1]), it now seems to be fairly agreed that there is no restriction as to the time at which such engagements may be sought for. *Zemindar of Kapileswarapuram* v. *Secretary of State*, [2] *Kandalam Rajagopalacharyulu* v. *Secretary of State for India*, [3] *Sethumadhava Chariar* v. *Secretary of State for India* [4]. The permanent and the Inam settlements have been taken to imply an engagement to supply water free of charge to the area marked wet (*Kandukuri Mahalakshmamma Garu* v. *The Secretary of State for India* [5]). Mr. Justice Sankaran Nair was for holding that the engagement should extend to affording facilities for extension as well as improvement of cultivation (except when irrigation works constructed by the Government have improved the water sources), but this view has not generally commended itself. As a rider on the accepted rule, it has been also held that if with the accustomed flow extension or improvement of cultivation is possible such improvement or extension cannot be charged (*Secretary of State for India* v. *Maharaja of Bobbili* [1], *Secretary of State for India* v. *Ambalavana Pandarasannadhi* [6]). In the case under review an engagement for supplying free ⅓rd of the river water was found by reason of a previous adjudication between the party and the Government in favour of the right to that quantity of water without any qualification as to Government's right to levy water cess. Mr. Justice Sankaran Nair says that where a right to take water is proved, an engagement not to levy cess should be implied even though no express agreement to that effect is proved. As however there is no difficulty in conceiving of a right to take water subject to payment, (cf. *Kandukuri Mahalakshmamma* v.

1. (1915) 30 M. L. J. 163.
2. I.L.R. 37 M. 355, 359.
3. (1913) 14 M. L. T. 454.
4. (1914) 1 L. W. 941.
5. (1910) I. L. R. 34 M. 295.
6. (1910) I. L. R. 34 M. 366.

Secretary of State for India [1]) would it not have been better to base the exemption on the ground that *pro tanto* the water is not Government water, having regard specially to the way in which the Government right of property is defined in the Land Encroachment Act? But as pointed out by Mr. Justice Sankaran Nair, in *Secretary of State* v. *Janakiramayya* [2], the term engagement in the Act must have been very loosely used to cover cases of Zamindars and Inamdars. The engagement, in such cases, is in fact, not *to supply* water but only not to withhold water. According to Mr. Justice Bakewell, the engagement in the case of riparian estates might include the riparian and other natural rights.

In the case of Inam settlements, it has been held that notwithstanding the area mentioned as wet in the Inam title-deed is less, it may be shown that the area entitled to free cultivation is greater by reason of an earlier engagement, *Sethumadhavachariar* v. *Secretary of State* [3]. Though Courts have refused to infer an engagement from the mere fact that cess has not been levied for a long time they have done so when in addition to that fact there was also the circumstance that contributions were made for the irrigation works either in the shape of land or in money by the landholder or the independent water sources of the landholder were intercepted. *Zemindar of Kapileswarapuram* v. *Secretary of State* [4].

Trasi Deva Rao v. Parameshwaraiya : I. L. R. 39 M. 74.

The point in the case was whether S. 14 of the Limitation Act applies to the Provincial Insolvency Act. Their Lordships hold that it does not. A Full Bench of the Allahabad High Court has taken a different view, *Dropadi* v. *Hira Lal,* [5] but the view taken in this case is in accordance with the reasoning in *Abu Backer Sahib* v. *Secretary of State for India* [6]. The last case however is unsatisfactory in that it does not refer to the series of cases including a Privy Council case relating to other Acts which seem to restrict the application of S. 29 of the Limitation Act to *periods* prescribed. See *Srinivasa Aiyangar* v. *Secretary of State* [7].

---

1. (1910) I. L. R. 34 M. 295.
2. (1914) I. L. R. 37 M. 322.
3. (1914) 1 L.W. 941.
4. I. L. R. 37 M. 359.
5. (1912) I. L. R. 34 A. 496.
6. (1909) I. L. R. 34 M. 505 (F. B.)
7. (1912) I. L. R. 38 M. 93 and 98.

Ramakrishna Pattar *v.* Narayana Pattar: I. L. R. 39 M. 80.

With all respect, we are afraid that their Lordships have put an unnecessarily narrow construction on S. 42 of the Specific Relief Act. We do not see why a right to a *contractual right* is not a right to property. The mere fact that the declaration asked for referred to the obligations on the discharge of which, certain pecuniary advantages would accrue to the plaintiff cannot make the question any the less concerning *a right to property*. We do not believe that a different idea is intended to be conveyed by the words "right to property" in S. 42 of the Specific Relief Act from that by "declarations of right" under Order 25 R. 5 of the Rules of the Supreme Court in England. Under the English law it has been held that the Court could declare whether parties to a mercantile contract are bound by it or not (*Societe Maritime* v. *Venus Steam Shipping Company*[1],) or, that a sub-agent who had stipulated for a secret commission would become indebted to the principals when or as he should receive any portion of such commission, *Powell and Thomas* v. *Easan Jones & Co.* [2]. It would be interesting to compare the expression "right to property" with the definition of actionable claim in S. 3 of the Transfer of Property Act. An actionable claim is therein defined as a claim to a debt.

---

1. (1904) 9 Com. M. Cases 289. 2. (1905) 1 K. B. 11.

NOTES OF INDIAN CASES.

Kusodhaj Bhukta *v.* **Braja Mohan Bhukta,** I. L. R. 43 C. 217.

The decision in this case seems to us unexceptionable and it must be treated as substantially disapproving of the judgment in *Jogeswar Atha* v. *Ganga Bishnu Ghattack* [1], for the judgment in that case affords no basis for assuming that the view therein taken was intended to be restricted to decrees by consent. The learned Judges there take the broad ground that the provisions of the Civil Procedure Code as to review are only 'enabling' and that there is nothing in law to prevent a person from instituting a suit to rectify a mistake in a decree. The observations in *Chand-mea* v. *Srimati Asima Banu* [2] and *Bhandi Singh* v. *Dowlat Ray* [3] would seem to be directed to explain this decision on the ground that the decree there in question was one passed without jurisdiction, but, with due respect, we doubt if the distinction is well founded.

As to the power of the Court to relieve against mistake, the principles laid down in the *Huddersfield Banking Co.'s Case* [4] would equally hold good in India, but on the question of practice we venture to doubt if, under the Indian Procedure, a separate suit will lie to rectify a mistake in a decree, even in cases where that decree was passed by consent; and this is the point on which Mitra, J., based his judgment in *Jogeswar Atha's Case.* After the Judicature Act, the power of review or rehearing (by other than an Appellate Court) is much more limited in England than under the older Chancery practice and it was on that ground that Romer, J. in *Ainsworth* v. *Wilding* [5] referred the parties to a fresh action (see also the explanation in this case as to the circumstances under which the action was brought in the Huddersfield Banking Company's case). Under the former practice, the Master of the Rolls in *Davenport* v. *Stafford* [6], while affirming the power of the Court to relieve against mistake, observed "I doubt whether the form of proceeding in such cases is strictly settled or whether the same form is exclusively applicable to all cases * * * * * there may be differences in this respect between cases of fraud and

1. (1904) 8 C. W. N. 472.
2. (1906) 10 C. W. N. 1024.
3. (1912) 17 C. W. N. 82.
4. (1895) L. R. 2 Ch. 273.
5. (1896) I. L. R. 1 Ch. 673.
6. (1845) 8 Beav 503.

cases of mistake. In cases of fraud the party aggrieved may file an original bill for relief and it may well be thought that he ought always to do so." This view perhaps explains the assumption of the Indian Legislature (in Art. 95 of the Limitation Act) that a suit will lie to set aside a decree obtained by fraud while there is no such indication in respect of relief on the ground of mistake. It would appear that the power of the Court to rectify a decree on the ground of mistke rests on mere equitable grounds and not on any 'cause of action' or right of suit properly so called resting in the party. The processual system of India provides amply for relief being obtained in such cases by way of review—the terms of O. 47 R. 1 as to the grounds being very wide—and it may be a reasonable deduction therefrom that no separate jurisdiction for the purpose can be invoked. In cases of fraud however the conduct of the wrongdoer may be taken to give the party wronged an independent cause of action to found a suit upon. It must be admitted that the elaborate judgment of Mr. Justice *Mookerjee* in *Mussumat Gulab Koer* v. *Badshah Bahadur* [1] puts fraud and mistake on the same footing for the present purpose but the learned judge was then dealing with a case of fraud and the few scattered observations relating to cases of mistake are clearly obiter.

Lakhipriya Dasi *v.* **Raikishori Dasi**, (I. L. R. 43, C. p. 243).

On a question of practice like the one raised in the present case, uniformity of practice is perhaps even more important than the soundness of the particular view as a matter of law. We must, however, say that the argument in this case based on S. 117 of the New Code does not seem to be of much weight. That section merely enacts that the provisions of the Code shall apply to the High Courts, and it corresponds to S. 632 of the Code of 1882. The principle of the decision in 27 Madras 121 is that the scheme of the appeal chapter in the code is such that it cannot be made applicable to appeals from one Judge of the *same* court (though exercising a special jurisdiction) to other judges of the same court (see also the Judgment of Sadasiva Iyer and

1. (1909) 13 C. W. N. 1197.

Napier, JJ. in *Venugopala Mudaly* v. *Venkatasubba Mudaly* [1].) And it is only reasonable to hold that order 41 rule 10 cannot be taken out of its context and given a wider application. This view seems to have at one time obtained in Calcutta also (see *In re Ramsebak Misser* [2]) and we are not able to trace from the reports when and how a different practice came into vogue. If we remember right, the Madras High Court also has latterly departed from the principle underlying the decisions above referred to but that was in connection with appeals from the original side. So far as any inference can be drawn from the scheme of the Presidency Towns Insolvency Act, the provisions of part 6 and part 11 clearly seem to suggest that the Courts exercising jurisdiction under the Act are not *prima facie* governed by the Code of Civil Procedure.

Soundararajan *v.* **Arunachallam,** I. L. R. 39 M. 159. (F. B.)

There was no way of getting out of the Privy Council decision in *Suraj Narain* v. *Iqbal Narain* [3] and we think that the Full Bench did right in following it. More recently, in *Mussamat Girja* v. *Sadasiv Dhundiraj* [4] the Judicial Committee have, after a full consideration of the authorities, reaffirmed the view expressed n *Suraj Narain* v. *Iqbal Narain* [3]. This view though in conflict with that adopted for a long time in this Court and so far as one could judge, assumed in several Privy Council dicisions themselves (see for instance *Pirthi Pal* v. *Jowahir Singh* [5]) is, it must be admitted, more suited to the present requirements and will be received with general satisfaction. The Saraswati Vilasa and the Vyavahara Mayukha, it might be readily conceded, support the view taken by their Lordships. But the text of the Viramitrodaya relied upon seems by no means to be conclusive on the question, for it seems to us that that passage is equally consistent with the position that while partition cannot generally be had without the consent of all, it can be *enforced* at the instance of one. Devanda Bhatta, the great South Indian authority (who is not referred to) seems to be distinctly against it. In chapter VII.

1. (1915) M. W. N. 211. 2. (1870) 5 B. L. R. 179.
3. (1916) 20 C.W.N. 1085. (P. C.)
4. (1913) I. L. R. 35 A. 80=L. R. 40 I. A. 40.
5. (1886) I. L. R. 14 C. 493.

S. 50, he says "the conclusion here is that no partition, sale or gift is to be made of hereditary immovable property except with the consent of coheirs." One possible explanation for the divergence between the Smriti Chandrika and the two later works is the failure of the former to recognise the distinction between *division in status* and *actual division* which seems to be clearly perceived only in the Saraswati Vilasa, the Vyavahara Mayukha and the Viramitrodaya.

Their Lordships' decision, however, can by no means be taken to have settled all the doubts and the difficulties on the subject. The extent of communication that is necessary to give effect to a declaration of intention, the persons to whom the declaration should be communicated and the effect of any defect in the communication must remain subjects for anxious judicial consideration to be finally settled only by the Privy Council.

In the view taken by their Lordships, it seems to be difficult to resist the conclusion that alienations of the shares of individual members in the entire property would equally operate to sever the status, provided due notice is given of the alienation to the other members. A transfer of the share in a portion only of the family property or of portions of family property without reference to the share of the vendor cannot of course have this effect. The first attempts the legally impossible while the second does not at all involve a determination to separate and even if such a determination can be spelt out of it, it must be a matter for consideration whether a transaction *prohibited* in law can effect a severance good in law.

NOTES OF INDIAN CASES.

Manjappa Rai *v*. **Marudevi:** I. L. R. 39 M. 12.

In this case their Lordships hold that under the Aliyasantana system of law the property of an individual member descends on his death not only to his nearest relations but to all the members of the nearest branch. In so laying down the law, their Lordships purport to follow the rule laid down in *Antamma* v. *Kaveri* [1], on an enquiry into the usage of the people concerned. With all deference we think that the precise question that arose for decision in this case did not arise in that case, the only question in that cose being as in the Full Bench case in *Krishnan Nair* v. *Damodaran Nair* [2] whether the Tarwad or the branch was preferentially entitled ; whether at all any distinction should be made as between the members of the branch was not considered. Though it is not impossible to conceive of a rule of succession providing for devolution to a group consisting of various grades of relations, giving preference to, it may even be, to members of that group undivided from the deceased (cf. the rule as to succession in the case of the self-acquired property of a Hindu) *Marudayi* v. *Doraisami Karambian* [3], *Fakirappa* v. *Yellappa* [4], *Nana Tawker* v. *Ramachandra Tawker* [5], the rule laid down, in so far as it recognises the right of representation in the case of collateral successions is in advance of anything found in the ordinary Hindu law which recognises such right of *representation* only in the case of *lineal male descendants*. We are afraid that the rule of succession to the nearest branch, far from being a rule of succession, is but a mitigated form of the old doctrine of lapse. The inapplicability of the rule to a status of division is as much an objection to the rule as stated in this case as to the doctrine of lapse to the Tarwad. The rule of Equity and good conscience, custom failing, would seem to be the rule of Hindu law,—to the nearest sapinda the property goes, *mutatis mutandis* on correct Aliyasantana analogies, substituting *nephews and nieces* for *sons*.

---

1. (1884) I. L. R. 7 M. 575.
2. (1912) I. L. R. 38 M. 48.
3. (1907) I. L. R. 30 M. 348.
4. (1898) I. L. R. 22 B. 101.
5. (1908) I. L. R. 32 M. 377.

Chakkra Kannan *v.* **Kunhi Pokker,** I. L. R. 39 M. 317.

The decision in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], was based upon a rule of construction which had the approval of the Privy Council in *Mahmad Shumsool* v. *Shewakram* [2] and as pointed out in *Kalliani Amma* v. *Govinda Menon* [3], there was no legal difficulty in applying that rule to Malabar. The only legitimate way of putting an end to that rule is by declaring that modern practice does not justify the imputation of such an intention. This has been done, with what success it is yet to be seen, by Mr. Justice Seshagiri Aiyar in the analogous case of widows. The attempt made in *Kenath Puthen Veetil Tavazhi* v. *Narayanan* [4], and *Ummanga* v. *Appadorai Pattar* [5], to restrict the rule to cases where Tavazhis had become distinct tarwads is based upon the assumption that between the tarwad and the individual there is no intermediate group that can hold property. The Marumakkathayam rule that property of a woman descends to her Tavazhi and the corresponding Aliyasantana rule of the devolution of all individual property to the nearest branch is opposed to such an assumption. As well pointed out by Mr. Justice Srinivasa Aiyangar property gifted to wife and children is only a species of branch property. Other kinds of branch property are property inherited by the branch, property gifted to or purchased by the branch or if the analogies of Hindu Law should apply, joint acquisitions of the branch. The rule laid down in *Kunhacha Umma* v. *Kutti Mammi Hajee* [1], may be legitimately extended to cases where the grant is made by a person equally related to or owing a moral or natural obligation to provide for the branch or again if the Hindu law analogies should apply where the grant is to the heirs of the donor. The circumstances, under which the presumption is justified have already been the subject of conflicting decisions *Kuyyattil Kundan Kutty* v. *Vayalpath Parkum* [6]. It need hardly be stated that the rule in question is only a rule of construction and the presumption may always be rebutted. It has, for instance, been held that a grant to the wife alone when

1. (1892) I. L. R. 16 M. 201.
2. (1874) L. R. 2 I. A. 7.
3. (1911) I. L. R. 35 M. 648.
4. (1904) I. L. R. 28 M. 182.
5. (1908) I. L. R. 34 M. 887.
6. (1916) 32 I. C. 107.

there are the children alive is a circumstance which will rebut the presumption. *Narasamma Hegadithi* v. *Billa Hesu Pujari* [1], *Duja Bhandary* v. *Venku Bhandary* [2]. The correctness of this ruling, at any rate as applied to Aliyasantana people may be doubted as the mother would under that system be the Ejamanthi of the branch and may appropriately be presumed to represent the branch. (Cf. 22 Travancore Law Reports 293) *Kalliani Amma* v. *Govinda Menon* [3]. In *Naku Amma* v. *Raghava Menon* [4] the grant of property to a woman *simpliciter* by the husband is held to be a circumstance in support of the ordinary presumption. The junction of the mother and the eldest son is also suggested as a circumstance tending in the same direction. *Ummanga* v. *Appadorai Patter* [5]. But the point is hardly a settled one. *Paru Amma* v. *Itticherri Ammah* [6]. Though it is stated generally that such property is held with the incidents of Tarwad property, those incidents have not been set forth precisely or exhaustively in any case and it is doubtful if all the incidents of Malabar Tarwad would attach to such property. In the matter of management, it has been held in *Parvathi Katilamma* v. *Ramachandra Ejman* [7], that a branch manager unlike a Tarwad manager is liable to account for the income.

In *Naku Amma* v. *Raghava Menon* [4] Mr. Justice Abdur Rahim is of opinion that apart from any question of the sufficiency of Tarwad property, each member of the branch is entitled to an allowance out of the branch property. Whether residence at the Tavazhi house is a condition precedent to the grant of such an allowance and whether, in the absence of a Tavazhi house at least the other members would be entitled to such an allowance is not yet settled but having regard to the decision in *Marudevi's Case* [8] it does not seem to be difficult to guess the probable answer that will be given. On the interesting question raised in the case and answered by Mr. Justice Sadasiva Aiyar, viz whether the benefits of a grant to a woman and her children by the husband can be confined to the

1. (1913) 25 M, L. J. 637.
2. (1915) 31 I. C. 854.
3. (1911) I L. R. 35 M. 649.
4. (1912) I. L. R. 38 M. 79.
5. (1908) I. L. R. 34 M. 387.
6. (1916) 32 I. C. 459.
7. (1909) 7 M. L. T. 273.
8. (1911) I. L. R. 36 M. 203.

children of the donor or whether they extend to children born of subsequent marriage as well, if it is permissible to hold that two out of three members of a Hindu family can inherit property with the incidents of joint family property, (*Cf. Juggumpet Case* [1]) it is surely not an unwarranted exercise of *legal imagination* to conceive of a group consisting of the children of a woman by the donor holding property with the incidents of Tarwad property. A little deviation from the ordinary rut of legal ideas may be pronounced but is not necessarily rank heresy.

