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NOTES OF RECENT CASES

Yahya Ali, J
4th December, 1945.

Chinna Mahali Mudali *v.* Nanjappa Goundan
S A No 2384 of 1944.

Hindu Law—Bequest of properties to four grandsons with direction to divide equally amongst them passing over the son on the ground that he was leading an immoral life—Grandsons if can form joint family when their father was alive—Sale by eldest brother as guardian of two minor brothers and one insane brother—Validity—Status of eldest brother—If that of guardian or manager

A, a Hindu died leaving a will, under which he bequeathed his properties to his four grandsons passing over his son *M* who it was alleged in the will was leading an immoral life The mother of the grandsons was also alive. Two of the grandsons were minors but no direction was given in the will as to any of the legatees or any one else having to act either as executor or as guardian. It was provided by the will that, after the lifetime of the testator, the four legatees should divide and take in equal shares the immoveable properties set out therein *X*, the eldest of the grandsons sold two items of the properties to discharge a mortgage purporting to act for himself and for his three brothers alleging that one of them was insane at the time and the other two were minors As a result of these transactions a piece of valuable garden land was saved for the family free from encumbrance. In a suit by the three younger brothers to set aside the sale,

Held, (1) during the lifetime of *M*, the father, his four sons cannot constitute a joint undivided family. (2) As the testator had indicated that the four legatees should divide and take in equal shares the properties bequeathed, the grandsons took the property in severalty and not as a joint tenancy. (3) *X*, the eldest brother accordingly was not entitled as " manager of the joint family " consisting of himself and his brothers, to make any disposition of the shares belonging to his insane brother or the minor brothers (4) There is no legal warrant under the Hindu Law which would entitle *X* the eldest brother to act as *de jure* guardian of his minor or otherwise disqualified brothers. *X* cannot be treated as the testamentary guardian as there was no such appointment expressly or by implication in the will. (5) The mere circumstance that the father and mother are alive and available would not *per se* render void *ab initio* the acts of a *de facto* guardian so as to deprive the transferee of any title whatsoever to the property alienated by such *de facto* guardian, if as a matter of fact, it appears that the sale itself was for the benefit of the family and for legal necessity and for proper and adequate consideration. (6) No doubt a fugitive or isolated act will not constitute a person a *de facto* guardian but there should be a continuous course of conduct.

[On the facts it was found that *X* was acting as a *de facto* guardian and the sale being one for the family benefit, must be upheld.]

Case-law discussed.

S. Panchapagesa Sastri and *M. R. Narayanaswami* for Appellants.

N Sivaramakrishna Aiyar for Respondents.

K.S.

Kuppuswami, Aiyar, J. — Talipulamma, *In re*
5th December, 1945. — C M P No 5380 of 1945.

Court-Fees Act (VII of 1870), section 5—Revision petition returned for payment of necessary court-fees—Non-payment—Petitioner absent when petition posted and deficit court-fee directed to be paid within two weeks—Finality of order

Civil Procedure Code (V of 1908), section 115—Revision petition by proper party to a suit—Court-fee payable

A revision petition (without the necessary court-fee on the ground that the petitioner was recognised as a pauper in the suit and therefore entitled to file the revision without paying the necessary court-fees) was returned for paying the court-fees. But the petitioner would not pay the same The matter was posted before the Master who passed the following order "The petitioner is called. He is absent The appeal examiner's view is correct Deficit Court-fee will be paid in two weeks" In a petition for directing refund of the Court-fees paid by him in the Revision Petition

Held, that (i) the order of the Taxing Officer was final as the petitioner was absent in spite of notice when the order was made

(ii) The Civil Revision Petition cannot be said to be a proceeding connected with the suit in the same Court and except when proceedings are taken by way of appeal as pauper there is no provision enabling pauper parties to file applications wihtout paying Court-fees.

Petitioner in person

K S

Horwill and Koman, JJ — Venkataraya Goundan *v* Nallappa Goundan
5th December, 1945 — A A O. No 545 of 1944.

Civil Procedure Code (V of 1908), section 48—Date of decree for purpose of computing limitation for execution

Where the shares of the parties are adjudicated and decided in a partition suit the decision became ripe for execution on the date of the judgment itself The decree though engrossed on stamp paper on a later date must be treated as being of the same date as the judgment for computing limitation for execution of the decree under section 48 of the Code of Civil Procedure

P. R Ramakrishna Aiyar, C K Viswanatha Aiyar and *P R. Vasudeva Aiyar* for Appellant

P. N Appuswami Aiyar and *M. Venkataramana Aiyar* for Respondent

K.S

Rajamannar, J — Ramanamma *v* Official Receiver, Kistna
6th December, 1945 — A A O No 45 of 1945

Provincial Insolvency Act (V of 1920), section 78 (2), proviso—Proof of debt—What constitutes—Return for production of vouchers or other information—Right to dividend declared before re-presentation.

When a creditor delivers or sends by registered post an affidavit verifying the debt due to him, he must be deemed to have proved his debt. Though the affidavit is returned with a direction to file the copy of the decree passed in respect of the debt and within the time granted it is re-presented, the creditor will be deemed to have proved his debt on the date when he first sent his affidavit and he will be entitled to any dividend declared between the dates of the first presentation and the re-presentation of the affidavit verifying the debt.

A person who has lodged a proof has "proved" within the meaning of the proviso to section 78 (2) of the Provincial Insolvency Act.

B V Ramanarasu for Appellant.

P. Satyanarayana Raju for Respondent

K S.

Bell, J — Palaniappa Chettiar *v* Narayanan Chettiar

10th December, 1945 — C R P No 241 of 1945.

Civil Procedure Code (V of 1908), Order 26, rules 2 and 4 ——Commission to examine witness—Discretion of Court to order—Principles.

Where the Court finds that an application for the issue of a commission to examine a witness is an abuse of process filed vexatiously with a view to protract litigation the Court can refuse the application It is a matter of discretion for the Court in the circumstances of each case to allow or refuse an application for the issue of a commission The Court may consider whether the evidence sought to be adduced on commission cannot be adduced save through that particular witness It is necessary for the applicant to show that unless a commission issues to take the evidence of the person desired, it will be impossible to place the necessary and relevant facts before the Court in support of his case

K R Rama Ayar for Petitioner

R. Rangaswami Ayyangar for Respondent

K S.

Yahya Ali, J. — Ammu Amma *v.* Kelan.

10th December, 1945 — S A No. 2368 of 1944

Malabar Tenancy Act (XIV of 1930), section 20, clause (5)—Failure of landlord to make out claim for eviction under—Landlord cannot fall back on clause (3) of the section and claim eviction under that clause

In a case falling under clause (5) of section 20 of the Malabar Tenancy Act, if one of the requirements of that section is not satisfied, it is not open to the landlord to fall back on clause (3) of section 20 and claim eviction under that clause

A Achuthan Nambiar for Appellants

M Chinnappan Nayar and *M Narayanan Unni* for 1st Respondent.

K S

Horwill and Koman, JJ — Venkata Narasimhan *v* Nagoji Rao

12th December, 1945 — C M A Nos 70 of 1945 and 110 of 1945

Civil Procedure Code (V of 1908), section 105—Scope—Order setting aside dismissal for default—If can be questioned in appeal

Where the effect of an order is to prevent an enquiry into merits such an order would come within the scope of section 105 of the Code of Civil Procedure as affecting the case on merits but where the orders do not affect the decision of the case on merits such orders would not come within the scope of section 105 of the Code of Civil Procedure Applying that principle, an order setting aside a dismissal for default, (of an application for setting aside a sale under Order 34, rule 6), as it only reopens an enquiry and does not affect the decision of the case cannot be questioned in an appeal under section 105 of the Code of Civil Procedure

C Rama Rao, N Narasimham and *N Ramakrishnayya* for Appellant in C M. A. No 70 of 1945

P Somasundaram for Respondent in C. M A No 70 of 1945

P. Satyanarayana Rao for Appellant in C. M. A No. 110 of 1945

P Somasundaram and *D Narasaraju* for Respondents in C M. A. No 110 of 1945.

K.S.

Chandrasekhara Aiyar, J
12*th December*, 1945

Venkanna *v* Venkatanarayana.
S A No. 1620 of 1944.