---

1. (1902) I. L. R. 25 M. 678.

NOTES OF INDIAN CASES.

Ramchandra v. Shripatrao; I. L. R. 40 B. 248.

This case raises a point of some nicety. A Hindu father mortgages family property and sometime later brings a suit for redemption which on his death is allowed to abate. Years afterwards his son who was in existence at the date of the mortgage but who had not joined either in the mortgage or in the father's suit for redemption brings a suit of his own for redemption. The learned Judges hold that the abatement of the first suit is no bar to the second. Referring to the cases in *Gansavant Balsavant* v. *Narayan Dhond Savant* [1] and *Padmakar Vinayak Joshi* v. *Krishna Joshi* [2] they say that after the Procedure Code of 1877 no legal proceeding by the father alone short of actual redemption would deprive his co-parceners of their right to redeem. This view does not seem to us to be beyond doubt. The learned Judges lay stress on the fact that there was nothing to show that the father's suit was brought in a representative capacity and as a redemption suit it was defectively constituted in the absence of the son. With reference to the decision of the Privy Council in *Kishen Pershad* v. *Har Narain Singh* [3] they say that it cannot be regarded as an authority with regard to redemption suits.

As to the question of representative suit and defect of parties, it appears to us that the learned Judges have not attached sufficient importance to the fact that the first suit was brought by the mortgagor himself who was also the father. In the converse case of the suit having been brought for sale by the mortgagee, the properties could have been sold in default of redemption by the father and the sons would be bound thereby unless they could show that the debt was not one binding upon them. The effectiveness of the execution sale as against the other members of the family depends not upon the representative character of the suit but upon the power of the defendant to bind them by his dealings. There is nothing in the decisions of the Judicial Committee in *Daulat Ram* v. *Mehr Chand* [4], and *Sheo Shankar Ram* v. *Jadu Kunwar* [5], (which was a case of foreclosure) to indicate that the defendant must be described as being sued in a representative character. We can see no reason

1. (1883) I. L. R. 7 B. 467.
2. (1885) I. L. R. 10 B. 21.
3. (1911) I. L. R. 33 All. 272.
4. (1887) I. L. R. 15 C. 70.
5. (1914) I. L. R. 36 A. 383.

they while should be otherwise when the father sues as plaintiff. If for instance he is a mortgagee he can sue by himself to enforce the mortgage. (See *Adaikalam Chetty* v. *Subban Chetty* [1], *Madan Lal* v. *Kishen Singh* [2]. A case in which he is the mortgagor seems to us to be an *a fortiori* case. No doubt a suit for redemption by him involves the relieving of the family property from encumbrance; but it is primarily an attempt to pay off a debt contracted by himself. Why should the sons be impleaded therein? The Transfer of Property Act allows the mortgagor to bring a suit for redemption and Sec. 85 of the Transfer of Property Act cannot take away this right.

As to the question of the effect of the abatement, there can be little doubt that the son could, if he had so chosen, have continued the former redemption suit after the death of the father. It is not necessary for this purpose that the suit must purport to be a representative suit. It will of course be incorrect to say that in every case in which one person could continue a suit instituted by another he is bound to do so on pain of being debarred from enforcing his right by a separate action. The question will depend upon the identity or the separateness of the cause of action. The recent decision of the Privy Council in *Venkatnarayana Pillai* v. *Subbammal* [3], may give rise to some doubts and difficulties in applying this rule to reversioners. But in the case under notice it is not possible to see how the son could have a cause of action different from that of the father. He may have an independent right in the property but that it is not the cause of action for the redemption suit. The position may be otherwise when one member of a joint family seeks to redeem a mortgage made not by himself but by another, and there are other members still of the family who are not parties to the suit. In such a case it may be as the learned Judges observe that the defeat of one co-parcener in his suit for redemption will not bar the exercise of the right by the others.

Madhusudan Sen v. Rakhal Chandra Das Basak : (I. L. R. 42 C. 248).

The judgment in this case deals with a number of questions arising out of the relationship of principal and agent. As to the

1. (1914) 27 M. L. J. 621. 2. (1912) I. L. R. 34 A. 572.
3. (1915) I.L. R. 38 Mad. 406.

article of limitation applicable to a suit for account, the preponderance of authority is certainly in favour of the view that Article 89 is not excluded merely by the fact that there is an express agreement to account. A covenant implied by law and an express covenant to the same effect stand on the same footing, the case here being the converse of that in *Zemindar of Vizianagaram* v. *Suryanarayana* [1]. The effect of the existence of a security bond by the agent himself or by another person, on the question of limitation does not seem to us altogether beyond doubt. Such a bond may create a mortgage or charge within the meaning of the Transfer of Property Act; and *prima facie* Article 132 will apply to a suit to enforce it. The difficulty, however, arises from the fact that the mortgage or charge can be enforced only for such amount as the taking of accounts may show to be due. No doubt, even in cases of ordinary suits to recover a debt some accounts may have to be taken, but this is not what is meant by a suit for accounts in the well-known sense of that expression. The suit contemplated by Article 89 of the Limitation Act however is a suit for accounts in its technical sense and it may well be doubted whether the mere fact of the existence of a security will suffice to prolong the period during which the agent is liable to be called on to account. This is the basis of the decision in *Jogesh Chandra* alias *Dhalughose* v. *Bonode Lal Roy* [2]. It may well be said that the accounting is the essential preliminary (cf. *Shib Chandra Roy* v. *Chandra Narain Mookerjee* [3]) to the enforcement of the charge and if the right to demand the account is barred, the charge cannot avail. Some support to this kind of argument is afforded by cases like *Raja Rajeswara Dorai* v. *Arunachalam Chettiar* [4], holding that Article 144 will not apply even to suits for recovery of possession when other reliefs which are preliminary to the right to possession have become barred. The difficulty of the position will be emphasised when the security is given by a stranger. The decision in *Subramania Aiyar* v. *Gopala Aiyar* [5], cannot reasonably be pressed into service in such cases.

The decision in the case under notice is, no doubt, supported by that in *Hafezuddin Mandal* v. *Jadu Nath Saha* [6], but in that case also the applicability of Article 132 was assumed as a

1. (1901) I. L. R. 25 M. 587.
2. (1901) 14 C. W. N. 122.
3. (1905) I. L. R. 32 C. 719.
4. (1913) I. L. R. 38 M. 321.
5. (1909) I. L. R. 33 M. 308.
6. (1908) I. L. R. 35 C. 298.

matter of course. In the cases of *Behari Lal* v. *Harakumar* [1], and *Suresh Kanta Banerji Chowdhree* v. *Nawab Ali Sikdar* [2], the point did not arise and *Troilokya* v. *Abinashi* [3], merely follows the ruling in *Hafezuddin Mandal* v. *Jadu Nath Saha* [4].

With reference to the alternative provided for in the third column of Articles 88 and 89, namely, demand and refusal, it is by no means easy to say what kind of non-response on the part of the agent will amount to a refusal. With due deference, we venture to doubt whether the learned Judges have not gone too far when they hold that an omission on the part of the agent to explain accounts submitted by him (when such explanation has been demanded by the principal) amounts to a refusal within the meaning of the article. The reference to Art. 115 at p. 259 of the report is evidently a slip.

Harinath Chowdhury *v.* **Haradas Archarjya Chowdhury**: I. L. R. 43 C. 269.

We feel little doubt as to the correctness of the conclusion in this case but we are by no means sure as to the soundness of the reasons assigned therefor. We beg leave to doubt if the case bears any analogy to *Marriott* v. *Hampton* [5] and if it does, whether it can be distinguished in the way that is attempted. In the present case, there had been no *adjudication* as to the right to the money and by mistake, the court had given away the money in its custody to somebody before deciding the question of his right to it and the payment had been made without notice to the person who had deposited the money. It is difficult to see where the rule in *Marriott* v. *Hampton* [5] comes in. The obvious course, when the mistake was pointed out, was for the Court to call upon the person who had drawn the money to bring it back into Court. It would be a lamentable state of the law if a suit were necessary for the purpose. And if a suit is instituted at all, it will be covered by the ordinary Count for money had and received. The fact that the money has been drawn from the Court instead of from any private person can make no difference in the circumstances.

Once however it is found that the money was paid in pursuance of a decision by the Court, after notice to the opposite party, we venture to doubt if the question of *bona fides* really has any place.

1. (1912) 21 C. L. J. 458.
2. (1915) 21 C. L. J. 462.
3. (1914) 21 C. L. J. 459.
4. (1908) I. L. R. 35 C. 298.
5. (1797) 7 Term Rep. 269.

The circumstances under which a decree can be set aside on the ground of fraud had been elaborately examined by this Court in *Chinnayya* v. *Ramanna*[1] and in the face of that decision it will be impossible to maintain that want of *bona fides* on the part of one of the litigants will avail to get rid of the plea of *res judicata*. As to the decision in *Ward and Co.* v. *Wallis* [2] we cannot help thinking that such a decision could not have been obtained in this country. A person who had a claim for a certain amount against another, erroneously gives credit for an item not really in existence and sues for the balance. He gets a decree for the suit amount by consent and is paid. He then finds out his mistake and sues again for the sum wrongly given credit for. It is not even said that the defendant was in any way responsible for the plaintiff's mistake but only that he was aware of it. The law of *res judicata* in this country, with explanation 4 to S. 11 and the rule in O. 2 R. 2, seems to us an insuperable bar to plaintiff's recovery in the second suit. Cases like *Gorachand* v. *Basanta Kumar* [3] and *Batul Kunwar* v. *Munni Lal* [4] afford no true parallel. Whether he could have obtained a review of the first judgment is another matter, which it is unnecessary here to discuss.

Bilasiram Thakurdas *v.* Gubbay I. L. R. 43 C. 305.

One of the points dealt with in the decision related to the principles on which damages are to be assessed in case of anticipatory breach of contract. Both counsel and the Court seem to have proceeded on the footing of the applicability of English cases and the question raised in the *Kistna Jute Mills Co.'s Case* [5], that the rule under the Indian Contract Act should be different from that obtaining in England does not, so far as one is able to judge from the report, appear to have been argued or considered.

Zamindar of Challapalli *v.* Somayya: I. L. R. 39 M. 341.

The point in this case is one of considerable importance to Zamindars and their tenants and can, by no means, be said to be free from difficulty. The solution of the question depends on the right construction of Ss. 2, Cl. (10), 8 cl. (1) (3) and 185 of the Estates Land Act. While S. 181 lays down that nothing in the

1. (1913) I.L.R. 38 M. 203.
2. (1900) L. R. 1 Q. B. 675.
3. (1911) 15 C. L. J. 258.
4. (1910) I. L. R. 32 A. 625.
5. (1910) 21 M. L. J. 182.

Act shall prevent the landholder from converting his private land into ryoti land, there is no section laying down the converse, that is, that landholder may convert his ryoti land into private land. S. 185 lays down a presumption against land being private land and prescribes somewhat stringently the kind of evidence available for proof of land being private. S. 8 Cl. (1) expressly says that the union of melwaram and kudivaram in one hand shall not have the effect of converting the land into private land. Thus, it is perfectly clear that the policy of the Legislature is to keep private land within strictly narrow limits, possibly within the limits indicated by Mr. Justice Seshagiri Aiyar. But have they really succeeded in so doing? We think not. S. 3 cl. (13) defines private land as domain or homefarm land * * * by whatever designation known. There is no indication as to the point of time at which the land should be homefarm to deserve the appellation of private land. S. 8 cls. (1) and (3) furnish the only indications in the Act towards fixing the period but they cannot obviously justify the sweeping generalisation that no ryoti land can become private land as neither of these clauses refers to waste land, nor if one interpretation of the clause should find acceptance cases of relinquishment or surrender. Again, if the history of any home farm land should be traced sufficiently backwards, it must necessarily have been at one time waste land, surrendered land or land otherwise acquired. In the absence of any definite indication in the Act fixing the time at which private land should bear the character of "home farm" there seems to be no justification for so fixing it and we should think the right test is—was the land homefarm land at any time, not homefarm nominally in the accounts or temporarily for want of tenants or colorably as a device to defeat the policy of the law in favour of the tenants but *bona fide* and permanently. Once it is proved that the land has acquired that character, no temporary cessation of private cultivation will deprive it of that character and the appropriate question when there has been letting of such land will be—has the landlord the *animus revertendi* so to say or has he abandoned his intention of having it as homefarm? In the case of immemorial private land, possibly stronger evidence would be required for the property to shed its character of private land than in the case of ryoti land acquiring that character.

NOTES OF INDIAN CASES.

Bhupendra Krishnaghose v. Amarendra Nath Dey, I. L. R. 43 C. 432 (P. C.).

One of the questions raised in this case was whether the interest which an adopted son acquires as heir of his father (and not under his will) can be limited or defeated by any provisions in the father's will. The point was suggested as early as in *Bhoobun Moyee's case*, but it was then left open. The Courts in India held that this could be done, but their Lordships have avoided deciding that point, by holding that in the case before them the estate was vested in the widow during her life-time and not in the adopted son. The will authorised successive adoptions by the widow and went on to provide that if she died without adopting a son or if such adopted son pre-deceased her, without leaving any son the estate should go over to his nephews. Their Lordships point out that the successive adoptions contemplated by the testator cannot be carried out unless the estate was held to remain with her during her life-time and they also lay stress on the fact that she was appointed executrix. It is no doubt open to a testator to postpone the vesting of the property in the adopted son, but in view of the well-known habits and notions of Hindus, we respectfully venture to think that it would have required much clearer language than is found in the will in question to lead one to the conclusion that in spite of an adoption the widow was intended to continue to be the owner. The conclusion also seems to us inconsistent with the last portion of the will (omitted in their Lordships' judgment but set out in the report in the lower court, *Bhupendra Krishna Ghose* v. *Amarendra* [1] whereby the widow is authorised during her life-time to receive Rs. 300 a month from the estate in lieu of her maintenance. The appointment of the widow as executrix will not vest in her the beneficial interest. It would be an interesting matter for speculation whether if the widow had made a second adoption after the first son had pre-deceased her—leaving his own widow surviving, their Lordships would have upheld the second adoption.

Jamal v. Moolla Dawood Sons & Co., I. L. R. 43 C. 493 (P. C.)

This case lays down the limits of the rule as to the duty of a party complaining of a breach of contract to take steps to

1. (1918) I. L. R. 41 C. at p. 643.

mitigate his damage. It may seem at first sight somewhat anomalous that a party who has *ultimately* benefited by a breach of contract should be able to recover damages for the breach: but as their Lordships point out the right to damages as well as the duty to mitigate has to be decided as at the date of the breach and subsequent events have no bearing on the question.

Musahar Sahu *v.* Lala Hakim Lal: I. L. R. 43 C. 521 (P. C.)

It is to be regretted that their Lordships' Judgment makes no reference to the question of the proper frame of a suit impeaching a transaction as being in fraud of creditors. The judgment of the High Court relied amongst other things on certain obervations in *Chatterput Singh* v. *Maharaj Bahadur* [1] as being in support of the view that the question must be raised only by a representative suit. The observations of their Lordships in that case are far from clear and they must continue to exercise the minds of Indian Courts until their Lordships avail themselves of an opportunity to explain them or lay down the law in clearer terms. On the question of substantive law their Lordships recognise the distinction between an intention to defeat a particular creditor and an intention to defeat creditors generally and they hold that it is only the latter that is obnoxious to S. 53.

Bank of Bengal *v.* Ramanathan Chetti, I. L. R. 43 C. 527 (P. C.).

The decision in this case turned wholly on the question whether the particular transaction was within the limits of the agent's authority, on the true construction of his power of attorney. But we would in passing invite attention to one observation of their Lordships, which is not always sufficiently borne in mind, *viz.*, that if authority is established, the mere fact that the principal did not receive any benefit does not rid him of his liability.

Sri Rajah Rama Rao *v.* Raja of Pittapur, I. L. R. 39 M. 396.

The basis of the junior member's right to maintenance is no doubt, his status as a member of the family of the holder for

1. (1904) I. L. R. 32 C. 198 (P. C.)

the time being but if he had a valid right as against the last holder, it is somewhat difficult to see how that right could be defeated by a gift especially seeing the donee was a universal donee. But the law as to impartible estates, it must be confessed, is in an amorphous condition and it requires more than ordinary courage to venture to predict what view is likely ultimately to prevail. The Judicial Committee is largely responsible for this state of affairs; for it is owing to the somewhat *partial* views their Lordships were disposed to take of the question, that this confusion has resulted. Fully aware of the practice of awarding maintenance to junior members, their Lordships did not deem it fit in *Sartaj Kuari* v. *Deoraj Kuari* [1] to explain the legal basis of that right. Again, notwithstanding that in that case their Lordships clearly negative co-parcenary rights in an impartible estate they keep on in later cases using the terms joint, joint family and survivorship with reference to it: *Jogendra Bhupati* v. *Nityanand Mansing* [2]; *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami* [3]; *The Udayarpalayam case* [4]; *Lakshmi Devi* v. *Dhatraz* [5]; *Ram Nandan Singh* v. *Janki Koer* [6]; *Raja Yarlagadda* v. *Raja Yarlagadda* [7]; see *Thirumal Rao Saheb* v. *Rangadhani Rao Sahib* [8]. Though in *Raja Yarlagadda* v. *Raja Yarlagadda* [7] their Lordships seem to be clear that the mere fact that partible property of the family has been divided would not affect the family status in respect of the impartible property, still in *Thakurani Tarakumari* v. *Chaturbhuj Narain Singh* [9] it is laid down that rights of inheritance would not survive such a division. The conclusion in the last case was arrived at, so far as one could judge, without reference even to *Raja Yarlagadda* v. *Raja Yarlagadda* [7]. As it is, confining the authority of each case to the point actually decided, after such partition *quoad* the estate the family would be joint for purposes of maintenance but *separate* for all other purposes. Doubtless, a most unsatisfactory condition of things!

---

1. (1888) I. L. R. 10 A. 272. (P.C.)
2. (1890) I. L. R. 18 C. 154. (P.C.)
3. (1900) I. L. R. 24 M. 377.
4. (1905) I. L. R. 28 M. 508.
5. (1897) I. L. R. 20 M. 256.
6. (1902) I. L. R. 29 C. 828.
7. (1900) I. L. R. 24 M. 147.
8. (1912) 23 M. L. J. 79.
9. (1915) 29 M. L. J. 371.

Venkata Subba Reddi *v.* **Bagiammal**, I. L. R. 39 M. 419.

It may be that the mortgagee may proceed against any portion of the mortgaged property relinquishing his claim against the balance but we do not think that Mr. Justice Napier has succeeded in establishing that on this question it is unnecessary to refer to English Law, for it is obvious that showing that there is nothing in the Transfer of Property Act against that course is not the same as establishing that the mortgagee has the right to follow that course and S. 44 of the Contract Act has reference only to joint-promisees and does not directly bear on the question of joint liability of properties.

Narayanan *v.* **Lakshmanan** : I. L. R. 39 M. 456.

As their Lordships observe, the Limitation Act merely prescribes within what periods suits should be brought and cannot be construed as of itself creating as obligation to sue where none existed and art. 91 would bar an action for possession only where the party suing is bound under the law to set aside the deed he has executed before he can recover the property, *Janki Kunwar* v. *Ajit Singh* [1], *Malkargen* v. *Narhari* [2]. An alienation of the trust office is clearly void and there is no duty under the law to set it aside. The conclusion of their Lordships on this point seems to be unexceptionable.

But the same cannot be said of their decision on the application of the analogy of S. 32 of the Trusts Act to the case of public religious trusts. Owing to the inalienability of the property forming the subject-matter of such trusts, the remedy would be in the highest degree illusory and in addition, the conclusion would seem to be opposed to the judgment of the Privy Council in *Peari Mohun Mukerji* v. *Narendranath* [3]. Their Lordships there upheld the judgment of the High Court giving a decree against the estate. Even in the case of private trusts, the exact meaning of S. 32 is doubtful. The Legislature seems to have copied the direction in *Darke* v. *Williamson* [4] without taking care to define the true meaning of such a direction. A possessory lien even in the case of a rightful trustee, *a fortiori* in the case of a trustee *de son tort* should be unthinkable and their Lordships did right in negativing it.

---

1. (1887) I.L.R. 15 Cal. 58.
2. (1900) I.L R.25 B. 337 (P.C.)
3. (1909) I.L.R. 37 Cal. 229 (P. C.)
4. 25 Beav. 622.

NOTES OF INDIAN CASES.

Venkatachalam Chetty v. Narayanan Chetty, I. L. R. 39 M. 376.

Assuming that Art. 115 does not apply to actions by a principal against his agent for money received by the latter to the principal's account, there is no valid reason for not applying Art. 116 when the contract between the principal and agent is in writing registered. If suits within Art. 89 are suits for compensation for breach of contract to account, then Art. 115 will not apply because contracts already provided for are taken out of its operation. There being however no similar restriction in Art. 116, that article will apply. Of course, it may with force be argued that an action for moveable property which the agent is bound to hand over to the principal cannot be viewed as a suit for compensation for breach of contract express or implied, such a suit differing in substance from a suit for money on a bond which is a suit for compensation. In the view above indicated, the application of Art. 115 will not be excluded. At any rate, Art. 89 cannot apply when under the contract, the principal is not entitled to call upon the agent to pay the amount earlier than the stipulated time. Art. 89 in our opinion stands to Art. 115 in a relation somewhat analogous to Art. 62. It is open to the party entitled to frame his action so as to bring it under the one article or the other as it suits him.

As rightly pointed out by the learned Judges in this case, argument that because the duty to account subsists, the agency also must be taken to subsist is obviously fallacious, for that duty subsists, subject to the conditions prescribed by the Limitation Act even after the cessation of the agency. The test suggested for determining whether the agency has ceased, *viz.*, the ceasing of the agent to represent the principal, though a fairly useful test is not at all a comprehensive test for the obvious reason that the failure to represent the principal cannot be conclusive as to his *capacity* to represent the principal which alone really matters for the purposes of the article. Renunciation by the agent being as effectual to terminate the agency as revocation by the principal, failure to represent has a larger bearing on the question than if the principal's act were the only determining factor.

Vellayan Chetty v. Mahalinga Aiyar: I. L. R. 39 M. 387.

Unlike the English O. 17, r. 2, which gives a discretion to the Courts—see *Ballard* v. *Millner* [1], O. 22, r. 4 Cl. (1) Civil Procedure Code prescribes that on the death of the sole defendant or one of the defendants, the Court, on an application made in that behalf, shall cause the legal representative to be made a party and shall proceed with the suit and if no application is made within the time limited the suit shall abate against the deceased defendant. The judgment under review does not indicate how the imperative provision of O. 22, r. 4 cl. (1) is to be got over, or the rule as to abatement in cl. (3) which operates as a matter of course without any act of the Court. We should think that the effect of order 22 is to effect a stay of all proceedings in the suit so far as the deceased person is concerned, whether for or against him and any act done in the interval would be of no legal validity cf. *Duke* v. *Davies* [2]. But whether a decree if passed could be collaterally impeached is quite another matter. It is equally another question whether the other side will be entitled to a rehearing when the representative does not claim one. It will be noticed that in *Debi Baksh Singh* v. *Habib Singh* [3], the argument in the lower court was that the rules of Order 22 as to addition of representatives applied only when the suit is pending and not after it has terminated by an order of the Court. Their Lordships however consider Order 22 applicable and as regards the order, hold that the court has power to rectify a mistake inadvertently made.

Lakshmi Achi v. Subbarama Aiyar, I. L. R. 39 M. 488.

There is no appeal against an order under R. 5 of O. 22 or any of the rules as to joinder of parties in O. 1 or 31 but if the refusal of the application has the result of putting an end to the suit, an appeal would lie as from a decree and the question may be raised in appeal—*Subbayya* v. *Saminadhayyar* [4]. This apparently was not a case like that. If by the act of the executor title in the property had become vested in the legatee during the life time of the executor (an aspect of the case referred to in the argument but not in the judgment), we should think that the case would have come under R. 10 of O. 22 unaffected by the circumstance of the death of the executor.

1. (1895) W. N. 14.
2. (1893, L. R. 2 Q. B. 260.
3. (1913) I. L. R. 35 A. 331 (P. C)
4. (1895) I. L. R. 18 M. 496.

NOTES OF INDIAN CASES.

Nagindas Bhagwandas *v.* **Bachoo Hurkissondas**: I. L. R. 40 B. 270. (P. C.)

The decision of their Lordships is, of course, final; but the case is interesting as an illustration of the way in which the Hindu Law texts have sometimes fared at the hands of Orientalists and of Judges, who have had to look to them for light. The point for decision was as to the share taken by an adopted son in a partition with his adoptive uncle, in respect of the grand-father's estate. It is, of course, now too late in the day to go back to the numerous conflicting texts which ascribe different positions to the adopted son in the scale of subsidiary sons. The modern partiality for the adopted son has placed him on a footing of almost complete equality with the natural born son. The restriction as to share, imposed by the text of Vasishta, in a case of partition between an adopted son and a subsequently born aurasa son has however been recognised by the Courts, but that text does not in terms cover the question now under consideration. Among Sanskrit writers the only author dealing with it is the writer of the Dattaka Chandrika (S. V, para. 25). In the opinion of Indian Sanskritists and of many Indian Judges (including Sir John Edge himself) his authority is very low. But the Privy Council have taken a different view, and Sir John Edge, now as the mouthpiece of the Privy Council, accordingly proceeds on the footing that the case has to be determined with reference to that text.

With all respect, we are obliged to say that it is well nigh impossible to follow their Lordships in their interpretation of the passage. The translation by Mr. Sutherland even with the emendation thereof in *Raghubanand Doss* v. *Sadhu Churn Doss* [1], is unfortunately inaccurate and a comparison of that with the translation by Sir Ramakrishna Bandarkar (set out in their Lordships' judgment) will make it clear that Mr. Sutherland's translation fundamentally varies the meaning of the text. The opening sentence of S. 25 is obviously mistranslated by Mr. Sutherland and his interpolation of the words 'as a general rule' in the middle of the paragraph and of the words "the

1. (1878) I. L. R. 4 C. 425.

adopted son of one adopted" towards the end, has unfortunately clearly misled many. The text itself runs as follows :—

एवं धनिनः पुत्रान्तरसत्त्वे मृतपितृकस्य दत्तकपौत्रस्यापि दत्तोचितांशभागित्वं तदसत्वे सर्वहरत्वमपीति ।

न च पौत्रस्य स्वपितृयोग्यांशनियमात् दत्तकस्यग्रहीतुः पितामहौरसत्वे तादृशपितृव्यतुल्यस्यैवांशस्य तद्योग्यत्त्वाद्दत्तकपौत्रः पितृव्य तुल्यमेवांशं लभतामितिवाच्यं । पुत्रस्यदत्तकत्वे चतुर्थांशः पौत्रस्य तु तथात्वे समानांशः इति वैषम्यात् ॥

ततश्च स्वसमानरूपस्य पितुर्यादृशांशः शास्त्रसिद्धः तस्यैव स्वपितृ योग्यांशतेति यथोक्तमेव साधु.

In the well known way of sanskrit writers, the last passage re-affirms the proposition laid down in the first passage; the intermediate passage contains the opponent's argument and the author's refutation thereof.

It is somewhat singular that their Lordships proceed to decide the case on the assumption that even as translated by Sir Ramkrishna Bandarkar, this passage is not inconsistent with the view they take. It is impossible to accept the suggestion that the author is here contrasting the case of a competition between an adopted son of a natural born son and that natural born son's natural born brother with the case of an adopted son of an adopted son competing with a natural born son of his adoptive father's adoptive father. If *ex hypothesi*, both father and son had come in by adoption the reference to स्वसमानरूपस्यपितुः is meaningless. The author is laying down that in the case of a grandson by adoption the 'father's share' means the share that would have been due to the father if he had been of the same kind as the son himself. We cannot help feeling that the Privy Council have been misled by Mr. Sutherland's translation and by the fact that Vasishta's text deals only with a case of competition between sons of the *same* father. Paragraph 25 of S. 5 of the Dattaka Chandrika is really not an illustration of the application of Vasishta's text but an extension of it on grounds of logic and congruity.

As for the Indian cases, the decision in *Tara Mohum* v. *Kripa Moyee* [1] is clearly based on Mr. Sutherland's rendering. Those in *Dinonath* v. *Gopal Churn* [2] and *Surjokant* v. *Mohesh Chunder* [3] only hold that this rule of the Chandrika has no application to cases where an adopted son and a natural born son claim to

1. (1868) 9 W. R. 423.
2. (1881) 8 C. L. R. 57.
3. (1882) I. L. R. 9 C. 70.

inherit as distant collaterals and daughter's sons respectively. In *Dinonath's* [1] case, the learned judges, though they purport to follow the decision in *Tara Mohun* v. *Kripa Moyee* [2] expressly say at the end that the true meaning of Ss. 24 & 25 of S. 5 of the Dattaka Chandrika is that an adopted son and the adopted son of a natural born son stand in the same position. In *Raja* v. *Subbaraya* [3] the learned judges no doubt expressed a doubt as to the correctness of the interpretation in *Raghubanand's* case, but the grounds for the doubt are not even indicated. The actual decision in *Raja* v. *Subbaraya* [3] that among sudras the adopted son and the *aurasa* son share equally has now been dissented from (*Karuturi* v. *Karuturi* [4].

Among text-writers, Mr. Mayne has obviously been misled by Mr. Sutherland's translation when he says that the commencement of para. 25 lays down explicitly that the adopted son of one natural son inherits equally with the natural born brother of such son (Hindu Law, S. 170); and this leads him on to the view that the rest of that paragraph deals with the case of the adopted son of an adopted son. Messrs. West and Buhler do not notice this text particularly, but in a note at p. 372, they observe that the decision in Raghubanand's case (which however is not very accurately stated) would not be right on the principle of an adopted son fully representing his father in the absence of a natural son.' Mr. Ghose (Hindu Law, p. 614) considers that the decision in *Raghubanand Doss* v. *Sadhu Churn Doss* [5] may be correct in the main. Mr. Sarkar also (Law of Adoption, 2nd Ed. p. 400) approves of the view there taken as to the effect of the passage in the Dattaka Chandrika, but he is of opinion that the rule is applicable only to cases of 'inheritance' properly so called, and not to those governed by the Mitakshara doctrine of right by birth. But, as against this it must be remembered that the text of Vasishta (restricting the adopted son's share as against an after-born aurasa son) is as much in conflict with the 'right by birth' theory, yet it is accepted by the author of the Mitakshara; and when the Mitakshara deals with partition, it treats of the partition both of the ancestral property of the father and of his self-acquired property; and the right by birth is allowed to the son in both kinds of properties. As to the

1. (1881) 8 C. L. R. 57.
2. (1868) 9 W. R. 423.
3. (1883) I. L. R. 7 M. 253.
4. (1915) 29 M. L. J. 710.
5. (1878) I. L. R. 4 C. 425.

effect of the doctrine of 'representation', *i. e.*, that the son would take whatever the father would have taken, we venture to observe that the Mitakshara in Ch. I, S. 5 is only laying down the rule of *stirpital* division and it cannot be understood as providing that the 'share' of the father devolves on the son. Such a notion is obviously inconsistent with the settled rule that if after the death of one son but before the date of partition, other sons die without leaving issue, the son (if any) of the first predeceased son would take an increased share according to the number of branches existing at the date of the partition.

Bhaskar Gopal *v.* **Padman Hira**, I. L. R. 40 B. 313.

The learned judges do not seem prepared to follow the extreme view taken in *Sibendra Pada Banerjee* v. *Secretary of State* [1], as to the inapplicability of the rule as to 'delivery' in S. 54 of the Transfer of Property Act to cases in which the vendee is already in possession. But they hold that as the vendee was in possession as a tenant, the vendor had only the 'reversion' to sell, and that can be transferred only by a registered instrument. This would no doubt be so where a landlord seeks to transfer the reversion to a third person, but we are not sure if the transaction should be regarded in the same light even when the transfer is from the lessor to the lessee, for as between them an 'implied surrender' is possible under the law. We rather think, it would depend upon the nature of the transfer in each case, whether the tenant retains his term and takes only a transfer of the reversion or surrenders his term (by implication) and takes a sale of the property itself. In the latter case, a registered document will not be necessary when the property is below Rs. 100 in value. In the Bombay case, the appellant may nevertheless have failed as against the later transferee (who had purchased under a registered instrument) by the operation of S. 50 of the Registration Act.

---

1. (1907) I. L. R. 34 C. 207.

NOTES OF INDIAN CASES.

Kishan Lal *v.* **Sultan Singh:** I. L. R. 38 A. 5.

The Court has no power to dismiss a suit because it has reason to believe that the plaintiff is keeping back certain valuable evidence. It is only if the plaintiff admits possession of a document and fails to comply with the order of the Court for inspection, that the suit can be dismissed for default of prosecution. If the court has reason to believe that a party is keeping back documents the court is entitled to draw adverse inferences against the party so withholding but it cannot dismiss a suit.

Madho Ram *v.* **Nihal Singh**: I. L. R. 38 A. 21.

Before the recent Privy Council decisions which have settled the question, three different views prevailed in India as regards the nature of and the limitation applicable to applications under the Transfer of Property Act for an order absolute for sale. The view held in Madras was that the preliminary decree was the real and only decree in the case, and all subsequent applications for whatever purpose made were only applications in execution to which under certain circumstances, that is to say whenever the third column of art. 179 would be inapplicable, art. 178 would apply but otherwise art. 179 would be applicable. See *Mallikarjanudu Setti* v. *Lingamurthi Pantulu & etc.*,[1] *Vadapuratta* v. *Vallabha Valiya Raja*[2] *Rangiah Gounder* v. *Nanjappa Rao*[3]. The final decree did not in that view afford any fresh starting point for limitation. The view taken in Allahabad, on the other hand, was that though the application for order absolute was really an application for execution, there would be a fresh start for limitation from the final decree. The Calcutta High Court was of opinion that the application for an order absolute was in fact only an application in the suit which would be pending till the final decree was passed and that such an application being under the Transfer of Property Act and not under the Civil Procedure Code to which alone art. 178 or 179 would apply, neither of those articles applied and the application could be made

1. (1900) I. L. R. 25 M. 244. 2. (1901) I. L. R. 26 M. 300
3. (1903) I. L. R. 26 M. 780.

at any time. (See *Tiluck Singh* v. *Parsotin Pershad* [1] *Madhabmani Dassi* v. *Lambert* [2] *Rahamit Karin* v. *Abdul Karin* [3].) The effect of the recent Privy Council decisions in *Ashfaq Husain* v. *Gauri Sahai* [4] *Batuk Nath* v. *Munni Dei* [5] *Abdul Majid* v. *Jawahir Lal* [6] *Munna Lal Panash* v. *Sarat Chander Mukerji* [7] would seem to be to affirm the view of the Allahabad High Court and to hold that the preliminary decree and the final decree afford fresh starting points of limitation including that prescribed by sec. 48 C. P. C. See *Venkatamma* v. *Manikkam Nayani Varu* [8]. Neither *Batuk Nath* v. *Munni Dei* [5] nor *Abdul Majid* v. *Jawahir Lal* [6] however affects *Rangiah Gounden & Co.* v. *Nanjappa Rao* [9] so far as it applies art. 178 to certain applications for order absolute as in both those cases there was an appellate decree confirming the original decree from which limitation could run under art. 179. There is no scope for such differences of opinion under the new Code. The applications are applications in suits and not being in the nature of reminders to the Court of its duty to terminate the suit but applications requisite under the law as preliminary to Court's further action, art. 181 would appropriately apply to them. As regards the starting point for art. 181, in ordinary cases when there is no appeal, there would be no difficulty and it would be on the expiration of the period fixed for payment. Their Lordships hold in this case that the same would be the case even when there has been an appeal when the appeal judgment affirms that of the Court below. It could not be denied that if the appellate Court varied the decree in any particular, there would be a fresh right to apply on the appellate decree and we fail to perceive why it should be different when the appellate judgment is an affirming judgment. On the true theory of appeals, the Lower Court's decree becomes merged in that of the Appellate Court and the only operative decree thereafter is the appellate decree *Krishnamachariar* v. *Mangammal* [10]. Such being the case, it is but right that limitation should run only from the appellate judgment. The ratio of. *Ashfaq Husan* v. *Gauri Sahai* [4], also would seem to support

1. (1895) I. L. R. 22 C. 924.
2. (1910) I. L. R. 37 C. 796.
3. (1907) I. L. R. 34 C. 672.
4. (1910) I. L. R. 33 A 264.
5. (1907) I. L. R. 36 A. 284.
6. (1904) I. L. R. 36 A. 350.
7. (1914) I. L. R. 42 C. 776.
8. (1914) 17 M. L. T. 399 = 26. I. C. 214.
9. (1901) I. L. R. 26 M. 780.
10. (1902) I. L. R. 26 M. 91.

this conclusion. Somewhat analogous questions have arisen in respect of applications to revive execution applications struck off, applications by way of restitution and the Courts have held that limitation commences from the final decree or order and not from the original decree or order *Sheikh Mahomed* v. *William Alfred Thomas* [1]. A similar view has also been taken with reference to the effect of decrees in connection with arts. 62, 97 and 120. *Rajagopalan* v. *Thiruppanandal Thambiran*[2] *Bassu Khan and others* v. *Dhurn Singh.*[3]. But the point is by no means clear.

Sital Prasad *v.* **Lal Bahadur:** I. L. R. 38 A. 75.

A petition which merely recites an adjustment would obviously not require registration but whether apart from the decree, the adjustment so proved could be relied upon depends upon the nature of the adjustment. If the adjustment amounts to a transaction for whose validity a registered writing is essential, the adjustment cannot be relied upon but if the adjustment is nothing more than a compromise of a doubtful right, it does not require registration, not being one of the transactions for which writing is required by the Transfer of Property Act. If the petition instead of merely reciting an adjustment purports itself to be a record of the adjustment, then how far the petition can be relied upon is a question of great difficulty on which judges have widely differed, see *R. P. Chelamanna* v. *R. P. Rama Row* [4]. Whether a petition merely recites an adjustment or in itself is the record of adjustment, is one depending upon the facts of each case but on which considerable difference of opinion is possible.