Hindu Law—Reunion—Burden of proof—One of the reuniting coparceners not having any property—Validity of reunion

A re-union under Hindu Law has to be specifically proved by the party who sets it up and it cannot be inferred merely from joint living and joint management

Whether or not there could be a re-union between two divided coparceners without possession of any properties whatever by them, (they having for example lost the properties taken by them at the prior partition) where one of the divided coparceners has got wealth, effects or properties and the case is that he has re-united with another coparcener (with whom a re-union can validly take place) who may bring no properties of his own to the joint stock, the requirement of the Mitakshara for a valid re-union is satisfied because what was divided previously is again treated as the joint property What the texts require is that divided wealth should again be regarded as joint common wealth It is not essential that there should be wealth and effects brought on each side into the common pool

[Leave to appeal granted]

P Satyanarayana Rao and *B V Subramaniam* for Appellant.

V Govindarajachari and *V Parthasarathi* for Respondent.

K S

Yahya Ali, J
18th *December*, 1945

Venkatasubba Rao *v.* Jagannadha Rao
C R P. No 541 of 1945.

Civil Procedure Code (*V of* 1908), *section* 2 (11)—*Legal representative—Hindu widow entitled to interest in husband's property under Hindu Women's Rights to Property Act* (*XVIII of* 1937)—*If a "legal representative" entitled to be brought on record*

A Hindu widow taking an interest in her husband's estate which devolves upon her under the Hindu Women's Rights to Property Act, would be his "legal representative" within the meaning of section 2 (11) of the Code of Civil Procedure, and is as such entitled to be brought on record as a person who in law represents the estate of her deceased husband

V Vyyanna for Petitioner

V Prakasamma for Respondent

K S

Yahya Ali, J
18*th December*, 1945

Ayiri Parambil Chozhi *v.* Parameswaran Nambudri
S A No 1750 of 1944, etc

Malabar Tenancy Act (*XIV of* 1930), *section* 20 (5)—*Applicability—Dewaswom as landlord if can evict tenant on the ground that it requires the property for its own cultivation*

The idol according to Hindu Law, is a juristic entity who can hold property and enjoy the same If it can do so, it can lease out its properties or can cultivate its own properties, the only disability being that being virtually in the position of a disabled person it has necessarily to exercise its acts of management or administration through an agent, *viz*, the trustee The trustee whether it be of a private or public trust is competent to declare on behalf of the idol of which he is the duly constituted trustee that a certain property belonging to the idol is required for cultivation on behalf of the idol and sue as jenmi for eviction of the tenant under clause (5) of section 20 of the Malabar Tenancy Act

P Govinda Menon for Appellant

D. H Nambudiripad for Respondent.

K.S

Wadsworth, J. Narannaidu *v.* Gangunaidu.

17*th December*, 1945. S.A. No. 1726 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 10 (2) (*i*)—*Applicability—Mortgage with provision that for the interest accruing due at the rate of Re.* 0-8-0 *per cent. per mensem the mortgagee was to be in possession and enjoyment of wet lands estimated to yield an income equal to the interest and the quit rent due on the land—If falls under section* 10 (2) (*i*) *of the Act.*

A mortgage after reciting that under a compromise of a previous litigation Rs. 2,500 was due from the mortgagors went on to say : " For discharging the sum of Rs. 150, the same being the interest accruing due per year on the above amount at the rate of Re. 0-8-0 per cent. per mensem, we have delivered to you possession of the wet land we have in the above-said village, after fixing therefor a cist of Rs. 160-5-0 per year. Hence you should as you please carry on cultivation, etc , in the said lands and out of the cist of Rs. 160-5-0 due every year therefor you should give credit for Rs. 150 being the interest accruing due on the principal amount due from us to you, and as regards the balance of Rs. 10-5-0 you should on our behalf pay the same towards the quit rent and land cesses payable every year in respect of these lands".

Held, though the mortgage recites a rate of interest, it does not stipulate any rate of interest as due to the mortgagees. What is called " cist " in the mortgage is nothing more than an estimate of the profits which will be realised by the cultivation of the land. Accordingly such a mortgage falls under section 10 (2) (*i*) of Madras Act IV of 1938 and can be redeemed on payment of the principal of Rs. 2,500.

(1943) 1 M.L.J. 419, applied.

E. Venkatesam for Appellants.

P. Somasundaram for Respondents.

K.S.

Wadsworth, J. Guruvulu *v.* Suryanarayana.

20*th December*, 1945. S.A. No. 2315 of 1944.

Mortgage—Khandagutta *deed providing for recovery of possession of the land from the mortgagee at the end of* 57 *years on the basis that the advance would have worked itself out by adjustment of the estimated annual produce —Property if can be redeemed before the expiry of that period.*

A *Khandagutta* deed provided that the mortgagor was entitled to recover possession of his land from the mortgagee at the end of 57 years on the basis that by the adjustment of an amount of Rs. 19 each year representing the estimated value of the produce, the advance would by that time have worked itself out.

Held : The contract contemplates that the mortgagee shall himself discharge the mortgage by annual adjustments of an agreed amount. Until the mortgage has been so discharged there is no right on the part of the mortgagor to recover possession and the mortgagor cannot claim a right to pay down the amount at any time and redeem the mortgage.

B. Jagannatha Das for Appellants.

P. Somasundaram for Respondents

K.S.

Chandrasekhara Aiyar, J. — Eramutti *v.* Pragi Sait.
20th December, 1945. — S.A. No. 2173 of 1944.

Trust—Alienation of trust property by previous trustee falsely asserting that properties belonged to him—Subsequent de facto trustees if can sue to recover possession in the absence of de jure trustees.

Persons claiming to be *de facto* trustees cannot bring a suit in the absence of *de jure* trustees for the recovery of possession of property wrongfully alienated by the previous trustee who falsely asserted that the properties belonged to him.

(1938) 2 M.L.J. 663 and (1944) 1 M.L.J. 35, followed though doubted.

I.L.R. 1945 Mad. 250 . (1944) 2 M.L.J. 326 distinguished.

K. P. Ramakrishna Aiyar for Appellant.

N. Gopala Menon for Respondents.

K.S.

Horwill and *Koman, JJ.* — Venkataratnam *v.* Prasada Rao.
21st December, 1945. — A.A.O. No. 434 of 1944.

Contract Act (IX of 1872), section 63—Principle of if applicable to a decree—Decree-holder exonerating three out of four judgment-debtors in consideration of their paying him a certain amount and reserving his right to proceed against the fourth—Transfer of decree to a stranger—Right of transferee to execute the decree for the balance against the fourth J. D.

X obtained a decree for Rs 15,508-8-1 against *A*, *B*, *C*, and *D*, the liability of *C* being limited to Rs. 3,297-10-0 *X* accepted a sum of Rs. 3,300 from *A*, *B*, and *D* exonerating them from all liability for the remainder and expressly reserving his right to proceed against *C* for the sum of Rs 3,297-10-0. The decree was sought to be executed against *C* for Rs. 3,297-10-0 by *Y*, the transferee of the decree. *C* contended that by accepting a sum of Rs 3,000 from *A*, *B* and *D* in discharge of the decree, *C* himself became exonerated from all liability on a principle analogous to that found in section 63 of the Contract Act.

Held : The case did not fall under the mischief of section 63 of the Contract Act and as *X*, the decree-holder, expressly reserved his right to proceed against *C* for the sum due by him under the decree, *Y* was not debarred from execut ng the decree for the balance against *C*.

A I.R. 1931 Bom. 123 and I.L.R. 1941 (2) Cal. 237, distinguished.

K. Kottayya for Appellant.

K. Kameswara Rao for Respondent.

K.S.

Rajamannar, J. — Parvathi *v.* Kunhan Menon.
26th December, 1945. — S.A. No. 1821 and A.A.O. No. 307 of 1944.

Malabar Tenancy Act (XIV of 1930) as amended by Act (XXIV of 1945)—Section 20 (5)—Scope—Landlord's right to recover possession of the land under—Proper ground.