Abid Ali *v.* **Imam Ali:** I. L. R. 38 All. 92.

Notwithstanding the strong expression of opinion of Mr. Amir Ali in the course of the argument in *Matadin* v. *Sheik Ahmed Ali* [5] the Courts in India have recently shown a tendency to recognise the principle of *de facto* guardianship even under the Mahomedan Law. *Mafazzul Hossain* v. *Basid Sheikh* [6] *Ram*

1. (1911) 11 I. C. 972.
2. (1907) 17 M. L. J. 149.
3. (1888) I. L. R. 11 A. 47.
4. (1910) I. L. R. 36 M. 46.
5. (1912) M. W. N. 183 (P. C.)
6. (1906) I. L. R. 34 C. 36.

Charan Sanyal v. *Arukul Chandra Acharjya* [1] *Ayder man Kutti* v. *Syed Ali* [2]. In the last named case Mr. Justice Abdur Rahim shows that that principle is recognised by the Mahomedan Law and reference to principles of equity is unnecessary and considers the limits of such concession. Of course the powers of the *guardian-de-jure* himself are very restricted under the Mahomedan Law and a *de facto* guardian cannot claim larger powers and necessity under the Mahomedan Law necessarily has a different connotation from that under the Hindu Law. Even in cases under the Hindu Law, alienations by *de facto* guardians (not being natural guardians) do not attract all the consequences of an alienation by *de jure* guardians (*Thayammal* v. *Kuppanna Kounden*)[3] and it may be questioned whether the rule as to inquiry justifying alienation can legitimately be extended to them.

Emperor *v.* **Lal Singh :** I. L. R. 38 All. 395.

The opposite construction adopted by the High Court of Bombay in *R.* v. *Kalubhai Meghabai*[4] and by our Court in *Uruma Mudali and others*[5] may no doubt lead to conflicting judgments but such a result is not provided against by the legislature in cases coming within S. 408 cl. (a) S. 411. The strongst argument is that the legislature had the interpretation placed by the Bombay High Court before it and yet did not make the point clear in the Act of 1898. On the other hand, the difference in language between S. 411 and S. 413 is noteworthy.

Kunwar Sen *v.* **Durbari Lal, :** I. L. R. 38 All. 411.

Obviously, mere entry of a man's name in the Revenue Register as the owner of a land cannot amount to adverse possession of the land but the further question decided namely that the equity of redemption which is not capable of possession cannot be adversely "possessed" has been otherwise decided in this court *Subramania Iyer* v. *Balasubramania Iyer* [6].

1. (1906) I. L. R. 34 C. 65,
2. (1912) I. L. R. 37 M. 514.
3. (1914) 27 M. L. J. 285.
4. (1870) 7 Bom. H. C. Cr. cases. 35.
5. (1914) 16 M.L.T. 33=23 I.C 928.
6. (1913) 38 M. 933, (F. B.).

Ramacharan Lal *v.* Rahim Baksh, I. L. R. 38 A. 416.

The question in this case is the same as that in *Appandai Vathyar* v.. *Bagubali Mudaliar* [1] but unlike the Madras High Court, the Allahabad High Court refused to attach any significance to *Pathakrama*. There is no question that in point of religious efficacy, the mother's brother's son is superior to the mother's sister's son but at the same time it cannot be denied that according to the popular notions, the relationship of the mother's sister's sons is closer than that of mother's brother's sons and this is reflected in the prohibition of marriage of the one and not of the other.

Chottey Lal *v.* Lakhmi Chand Magon Lal: I. L. R. 38 A. 425.

If the case pending before a Small Cause Court can validly be transferred to a court not having small cause powers, that court should be considered for the purpose of the suit, a court of small causes with the further result that the procedure of Small Cause Courts as well as the the revisional powers of the High Court becomes applicable to the such court quoad that suit. No doubt a somewhat anomalous state of affairs but the policy of S. 24 C. P. C. is for the legislature and not for the courts.

Radhika Prasad *v.* Secretary of State for India, I. L. R. 38 A. 438.

On an application for succession certificate, the right to the succession certificate is the only question that can legitimately be gone into *i. e.* the right of the applicant to represent the deceased person. The validity of the alleged claim of the deceased person is entirely beside the scope of the inquiry and the alleged debtors can have no locus standi.. The indemnity that the succession certificate affords is against the claimants to the estate of the deceased. If the court undertakes to decide disputed questions between the debtor and the representative it is obviously arrogating to itself the functions of the court to try the suit for the alleged debt.

1. (1909) I. L. R. 33 M. 439.

Laxman Nilkant v. Vinayakkeshvi, I. L. R. 40 B. 329.

The question for decision in this case was whether the interest of a member in joint family property could be attached in execution of a money decree obtained against his brother in respect of a debt borrowed for the benefit of both. It does not appear whether or not the judgment-debtor was the managing member of the family. The learned judges hold that whatever may be the effect of a sale (if one had been allowed to take place), where the stage of sale has not been reached, there is no reason for assuming jurisdiction to dispose of property belonging to one not a party to the suit nor the representative of the judgment-debtor. It seems to us that the question has not been dealt with from the correct standpoint and it is noteworthy that the judgment makes no reference to the line of reasoning adopted in decisions like *Lallubhai* v. *Vijbhukhandas Jagjivandas* [1], *Rangiah Chetti* v. *Thanikachella* [2] and *Nunna Setti* v. *Chidaraboyina* [3]. The Civil Procedure Code authorises the attachment in execution not only of property *belonging* to the judgment-debtor but also of that over which he has a disposing power which be may exercise for his own benefit. It is by virtue of this provision that in execution of a money decree against the father the interest of his sons in family property is allowed to be attached. And as pointed out by Subramania Aiyar, J. in *Rangiah Chetti* v. *Thanikachalla* [2] " if the son's share is property which the father has power to dispose of for his own benefit * * * * how can the share of any other undivided coparcener which the managing member can convey for debts incurred by him for legal necessity be treated differently ? " In *Sardarmal* v. *Aranvayal Sabapathi* [4] which was a case arising out of the insolvency of the manager of a joint family (other than a father) Strachey, J. held that but for the vesting order the creditor could have attached and sold on account of a family debt, " not only the interest of the judgment-debtor but also the interests of the whole joint family of which he was the manager." In *Shiam Lal* v. *Ganesh Lal* [5] a son who had been impleaded in the suit against his father but as against whom the suit had been dismissed, sued for a declaration that his share

1. (1886) I. L. R. 11 B. 37.
2. (1895) I. L. R. 19 M. 74.
3. (1902) I. L. R. 26 M. 214.
4. (1896) I. L. R. 21 B. 205.
5. (1905) I. L. R. 28 A. 288.

in the family property was not liable to be attached in execution of the decree that had been passed against the father alone; but the court held that unless the debt was shown to be illegal or immoral the son could not prevent the attachment and sale of his interests as well. We see no warrant for the distinction between the stage before the sale and that after it. If the learned judges had definitely come to the conclusion that a sale in execution of a money decree against a managing member can never pass anything more than his personal interest *i.e.*, that *Hari Vithal* v. *Jayaram Vithal* [1] was not right, the position would then be different. But they leave that point open.

Hansa Godhaji *v.* **Bhawa Jogaji**: I. L. R. 40 B. 333.

Much as we appreciate the sentiment underlying this decision, we cannot help observing that the decision is irreconcileable with the clear language of O. 21, R. 2 and is at variance with the whole course of case law relating to that provision. The interpretation placed on the rule by Heaton, J. in *Trimbck Ramakrishna* v. *Hari Laxman* [2] was not concurred in by his colleague (Chandavarkar, J.) and stands alone. Fraudulent conduct on the part of judgment creditors, in ignoring adjustments outside court, may be a fit matter for punishment by criminal courts or may afford a basis for a claim for damages in separate proceedings but the policy of the law, so far as the *executing* court is concerned is unmistakeable. It is not for the courts to sit in judgment upon it, however much they may regret it.

Sitabai *v.* **Laxmibai**: I. L. R. 40 B. 337.

The question of jurisdiction raised in this case turns upon whether a widow's claim to have her maintenance charged upon certain immovable properties involves 'the determination of any right to or interest in immovable property' within the meaning of S. 16 (d) of the Civil Procedure Code. The view here taken is substantially the same as that adopted by the Madras High Court in *Sundara Bai Sahiba* v. *Tirumal Rao Sahib* [3], which however was decided under the corresponding provision in the Letters Patent. In the Madras case, the learned judges observed

1. (1890) I. L. R. 14 B. 597. 2. (1910) I. L. R 34 B. 575.
3. (1909) I. L. R. 33 M. 131.

that the right of maintenance is 'not merely a personal obligation. It is a real right but is not a charge or any other proprietary right until it is referred to specific property by contract or decree.' We feel some doubt as to the correctness of this description nebulous as it is, and we are not sure if the view that it is a 'real' right is consistent with the decision in *Kalpagathachi* v. *Ganapati Pillai* [1], that a release of a right to maintenance does not require to be registered. (For a full discussion of the nature of the right to maintenance see *Lakshman* v. *Satyabhama* [2].) In so far as there is a claim to have the maintenance charged on specific immovable property, the applicability of S. 16 (d) Civil Procedure Code to the case depends upon the connotation of the word 'determination' *viz.*, whether it covers the 'creation' of a charge by the decree to be passed or it signifies only an adjudication as to an 'existing' interest. In the latter view, it would be difficult to maintain that the person entitled to maintenance has an existing interest in the property sought to be charged (the question is left open by the Judicial Committee in *Roshan Singh* v. *Balwant Singh* [3]). But the wider interpretation is more in accordance with accepted principles as to jurisdiction over immovable property; for otherwise it may become necessary for a court to create by its decree a charge on property not situate within its jurisdiction. It may also be mentioned in passing that a claim to charge maintenance on specific immovable property was in *Dose Thimmanna Bhutta* v. *Krishna Jantri* [4] held to be a suit in which a right to immovable property was directly and specifically in question, within the meaning of the rule as to *lis pendens*.

---

1. (1881) I. L. R. 3 M 184.
2. (1877) I. L. R. 2 B. 494.
3. (1899) I. L. R. 22 A. 191, 199.
4. (1906) I. L. R 29 M. 508.

NOTES OF INDIAN CASES.

The Municipal Board of Allahabad *v.* Tikanda Jang: I.L.R. 38 A. 52.

The Full Bench of our Court in *Natesa Aiyar* v. *Appavu Padayachi* [1] has taken the view that the deposit that is forfeited is not "a sum named in the contract as the amount to be paid in case of breach" within the meaning of S. 74 of the Indian Contract Act; in that view the vendor though bound to give credit for it is not restricted to that amount as compensation for breach. *The President of Vellore Taluq Board* v. *Gopalasami Naidu* [2]. This case is not in conflict with the decision of the Full Bench but proceeds upon the construction of the conditions of sale in the particular case. On a construction of those conditions, the Court came to the conclusion that the only penalty that was prescribed for non-payment of the purchase-money was the forfeiture of the deposit and that the vendor should have the right to resell. There was no clause that if on such resale, there should be deficiency, that deficiency should be made good by the vendee. The specific claim made in the case, *viz.*, the claim for the deficit might be got rid of that way but whether in the absence of an express clause in the contract his right to damages under S. 73 of the Contract Act could be so got rid of is certainly open to question.

Jibar Kunwar *v.* Gobind Das: I. L. R. 38 A. 56. (F. B.)

The decision in this case is obviously right. When in fact the parties are not co-owners, and they do not also purport to deal with each other as such, the mere fact that the result of the arrangement is that property is divided between two persons cannot make the transaction an "instrument of partition."

Barati Lal *v.* Salik Ram: I. L. R. 38 A. 107.

This is a case more or less upon the line but the conclusion is, we think, right. Here the daughter set up a limited right in herself; the brother's son contended on the other hand that the property belonged absolutely to himself. A compromise was entered into by which the brother's son, on receipt of consideration, gave up his right and agreed that the daughter should take absolutely. There were two ways in which the transaction could

1. (1913) I. L. R. 38 M. 178. 2. (1913) I. L. R. 38 M. 801.

be looked at; it could be looked at as an acknowledgment of the daughter's right as such daughter, with a promise by the reversioner not to claim succession or it might be looked at as a settlement which acknowledged the truth of the case of neither, and which neither was entitled to impeach relying on the case of the other. Their Lordships hold apparently that in neither view the brother's son was entitled to recover the property. That on the second view, he would not be entitled to succeed, we agree; but we do not at all feel sure that he would not be on the first. The distinction between agreement not to claim the right when it should fall in and a release of reversionary rights, is, we must confess, hardly a tangible one.

Dujai *v.* Shamlal: I. L. R. 38 A. 122.

From the point of view of common sense there is much to commend this judgment. Plaintiff says that he is the real mortgagee, his wife in whose name the mortgage deed stands being only a benamidar and makes her a party defendant. She does not object to his claim. Under those circumstances, if by the course adopted no defence of the other defendants (mortgagors) on the merits is prevented, it does not seem to be any concern of theirs as to which of them is really entitled. If for instance they could show that the suit was instituted by the plaintiff to avoid the plea of limitation, the wife not being available at the time of filing the plaint that may give them an interest in the question but in the absence of any such interest, it is difficult to see why they should be allowed to agitate it. Indeed, it has been held that an adjudication as between parties similarly situated is conclusive against third parties not interested in the question. *Ramamurthi Dhora* v. *The Secretary of State for India in Council* [1]. Convenient as this rule may be, we are afraid it is opposed to the judgment of the Privy Council in *Aumirtolall Bose* v. *Rajoneekant Mitter* [2]. Referring to a petition by the aunts of the plaintiff therein preferentially entitled to succeed (who were defendants in the case) in which they acknowledge the right of the plaintiff their Lordships say "the petition did not amount to a conveyance or a disclaimer of title but merely to an admission made more than six months after the commencement of the suit that the plaintiff was the real heir and that they had no defence to offer. It is clear that an admission or even a confession of

1. (1911) I. L. R. 36 M. 141. 2. (1875) 23 W. R. 214.

judgment by one of several defendants in a suit, is no evidence against another defendant. Suppose the real heir had been barred by limitation, she could not by her admission contrary to the fact that the plaintiff was the real heir, have bound the other defendants and thus have entitled the plaintiffs, upon a question of limitation to a deduction of the period of his minority to which she would not have been entitled herself."

Ram Baksh *v.* **Ram Lal**, I. L. R. 38 A. 217.

In applying *Subba Rao* v. *Rama Rao* [1] a point that is overlooked but has considerable bearing is that whereas under the Code of 1859 a party could not combine claims with respect to immoveable properties within different jurisdictions, without the permission of the Court under the later Codes, no such permission is needed. This change does cut out the root of the reasoning of in *Subba Rao* v. *Rama Rao* [1]. However that may be O. 2, r. 2 could not have barred the suit in this case. The right of a co-owner in joint possession to have partition is a continuing cause of action and the fact that he has omitted to sue at one time can't prevent him from suing at a later time. The case would be entirely different if there was an ouster at the date of the previous suit in which case, there would be no continuing cause of action at all, the cause of action accruing once for all when the dispossession took place. To this extent we think the statement that O. 2, r. 2 does not apply to partition suits requires qualification. In also another matter, we think the statement of law of Mr. Justice Walsh requires qualification. While it is true that "a right which a litigant possesses without knowing or having known that he possesses it can hardly be regarded as a "portion of his claim" *Amanath Bibi* v. *Imdad Hussain*, [2] the section "plainly includes accidental and involuntary omissions as well as acts of deliberate relinquishment" *Munshee Buzloor Ruheem* v. *Shumsoonissa Begum* [3].

Ganapat Rai *v.* **Multan**: I. L. R. 38 A. 226.

As Mr. Justice Mukherjea says in *Bhaiganta* v. *Himmat* [4] Ss. 115 and 116 of the Evidence Act may not be exhaustive and there may be other rules of estoppel, one of them being that a tenant is not entitled to deny the title of the landlord even after

1. (1867) 3 M. H. C. 376.
2. (1888) I. L. R. 15 C. 800 (P.C.).
3. (1867) 11 M. I. A. at 605.
4. (1916) 24 C.L.J. 103=20 C.W.N. 1335.

the determination of the tenancy. That is a perfectly intelligible position. The position taken in this case is however different and it is supported by the Privy Council decision in *Bilas Kunwar* v. *Desraj Ranjit Singh* [1] *viz.* that S. 116 directly governs. It must be confessed that a certain strain on the words of the section is needed to reach that result. Either the expression "continuance of the tenancy" is to be understood in a special sense or the duty to surrender must be taken to flow from the fact of the tenancy the legal effect of which cannot be destroyed by proof of title in others. The conclusion, however, is beyond the pale of controversy.

Ali Husain *v.* Hakin Ullah : I. L. R. 38 A. 230.

This seems to be an obvious case. On the one hand the benefit of the covenant could not run with the land reserved without an express assignment; on the other, the burden of the covenant could not run with the land sold as the covenant did not "touch or concern" the land.

Abdul Karim *v.* Islamunnissa Bibi : I. L. R. 38 A. 339.

At the first blush, the argument based on the similarity in the language of Art. 165 and O. 21, Rr. 100 and 103 might appear conclusive but on second thoughts it will be found that the arguments on the other side are by no means negligible. Art. 165 does not refer to R. 100, on the other hand while R. 100 speaks of applications by persons "other than the judgment-debtor" Art. 165 speaks of application by "person dispossessed." Again, the effect of R. 103 and S. 47 taken together, see *Ramaswami Shastrulu* v. *Kameswaramma* [2], is to compel persons other than the judgment-debtor not being transferees from him after institution of the suit (*e. g.*, purchasers in execution of decrees) to apply under R. 103 within the time limited by Art. 165. No valid reason can be suggested why those persons should be accorded a less favourable treatment than the judgment-debtor or his transferees. Lastly, the construction adopted by the Madras and the Allahabad Courts was before the legislature when the Act of 1908 was passed ; nevertheless the legislature allowed the old language to continue.

---

1. (1915) I. L. R. 37 A. 557.
2. (1900) I. L. R. 23 M. 361.

NOTES OF INDIAN CASES.

Sonu Valad Khushal *v.* **Bahinibai** : I. L. R. 40 B. 351.

This is a case practically on all fours with *Dampanaboyina* v. *Addala Ramaswami* [1], though we find no reference to the Madras case, either in the arguments or in the judgment. The attempts made from time to time to define the expression 'cause of action' have done the cause of procedure more harm than good, for the language used in each case is necessarily such as to meet the particular objection to which prominence was given in that case. Undue stress is thus sometimes laid on the 'title of the plaintiff' as being the chief element in determining his 'cause of action' while in other cases more importance is attached to the 'infraction' thereof. But whatever the reason may be, few can help feeling that it does little credit to the judicial record of this country that in numerous cases a litigant has to pass through three Courts before he can feel sure that his suit has been properly framed.