Where a holding subject to a lease was purchased by a stranger in discharge of a debt due to her and the stranger sought to evict the tenant on the ground that her sons were unemployed and that she could have the lands cultivated more profitably by her sons rather than by leasing them out, it cannot be said that she "needs the holding *bona fide* for the purpose of raising crops or other produce fo

her own maintenance or that of any member of her family " as provided for in sub-section (5) of section 20 of the Malabar Tenancy Act as amended by Act (XXIV of 1945). Where pending a second appeal by the tenants against decree ejecting them the amedment has come into force, the amendment applies to the proceedings and the tenant in such a case cannot be evicted under section 20, clause (5), as amended.

C. Unnikanda Menon for Appellant.

D. A. Krishnavariar for Respondent.

K.S.

Kuppuswamy Ayyar, J
7th January, 1946.

Perayya, *In re*
Cr.R.C. Nos. 574 and 575 of 1945.
(Cr.R.P. Nos. 533 and 534 of 1945).

Madras Gaming Act (III *of* 1930), *section* 5—*Warrant for search issued under—Presumption of validity—Failure of Magistrate to state what the materials were on which the Magistrate came to the conclusion that a warrant should be issued in the case—Effect.*

A search warrant purporting to be issued under section 5 of the Gaming Act cannot be said to be invalid merely because of the fact that what the information was on which the Magistrate was asked to issue the warrant was not stated therein. A Magistrate should be presumed to know the law and also must be presumed to have known what the requirements are before he could issue the warrant. Section 5 of the Gaming Act does not state that the Magistrate should record what the materials were on which he was asked to issue the warrant or whether he believed them to be true or not. The presumption is that the Magistrate would not have issued the warrant under section 5 unless he had been satisfied on the information supplied to him that it was necessary to issue the warrant. If the warrant is presumed to be valid then the other presumption naturally follows under section 6 of the Gaming Act that the place was used as a common gaming house and the persons found therein were there present for the purpose of gaming. The presumption will be enough to justify a conviction.

A. Bhujanga Rao for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
9*th January*, 1946

Narayandoss, *In re.*
Cr. A. No. 626 of 1945.

Hoarding and Profiteering Prevention Ordinance (*XXXV of* 1943), *section* 6—*Landed cost—Computation for fixing ceiling price—Interest on advance and cable charges cannot be included in "landed cost"*—Bona fide *inclusion of such items in calculation—Effect on sentence —Absent proprietor of business—Liability for offence by servant.*

The landed cost will only include the price paid, the freight and other duties paid and cannot include the interest on the amount advanced originally and the cable charges.

Even if the proprietor of the business was not present at the sales in contravention of the Hoarding and Profiteering Order, he will be liable for the sale of an article by his clerk at an excess price.

A.I.R. 1945 Lah. 238 and Cr. A. 378 and 379 of 1945, followed.

Where however the clerk who made the calculations as to landed cost included the interest and cable charges in the *bona fide* belief that such charges could be

included and the sale price was not in excess of the landed cost by more than twenty per cent. an exemplary fine is not called for.

K. V. Ramaseshan for accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
11th January, 1946.

Janarthana Goundan, *In re.*
Cr. R. C. No. 1001 of 1945.
(Cr. R. P. No. 935 of 1945).

Defence of India Rules (1939), *rule* 34 *and rule* 39 (2) (*b*)—*Prejudicial literature found at the time of police search in a locked bureau (the key of which was with one of four Hindu undivided brothers) in an engine shed adjoining the house belonging to the family—Inference as to possession of the literature by other brothers—If permissible.*

Where at the time of police search in an engine shed in the house belonging to the family of four undivided brothers, some prejudicial literature is found in a locked bureau, the key of which was with the second brother who was in management and the elder brother only went occasionally to the village, the elder brother cannot be said to be in occupation of the portion of the house where the prejudicial literature was found and he cannot be convicted of an offence under rule 39 (2) (*b*) of the Defence of India Rules.

I.L.R. 1945 Mad. 233, distinguished.

J. R. Gundappa Rao for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
15th January, 1946.

Ramaratnam, *In re,*
Cr. R. C. No. 1169 of 1945.
(Cr. R. P. No. 1085 of 1945).

Criminal trial—Charge of sedition—Trial by sessions with jury—Grounds for directing.

Though the law has not made a case of an offence under section 124-A of the Penal Code triable exclusively by a Court of Session, where the article in a widely circulated newspaper alleged to be seditious is in Tamil, a trial of the case with the aid of a jury will be advantageous not only from the point of view of the accused but also from the point of view of the prosecution. The main considerations which ought to weigh in deciding such matter are :—

(1) The advantages of a trial by a High Court with the aid of a jury which would be in a position to know the language and appreciate the significance of the article, its implications and its effect on the general public and the readers' reaction to it;

(2) The adequacy of the sentence that may be passed by the Court for the offence in question ; and

(3) The capacity of the judge to appreciate the impression that is likely to be formed in the minds of the reading public.

I.L.R. 53 Bom. 611 and I.L.R. 56 Bom. 61, referred to.

Sir Alladi Krishnaswami Aiyar with *T. M. Kasturi* and *N. Rajagopala Aiyangar* for the Petitioners.

The Crown Prosecutor (*P. Govinda Menon*), on behalf of the Crown.

K.S.

Yahya Ali, J.
14*th December*, 1945

Kallalagar Devasthanam, Madura *v* Karuppa Pillai.
S.A. Nos 2098 and 2099 of 1944.

Landlord and tenant—Water charges—Right to claim—Water from Periyar dam passing through course on the inside of the old bund of a disused tank into lands in possession of defendants—Remnants of the tank bed registered as ryoti land and assessed to rent—Effect.

At one time a tank in a village belonging to the plaintiff comprised a large extent and had a bund of considerable size with a sluice and other arrangements for irrigation After the erection of the Periyar dam supply from that source was provided In consequence a considerable portion of the tank was assigned for wet cultivation leaving a portion of the old bund and sluice without shutters. The portion was registered as *ryoti* land of the plaintiff and assessed to rent The Periyar water passed through the course on the inside of the old bund and flowed out through the unshuttered hole in the sluice and irrigated the lands in the occupation of the defendants In a claim by the plaintiff for water charge for the second crop raised on the lands in the occupation of the defendants,

Held · The right to levy water charges of this description rests on the principle that the *solum* of the surface from which water is supplied vests in the landholder *qua* landholder. The land having been converted into *ryoti* land and assessed to rent the very foundation on which water charges can be levied disappears.

(1940) 1 M L J. 160, distinguished.

C Rangaswami Ayyangar and *P. N Marthandam Pillai* for Appellant.

A V. Narayanaswami Ayyar for Respondent

K S.

Wadsworth and Rajamannar, JJ.
18*th December*, 1945.

Nachiappa Chettiar *v.* Muthukaruppa Chettiar.
Appeal No. 239 of 1944

Civil Procedure Code (*V of* 1908), *section* 16 (b)—*Hindu joint family carrying on business and owning immoveable property in Ceylon—Suit for partition in British India in respect of such assets—Not maintainable—Law applicable to transfers of immoveable properties.*

A Court in British India has no jurisdiction to entertain a suit for partition of immoveable property situate outside British India (for instance, in Ceylon) The British Indian Court has no judisdiction even to declare that the properties in dispute were partible joint family properties

A capacity to alienate immoveable properties by will is governed by the *Lex Situs.*

V. Ramaswami Ayyar for Appellant.

The Advocate-General (*K. Rajah Ayyar*), *R Rangachari* and *S. Thyagarajan* for Respondents.

K.S.

Rajamannar, J.
20*th December*, 1945.

Palaniappa Chettiar *v.* Sadasivan.
S A No. 148 of 1945.

Provincial Insolvency Act (*V of* 1920), *sections* 28 (6), 39 *and* 44—*Scope—Rights of secured creditor—Nature of—Right to personal decree against insolvent for entire balance due after realising security.*

The debt of a secured creditor is not provable until he has realised his security or has abandoned it or valued it. Until one of these events has happened there is

no debt provable in the insolvency proceedings A secured creditor is not affected by the proceedings in insolvency unless his debt was provable in insolvency Any composition scheme to which he was not a party would not be binding on him to any extent and he is entitled not only to the benefit of the security but to a decree for the entire balance that may remain after crediting the proceeds of the sale of the secured properties to be recovered from the insolvent personally and from family properties in the hands of his sons His right is not limited to the rate fixed for payment of creditors in the composition

I L R (1942) Mad 448, relied on , I L R 48 Mad. 521, distinguished ; and (1941) 2 M L J 690, not followed [Leave granted]

S. Jagadisa Aiyar for Appellant.

S. Panchapakesa Sastri, N T Raghunathan, S Desikachari and *N. T Ramanujam* for Respondents

K S

Yahya Ali, J.
4th January, 1946

Subramania Iyer *v* Sankuppan.
C R P. No 180 of 1945.