Gangabai Peerappa *v.* **Bandu** : I. L. R. 40 B. 369.

The decision in this case that an illegitimate son among sudras can inherit even where he was born of a mother who had been married to another before her concubinage, must be taken to be limited to the Bombay Presidency; though even there, the right is denied if the illegitimate son is born during the continuance of the mother's married status. The Calcutta High Court went to the other extreme in confining the right of inheritance to one born of a 'female slave' (See *Kirpal Narain* v. *Sukurmoni* [2], *Ram Saran* v. *Tekchand* [3]), but even there the more recent tendency is towards the intermediate view, obtaining in Madras, of recognising a right of inheritance in one born of a permanent and exclusive concubinage See *Chathurbhuj* v. *Krishna Chandra* [4]. The Madras authorities are collected in the judgments in *Soundarajan* v. *Arunachalam* [5], and the Full

1. (1902) I. L. R. 25 M. 736.
2. (1891) I. L. R. 19 C. 91.
3. (1900) I. L. R. 28 C. 194.
4. (1912) 16 C.L. J. 335.
5. (1915) I. L. R. 39 M. 136. (F. B.)

Bench ruling has for the present set at rest the question raised by *Sundaram* v. *Minakshi* [1], whether if the mother was a dancing girl attached to a temple, the son can claim to inherit to his putative father even though born of an exclusive and continuous connection. It may also be noted that the Full Bench attach no importance to the circumstance (relied on by Seshagiri Aiyar, J.) that the woman was not a virgin when she became the concubine of the plaintiff's father.

On the question of the 'share' to be allotted to the illegitimate son when there are other heirs taking with him, the decision under notice is in conflict with the view adopted in Madras in a recent case *Visvanathaswami* v. *Kamalammal* [2]. In so far as reliance is placed in the last mentioned case on the Bombay decisions in *Kahi* v. *Govind* [3], and *Sheshgiri* v. *Gireva* [4], the observations thereon in the present judgment deserve notice. Even among the Madras authorities referred to, none of the earlier cases except perhaps *Chinnammal* v. *Varadarajulu* [5], had directly to decide the question of the extent of the 'share' of the illegitimate son and the decision in *Visvanathaswami* v. *Kamalammal* [2], seems to us fairly open to reconsideration, when the question should come up again. The argument on the basis of the Sanskrit texts is clearly stated in the decision under notice and even in the Madras case, the learned Judges admit that much may be said in favour of that view.

Shavakshaw *v.* **Tyab Haji Ayub** : I. L. R. 40 B. 386.

We wonder why no reference is made by Macleod, J. to the decision in *Harakhbai* v. *Jamnabai* [6], on the strength of which the application before him seems to have been made. It is anyhow clear that the two cases take divergent views as to the procedure to be followed by a party to a suit, when the subject matter thereof had since the institution of the suit been made the subject of an arbitration and award without the intervention of the Court.

1. (1912) 16 I. C. 787.
2. (1915) 30 M. L. J. 451.
3. (1875) I. L. R. 1, B. 97.
4. (1889) I. L. R. 14 B. 282.
5. (1892) I. L. R 15 M. 307.
6. (1912) I. L. R. 37 B. 639.

It is perhaps not altogether beyond doubt whether the jurisdiction of a court to decide a suit pending before it can be excluded except in one or other of the ways provided by statute. *Cf. Raja of Venkatagiri* v. *Chinta Reddi* [1]. We are inclined to agree with Davar, J. (in *Harakhbai's case*) in spite of the decision to the contrary in *Nanjappa* v. *Nanjappa* [2], that the arbitration sections of the Civil Procedure Code do not contemplate a reference in a pending suit except by order of the Court. See also *Venkatachala* v. *Rangiah* [3]. It seems also fairly clear that an agreement to refer, entered into *after suit* or even a reference made pursuant thereto cannot be specifically enforced or as such operate to bar the trial of the suit *Cf. Tincowry Dey* v. *Fakir Chand Dey* [4], *Rukhanbai* v. *Adamji* [5]. The decision in *Sadiq Hussain* v. *Fargir Begam* [6] does not seem to us to militate against this view; for there the compromise settled the rights of the parties and only left the working out thereof to certain arbitrators. The question remains, what is the effect of an award following upon the reference. *Lakshmana Chetti* v. *Chinnthambi* [7] cannot certainly be said to *decide* that the reference and the award amount to an 'adjustment' within the meaning of S. 375 Civil Procedure Code. *Pragdas* v. *Girdhardas* [8] and *Nanjappa* v. *Nanjappa* [2] are the only two authorities prior to *Harakhbai's case*, holding that the award can be given effect to under S. 375 Civil Procedure Code. The remarks of Beaman, J. (in *Rukhanbai's case*) on the decision in *Pragdas* v. *Girdhardas* [8] seem to us to have more force than the learned Judges who heard *Nanjappa* v. *Nanjappa* [2] were inclined to recognise. Where, at any rate, one of the parties does not accept the award, it is not easy to see how a Court acting under S. 375 can exercise the powers conferred by the sections of the code relating to arbitration, as for instance, to modify or correct the award or remit it for reconsideration; and, in spite of the remarks of Davar, J. in *Harakhbai's case*, we venture to doubt if the court can in such a case enquire into the objections to the validity of the award. Macleod, J. in the case under notice, cuts the Gordion knot by

1. (1912) I. L. R. 37 M. 408.
2. (1912) 23 M. L. J. 290.
3. (1911) I. L. R. 36 M. 353.
4. (1902) I. L. R. 30 C. 218.
5. (1909) I. L. R. 33 B. 69.
6. (1909) I. L. R. 33 A. 743; (P.C.)
7. (1901) I. L. R. 24 M. 326.
8. (1902) I. L. R. 26 B. 76.

holding that S. 89 of the new Code of 1908 has the effect of making the arbitration sections applicable to an award of the kind in question. It remains to be seen whether this view will find general acceptance.

Secretary of State for India *v.* Gulam Rasul; I. L. R. 40 B. 392.

Much as we sympathise with the endeavour to temper law by justice, we cannot help saying that the position taken up here on the strength of the observations in *Secretary of State* v. *Gajanan Krishnarao* [1] is somewhat illogical. If, as the learned judges hold, the language of S. 80, C. P. C. does not permit of an exception being made in the case of suits for injunction, it does not appear to be for the Court to make its application depend upon its view of the imminence of the injury threatened. The observations in *Secretary of State* v. *Kalekhan* [2] clearly incline to the contrary.

---

1. (1911) I. L. R. 35 B. 362.
2. (1912) I. L. R. 37 M. 113.

NOTES OF INDIAN CASES.

Chandrika Baksh Singh *v.* **Indar Bikram Singh,** I. L. R. 38 A. 440. (P. C.)

Impertinent intervener in another person's affair is a catching phrase and will have the vogue for a long time to come but what exactly the case decides it is difficult to gather. Plaintiff wanted a declaration of title against the defendant and there was a declaration against him. Plaintiff was the party in possession. It is difficult to say whether this was what sufficed, in their Lordships' opinion, in the absence of title in the defendant to entitle the plaintiff to a declaration or the further circumstance that a declaration had been obtained against the persons really entitled and they had acquiesced in the decision. We apprehend that this latter aspect it was that weighed with their Lordships and in that view, the decision involves no departure from any previously accepted principles.

Fateoh Chund *v.* **Rup Chand,** I. L. R. 38 A. 446, (P. C.)

"Maliki" is a term of art and denotes absolute title even though the grantee is a woman and the significance of the term is not abated or fortified by enumeration of the powers involved in it. The testatrix in this case had made a grant to A, a male of the entire properties of hers as malik with "powers of sale gift &c.," subject to a condition *viz.,* that of a village, a certain named lady shall be malik. The grant in her favour was not accompanied by any statement as to her powers. From this the first court inferred that her "maliki" was of a more qualified kind than that of A. Their Lordships held that this inference was inadmissible.

Param Hans *v.* **Randhir Singh,** I. L. R. 38 A. 461.

The definition of an attestation approved by their Lordships of the Privy Council in *Shamu Patter* v. *Abdul Kadir* [1] is that given in *Burdett* v. *Spillsbury* [2] "the party who sees the will

1. (1912) I. L. R. 35 M. 607. 2. (1843) 10 Cl. & Fin. 340.

executed is in fact a witness to it; if he subscribes as a witness, then he is an attesting witness." A party who does not subscribe at all cannot, therefore, be an attesting witness; what amounts to subscribing is another question, whether it should be the mark or signature of the party himself or whether the same by somebody else under his directions would suffice. It is also quite another question whether the party should subscribe himself as witness. On the authorities evidence *aliunde* would seem to be admissible to show that the party subscribing signed *animo attestandi*.

Goswami Sri Raman *v.* Lalji Hari Das, I. L. R. 38 A. 474.

This case raises a somewhat difficult point on the language of S. 4 of the Succession Certificate Act. That section says that no decree shall be passed against the debtor of a deceased person for payment of the debt in favour of a person claiming to be entitled to the effects of the deceased person or any part thereof except on the production by the person so claiming of (i) a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased or (ii) a certificate granted under the Act and having the debt specified therein. Now suppose the legal representative of a deceased person transfers the debt. What is the position of the transferee? Is he bound to produce a succession certificate or letters of administration in his own favour before getting a decree or is it sufficient if he produces one in favour of his assignor or is he entitled to sue without producing either. The language of Mr. Justice Walsh in this case might suggest that the last is the right view but that would be opposed to *Karuppasami* v. *Pichu* [1] and would apparently frustrate the object of the Act. We doubt if that is what is intended by his Lordship, the case itself being one in which letters of administration had already been taken out. As his Lordship points out the section has reference only to a person claiming to be entitled to the *effects* of a *deceased* person or any part of it and an assignee is not such a person. The utter absurdity of the contrary view would be made clear if we consider the case of probate of a Hindu Will in one of the Presidency Towns. After transfer, the transferor could not sue because he would have no

1. (1892) I. L. R. 15 M. 419.

title and there would also be no means of enabling the transferee to sue as there is no machinery provided for the grant of succession certificate in the Presidency Towns. This *impasse* could be avoided by reading the section as only requiring the title of the person claiming the estate of the deceased to be vouched by the successsion certificate or letters of administration irrespective of the person that sues. The liability of the assignee to produce such a voucher is a liability *de hors* the Act, a consequence of the rule that an assignee takes subject to all the liabilities of the assignor.

It is a more difficult question whether the conclusiveness and the indemnity afforded by S. 16 would be available in the case of transferees as well. Seeing that the indemnity is afforded not only to payments but also dealings, it does not *prima facie* seem improper to extend it to payments to transferees, provided the validity of the transfer *inter se* between the transferor and the transferee is established. The liability to account under S. 25 would also devolve on the transferee under S. 132 of the Transfer of Property Act.

Secretary of State for India v. Chellikani Rama Rao, I. L. R. 39 M. 617 (P. C.).

With this case, we shall have seen the last of the doctrine that it is open from a shorter enjoyment than is insisted upon by the statute, to infer a longer enjoyment subject to the inference being displaced by the other side. Though the case is one on Art. 149 of the Limitation Act, we do not fancy that a different rule can be laid down with regard to easements or with regard to private individuals. In all cases, the onus of establishing enjoyment for the *full* prescription period would lie on the party alleging it.

With this case, we shall also have seen the last of the attempts based upon *Rangoon Botatung Company* v. *Collector of Rangoon* [1] to cut down the right of appeal. Their Lordships are perfectly clear on the point. "When proceedings of this character reach the District Court," they say "that court is appealed

1. (1912) I. L. R. 40 C. 21.

to as one of the ordinary courts of the country with regard to whose procedure orders and decree, the ordinary rules of the Civil Procedure apply." Th.s, it may be noted, is in accordance with the view enunciated by the House of Lords in *National Telephone Company* v. *Post Master General* [1].

The moot point of jurisprudence decided in this case which must give it more than Indian importance is that the Crown has property in the sea bed within the three-mile limit.

Janaki Ammal *v.* **Narayanasami Aiyar**, I. L. R. 39 M. 634 (P. C.)

Although it was well understood that bare declarations should not ordinarily be given in favour of a reversioner that he is such, it was thought that this was not an inflexible rule; their Lordships apparently think otherwise.

Satyabhama *v.* **Kesavacharya**, I. L. R. 39 M. 658.

In this case, their Lordships enforce in favour of a fallen Brahmin widow the humane provisions of the Hindu Law allowing starvation allowance even to fallen women if they repent. It was possible to have held them to be mere moral injunctions, or to have treated the widow's case as an exception. But on the whole we think that their Lordships chose the better part in treating the injunction as legal and enforceable. It is curious to note that the practice referred to in the Mitakshara of providing a residence is still prevalent among the Nambudiris.

---

1. (1913) A. C. 546.

NOTES OF INDIAN CASES.

Venkayamma Rao *v.* Appa Rao : I. L. R. 29 M. 509, P. C.

This, no less than the previous judgment of Lord Shaw in *Mahomed Mussa* v. *Aghore Kumar Ganguly* [1] may be counted on to confuse for a considerable time to come the profession and the judiciary in this country, a result more or less to be expected from the application of the terms of an alien system of jurisprudence to the Statute law of this country. Terms like proposal, acceptance, contract and specific performance are freely used in this case to denote the nature of the transaction and the remedy thereon. Nevertheless, it will be found that the action was not framed as for specific performance but was one merely for declaration of title and possession. Nor is the basis for decree in favour of the plaintiff precisely indicated, whether it is based on the doctrine of part performance or whether their Lordships use the term contract in the sense of executed contract or conveyance (a course justifiable in Scots jurisprudence) or whether their Lordships regard the suit as substantially one for specific performance. However, rei interventus or actings upon it will be found, are used only for presuming a completed engagement and as such, it cannot be said that relief was given to the plaintiff with reference to the doctrine of part performance nor was reference to such a doctrine necessary in the circumstances of the case, the suit being in time, viewed even as a suit for specific performance. The only difficulty in accepting the view that the suit was treated by their Lordships as one for specific performance is that presented by the frame of the decree. Even viewing the transaction as a conveyance in 1893, it was not, as pointed out by their Lordships a transaction for which the Indian Law required writing. A transfer for consideration, not being a sale, does not require writing. Such writing as there was, contained but a bare proposal and did not require registration. Thus the case, properly understood, it will be found does not afford foundation for the reversal of the previously accepted opinions of this court *e. g.*, in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* [2].

1. (1914) I. L. R. 42 C. 801. 2. (1904) I. L. R. 29 M. 336.

Re Abdur-Desikachari : I. L. R. 39 M. 539.

This case is *ad idem* with 27 M. 510 but the reasoning seems to go further than is warranted by that case. The reasoning based on the circumstance that Art. 15 falls within the part dealing with civil jurisdiction would affect right of appeal in sanction matters as well as in the case of proceedings under S. 145. Right of appeal in the former case is recognised by a Bench of three Judges in *Chakrapani Ayyangar* v. *King Emperor* [1]; in the latter by a Full Bench in *Rajah of Kalahasti* v. *Narasimha Nayanivaru* [2]. The judgments in these two cases make it clear that neither the circumstance that the Court that passes the order is a criminal Court, nor the circumstance that the object of the proceedings is prevention of a criminal offence is sufficient to make the order an order in a *criminal trial*. The true test seems to be that deducible from the collocation of the two words "sentence or order;" it must either be a sentence or something *ejusdem generis* with a sentence. Applying this test, an order under S. 488 would come within the exception; for whether the direction to pay is a sentence or not there is the alternative penalty of an imprisonment in the case which would be in the nature of a sentence. In the case of security proceedings, we have the nearest approach to a sentence. We doubt if the same can be said of proceedings under S. 133. These proceedings would seem more appropriately to go with proceedings under S. 145 than with proceedings under the security chapter unless the circumstance that disobedience of the order promulgated is expressly made an offence should be considered to make a difference. In *Subbaya* v. *Ramaya* [3], the view is taken that no appeal lies against such an order.

Subrahmania Pillai v. Kumaravelu Ambalan : 39 M. 541.

This point is now covered by a Full Bench of this court. (see C. M. A. 51 and 93 1915.)

---

1. (1902) 12 M. L. J. 408.
2. (1907) 17 M. L. J. 158.
3. (1915) I. L. R. 39 M. 537.

Husain v. Karim: I. L. R. 39 M. 545.

Subject to one qualification which we would suggest this case contains, we think, an accurate and comprehensive statement of the rules of limitation applicable to the case of mortgage decrees passed under the Transfer of Property Act. The conclusions deducible from the case law are thus summarised (i) The preliminary decree passed under S. 88 of the Transfer of Property Act is executable. (ii) In order to obtain the order absolute under S. 89, steps have to be taken in execution. (iii) To such applications Art. 182 or 183 would apply according as the decree happens to be of a mofussil court or of the original side of the High Court. (iv) There is a fresh starting point given to the decree holder after the preliminary decree ripens into a final decree. (v) It would follow from the above that a decree-holder will have 12 years under S. 48 of the Code of C, P. C. to perfect the preliminary decree and another 12 years under the same section if he gets an order absolute within the first 12 years. The emendation required is that suggested by *Rangiah Goundan & Co.* v. *Nanjapparao* [1], *viz.*, that art. 181 (178) must apply to the first application to make the order absolute by reason of the inapplicability of the third column of art. 182 to such a case.

Moolchand v. Alwar Chetty: I. L. R. 39 M. 548.

As observed by their Lordships of the Privy Council in *Sundar Koer* v. *Rai Sham Krishen* [1] "after the passing of a decree, the matter passes from the domain of contract to that of judgment" and the rights of the promisee "should thenceforth depend not on the contents of his bond but on the directions in the decree", but the decree carries out only what the parties undertook under the contract, and it seems to be a fair presumption to make that where the promise is a joint and several promise, the decree passed upon such a promise similarly imposes a joint and several liability. Joint and several decrees are contemplated by the code, see O. 21, R. 18.

1. (1908) I. L. R. 26 M. 780. 2. (1906) I. L. R. 34. C. 150.

Sri Jagannada Raju *v.* **Sri Rajah Prasad Rao**: I. L. R. 39 M. 554.

We are not certain that in deciding that the contract is void, their Lordships are not adding a new head of public policy, a course disapproved in *Janson* v. *Driefontein Consolidated Mines* [1].

A contract is not a conveyance and is attended with several obstacles to its fulfilment and it is hard to infer out of the statutory bar to transfers *in praesenti* a prohibition of agreements to transfers *in futuro* when the transfer becomes permissible in law. The transfer of a *spes successionis* is only void and not illegal. Personal estoppels against reversioners recognised in numerous cases in this Court as well as the Privy Council would seem to point to the contrary conclusion.

[*End of Vol. XXXI.*]

---

1. (1902) A. C. 484.

NOTES OF RECENT CASES.

Seshagiri Aiyar, J.
Phillips, J.
1916, July 11.

L. P. A. No. 316 of 1914.

Contract—Offer and acceptance—Counter proposal—Silence, if amounts to acceptance.

A ordered goods from B and directed that they should be immediately despatched. Ten days after the receipt of the order B wrote back saying that he would send the goods in ten or fifteen days thereafter. There was no reply to this letter from A.

Held, that there was no completed contract between the parties, that B's letter contained a counter proposal which was not accepted by A, and that in the circumstances of the case A's silence did not amount to an acceptance of B's offer.

T. Prakasam for Appellant.

P. V. Parameswara Iyer for Respondent.

The Offg. Chief Justice
Krishnan, J.
1916, July 11.

A. S. No. 110 of 1915.

Evidence Act, S. 41—Judgment in rem—*Grant of letters of administration with will annexed—Bar to subsequent suit impugning will.*

Where letters of administration with the will annexed have been granted, a subsequent suit impugning the validity of the will is barred by reason of S. 41 of the Evidence Act.

G. Venkatramiah for Appellant.

B. Narasimha Rao and *P. Somasundram* for Respondent.

The Offg. Chief Justice
Seshagiri Aiyar and
Phillips, JJ.
1916, July 17.

L. P. A. No. 290 of 1914.

Hindu Law—Joint Family—Alienation of Specific property by a member—Alienee not entitled to joint possession.

Where a stranger purchases a portion of joint family property from one of the members of the family, he cannot ask for joint possession along with the other members but can only sue for partition.

T. Prakasam for Appellant.

P. Nagabhushanam for Respondent.

Spencer and Krishnan, JJ.
1916, July 18.

C. M. S. A. No. 22 of 1915.

Limitation Act, 1908, Art. 182, (5)—Application in accordance with law—Relief which the Court is incompetent to grant, application for—Whether saves time for a subsequent application for execution.

Where a decree holder in his execution petition asked for the arrest of the judgment debtor's legal representatives, while his only right was to proceed against the assets of the deceased judgment-debtor in the hands of the legal reprentatives and the execution application was dismissed and within 3 years of that application he again applied to execute the decree against the assets of the judgment-debtor, *Held* that the latter application was not barred by limitation; and the former application though it prayed for a relief which the Court could not grant was an application "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act.

(1914), M. W. N., p. 157, followed.

Mir Sultan Mohideen for Appellant.

V. Ramesam for the Respondent.

Spencer, J.
Krishnan, J.
1916, July 19.

C. M. S. A. No. 39 of 1915.

Limitation Act, 1908, Art. 182 (5)—Application in accordance with law—Application not giving details of, prior execution petitions—Returned for amendment—Necessary amendments not made—Whether one in accordance with law—Civil Procedure Code, 1908. O. 21 R. 17 (2)—Whether has changed the law.

Where an execution petition was presented in 1911 in which the date of a former petition was not given and another petition and its result were not mentioned at all and the petition (of 1911) was returned for amendment in the above particulars, but was not re-presented after making the amendments and there was no prejudice to the judgment-debtor by reason of the inaccuracies in the petition, *Held* that such a petition is one in accordance with law and will save time for a subsequent application for execution.

16 M., p. 142, followed.

O. 21 R. 17 (2) of the Civil Procedure Code of 1908 has not made any change in the meaning to be given to the word "in accordance with law" in Art. 182 (5) of the Limitation Act.

C. A. Seshagiri Sastri for *K. V. Krishnaswami Aiyar* for the Appellant.

V. Narasimha Aiyangar for the Respondent.

NOTES OF RECENT CASES.

Ayling, J.
Srinivasa Aiyangar, J.
1916, July 26.

C. M. P. No. 1936 of 1916.

Civil Procedure Code, O. 45 r. 7—Deposit of Security after six months of the decree or six weeks of the certificate—Power of Court to order—Cogent reasons—Poverty and inability to find funds, whether sufficient reason.

The Court has jurisdiction to extend the time for furnishing security under O. 45 r. 7 for cogent reasons; and there are no limitations for exercising their discretion to excuse the delay. Poverty and inability to find funds within the specified time may be a ground to excuse the delay.

T. R. Ramachandra Aiyar for the Petitioners.

C. A. Seshagiri Sastri for *I. M. Krishnaswami Aiyar* for the Respondents.

[Ed.—Their Lordships declined to follow 14 Mad., p. 391, and 14 Mad., p. 392, contra.]

Ayling and
Srinivasa Iyengar, JJ.
1916, July 27.

A. S. Nos. 170, 171 and 231 of 1914.

Mahomedan Law—Waqf—Dedication—Execution of registered waqfnamah—Fraud of creditor—Transfer voidable—Subsequent conduct of dedicator, if relevant.

Where a Mahomedan in heavily involved circumstances executes a registered deed of waqf of all his properties and himself continues in possession, creditors can impeach the transfer as being colorable and intended to defraud them. Evidence of the subsequent conduct of the dedicator and his representatives is relevant to prove the colorable nature of the dedication.

C. Madhavan Nair for Appellant.

C. V. Ananthakrishna Aiyar and *A. S. Venku Iyer* for Respondents.

Phillips, J.
1916, July 28.

Crl. R. C. No. 104 of 1916.

Criminal Procedure Code, Ss. 4 (h) and 203—Dismissal of complaint, if a bar to re-hearing it—Letter to the District Magistrate to take action, if a complaint.

Where a complaint under S. 203, Criminal Procedure Code is dismissed and the order of dismissal is not set aside, it is still competent to the Magistrate to re-hear it.

A letter sent by a District Munsif to the District Magistrate as head of the Police of the District, to take proceedings against a person under Ss. 193, 467 and 471, I. P. C., is a complaint.

26 A. 514 followed.

K. V. Krishnaswami Aiyar for *T. M. Krishnaswami Aiyar* for Petitioner.

The Public Prosecutor for the Crown.

Oldfield and Sadasiva Aiyar, JJ.
1916, August 4.

Referred Case No. 1 of 1916.

Jurisdiction—Small Cause Court—Suit for contribution from ex-partner in respect of sums paid for debts of dissolved partnership.

A suit by a partner, who pays the debts of a dissolved partnership, for contribution from his ex-partners is cognisable by a Small Cause Court.

A. V. Visvanatha Sastri for Petitioner.

G. S. Venkatarama Aiyar for Respondent.

Abdur Rahim, Offg. C. J.
Seshagiri Aiyar and Phillips, JJ.
1916, August 7.

Full Bench.
C. M. S. A. No. 105 of 1914.

Civil Procedure Code, S. 48 (a) and (b)—Combined decree in mortgage suit—Right to proceed against other properties after exhausting the hypotheca—Execution of decree—Limitation.

Per *Abdur Rahim, O.C.J.* and *Seshagiri Iyer, J.* (*Phillips, J.* dissenting.) Where a mortgage decree for sale also includes a provisional decree for recovery of any balance from the other properties of the mortgagor in case the sale proceeds of the mortgaged property are found insufficient to satisfy the entire decree amount, the period of 12 years limited by S. 48 of the C. P. Code, for the execution of the decree against the other properties of the mortgagor begins to run not from the date of the decree but only from the date when the mortgaged properties are sold and the sale proceeds found insufficient to satisfy the decree.

A. V. Visvanatha Sastri for Appellant.

S. Muthiah Mudaliar for Respondent.

The Offg. Chief Justice, Seshagiri Aiyar and Phillips, JJ. 1916, August 7.

L. P. A. 329 of 1914.

Transfer of Property Act, 83, 84—Deposit in Court—Disputes among heirs of the mortgagee—Subsequent withdrawal by mortgagor—Cessation of interest.

A mortgagor having deposited the mortgage amount in Court under S. 83 of the Transfer of Property Act allowed the same to remain there for a period of one year but subsequently withdrew it as the heirs of the original mortgagee could not draw the amount owing to disputes among themselves as to who was entitled to the amount. *Held* that interest did not cease to run from the date of the deposit.

Per *The Offg. Chief Justice and Seshagiri Aiyar, J.* (*Phillips, J.* contra). The mortgagor should have continued the deposit in Court to enable the mortgagee to take the amount from Court.

35 Mad., p. 44 followed.

Per *Phillips, J.*—As the heirs of the mortgagee would not draw the amount till they had settled the disputes among themselves, the mortgagor by withdrawing the amount before they settled their disputes, had not done everything to enable the mortgagee to take the amount from Court.

The view, that even after a refusal by the mortgagee to take the amount from Court the deposit must be continued, to stop interest from running as laid down, 35 Madras 44 *not approved.*

K. R. Rengasawmi Aiyangar for the Appellant.

B. Sitaram Rao for *T. R. Venkatrama Sastri* for the Respondents.

The Offg. Chief Justice, Seshagiri Aiyar, and Phillips, JJ. 1916, August 7.

Full Bench.

S. A. No. 2177 of 1914.

Evidence Act, S. 116—Estoppel between landlord and tenant—Tenant not let into possession, but already in possession executing lease deed—Whether estopped from denying title of landlord.

Where a tenant already in possession executed a lease deed to a person thereby acknowledging him to be the landlord and when on the expiry of the term of the lease, the landlord brought

a suit in ejectment against the tenant and the tenant denied the title of the landlord.

Held, per Seshagiri Aiyar and Phillips, JJ.—(*The Offg. Chief Justice* dissenting) that in the absence of proof, that the lease deed was executed under circumstances of fraud, misrepresentation or mistake entitling a party to a contract to set it aside, the tenant is estopped from denying the landlord's title.

Per The Offg. Chief Justice.—S. 116 of the Evidence Act is exhaustive of the law of estoppel and is the same as the English Law on the point. A tenant not let into possession by the landlord is not estopped from denying his landlord's title. S. 116 of the Evidence Act only deals with cases where the tenant has been let into possession by the landlord.

T. M. Krishnaswami Aiyar for the Appellant.

V. C. Seshachariar for the Respondent.

Abdur Rahim, O. C. J.
and Seshagiri Aiyar, J.
1906, August 7.

O. S. A. 87 of 1915.

Presidency Towns Insolvency Act, Ss. 7 and 36—High Court—Insolvency Jurisdiction—Claims outside the ordinary original Civil Jurisdiction—Power of Court—Letters Patent, cl. 12.

Under S. 7 of the Presidency Town Insolvency Act, the High Court in the exercise of its insolvency jurisdiction has the power to try claims against third parties who are alleged to be in possession of the property of the insolvent or to be indebted to him and the Court can exercise this power though the claim be one which it could not entertain under cl. 12 of the Letters Patent, in the exercise of its ordinary original Civil Jurisdiction.

M. D. Devadoss for Appellant.

M. A. Tirunaranachari for Respondent.

Abdur Rahim, Offg. C.J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

Full Bench.

L. P. A. 205 of 1914.

Shrotriem—Grant of—Enfranchisement of Inam—Right of Government to minerals and quarries.

A whole village was granted as Shrotriem to the ancestors of the plaintiff. At the time of the enfranchisement, the Inam Commissioner issued a title-deed to the then Shrotriemdar recognising the Shrotriem as the absolute property of the Shrotriemdar subject only to the payment of a fixed quit-rent. *Held*, that the Government had parted with the entire free-hold interest in the land in favour of the shrotriemdar, including the rocks and minerals and that the Government had no right to levy seignorage on stones quarried by the shrotriemdar.

The Ag. Government Pleader (*V. Ramesan*) for Appellant

T. R. Venkatarama Sastri for Repondent.

Abdur Rahim, Offg. C. J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

Full Bench.
L. P. A. Nos. 39 of 1915.

Mortgage—Contribution—Purchase of some items of mortgaged property freed from the mortgage, by the mortgagee—Subsequent transferee of remaining items from the mortgagor—Liability to pay the entire mortgage amount—No right to contribution.

Where a mortgagee purchased some items of the mortgaged property freed from the liability to pay the mortgage debt and on the understanding that the entire mortgage debt was to be paid out of the remaining items and the mortgagor subsequently sells the remaining items to a third person, *held* that the mortgagee could realise the mortgage debt entirely out of the properties in the hands of the subsequent purchaser and that the latter had no right to contribution from the mortgagee-purchaser.

C. Padmanabha Aiyangar for Appellant.

K. R. Rengaswami Aiyangar for Respondent.

Abdur Rahim, Offg. C. J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

L. P. A. Nos. 270 and 271 of 1914.

Limitation Act, Arts. 11 and 29—Suit to establish right to moveables wrongfully attached and sold in execution and for heir value—Limitation—Starting point.

Where a person whose objection to the attachment of certain moveables in execution of a decree was dismissed, brings a suit for a declaration of his right to, and for the recovery of the value of the moveables alleged to have been wrongfully sold in execution, *held* that the suit is governed by Art. 11 of the Limitation Act and that limitation begins to run from the date of the adverse order in the claim proceedings and not from the date of seizure under Art. 29 of the Limitation Act.

P. Somasundaram for Appellant.

T. Prakasam for Respondent.

Ayling and Srinivasa Aiyangar, JJ.
1916, August 8. — A. S. No. 219 of 1913.

Civil Procedure Code, S. 10—Two Suits involving common issues between same parties—Procedure—Stay of Suit—Dismissal of Suit, improper.

Under S. 10 of the new Civil Procedure Code, where two suits involving common issues as between the same parties are instituted, the Court has no power to dismiss the subsequent suit. The proper procedure is to stay the trial of the subsequent suit pending the decision in the former.

27 M. L J. 405, Referred to.

A. V. Visvanatha Sastri for Appellant.

A. Krishnaswami Iyer and *M. Subbaraya Aiyar* for Respondents.

Oldfield and Sadasiva Aiyar, JJ.
1916, August 9. — L. P. A. Nos. 10, 61 and 62 of 1916.

Civil Procedure Code, O. 22 R. 5—Legal representative, Determination of, in suit or appeal—Not res judicata *in subsequent proceedings.*

Where a person claims to be the legal representative of a deceased party to a suit or appeal but another is brought on record as the legal representative under O. 22 R. 5, Civil Procedure Code, decision does not bar a fresh suit by the defeated claimant to establish his character as legal representative.

S. Muthiah Mudaliar for Appellant.

T. R. Venkatarama Sastri for Respondent.

NOTES OF RECENT CASES.

Oldfield and
Sadasiva Aiyar, JJ.
1916, August 4.

C. M. A. No. 247 of 1915.

Provincial Insolvency Act, S. 36—Proceedings under—Court directing Official Receiver to take evidence and submit report as to validity of a mortgage by insolvent—Delegation of functions, irregular.

A Court exercising insolvency jurisdiction under S. 36 of Act III of 1907 has no power to direct the Official Receiver to take evidence and submit a report as to whether a mortgage executed by an insolvent was *bona fide* or not. The Court must itself take the evidence and adjudicate upon the claim.

K. S. Ganesa Aiyar for Appellant.

S. T. Srinivasagopalachari for Respondent.

Abdur Rahim, Offg. C. J.
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

S. A. No. 945 of 1914.

Madras Irrigation Cess Act (VII of 1865) S. 1 (b)—Irrigation by percolation—Sub-soil water absorbed by trees—Certificate of Collector—Levy of cess.

It is not obligatory on the Collector personally to certify under S. 1 (*b*) of Act VII of 1865 that the irrigation is beneficial. The enquiry by the Collector under the section is not a judicial one. 'Irrigation by percolation' within S. 1 (*b*) of the Act covers cases where subsoil water is absorbed by the roots of trees.

V. Ramesam (Government Pleader) for Appellant.

T. R. Venkatarama Sastri for Respondents.

Abdur Rahim, Offg. C. J.,
Seshagiri Aiyar and
Phillips, JJ.
1916, August 7.

L. P. A. No. 102 of 1915.

Equitable Assignment — Debtor and creditor —Letter by debtor authorising creditor to collect decree debt due to the former —Power of attorney to creditor to execute decree—Rights of creditor.

Where a debtor wrote a letter to the creditor directing him to collect a decree debt due to the former and appropriate the same in satisfaction of the debt due to the creditor and also executed a power of attorney authorising the creditor to execute the decree standing in the name of the debtor, *held*, that the letter and the power of attorney together constituted an equitable assignment of the decree debt in favour of the creditor. The mode or form of the assignment is immaterial provided the intention of the parties is clear.

L. A. Govindaraghava Aiyar for Appellant.

T. Narasimha Aiyangar for Respondent.

Oldfield and Sadasiva Aiyar, JJ.
1916, August 8. — S. A. No. 2087 of 1913.

Religious Endowment—Tarwad Temple — Right of junior members to sue for removal of Karnavan—Sanction under S. 92, unnecessary—Compromise—Alienation of trust property—Duty of Court—Hindu widow—Power to compromise, limits of.

Where a temple belongs to a tarwad, it is open to the junior members of the tarwad to sue for the removal of the *Karnavan* from the management of the Devaswom, for good cause shown, without the sanction prescribed by S. 92, Civil Procedure Code, or S. 18 of the Religious Endowments, Act.

It is open to the parties to compromise a litigation concerning a trust but where the compromise has the effect of an alienation of the properties belonging to the trust, Courts will scrutinize it with great care before recognising its validity as against the trust.

The powers of a Hindu widow to compromise a litigation concerning her husband's estate so as to bind the actual or contingent reversioners have been too narrowly laid down in the decisions.

Bhogaraju Venkatrama Jogiraju v. *Addepalli Seshayya* [1], referred to.

T. R. Ramachandra Aiyar for Appellants.

C. V. Ananthakrishna Aiyar for Respondents.

---

1. (1911) I. L. R. 35 M. 560

Abdur Rahim, O. C. J.,
and Krishnan, J.
1916, August 10.

A. S. No. 235 of 1913.

Abatement—Malicious prosecution—Suit for damages—Death of plaintiff during pendency of appeal.

Where during the pendency of an appeal in a suit for damages for malicious prosecution, the plaintiff-appellant dies, *held*, that the cause of action does not survive to his legal representatives and that the appeal abates.

Krishna Behari Sen v. *The Corporation of Calcutta* [1] followed.

L. A. Govindaraghava Aiyar and *L. Venkataraghava Aiyar* for Appellants.

S. Ranganadha Aiyar for Respondents.

Oldfield and
Sadasiva Aiyar, JJ.
1916, August 11.

S. A. No. 2382 of 1913.

Damages—Contract of indemnity—Breach—Cause of action, when arises.

The defendant agreed to indemnify the plaintiff in respect of any loss that the property of the latter might sustain by reason of the defendant's default in the carrying on of a *Kuri* started by the plaintiff's husband. The property of the plaintiff was sold in Court auction for the satisfaction of claims under the Kuri arrangement. Plaintiff who in spite of the Court sale continued in possession of the properties, sued the defendant for damages. The Lower Courts dismissed the suit as premature. *Held*, that there was a loss of title sustained by the plaintiff, which entitled her to sue for damages.

K. Ramanath Shenai for Appellant.

B. Sitarama Row for Respondent.

Spencer and
Krishnan, JJ.
1916, August 11.

S. A. No. 2281 of 1914.

Madras Estates Land Act, S. 12—Trees in holding—Cutting and carrying away by landlord—Tenant's suit for damages—Civil Court—Jurisdiction—Nature of suit—Second Appeal, if

1. (1904) I. L. R. 31 C. 406.

lies—Plaint returned for representation to proper Court—Effect —Estates Land Act, S. 213—Scope of.