Limitation Act (IX of 1908), *Article* 85—*Applicability—Overdraft account—Insolvency of customer—Effect—If operates as a termination of the account and as a cessation of its mutual, open and current character.*

The mere intervention of bankruptcy of a debtor is not by itself a reason to deny either mutuality or openness or currency to an account which was a mutual, open and current account upto the date of the insolvency in respect of an overdraft account with his creditor Having regard to commercial practice, one would imagine that some pecuniary limit would have been fixed and possibly also a period of time during which the overdraft would be current If such an overdraft was sanctioned it would in the ordinary circumstances be open to the customer to continue to operate on the account within the sanctioned limits, subject to the conditions attached to the overdraft, unless the person who represented the estate of the customer after his adjudication in insolvency, by an overt act put an end to the overdraft and closed the account by striking a balance and making a demand Insolvency by itself does not terminate the overdraft account.

C. S Vidyasankaran for Petitioner.

D. A Krishna Variar for Respondent.

K.S

Horwill and Koman, JJ
9th January, 1946

Srinivasachariar *v.* Seshadri Iyengar.
A A O No 684 of 1944.

Indian Soldiers (Litigation) Act (IV of 1925), *sections* 6 *and* 10—*Scope—Junior member of Hindu Joint family managed by his elder brother serving in the army—Sale of property of family in execution of decree—When can be set aside*

Where a junior member of a Hindu joint family which was managed by his elder brother is serving in the army overseas and the family properties are sold in execution of a decree, the Court has power by virtue of section 10 of the Soldiers (Litigation) Act to set aside the sale at the instance of the soldier if it is of opinion that it is necessary in the interests of justice to do so But section 6 of the Act permits the Court to refrain from suspending the proceedings if the interests of the soldier are identical with those of any other party and adequately represented by such party. Accordingly where the sale in execution is confirmed after dismissing

the application of the soldier to suspend it and it is found that his elder brother as manager of the joint Hindu family adequately represented the soldier in the proceedings the sale cannot be set aside under the Act.

C Rajagopalachari and *M E Rajagopalachari* for Appellant

K Krishnaswami Ayyangar and *N C. Raghavachari* for Respondents.

K S

Koman, J. — Jagannatha Rao *v* Manickyamma.

11th January, 1946 — C R.P No 1464 of 1944.

Civil Procedure Code (V of 1908), Order 9, rule 9—Vakil asking for adjournment and expressing his inability to go on as papers had been taken away from him—Refusal of adjournment and subsequent dismissal of suit—Dismissal is one for default which can be set aside under Order 9, rule 9

Where a vakil asked for an adjournment and expressed his inability to go on as the papers had been taken away from him, he could not be said to have any more authority or instructions to appear in the suit. When the suit is afterwards dismissed, the dismissal is one for default and an application under Order 9, rule 9, of the Civil Procedure Code to set it aside would lie.

Y. Suryanarayana for Petitioner.

G Chandrasekhara Sastri for Respondent.

K.S.

Yahya Ali, J — Vanjiya Goundar *v* Venkatachala Naicker.

11th January, 1946. — C R P. No 880 of 1945.

Execution—Question of limitation—Failure to raise at earlier stage—Not a bar to its being raised at a later stage of the execution proceedings

Having regard to section 3 of the Limitation Act it is open to a judgment-debtor to raise the question of limitation in an execution petition at a later stage, although it was not raised at the earlier stage I L R 58 All 313 (F.B), relied on

The fact that by reason of the question not being raised at an earlier stage the decree-holder was put to expense and inconvenience is a matter bearing only on the question of costs.

T. P. Gopalakrishnan for Petitioner.

T R. Srinivasa Aiyar for Respondent.

K.S

Kuppuswami Ayyar, J. — Kunju Iyer, *In re.*

16th January, 1946. — Cr.M.P. No. 1211 of 1945.

Criminal Procedure Code (V of 1898), section 403 (1)—Conviction by trial Court for offence punishable under section 409 of the Penal Code—Acquittal on appeal on the ground that facts alleged did not constitute offence under section 409 with a direction to frame charge under section 420, Penal Code—Proceedings for offence under section 420, Penal Code, not barred by section 403 (1), Criminal Procedure Code.

The accused was convicted by the Joint Magistrate for an offence punishable under section 409 of the Indian Penal Code On appeal, however, the Sessions Judge being of the opinion that the facts alleged did not constitute an offence under section 409 of the Penal Code acquitted the accused but directed the papers to be sent to the lower Court for a charge being framed under section 420, Penal Code and evidence being let in On a petition to quash the proceedings,

Held, there was no fresh prosecution or a fresh trial which alone is prohibited by section 403 of the Code of Criminal Procedure The appellate Court merely corrected the error of the first Court and in exercise of the power under section 237

of the Code of Criminal Procedure directed that the alternative charge should be inquired into and section 403 is no bar to it

70 M L J. 635 (F B), distinguished.

T. M. Kasturi for Petitioner.

The Assistant Public Prosecutor (*A. S Sivakaminathan*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. — Ramaswami Nadar, *In re.*

17*th January*, 1946. — Crl. App. No. 812 of 1945.

Criminal Trial—Sentence—Conviction of postman for forgery of payees' signatures in money orders and misappropriation of the amount—Sentence should run concurrently as forgery was for the very purpose of misappropriation.

Where the accused, a postman was convicted of forging the signatures of the payees in three money-orders and misappropriating the amounts, as the forgeries were for the very purpose of committing the misappropriation the sentences for the two offences should run concurrently Further the sentences for the offences in respect of the different money-orders must also run concurrently as they all formed part of the same transaction.

A sentence of imprisonment in default of payment of fine must run consecutively and independently.

K. S. Sankararaman for the Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. — Palaniswami Goundan, *In re.*

18*th January*, 1946 — Crl. M. P. No. 1300 of 1945.

Criminal Procedure Code (*V of* 1898), *Section* 170—*Laying of further charge sheets—Power of investigating officer.*

If a police officer after he lays a charge, gets information, he can still investigate and lay further charge sheets. Accordingly a police officer who had filed a charge sheet in which he has not laid a charge against one of several persons against whom information was received by him at the earlier stage of investigation, could file a further charge sheet against that person without disclosing that he had received any further information

K. S. Jayarama Aiyar and *C. K. Venkatanarasimham* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J. — Manicka Mudaliar, *In re.*

24*th January*, 1946. — Cr. R. C. No. 934 of 1945.

(Cr R. P. No. 874 of 1945).

Madras Traffic Rules—Rule 8 (a) *and* (b)—*Scope—Prohibition against overtaking of vehicles—Limits*

In rule 8 (*b*) of the Madras Traffic Rules a " vehicle " the overtaking of which in the vicinity of a bend or corner or other obstruction in the road means only a vehicle that is moving and not a vehicle that is parked. Where there is nothing to indicate that the driver of such overtaking vehicle could have apprehended causing any inconvenience or danger for other traffic before he overtook the parked vehicle there is no contravention of rule 8 (*a*) either

K. V. Ramaseshan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J
9*th January*, 1946

Kempamma *v* Racha Setty.
S A No 143 of 1945.

Limitation Act (*IX of* 1908), *section* 20—*Payment by mortgagor towards mortgage debt—Effect—When starts fresh period of limitation as against an item of the mortgaged properties which had been alienated before such payment*

Where a mortgagor after alienating one of the four items but while still in possession of the remaining three items of mortgaged properties makes a payment to the mortgagee, a fresh period of limitation would start in favour of the mortgagee as against all the items of mortgaged properties including the one which the mortgagor had alienated before his making the part payment

I L R (1940) Mad 872 : (1940) 1 M L J. 766 (F.B), (1941) 2 M L J 913 and (1943) 1 M L J 185, referred to.

P N Appuswami Aiyar for Appellant.

Respondent not represented.

K S

Lakshmana Rao, J.
21*st January*, 1946

Samba Sundara Rao *v*. Veeraswami.
S A No 2428 of 1944.

Madras Estates Land Act (*I of* 1908) (*as amended by Third Amendment Act*, 1936), *section* 6 (1) *and* (2)—*Lease of mango grove on land reserved by the owner for raising mango grove—If confers right of occupancy on the lessee—Character of such land.*

Where land is *bona fide* reserved for raising a mango grove and mango trees have been planted on it, and the grove is leased out with a condition that the lessee should plant new plants, tend them and keep the garden in tact, section 6 (2) of the Madras Estates Land Act, as amended by the Madras Estates Land (Third Amendment) Act of 1936, places such land on a par with waste land let under a contract for the pasturage of cattle and land reserved *bona fide* for forest let under a contract for temporary cultivation with agricultural crops and provides that by reason only of such letting or temporary cultivation such land will not become ryoti land. As such land does not become ryoti land section 6 (1) of the Estates Land Act as amended by the Third Amendment Act of 1936, will not apply to those lands and the lessee is not entitled to claim a permanent right of occupancy in the mango grove so leased.

K. Kameswara Rao, P. Satyanarayana Rao, Ch Raghava Rao, V Govindarajachari, V. Subramanyam and *P. Sivaramakrishniah* for Appellant

K. Subba Rao for Respondent.

K.S.

Happell, J.
24*th January*, 1946.

Atma Ram *v*. Chengodi Sita Ramaswami.
A. A. A. O No. 120 of 1945.

Provincial Insolvency Act (*V of* 1920), *sections* 65 *and* 56 (4)—*Official Receiver by gross negligence though* bona fide *paying dividend to a person falsely representing himself to be a creditor—Application by real creditor for directions to the Official Receiver to pay his dividend —Power of Court to allow—Separate suit—If essential.*

Where an Official Receiver pays a dividend to one who impersonates a creditor and the real creditor subsequently applies to the insolvency Court for directions to the Official Receiver to pay the amount of dividend due to him, it

cannot be said that the creditor should necessarily be referred to a suit. The Court has power to direct payment of the dividend to the real creditor when it is found that the Receiver was guilty of gross negligence in paying the amount to a wrong person though he acted *bona fide* in making the payment.

B. V. Subramanyan for Appellant.

K Venkatarama Raju for Respondent.

K S

Wadsworth, J. Ramakrishnaraju *v* Maharajah of Pithapuram.

26th January, 1946. A. A Á O No. 341 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), *section* 15—*Payments towards arrears of rent by a tenant under Madras Estates Land Act—Appropriation for future local and road cesses—Propriety—Effect on ryot's right to wiping off arrears of prior faslis.*

The total amounts due for the cist (from a pattadar under the Madras Estates Land Act) for the whole year was Rs. 974-4-8, the water-rate was Rs 15-9-0, the local cesses were Rs 46-6-5 and the educational cess Rs 7-11-9 making up a total of Rs 1,045-15-10 and the *kistbandi* dates were 1st September, 1st October, 1st November and 1st December. The payments made by the pattadar were . On 29th September, 1937, that is to say, nearly a month after the first instalment fell due, he paid Rs 100 which was appropriated towards the cist On 22nd October, 1937, he made a payment of Rs. 332-2-0 in respect of which he was given a receipt indicating an appropriation towards rent and cesses, but without any particulars regarding the amount appropriated to each head In the landlord's books the whole of the water-rate and the whole of the local cess and the whole of the education cess for the year (including instalments not yet due) were treated as discharged and the balance of Rs. 265-6-10 was appropriated towards the cist On this date the amount which had accrued due for local cess was only Rs. 23-3-3 out of Rs. 46-6-5. The excess of Rs 23-3-2 was therefore appropriated to a claim for local cess which had not yet accrued due Similarly the appropriation towards the education cess was a sum of Rs 7-11-9 instead of Rs. 3-13-10 which alone was due. The effect of these appropriations was to reduce the amount available in discharge of the arrears of rent proper then due by approximately Rs. 27. After these payments there were numerous other payments in respect of each of which a receipt was given as for payment towards cist and there was no reference to cesses in any of these subsequent receipts Just before the last date for making payments towards fasli 1347 under section 15 of Madras Act IV of 1938 a payment of Rs. 5-8-0 was made which was adjusted towards the arrears for the next fasli 1348 in contravention of the provisions of section 15 (3) of Madras Act IV of 1938.

Held, the payment for October, 1937, was made towards the arrears then due under rent and cesses and the landlord had no right to keep a portion of that payment unappropriated with a view to its adjustment against future arrears of cesses only. The arrears in respect of fasli 1347 due from the ryot must on a proper appropriation be deemed in the circumstances to be an arrear relating to cesses and the ryot is entitled to the cancellation of all the arrears of rent for the earlier faslis inclusive of any arrears in respect of cesses for those earlier faslis.

V. Govindarajachari and *V Parthasarathi* for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Koman, J. — Rami Reddi *v.* Seshamma.
22*nd January*, 1946. — C. R. P. No. 899 of 1945.

Hindu Law—Suit against widow on promissory note executed by her in renewal of a prior promissory note executed by her husband—Decree against estate of husband in the hands of the widow—If can be passed

In a suit filed against a Hindu widow on a promissory note executed by her in renewal of a prior promissory note executed by her husband a decree against her husband's estate in her hands can be passed as the debt was originally incurred by her husband.

Mayne's Hindu Law, 10th Edition page 782 paragraph 646 and 68 M. L J. 643, relied on.

G. Balaparameswara Rao for Petitioner.

Respondent not represented.

K.S.

Koman, J. — Boyyanna *v* Kristappa.
22*nd January*, 1946. — A. A A O. No. 43 of 1945.

Civil Procedure Code (V of 1908), *section* 151—*Execution sale—Court misled into fixing low value by fraud practised and misrepresentation made by decree-holder—Inherent power of Court to set aside sale even after its confirmation—Limitation Act (IX of* 1908), *Article* 166—*Not applicable.*

Where it is found that the Court was misled into fixing a low value (for the property sold in execution), by the fraud practised and misrepresentations made by the decree-holder the Court is competent to set aside the sale under its inherent powers even after it has been confirmed.

I.L.R. 20 Lah. 103, I L.R. 30 Cal. 142 and I L.R 25 Bom. 337, relied on.

The fact that the judgment-debtor took no steps at the time of settlement of the proclamation or subsequently till after confirmation of sale to challenge the valuation given by the decree-holder or to raise objections to the sale is not material.

(1945) 2 M.L.J. 229 (P C.), referred to.

Article 166 of the Limitation Act has no application to such a case.

(Leave granted).

K. Subba Rao and *C. Kondiah* for Appellant.

P Chandra Reddi and *K Venkataratnam* for Respondent.

K.S.

Happell, J. — Kuppuswami Padayachi *v.* Vadivelu Padayachi
23*rd January*, 1946. — A. A. A. O. No. 117 of 1945.

Limitation Act (IX of 1908), *Article* 182 (5)—"*Step-in-aid*"—*Application for payment out of amount standing to credit of opposite party in another suit payable to the decree-holder under a compromise decree—If a "step-in-aid."*

A compromise decree provided for payment to the decree-holder of an amount standing to the credit of the opposite party in a different suit on the file of another Court. An application was made by the decree-holder for payment out of the amount which was opposed by the judgment-debtors. In a subsequent application for execution,

Held, as a judicial order (and not a mere administrative order) was necessary for payment out in the prior application that application constituted a step-in-aid of execution which will save limitation.

48 M L.J. 506, distinguished.

K. S. Desikan for Appellant

S. Sitarama Ayyar and *S. Rajaraman* for Respondents.

K.S.

Wadsworth, J. Muttayya *v.* Rajalakshmi Venkayamma Rao.
25*th January*, 1946. A. A. A. O. No. 350 of 1944.

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 15—*Purchaser of a portion of a joint holding with the knowledge of the landholder—If constituted separate* pattadar *of his portion—If can claim relief under section* 15 *of Madras Act* (*IV of* 1938) *by paying only his portion of the rent for faslis* 1347 *and* 1346.