A suit by a tenant against his landlord for damages for trees in his holding, cut and carried away by the landlord contrary to the provisions of S. 12 of the Madras Estates Land Act is cognisable by the Civil Courts. Such a suit is a suit of a small cause nature and no second appeal lies against the decree therein. The fact that the plaint in such a suit was returned under S. 23 of the Provincial Small Cause Courts Act for presentation to the proper Court does not affect the matter.

Scope of S. 213 of the Madras Estates Land Act explained.

P. R. Ganapathi Aiyar for Appellant.

T. S. Narayana Sastri for Respondent.

Abdur Rahim, Offg. C. J., Seshagiri Aiyar and Phillips, JJ. 1916, August 15.

S. A. No. 2062 of 1914.

Transfer of Property Act, S. 55 (4)—Vendor's lien for unpaid purchase money—Contract to the contrary—Direction to vendee to pay off creditor of vendor—Default—Lien of vendor for unpaid purchase money—No waiver.

Where a purchaser of immoveable property covenants, in consideration of the transfer of such property to him, to discharge certain liabilities of the seller, *held* that upon breach of such a covenant the seller is entitled to a charge on the property in the hands of the purchaser under S. 55 (4) (b) of the T. P. Act.

The mere direction to the vendee to pay off a creditor of the vendor, does not negative the statutory charge for the unpaid purchase-money. *Abdulla Beari* v. *Mammali Beari,* [1] overruled.

A. V. Visvanatha Sastri for Appellant.

N. Rajagopala Chari for Respondent.

---

1. ( ) I. L. R. 38 Mad 446.

NOTES OF RECENT CASES.

Abdur Rahim, Offg. C. J. and Seshagiri Aiyar and Phillips, JJ. 1916, August 15.	C. M. A. No. 51 and 93 of 1915.

Civil Procedure Code, O. 21 R. 2 (3)—Decree—Agreement prior to decree providing for its satisfaction in a particular manner or postponing execution, if can be pleaded in bar of execution.

Per Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J. Phillips, J. dissenting.

During the pendency of a suit, the parties entered into an agreement that the defendant should submit to a decree in the suit and that the plaintiff should receive within a fixed date a smaller sum in full discharge of the decree and the plaintiff should not, before that date execute or transfer the decree that may be passed. A decree was accordingly passed in the suit against the defendant. *Held* that it was open to the defendant to rely on the aforesaid agreement as a bar to execution of the decree by the plaintiff decree-holder.

K. V. Krishnaswami Aiyar for Appellant.

C. V. Ananthakrishna Aiyar for Respondent.

Abdur Rahim, Offg. C. J. Seshagiri Aiyar and Phillips, JJ. 1916, August 15.	S. A. No. 801 and 688 of 1914.

Civil Procedure Code, S. 92 (2), O. 1 R. 8—Suit by two worshippers of Hindu Temple on behalf of general body of worshippers, to set aside alienation of temple property by members of the Temple Committee—Suit without sanction of Advocate-General nor with sanction under S. 18 of the Religious Endowments Act, if maintainable.

Two worshippers of a Hindu Temple acting on behalf of themselves and the other worshippers, instituted a suit to set aside a permanent lease of the money offerings made by the worshippers, granted by the members of the Devasthanam Committee in favour of the Archakas with a reservation of Rs. 300 a year to the temple. Neither the sanction of the Advocate-General

nor the leave prescribed by S. 18 of the Religious Endowments Act was obtained for the suit.

Held, that the suit was maintainable as laid.

C. S. Venkatachariar for Appellant.

K. Bhashyam Aiyangar for Respondent.

Spencer and Krishnan, JJ.
1916, August 15. — S. A. No. 2363 of 1914.

Onus of Proof—Hindu Law—Reversion—Suit for possession on death of widow—Plea that property was widow's, having been purchased by her—Onus of Proof—Proof that widow has no funds while last owner had ample funds—Effect.

Where in a suit brought by a reversionary heir after the death of a childless Hindu widow for the recovery of property alleged to belong to her husband, the defendants raised the plea that it belonged to the widow, having been purchased by her with her own funds, and not to her husband, *held* that the onus of proving that the property formed part of the deceased's estate lay on the plaintiff, although it was proved that the widow had no funds wherewith to make the purchase and that the deceased died possessed of considerable property.

26 C. 871 P. C. followed.

T. V. Muthukrishna Aiyar for Appellants.

Hon. Mr. T. Rangachariar and *K. Raja Aiyar* for Respondent.

Seshagiri Aiyar, J.
1916, August 17. — Cri. Revn. Case No. 291 of 1916.

Criminal Procedure Code, S. 197—Public servant—Offence by—Sanction when necessary—Talayari of village, if a public servant within the section.

Sanction under S. 197, Cr. P. Code is required only in cases where the public servant who is sought to be prosecuted professes to act in the exercise of his duties as such public servant and while so acting exceeds his authority or commit an offence. The section is not applicable to a case where the public servant does an act independently of the discharge of his official duties.

A *Talayari* of a village is not a public servant of the category specified in S 197, Cr. P. Code.

C. Veeraraghava Iyer for accused.

The Public Prosecutor for the Crown.

Oldfield, Sadasiva Aiyar and Seshagiri Aiyar, JJ. 1916, August 17. — C. M. A. No. 333 of 1914.

Will—Revocation—Later will—Codicil—Intention to revoke —Extraneous evidence—Admissibility.

In the absence of an express reservation, a later will revokes an earlier one. If, however the later instrument is only a codicil, the presumption is that the earlier will should be operative, unless the codicil contains clear expressions to the contrary. Where it is doubtful whether a later will was meant to revoke an earlier one, extrinsic evidence of the intention of the testator is admissible.

T. R. Ramachandra Aiyar and *C. P. Ramaswami Aiyar* for Appellant.

J. L. Rozario for Respondents.

Oldfield and Krishnan, JJ. 1916, August 23. — Ref. Case No. 3 of 1916.

Paper Currency Act, S. 26—Promissory Note—Payable to bearer or order on demand—Suit on original loan if lies.

A promissory note, payable on demand to bearer or order, contravenes S. 26 of the Paper Currency Act and cannot be sued on. It is, however, open to the Court to give a decree in respect of the debt, covered by the note, on proof of an independent agreement to repay the same.

The Hon. The Ag. Advocate-General (S. Srinivasa Aiyangar) C. S. Venkatachari and *K. S. Ganapathi Iyer* for petitioner.

B. Sitarama Row (Amicus Curiae) for Respondent.

Seshagiri Aiyar and Napier, JJ. 1916, August 23. — S. A. No. 2242 of 1914.

Malicious prosecution—Damages—Suit for—Cattle Trespass Act, S. 20—Prosecution for illegal impounding of cattle, gives rise to a cause of action.

To sustain an action for malicious prosecution it is not necessary that criminal proceedings, should have been launched against the plaintiff. It is enough if proceedings in the nature of criminal proceedings, *e. g.* bankruptcy, winding up etc. were started against him.

Where, however, the plaintiff impounded defendant's cattle and the latter preferred a complaint against the former under S. 20 of the Cattle Trespass Act. *Held* that there was no cause of action to the plaintiff to institute a suit for damages for malicious prosecution. The gist of the action is not the prosecution but the aspersion it casts on the reputation and character of the person prosecuted, and there being no moral turpitude or injury to reputation by reason of a charge of illegal seizure of cattle being preferred against the plaintiff, he had no right to sue.

K. R. Rangaswami Aiyangar for *A. K. Madhava Rao* for Appellant.

T. Ramachandra Rao for Respondent.

Abdur Rahim, Offg. C. J. and Phillips, J. 1916 August 29. — O. S. A. No. 79 of 1915.

Hindu Law—Joint Family—Partnership—Starting of new business by adult member—Liability of minor members—Nattukottai Chetties.

Per Abdur Rahim, Offg. C. J :—Where the adult member of a joint Hindu family started a new business, without detriment to the ancestral estate and the minor members lived with him and were also being maintained by him, *held*, that there was no presumption that the business was a joint family business and that the minors were not partners with the adult member in the business so as to make themselves personally liable on attaining majority for the debts of the business.

Per Phillips, J.—Where the head of a Nattukottai Chetty family possessed of a nucleus of ancestral property starts a business and the other members who are minors live with him and actively assist him in the business without receiving any salary for their labours, the inference is that the business was a joint-family business and that the minors were admitted to the benefits of the partnership so as to be liable, personally, on attaining majority, for the debts of the business.

K. Ramanath Shenai for Appellant.

Dr. Pandalai for Respondent.

NOTES OF RECENT CASES.

Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J. 1916, September 4. — O. S. A. No. 85 of 1915.

Criminal Procedure Code, S. 195—Sanction—Omission to include material document in affidavit—Perjury—Sanction, bad.

Where a party omitted to include a material document in the affidavit of documents filed by him in an original suit, *held*, that the omission by itself did not warrant the grant of sanction for his prosecution.

V. C. Seshachariar for Appellant.

D. Chamier for Respondent.

Oldfield and Krishnan, JJ. 1916, September 5. — C. M. A. Nos. 106 and 42 of 1915.

Provincial Insolvency Act (III of 1907) Ss. 36 and 46 (2)—Reference by Official Receiver to District Judge for annulling sale by insolvent—Decision of District Judge—Right of creditor, not a party to proceedings before District Judge, to appeal—"Aggrieved party"—Official Receiver, position of—Proceedings under S. 36—Duty of Court to take evidence.

Where the Official Receiver made a reference to the District Judge under S. 36 of the Provincial Insolvency Act for annulling a sale-deed executed by the insolvent in favour of one of his creditors within 2 years of the insolvency and the District Judge set aside the sale but gave the creditor a charge for the consideration mentioned in the sale-deed and another of the creditors who was a party to the proceedings before the Receiver but not before the District Judge, appealed from the order of the latter, *Held*, that he was a "person aggrieved" within S. 46 (2) of the Provincial Insolvency Act, so as to entitle him to prefer an appeal.

The Official Receiver represents the whole body of creditors and it is his duty to appeal against any order which he thinks is prejudicial to the interests of the creditors. The fact that a transaction

is said to be "void as against the Official Receiver" does not mean that he alone is the person aggrieved.

A District Judge exercising jurisdiction under S. 36 of the Provincial Insolvency Act will not be justified in treating as legal evidence, the depositions of witnesses examined by the Official Receiver, though such depositions were taken on oath, such depositions cannot be treated either as affidavits or as evidence taken on commission.

C. M. A. No. 247 of 1915 followed.

R. Gopalaswami Aiyangar for *T. Rangacharir* for Appellant in C. M. A. 106.

S. T. Srinivasagopalachari and *N. S. Rangaswami Aiyangar* for Respondent.

K. V. Krishnaswami Aiyar for Appellant in C. M. A. 42.

S. T. Srinivasagopalachariar for the Respondent.

Sadasiva Aiyar and Napier, JJ. 1916, September 5. — S. A. No. 1660 of 1913.

Provincial Small Cause Courts Act, Sch. ii, Art. 13—Thunduvaram—Suit to recover—Second Appeal—C. P. Code, S. 102.

A suit for recovery of Thunduvaram is exempted from the cognizance of a Small Cause Court by Art. 13 of Sch. ii of the Prov. Sm. C. C. Act. Consequently S. 102, Civil Procedure Code, is no bar to a second appeal.

L. A. Govindaraghava Aiyar for Appellant.

T. R. Ramachandra Aiyar for Respondent.

Oldfield and Krishnan, JJ. 1916, September 6. — Crl. Rev. Case No. 205 of 1916.

Criminal Procedure Code, Ss. 145, 435 and 439—Death of petitioner during pendency of revision petition—Heir of deceased not entitled to be brought on record.

Where during the pendency of a revision petition against the order of a Magistrate under S. 145, Cr. P. Code the petitioner dies, his legal representatives have no right to be brought on record so as to enable them to continue the petition.

C. Rajagopala Aiyangar, for Petitioner.

B. Narasimha Row, for Respondent.

Spencer and Phillips, JJ.
1916, September 6.

S. A. No. 113 of 1916.

Mahomedan Law — Religious Office—Mujavar — Right of females—Custom—Validity of.

Where it was found that the duties of a Mujavar Office consisted in sweeping the mosque, spreading the mats and calling the worshippers for prayer, lighting the mosque, and reading the scriptures and it was also found that these duties had been sometimes performed by proxy, by the office holders,

Held, that females could inherit the office along with males and enjoy the emoluments, there being nothing in the usage of the institution to exclude females from the office.

3 Mad 95, 34 Cal. 118 Referred to.

T. M. Krishnaswami Aiyar for *A. Krishnaswami Aiyar* for Appellant.

S. Doraiswamy Aiyar for Respondent.

Abdur Rahim, Offg. C. J. and Phillips, J.
1916, September 7.

O. S. A. No. 25 of 1915.

Insolvency — Undischarged bankrupt—After-acquired property—Vesting of, in Official Assignee—Adverse possession—Acquisition of property by joint exertions—Rights of Assignee to such acquisition.

Where an insolvent acquires property after adjudication but before his final discharge, he does so as the agent of the Official Assignee and cannot set up adverse possession against the latter.

When an insolvent after his adjudication acquires property jointly with the other members of his family by joint exertions, it is only the share of the insolvent in such acquisition, that vests in the Official Assignee.

V. C. Seshachariar for Appellant.

M. O. Parthasarthy Aiyangar for the Official Assignee.

Abdur Rahim, Offg. C. J. and Seshagiri Aiyar, J.
1916, September, 11.

L. P. A. No. 223 of 1915.

Receiver—Appointment of, by High Court, during pendency of suit in Lower Court—Power of Lower Court to remove.

Where during the pendency of a suit for partition the Subordinate Judge made an order appointing a receiver and on appeal from that order, the High Court confirmed the appointment and subsequently the Subordinate Judge removed the receiver originally appointed for misconduct and appointed another instead, *Held*, that the Subordinate Judge had power to remove the receiver originally appointed and to appoint a new one.

T. R. Venkatarama Sastri for Appellant.

R. Sadagopachariar and Kuppusami Aiyar for Respondent.

Ayling and Srinivasa Aiyangar, JJ.
1916, September 12.

A. S. No. 212 of 1915.

Limitation Act of 1908, Art. 89—Agency—Termination—Test of—Suit against agent— Limitation—Starting point—Practice among Nattukottai Chetties—Salary chits—Significance of.

The question when an agency terminates within the meaning of Art. 89 of the Limitation Act is a question of fact to be decided on the circumstances of each case. The fact that the salary chit is for a fixed period does not necessarily indicate that the agency terminates *ipso facto* at the expiry of that period. In deciding the question the period for which the agent is entitled to his salary will be a material circumstance to be considered.

The rule laid down in *Venkatachellum Chetty* v. *Narayanan Chetty* [1] is not a rule of law applicable to all cases regardless of the facts thereof.

Practice among Nattukottai Chetties and significance of salary chits considered.

A. Krishnaswami Aiyar (*K. S. Aravamudu Aiyangar* with him) for Appellant.

T. Narasimha Aiyangar for Respondent.

---

1. (1914) 28 M. L. J. 140.

Oldfield and Krishnan, JJ.
1906, September 14. — L. P. A. No. 188 of 1915.

Civil Procedure Code, S. 20 (c)—Jurisdiction—Suit on a promissory note—Place of indorsement—Cause of action.

A suit on a promissory note is maintainable in a court within the local limits of whose jurisdiction it has been endorsed in favour of the plaintiff. The indorsement constitutes a part of the cause of action, within S. 20 (c), C. P. Code.

Read v. *Brown* [1] followed.

M. Patanjali Sastri for *B. Somayya* for Appellant.

K. G. Sarangaraja Aiyangar for *V. Ramadoss* for Respondent.

Oldfield and Krishnan, JJ.
1916, September 15. — C. M. S. A. No. 108 of 1915.

Hindu Law—Widow—Decree against, for rent—Sale of property in the hands of reversioners, if allowable.

Where a decree for arrears of rent due from the estate inherited by a Hindu widow, was obtained against her and the decree was sought to be executed against the estate in the hands of the reversioners after the death of the widow, *held* that the liability of the widow was personal to her and that the decree could not be executed against the estate in the hands of reversioners.

T. R. Ramachandra Aiyar for Appellant.

T. Prakasam for Respondent.

Spencer and Phillips, JJ.
1916, September 18. — S. A. No. 2137 of 1914.

Mortgage Suit—Parties—Mortgage in favour of late Zemindar—Suit by successor without joining other heirs—Maintainability.

It is open to a Zemindar in his capacity as manager of the family to sue on a mortgage executed in favour of his deceased father, without joining his undivided brothers as parties to the suit.

Kishan Pershad v. *Har Narain Singh* [2] Referred to.

T. Eroman Unni for Appellant.

T. R. Venkatarama Sastri for Respondent.

---

1. 22 Q. B. D. 128.
2. I. L. R. 33 All. 272.

Phillips, J.
1916, September 19. } C. M. P. No. 2137 to 2139 of 1916.

Land Acquisition Act I. of 1894, S. 54—Land Acquisition—Single notification—Several plots acquired—Several references made and registered as separate suits—One judgment but several awards—Legality—Appeal—Consolidation of awards.

Where several plots of land were acquired by the Government under the Land Acquisition Act under the same notification but several references were made under S. 18 of the Act and were registered as separate cases and the District Judge made a separate award in respect of each plot of land acquired though only one judgment was delivered, *held* that the Court below should have passed only one award and that the several awards passed should be deemed to be only one award and that one appeal only need be preferred to the High Court under S. 54 of the Act.

The several awards were consolidated into one.

K. S. Jayaram Aiyar, for Petitioner.

Government Pleader, for Respondent.

Seshagiri Iyer and
Srinivasa Iyengar, JJ.
1916, September 20. } S. A. No. 2056 of 1915.

Madras Rent Recovery Act, Ss. 1 and 79—Landholder, meaning of—Revenue registry, transfer in, effect of—Transferee not a delegate or agent—Hindu Joint Family—Manager, right of, to tender patta and sue for rent, without joining other members.

Where a Hindu father having a permanent and self-acquired *izara right* in certain lands effected a transfer of the same in the Revenue registry in his son's name, *Held* that the transfer did not have the effect of making the son a 'landholder' within S. 1 of the Madras Rent Recovery Act and that the son was not competent to tender pattas or to sue for rents. The transfer in the Revenue registry would not confer any proprietary interest on the transferee nor would it constitute him a delegate or agent within S. 79 of the Act.

It is open to the manager of a joint Hindu family to tender a patta and institute a suit for rent without joining the other members as parties.

V. C. Seshachariar for Appellant.

K. Bhashyam for Respondent.

Ayling and Napier, JJ.
1916, September 20.

S. A. No. 1411 of 1915.

Landlord and Tenant—Buildings erected by tenant—Forfeiture—Tenant's right to compensation—Lease before the Transfer of Property Act.

Where a person holding land under a lease executed prior to the Transfer of Property Act, erects buildings on the land demised and subsequently incurs a forfeiture of the tenancy, *Held,* in a suit in ejectment by the landlord, that the tenant was not entitled to compensation but only to remove the buildings within a time to be fixed by the decree.