The mere fact that a person purchased a portion of a joint holding with knowledge of the landholder, will not constitute such person a separate *pattadar* in respect of that portion. The holding remains joint and is in its entirety liable for the whole of the rent. The purchaser of the portion cannot get relief under section 15 of Madras Act IV of 1938 by paying only that portion of the rent of the holding for faslis 1347 and 1346 which is due on the land in his enjoyment.

D. Munikanniah and *N. R. Amirthalingam* for Appellant.

D. Narasaraju for Respondent.

K.S.

Happell, J. Kalliani Amma *v.* Vasudevan Nambudri.
25*th January*, 1946 A. A. A O. No 155 of 1945.

Malabar Tenancy Act (*XIV of* 1930), *sections* 2 (3) *and* 33—*Tenant erecting another building in the compound—If entitles him under section* 33 *to purchase the landlord's right in the kudiyiruppu.*

The Malabar Tenancy Act does not apply to property which consists of a building owned by a landlord and the site thereof within the meaning of section 2 (3) of the Act. The mere fact that the tenant has erected another building in the compound cannot take the property out of the scope of section 2 (3) of the Act. The tenant or his assignee of his interest cannot have the right to purchase the *kudiyiruppu* rights of the landlord without proving that the original building had been removed or that he had permission to remove it and erect a new building.

(1945) 2 M L J. 471, distinguished

D. A. Krishna Variar for Appellant.

D. H. Nambudiripad for Respondent.

K.S.

Yahya Ali, J. Chenchu Reddi *v* Narasiah.
25*th January*, 1946. S. A. No 1007 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 37—*Principle of, is applicable to case of absolute order of discharge—Property reverts to the debtor.*

The principle of section 37 of the Provincial Insolvency Act extends and can be applied to cases of absolute order of discharge . Unless there is a direction by the Judge at the time of making the order of discharge vesting the property in some appointee the property would revert to the debtor subject to such conditions as the Court may in writing declare

(1942) 2 M L.J. 714, relied on.

P. Chandra Reddi for Appellant.

K N. Arunachala Ayyar for Respondent

K.S.

Bell, J. Subbaratnam Setty *v.* Venkataraghaviah.
28*th January*, 1946. C R P No 816 of 1945.

Promissory note—Mother renewing prior promissory note after son becoming major—When binding on the son.

Where a person even after becoming a major permits his mother to manage his affairs and the mother renews an earlier promissory note stating herself to be " the guardian of her minor son," it may be considered that the son authorised his mother to execute the promissory note in renewal of the previous liability and a decree can be passed against the son.

I.L.R. 18 Mad 456, applied.

C V Narasimha Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Happell, J. Balakrishna Mudaliar, *In re.*
31*st January*, 1946. C R. P No. 671 of 1945.

Court-fees Act (*VII of* 1870), *section* 7 (iv) (a)—*Suit for cancellation of a decree—Court-fee payable.*

Where a suit for possession of immoveable properties was compromised and a decree passed by which the plaintiff who had purchased the properties in a Court auction sale agreed to reconvey all the properties to the defendants on his being paid a sum of Rs 3,000, for a subsequent suit to have the compromise decree cancelled on the ground that it had been obtained by fraud, court-fee is payable under the provisions of section 7 (*iv*) (*a*) of the Court-Fees Act on the value of the decree in the former suit A Court-fee of Rs 15 under Article 17-A of Schedule II of the Court-Fees Act will not be sufficient

55 M.L J. 345, distinguished.

N. C. Raghavachari for Petitioner.

(The Government Pleader) *K. Kuttikrishna Menon* for Respondent.

K.S.

Wadsworth and Rajamannar, JJ. Albuquerque *v* Catholic Bank, Ltd.
1*st February*, 1946. A. A O. No. 436 of 1945.

Arbitration Act (*X of* 1899), *section* 15—*Award filed in Court—'Execution as if it were a decree'—Limitation—Starting point—Limitation Act* (*IX of* 1908), *Article* 182 (5).

An award acquires the incidents of a decree when it is filed in Court under section 15 of the Arbitration Act, 1899, and in applying article 182 of the Limitation Act the date of the decree or order cannot be any earlier than the date on which by being filed into Court that which was a non-judicial decision becomes clothed with a judicial character as if it were a decree. The anomaly that it might be possible to file in Court an award which was twenty years old without leaving open any objection to the parties on the ground of limitation is a matter for the Legislature and not the Courts.

The Advocate-General and *Messrs Pais, Lobo* and *Alvares*, for Appellant.

B Sitarama Rao and *R. Somanatha Rao*, for Respondent.

K.S.

Kuppuswami Aiyar, J Narayana Ayyar, *In re.*
5*th February*, 1946. Cr. R. C. No. 132 of 1946.
(Cr. R. P No. 126 of 1946).

Criminal Trial—Summons case—Accused secured by bailable warrant—Personal attendance—If can be dispensed with

In respect of certain offences punishable under sections 323 and 324 of the Penal Code though the procedure to be followed is as in a summons case, the magistrate happened to issue a bailable warrant and when the accused sought to have his personal attendance in Court dispensed with, the Magistrate refused the application on the ground that the prosecution of the accused was secured after the issue of a bailable warrant. On revision,

Held, the Magistrate was not justified in taking his stand on an incorrect order of his for refusing the application Even in a summons case it will be open to the Magistrate to insist upon the personal appearance of the accused but he will have to give reasons for the same

P Narayana Kurup and *S Rajaraman* for Petitioner

K S.

Kuppuswami Ayyar, J.
8th February, 1946.

Sala Mahamad, *In re.*
Cr. R. C. No. 375 of 1945.
(Cr. R. P. No. 350 of 1945).

Madras Rationing Order, clause 4—" *Rationed article* "—*Interpretation—Wholesale dealer effecting sale of paddy within a rationed area to persons living outside the area—Offence* —Bona fides *of seller—Effect on sentence.*

A wholesale dealer who had a licence to sell paddy and rice at Tellicherry (a rationed area) sold some paddy to two persons in Kallai, outside the limits of Tellicherry He did not have a permit entitling him to sell in the area any rationed article He was prosecuted for contravention of clause 4 of the Madras Rationing Order and on conviction was sentenced to pay a fine of Rs 10,000. On revision, it was contended that an article will be a " rationed article " only if it is to be sold for use in a rationed area and if it is to be used or dealt with in a place other than the rationed area, it will not be a " rationed article." Negativing such contention

Held, the participle " rationed " must be understood as referring to the article and not to the use to which it is put or the place where it is to be used. The scheme of the Rationing Order clearly indicates that it deals only with transactions in respect of rationed articles which are sold and purchased in the area. Accordingly the seller not being an " authorised wholesale distributor " as defined in the order, is guilty of selling a rationed article to a person in contravention of the order.

As the sale however, was made *bona fide* it was not necessary to give an exemplary punishment and the fine must be reduced to Rs. 500.

V. Rajagopalachari for Petitioner

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
8th February, 1946.

Kuttiali, *In re.*
Cr. R. C. No 455 of 1945.
(Cr. R P. No 418 of 1945).

Madras Rationing Order, clause 6—*Resident of non-rationed area purchasing paddy in rationed area for use outside area—Offence*

Where persons living outside a rationed area purchase 'rationed articles' within the rationed area they are guilty of an offence. The question whether the article is a " rationed article " or not, is to be determined with reference to the nature of the article and not with reference to the area in which it is to be used or consumed.

B. Pocker for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
18th February, 1946.

Pichai Pillai, *In re*
(Cr. R C. No. 1072 of 1945.
(Cr. R. P. No. 991 of 1945).

Criminal Trial—Lacuna *in prosecution evidence—Effect—Serious offence affecting public interest—If ground for directing a retrial.*

If there is a *lacuna* in the prosecution evidence, the accused is entitled to have the benefit of the same. The burden is on the prosecution to prove that the accused is guilty and, if the evidence is not sufficient to bring the guilt home t the accused, the judge has no other course but to acquit him. Even if the offence is a serious one affecting the public interest, there is no justification for directing a retrial.

K. Kalyanasundaram for *V. T. Rangaswami Ayyangar* and *R. Santanam* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth and Rajamannar, JJ. Ramayya Moopanar *v.* Suppammal
28*th January*, 1946. Appeal No 465 of 1944.

Arbitration—Reference—Natural and legal guardian of minors—Competence to refer to arbitration

It cannot be contended that the natural and legal guardian is incompetent to make a reference to arbitration on a matter with regard to which a reference is for the benefit of the minors

14 C L.J 188, relied on

P N Marthandam Pillai and *C Rangaswami Ayyangar* for Appellant

K Venkateswaran and *A V Avudainayagam* for Respondents

K S.

Wadsworth and Rajamannar, JJ Periyakaruppan Chettiar *v.* Venugopal Pillai
29*th January*, 1946 A A O No 601 of 1944.

Mortgage—Final decree passed during pendency of appeal against preliminary decree—Modification of preliminary decree on appeal—Effect—Executability of final decree—Modification of final decree—Procedure and limitation

A preliminary decree on a mortgage was passed on 4th May, 1929, for Rs. 6,905-13-0 giving three months time to pay, that is till 4th August, 1929. The eighth defendant a puisne mortgagee impleaded in the suit preferred an appeal to the High Court with regard to the claim for interest and that appeal was allowed on 26th November, 1934, reducing the amount payable to Rs 6,112-8-2 Pending appeal, as further proceedings had not been stayed, the trial Court passed a final decree on 23rd September, 1933, on the basis of the preliminary decree of 4th May, 1929 After the decision of the High Court on appeal the decree-holder filed an execution petition on 23rd September, 1936, and again another petition in 1939, and finally on 31st March, 1942. he filed an execution petition for further proceedings in execution by bringing the mortgaged properties to sale. Along with that he filed a miscellaneous application for an amendment of the execution petition by substituting in columns 8 and 11 the amount payable according to the preliminary decree as modified by the High Court in place of the amount fixed by the preliminary decree of the trial Court. Both the applications were allowed and on an appeal against the order on the miscellaneous application it was contended that no appeal lay against the order

Held, (*i*) As the order in question did decide that the decree-holder was entitled to proceed with the execution of his decree the appeal will certainly lie

(*ii*) The fact that an appeal was preferred against the preliminary decree did not prevent the trial Court from passing the final decree and such a decree will be executable notwithstanding that certain modifications may be necessary in view of the appellate judgment The final decree can be executed with such modifications as may be necessary in the circumstances which might as well be made in the execution petition filed after the appellate decree. (1939) 2 M.L J. 86, applied ; I L R. 1943 Mad 804 : (1943) 1 M L J 198, distinguished

(*iii*) The fact that the appropriate modifications have to be made in the final decree already passed as a result of the decision of the appellate Court cannot arm the judgment-debtor with an objection that any formal application for such modification is barred by time if made after three years from the date of the decree of the appellate Court There is nothing in the Code which makes it incumbent on a decree-holder to make an application which would be governed by Article 181 of the Limitation Act to obtain any fresh relief.

T. E Ramabhadrachariar for Appellant.

T. K. Srinivasathathachariar for Respondent.

K.S.

NRC

Chandrasekhara Aiyar, J. — Palaniammal *v.* Arumugam Chetti.
1st February, 1946. — A A O No. 325 of 1945

Res judicata—*Execution of decree for maintenance against husband—Plea that decree had become unexecutable by resumption of cohabitation after the decree—Failure to set up plea in prior application for execution—Bar of constructive* res judicata

Where in a prior application for execution of a decree for maintenance against the husband, the husband after notice did not come forward with any objections but resisted a subsequent application for execution by an objection that as cohabitation was resumed after the decree, the decree had become ineffective and was unexecutable,

Held, that the plea was barred by constructive *res judicata*. It is an objection which might and ought to have been raised in the prior application for execution.

C S Swaminathan for Appellant

C. Vasudevan for Respondent

K S.

Chandrasekhara Aiyar, J — Subbiah Pillai *v* Muthal Achi.
7th February, 1946 — S A No 629 of 1945.

Stamp Act (II of 1899), *section* 35—*Scope and effect—Usufructuary mortgage evidenced by unstamped documents—Invalidity—Mortgagee admitting possession and claiming prescriptive right under the invalid mortgage—Suit by mortgagor to redeem property—If barred.*

In a suit for redemption of a usufructuary mortgage created under an unstamped *muri* though the plaintiff cannot rely on any secondary evidence of the unstamped *muri*, where the mortgagee had in a prior suit admitted that he had acquired title as usufructuary mortgagee by enjoyment for over the prescriptive period, the mortgagee cannot deny the mortgagor's right to redeem the property. Where the *muris* were relied on not as evidence of a mortgage sought to be redeemed but only to show how the prescriptive right was created in the defendant, the suit is maintainable

I L R. 30 Mad 386, distinguished

T Krishna Rao and *R Subramanyan* for Appellant

V. Ramaswami Aiyar for Respondent.

K S.

Wadsworth and Yahya Ali, JJ — Govinda Rao, *In re.*
11th February, 1946. — C M P. No 569 of 1946.

Letters Patent (Madras), clauses 15 *and* 44—*Clause* 44 *if abrogates clause* 15—*Appeal against judgment of single judge in second appeal—Necessity for certificate of fitness for appeal.*

By clause 15 of the Letters Patent (Madras) it is necessary that the Judge who has passed the judgment in a second appeal shall certify it as a fit case for appeal in order that an appeal under that clause may lie. It cannot be suggested that clause 44 in any way abrogates the effect of clause 15.

Petitioner in person.

K.S

Kuppuswami Ayyar, J. — Sevuttu Raman, *In re.*
21st February, 1946. — Cr.R C. No. 6 of 1946.
(Case Refd No. 1 of 1946).

Criminal trial—Deaf accused—Trial—Difficulty of making the accused know what is taking place in Court—Proper procedure.

Where though an accused is deaf he could be made to hear when talked to at a close range, it cannot be said that it is a case in which it is not possible for the trying magistrate to make the accused know what is going on. Merely because of the difficulty of having somebody to speak to the accused at close range and explain to him what all has taken place in Court as and when the proceedings go on, such a procedure cannot be dispensed with.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

Accused not represented.

K.S.

Wadsworth and Rajamannar, JJ. Ramasubba Aiyar *v.* Muthu KR. AR.
18th January, 1946. PL. Arunachalam Chettiar.
Appeal No. 574 of 1944.

Limitation Act (IX of 1908), *Article* 132—*Charge declared by decree in favour of subrogee —Suit to enforce charge—Starting point of limitation.*

S, a creditor of *M*, the original owner of certain properties filed a suit to recover an amount due to him and obtained an attachment before judgment of the properties of the debtor including the suit properties, which were actually attached in March, 1917. Eventually he obtained a decree in the suit and his legal representatives brought the attached properties to sale and purchased them themselves on 8th April, 1929. *X* purchased the suit properties in 1920 from *N* to whom *M* had alienated the same in 1918 When the auction-purchasers proceeded to obtain delivery of the properties, they were obstructed by *X* who was in possession under his purchase from *N*.

Meanwhile a mortgagee of *M* obtained a decree for sale and assigned the decree to *Y*. There was another mortgage also on the properties *X* claiming to have discharged these encumbrances urged in the execution proceedings for delivery that in any event he was entitled to remain in possession till he was reimbursed in the amount paid by him to discharge the encumbrances subsisting on the property. Ultimately on 28th August, 1931 the High Court ordered that possession should be delivered to the auction-purchasers but made a declaration that *X* had a charge for the amounts paid by him to discharge the various mortgages In 1937 the auction-purchasers sold the property to *A* on 13th August, 1943, and *X* instituted a suit to enforce the charge declared in his favour. On a question as to limitation,

Held, that right of *X* to subrogation became merged in the order of the High Court declaring the charge and the suit to enforce it was in time In the circumstances it is unnecessary to deal with the difficult question whether the starting point of limitation for a suit to enforce the right of subrogation by a puisne encumbrancer is the date of payment by him in discharge of the prior encumbrance or the date when the prior encumbrance itself became payable.

I L R (1944) All. 654 : (1944) 2 M L J 330 (P C.), relied on.
(1945) 1 M L J. 341, distinguished

P S Sundaram for Appellant.
S. Panchapagesa Sastri and *P. S. Sarangapani Ayangar* for Respondent.
K S

Chandrasekhara Aiyar, J. Mutyalu *v.* Veerayya
5th February, 1946. S A No 60 of 1945.