T. V. Muthukrishna Aiyar for Appellants.

G. S. Ramachandra Aiyar for Respondent.

Seshagiri Aiyar and Srinivasa Aiyangar, JJ.
1916, September 20.

S. A. No. 459 of 1915.

Hindu Law—Adoption—Appointment of heir—Prostitute other than dancing girls—Estoppel, question of, not to be raised for the first time in second appeal.

Under the Hindu Law it is not permissible to a prostitute who is not a dancing girl, to adopt a girl to herself. A custom permitting such adoption is illegal and cannot be recognised by Courts.

A plea of estoppel will not be allowed to be raised for the first time in second appeal, in the absence of any averment in the pleadings.

J. L. Rozario for Appellant.

B. Sitarama Row for Respondent.

Spencer and Krishnan, JJ.
1916, September 21.

S. A. No. 1666 of 1914.

Hindu Law—Joint Family—Managing member and minor members—Sale of family property by managing member for himself and as guardian of minor members—Suit by minor to recover his share of property alienated—Limitation—Limitation Act of 1908, Arts. 44 and 144—Applicability.

Art. 44 of the Limitation Act is applicable only to a case in which a sale is made by the guardian of a minor of property in which the minor has individual rights.

29 I. C. 199 followed.

No guardian can be appointed in respect of the interest in family property of the minor member of a joint Hindu family.

Where the senior member of a joint Hindu family sells family property purporting to act in his own behalf and as guardian of the minor members, *held* a suit by one of the minor members to recover his share of the property sold was governed by article 144 and not by article 44 of the Limitation Act.

The Hon. The (Ag.) Advocate-General and *K. Balasubramania Aiyar* for Appellant.

B. Satyanarayana for *V. Ramesam* for the Respondent.

Spencer and Krishnan, JJ.
1916, September 21.

C. M. P. No. 2605 of 1916.

Appellate Side Rules—Rule 32 cl. 7—Rule inapplicable to appeals and applicable only to miscellaneous applications.

P. Somasundaram for Petitioner.

B. Narasimha Rao for Respondent.

NOTES OF RECENT CASES.

Chief Justice and Burn, J.
1916, November 8.

A. S. No. 206 and 207 of 1908.

Limitation Act of 1871, Art. 129—Suit to set aside adoption —Limitation—Invalid Adoption in 1862 and adopted boy and his heirs in possession of properties of adoptive father from 1862 to 1876—Death of adoptive mother in 1902—Suit by reversioners to recover properties of last owner within 12 years thereof—Limitation—Right barred under Art. 129 of Act of 1871 not revived by Act of 1877—Res-judicata—Hindu Law—Widow—Decree against, based on limitation not res-judicata against reversioners.

In a suit brought by the reversionary heirs of a Hindu within 12 years of the date of the death of his widow Chockammal in 1902 for possession of his properties, it appeared that in 1862 the widow adopted to her husband one Alagasundara, that the adopted boy and, after his death, his heirs, enjoyed the suit properties till 1876 by virtue of the rights of Alagasundara as such adopted son, that in that year Chockammal trespassed upon the suit properties, and that Alagasundara's widow thereupon instituted a suit (O. S. No. 9 of 1887) against Chockammal and obtained a decree for possession on the ground that Chockammal's right became barred by limitation. In that suit it was also held that the adoption of Alagasundara was invalid on the ground of his being an orphan at the time of his adoption. The defendants were, amongst others, Alagasundara's widow and alienees from her, and they pleaded that the suit was barred by limitation because a suit to set aside the adoption of Alagasundara was barred under Art. 129 of the Limitation Act of 1871, and the right so barred under that Act was not revived by the Act of 1877. They also pleaded that the suit was barred by res-judicata by reason of the decision in the suit by Alagasundara's widow against Chockammal. They relied upon *Jagadamba Chaodhrani* v. *Dakhina Mohun Roy Chaodhri* [1], and *Mohesh Narain Munshi* v. *Taruck Nath Moitra* [2], in support of the former contention and upon, *Hari Nath Chatterjee* v. *Mothurmohun Goswami* [3], in support of the latter. Their Lordships upheld the former contention distinguishing the decision of the Privy Council in *Tirbhuwan Bahadur Singh* v. *Ramesher Baksh Singh* [4], and

1. (1886) I. L. R. 13 C. 308. (P. C.)
2. (1892) I. L. R. 20 C. 487. (P.C.)
3. (1893) I. L R. 21 C. 8. (P. C.)
4. (1906) I. L. R. 28 A. 727. (P.C.)

overruled the latter distinguishing, *Hari Nath Chatterjee* v. *Mothurmohan Goswami* [1].

A. Krishnaswami Aiyar for Appellant.

The Hon. The Advocate General, T. V. Gopalaswami Mudaliar, Hon. Mr. T. Rangachariar, S. Muthiah Mudaliar and *A. S. Visvanather* for the Respondents.

Chief Justice and Burn, J.
1916, November 8.

A. S. No. 290 of 1913.

Hindu Law—Adoption—Authority to widow to adopt specified boy—Construction—Principles—Adoption of stranger without any attempt being made to adopt boy named—Validity—Adoption of husband's younger brother—Validity—Custom in Southern India—Practice—Appeal—Plea of invalidity of adoption—Permissibility—Adoption sanctioned by custom—Absence of evidence owing to plea not being raised in Court below—Effect.

Where a Hindu authorised his widow (the authority being contained in a will) to adopt to him either G. or L, minor sons of his uncle S. R, whomever of them his mother might select and the widow adopted a stranger without making any attempt to adopt either of the boys named, both of them being available, *held*, in a suit to set aside the adoption that, even if the authority was held to be a general one authorising the widow to adopt any other than the boys named in certain contingencies (a point on which their Lordships did not express any definite opinion) the widow was bound to comply in the first instance with her husband's directions and the adoption actually made by her without doing so was invalid.

Review of case-law on construction of authority to adopt given by a Hindu.

Quære whether under the Hindu Law the adoption by a widow of a younger brother of her husband is valid. Semble it may be valid in South India as being sanctioned by custom.

The High Court will not allow a plea of the invalidity of an adoption to be raised for the first time in appeal in a case in which it would be perfectly open to the other side to adduce evidence of custom in support of its validity and no such evidence was adduced because the point was not raised in the court below.

The Hon. The Ag. Advocate General, R. Narayanaswami Aiyar and *K. S. Ganesa Aiyar* for Appellants.

V. Ramesam, S. Ranganatha Aiyar, H. Suryanarayanah, K. Sundara Rao, A. Krishnaswami Aiyar and *K. S. Aravamudha Aiyangar* for the Respondents.

---

1. (1898) I. L. R. 21 C. 8 (P. C.)

NOTES OF RECENT CASES.

Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.
1916, November 1.

L. P. A. No. 120 of 1916.

Registration Act (XVI of 1908) Ss. 72 and 77—Suit for compulsory registration—Refusal to accept document for registration by sub-registrar on the ground of delay in presentation—Appeal to the District Registrar—Right of suit.

Where a document was presented in time but the sub-registrar after taking the directions of the District Registrar refused to accept a document for registration as being presented out of time and on appeal from the order of the sub-registrar the District Registrar again refused registration of the document, *held* that it was open to the aggrieved party to maintain a suit for compulsory registration under S. 77 of the Registration Act.

10 M. L. J. 104 and 26 M. L. J. 307, followed; 21 Bom. 699 Dissented from.

A. V. Visvanatha Sastri for the Appellant.

K. S. Ramabhadra Iyer (amicus curiæ) for Respondent.

Ayling and Seshagiri Iyer, JJ.
1916, November 6.

L. P. A. Nos. 110, 111 and 112 of 1916.

Civil Procedure Code, S. 115—Scheme suit—Refusal to add son of hereditary trustee as party defendant—Revision.

Where during the pendency of a suit under S. 92 of the Civil Procedure Code, for removal of the defendant from his office of trustee and for the settlement of a scheme, an application was made by the son of the defendant, to be added as a party on the ground that the trusteeship was hereditary in his family and that his father was not defending the suit properly, *held* that, having regard to the fact that the applicant was practically remediless if his rights were not recognised in the scheme suit, the court below was wrong in refusing to add him as a party defendant.

K. V. Krishnaswami Iyer for Appellant.

G. S. Ramachandra Iyer for Respondents.

Abdur Rahim, Spencer and Srinivasa Aiyangar, JJ.
1916, November 15.

C. M. A. No. 73 of 1916.

Civil Procedure Code, O. 40, R. 1 and O. 43, R. 1 (s)—Order of Lower Court determining that a receiver should be appointed—No actual nomination—Order if appealable.

Per *Abdur Rahim* and *Srinivasa Aiyangar, JJ.* (*Spencer, J.* Dissenting) :

An order determining that a receiver should be appointed is appealable though no actual nomination of a person as receiver has been made.

The Hon'ble the Advocate-General and *K. Bhashyam* for Appellants.

N. S. Rangaswami Aiyangar, for Respondents.

Abdur Rahim, Sadasiva Aiyar and Napier, JJ.
1916, November 15.

L. P. A. No. 219 of 1915.

Transfer of Property Act, Ss. 54 and 118—Exchange of immoveable property —Unregistered instrument — Part-performance, doctrine of—Equitable Estoppel—Compensation for improvements—Transfer of Property Act, S. 51.

Where the plaintiffs and the defendants by an unregistered instrument agreed for mutual convenience to an exchange of certain plots of land forming part of their adjoining house and the defendants erected a costly building on the land which fell to them under that instrument, and the plaintiffs kept quiet and even received an additional amount from the defendants on the ground that the land that fell to the share of the latter was larger in extent and the plaintiffs sued the defendants in ejectment on the ground that the instrument did not pass title :

Held per *Sadasiva Aiyar and Napier, JJ.* (*Abdur Rahim, J.* dissenting) that in the absence of a registered conveyance in writing no title passed to the defendants, that the fact that the plaintiffs took an additional sum of money in ignorance of the fact that they were still the owners did not create an estoppel, and that the plaintiffs were entitled to eject the defendants on payment to the latter of compensation under S. 51 of the Transfer of Property Act.

Kurri Veera Reddi v. *Kurri Bapi Reddi* [1], *Mahomed Musa* v. *Aghore Kumar Ganguli* [2], *Mulraju Lakshmi Venkayyama* v. *Venkata Narasimha Appa Rao* [3], *Ramsden* v. *Dyson* [4], *Plimmer Mayor of Wellington* [5], and *Attorney General of Nigeria* v. *John Holt & Co.* [6]. Referred to.

The Hon'ble The Ag. Advocate-General with *K. Rajah Iyer* for Appellants.

T. R. Venkatarama Sastri for *A. Krishnaswami Iyer* for Respondents.

---

1. (1904) I. L. R. 29 M. 336.
2. (1914) I. L. R. 42 C. 801.
3. (1916) I. L. R. 39 M. 509.
4. (1866) L. R. 1 H. L. 129.
5. (1884) L. R. 9 A. C 699.
6. (1915) L. R. A. C. 599.

NOTES OF RECENT CASES.

Wallis, C. J., Abdur Rahim and Srinivasa Iyengar, JJ.
1916, November 28.
S. A. No. 979 and 1712 of 1914.

Civil Procedure Code, O. 23 R. 1—Leave to withdraw with liberty to bring a fresh suit—Power of Appellate Court to grant leave.

It is competent to an Appellate Court when reversing the decree of the first court, to grant leave to the plaintiff to withdraw from the suit with liberty to bring a fresh suit.

V. K. Srinivasa Iyengar for C. S. Venkatachariar for Appellant.

K. V. L. Narasimham for Respondent.

Wallis, C. J., Abdur Rahim, Oldfield, Srinivasa Iyengar and Phillips, JJ.
1916, November 30.
S. A. No. 838 of 1914.

Malabar Compensation for Tenant's Improvements Act (I of 1900) S. 19—Contracts entered into before the Act, prescribing rates for valuing improvements, if affected.

Contracts entered into before 1-1-1886 between landlord and tenant prescribing rates for valuing the improvements effected by the tenant, are saved by S. 19 of Act I of 1900.

C. V. Ananthakrishna Iyer for Appellant.

Eroman Unni for Respondent.

Ayling and Seshagiri Iyer, JJ.
1916, December 4.
L. P.A. No. 115 of 1916.

Civil Procedure Code, O. 1, Rr. 1 and 10—Appearance by defendant—Omission to file written statement—Defendant if can be declared ex parte.

Per Ayling, J. (Seshagiri Iyer. J. dissenting).—Where a defendant appears in person but does not file a written statement of his defence as required by the Court under O. 8, R. 1, the defendant can be declared ex parte.

Per Seshagiri Iyer, J.—The rule as to declaring a defendant *ex parte* is confined to cases of non-appearance by him and does not apply where the defendant appears but does not file a written statement.

Per Ayling, J.—Omission to file a written statement when required by the Court under O. 8, R. 1, C. P. Code entails the penalties imposed by O. 8, R. 10 and declaring the defendant *ex parte* is one of the orders contemplated by O. 8, R. 10, C. P. Code.

Per Seshagiri Iyer, J.—O. 8, R. 10, C. P. Code applies only to cases of written statements required under O. 8, R. 9 and not to those required under O. 8, R, 1, C. P. Code.

C. Padmanabha Iyengar for Appellant.

N. Chandrasekhara Iyer, amicus curiae, for Respondent.

Oldfield and Phillips, JJ.
1916, December 5.

S. A. No. 333 of 1916.

Malabar Law — Tarwad — Anandravan entrusted with management under Karar—Suit for accounts, by junior member, if maintainable.

When an Anandravan was entrusted with the management of the tarwad properties under a *Karar* to which all the members of the tarwad including the Karnavan were parties and subsequently the junior members sued the Anandravan for accounts of his management,

Held, that, under the Karar, the Anandravan did not become the agent of all the members of the tarwad but was accountable only to the Karnavan and that in the absence of any proof that the Karnavan was in collusion with the defendant or had disabled himself from suing, the junior members had no right of suit.

C. V. Ananthakrishna Iyer for Appellant.

K. P. M. Menon for Respondents.

Wallis, C. J.,
Abdur Rahim and
Srinivasa Iyengar, JJ.
1916, December 6.

C. R. P. No. 521 of 1915.

Presidency Towns Small Cause Courts Act (XV of 1882) S. 38 —Jurisdiction of Full Bench to decide questions of fact.

A Full Bench of the Small Cause Court, sitting under S. 38 of Act XV of 1882 has no jurisdiction to decide questions of fact generally. Nor has it jurisdiction to do so, when the question of fact first arises before it, in consequence of its finding on another question of fact or law.

C. Krishnamachariar for *V. C. Seshachariar* for Petitioner.

A. Narasimhachariar for *V. V. Srinivasa Iyengar* for Respondent.

NOTES OF RECENT CASES.

Wallis, C. J.
Abdur Rahim and
Srinivasa Iyengar, JJ.
1916, December 6.

C. M. A. No. 370 of 1915.

Provincial Insolvency Act (III of 1907) S. 37—Surety for payment of debt by insolvent, if a creditor.

A person who stood surety for the payment of a debt by the insolvent is a creditor within the meaning of that expression in S. 37 of the Provincial Insolvency Act.

In re *Paine :-Ex parte Read* (1897) 1 Q. B. 122.

In re *Blackpool Motor Co. Ltd., Hamilton* v. *Blackpool Mortor Co., Ltd.* (1901) 1 Ch. 77, Referred to.

M. D. Devadoss for Appellant.

A. Krishnaswamy Iyer for Respondent.

The Chief Justice.
Abdur Rahim, Oldfield,
Srinivasa Iyengar and
Phillips, JJ.
1916, December 12.

S. A. No. 217 of 1915.

Malabar Law—Landlord and tenant—Agreement to pay kuttukanom, if valid—Malabar compensation for Tenant's Improvements Act (I of 1900) S. 19.

A contract between a jenmi and a tenant by which the latter agrees to pay a *Kuttukanom* or stump fee, at the rate of 8 as. for every tree planted by him at the time when he cuts and appropriates the same, is not opposed to S. 19 of the Malabar Compensation for Tenants' Improvements Act.

C. V. Ananthakrishna Iyer for the Appellants.

Eroman Unni for Respondent.

Ayling and Seshagiri Iyer, JJ.
1916, December 13.

S. A. No. 100 of 1915.

Hindu Law—Widow—Maintenance—Liability of adopted son, after adoption—Co-parceners of husband, not bound.

One of four brothers constituting a joint Hindu family died leaving a widow. The remaining brothers executed a deed of maintenance in her favour agreeing to pay an annual sum for her maintenance. Subsequently the widow adopted a son to her husband and a division of the entire family properties was effected between the co-parceners.

Held, that in the absence of an agreement to the contrary, the ultimate liability to maintain the widow rested on the adopted son and that he was liable to reimburse the executants of the deed of maintenance in respect of moneys paid by them to the widow under the deed, (1915) M. W. No. 187 followed.

A. V. Visvanatha Sastri for Appellant.

P. V. Parameswara Iyer for *C. V. Ananthakrishna Iyer* for Respondent.

Oldfield and Phillips, JJ.
1916, December 15.

S, A. No. 985 of 1916.

Civil Procedure Code, O. 21, R. 93 (O. C. S. 315)—Right of suit for refund of purchase money—Judgment-debtor having no saleable interest in the property—Sale before the new C. P. Code—Right of suit, if taken away—General Clauses Act (X of 1897) S. 6 (c)—Effect of.

Plaintiff purchased certain properties in court auction on 22-4-1907 and brought a suit for possession of the same. The suit was dismissed on 4-10-1909 on the ground that the judgment debtor had no saleable interest in the property. On 6-8-1914 he sued the decree-holder for recovery of the purchase money. *Held* that the cause of action for recovery of the purchase money arose on the date of the Court sale, that under the old C. P. Code (1882) the plaintiff had a right of suit to recover the purchase money and that the new C. P. Code had not the effect of taking away such a vested right.

Under the new Civil Procedure Code of 1908, an auction purchaser has no right to sue for the recovery of the purchase money in case the judgment debtor had no saleable interest in the property. The only remedy is by way of application under O. 21, R. 93, after setting aside the sale.

The Hon'ble Mr. T. Rangachari and K. Bhashyam for Appellants.

C. V. Ananthakrishna Iyer for Respondent.

Sir John Wallis, C. J. and Napier, J. 1916, December 15. — A. S. No. 317 and 318 of 1913.

Religious Endowments—Mutts—Matadhipati—Appointment to juniorship to secure his own position—Validity of appointment —Fraud on the power of a matadhipati.

Where the head of a mutt who claimed his possession under a will and ordination by his predecessor, appointed under a compromise deed another as junior pattam, because the latter set up a rival claim to the headship of the mutt under an appointment by the same predecessor, with a view to secure his own possession to the headship of the mutt, the appointment of the junior is invalid in law. Such an appointment is a fraud on the power of the Matadhipati to appoint a junior keeping in view the interests of the institution.

I. L. R. 16 M. 490, followed.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Appellants.

The Hon. the Ag. Advocate General (S. Srinivasa Aiyangar) for the 1st Respondent.

S. Ramaswami Aiyar for the 2nd Respondent.

[*End of Vol. XXXI.*]