Evidence Act (I of 1872), *section* 92—*Scope—Doctrine of part performance under section* 53-A, *Transfer of Property Act—Proof* aliunde *of consideration—If prohibited.*

The prohibition in section 92 of the Evidence Act is only as regards evidence sought to be adduced for the purpose of contradicting, varying, adding to or subtracting from the terms of a contract So long as the passing of consideration is not a term of the contract, evidence adduced to show that it did pass, even though the contract does not recite it, is not within the scope of the prohibition in section 92 Where a letter evidences the terms of a contract under which possession of land is supported on the basis of part performance, if the contract does not recite the consideration for the transfer, there is no prohibition to proof *aliunde* of the consideration

K S Desikan and *J Sitamahalakshmi* for Appellant
B Sitarama Rao and *B Somanatha Rao* for Respondents
K S

Happell, J. Lingala Bugga Reddi *v* Yerikala Reddi
8th February, 1946 A A A O No 152 of 1945.

Hindu Law—Decree against father on promissory note in favour of endorsee of the note—Subsequent partition—Property in the hands of the sons—If can be proceeded against in execution when sons were not made parties to the suit at all

It has no doubt been held that where the sons of a Hindu had been impleaded in a suit on a promissory note by the father, though exonerated, the decree-holder

could proceed against the interest of the sons after partition. But there is no authority for the view that this procedure can be adopted where the sons were not parties at all to a suit brought by an endorsee of a promissory note executed by the father, unless such note was executed by the father in his capacity as manager of the family. I L R. (1937) Mad. 880 : (1937) 2 M.L J. 251 (F.B), dist.

P. Satyanarayana Rao for Appellant.

Respondents not represented.

K.S.

Chandrasekhara Aiyar, J. — Katheessa *v.* Raman Nambiyar.

14*th February*, 1946 — S A No. 687 of 1945.

Malabar—Kudima *tenancy—Tenants to bring lands to cultivation, effect improvements and enjoy them themselves and pay rent from sixth year onwards—Subsequent assessments on the land—Person liable for—Revenue Recovery Act* (*I of* 1890), *section* 35—*Scope.*

Section 35 of the Revenue Recovery Act must be read as subject to any enforceable rights and obligations as between the landholder and tenant with reference to the assessment, such obligations flowing out of any agreement between them. The agreement need not be expressed but can be implied from the surrounding circumstances, probabilities and conduct. I.L.R. 34 Mad. 231 : 20 M.L J. 640 (F.B), considered.

Where in respect of a *kudima* tenancy in Malabar created by a marupat of the year 1871 when the lands were waste lands and it was contemplated that the tenant should bring the lands under cultivation, effect improvements and enjoy them and it was provided that the tenant should pay from the sixth year onwards a rent of Rs. 25 per year for all time, it could not be said that the parties entered into this arrangement with the possibility present to their minds of assessment being imposed in the future Any future liability for assessment need not be borne by the landlord In the case of such tenancies the obligation to pay revenue is with the tenant and a purchaser of the tenant's rights will be liable to pay the assessment and not the landholder. (Leave granted).

C. K. Viswanatha Aiyar for Appellant.

S. Venkatachala Sastri for Respondent.

K.S.

Happell, J — Satyanarayanamurthi *v.* Appanna.

18*th February*, 1946. — C. R P. Nos. 367 & 368 of 1945.

Madras Estates Land Act (*I of* 1908), *section* 131—*Application for sale to be set aside —Notice to purchaser—Necessity.*

It is necessary to give notice to the purchaser of an application for the sale to be set aside before an order on such application could be passed. The failure to give such notice will invalidate the proceedings. 12 L W. 354, followed.

Kasturi Seshagiri Rao for Petitioner.

Respondents not represented.

K S.

Kuppuswami Ayyar, J. — Maruthy *v.* Thavyil Pathumma.

19*th February*, 1946 — A A. A O No 145 of 1945.

Malabar Tenancy Act (*XIV of* 1930), *section* 33—*Petition under—If maintainable by an insane person.*

It cannot be said to have been the intention of the framers of the Malabar Tenancy Act that no petition under sec. 33 of the Act could be filed by a minor, insane person, or person under a disability on the ground that they are not competent to contract. The section is only a protection to the tenant, to the helpless man who is not able to find any residence. Persons under disability are likely to be at a greater disadvantage than other men and they should not be denied the benefit of the Act. Such a petition can be filed by a guardian of persons under disability. There is no question of contract. It is the order of the Court confirming the right in respect of a portion of a holding as separable kudiyiruppu that confers the right under section 33

K Kuttikrishna Menon for Appellant.

S. R. Subramania Aiyar for Respondent.

K.S.

Happell, J. Appayya *v.* Akkayya.
14th February, 1946. A.A.A.O. No. 109 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 78 (2)—*Construction—Exclusion of time between date of adjudication and date of its annulment in computing limitation for suits or execution applications by creditor—Limits—Time during which vesting order under section* 37 *was in force—If can be deducted.*

By virtue of section 78 (2) of the Provincial Insolvency Act, the period between the date of the order of adjudication and the date of the order of annulment may be excluded in computing limitation for execution against the debtor. But such period cannot be extended so as to include the period during which the estate was vested in an appointee under section 37 of the Act. It cannot be said that the time till the date of the "final closing of the administration of the estate by the appointee" should also be excluded.

Section 15 of the Limitation Act will not apply to such a case as the vesting order under section 37 did not have the effect of an absolute stay.

42 Mad. 319, relied on.

[Leave to appeal granted.]

K. Umamaheswaram for Appellant.

V. Rangachari for Respondent.

K.S

Happell, J Panakala Rao *v.* Subba Rao.
14th February, 1946. C R.P. No. 513 of 1945.

Court-Fees Act (*VII of* 1870), *section* 7 (v) *and Schedule II, Article* 17-*B—Joint Hindu family—Suit for partition—Court-fee—Decree against manager said to be enforceable only against manager*—Ad valorem *court-fee as for cancellation of decree—If to be paid.*

Madras Civil Rules of Practice and Circular Orders, Volume I, page 218, *item* 6—*Scope.*

A decree against the manager of a joint Hindu family as such *prima facie* affects the shares of all the members and a member cannot claim the whole of his share in a partition until he has got rid of the decree Where such share is *prima facie* affected by such a decree against the family the plaintiff suing for partition must pay court-fee in respect of any decree against the manager which is contended to be enforceable against such manager alone. Rule 2 of the rules framed under section 9 of the Suits Valuation Act published in Civil Rules of Practice and Circular Orders, Volume I, page 218 as item 6 does not affect the decision in *Ramaswami* v. *Rangachariar*, (1939) 2 M.L.J 818 : I.L.R. (1940) Mad. 259 (F.B.).

Bhavadasan Bhattathiripad v. *Neelakandhan*, (1943) 2 M.L.J. 396 : I.L.R. (1944) Mad. 430, approved.

Even if alienated properties are still in the possession of the manager of the family they must be deemed to be held on behalf of the alienees and not on behalf of the coparceners suing for partition. Court-fee must be paid in respect of the alienations also.

B. V. Ramanarasu for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

K.S.

Yahya Ali, J. Lakshmayya *v.* Krishnarao and others.
14th February, 1946. S. A. No. 2482 of 1944.

Limitation Act (*IX of* 1908), *section* 19—*Acknowledgment—Essentials and test of.*

The principles governing acknowledgments under section 19 of the Limitation Act may be summarised thus . (1) The question whether a particular prior admission amounts to an acknowledgment of subsisting liability so as to save the bar of time should be treated in each case largely upon its own merits. (2) The acknowledgment must be gathered from the document itself but it need not be express nor need it

specify the legal consequences flowing from the admission . It can be inferred by necessary implication from the language used, the context of the admission and the circumstances attending upon the making of the acknowledgment although for that purpose proof *aliunde* cannot be adduced. (3) The inference that can be drawn in the absence of an express admission should be not as a matter of legal inference but as a deduction from the facts and circumstances of the case. (4) If on an interpretation of the document or by necessary inference from the intrinsic features of the document, an acknowledgment is found to have been made before the expiry of the prescribed period of limitation of liability of a subsisting nature in respect of such property or right which is the subject-matter of the action, it would be efficacious to avoid the bar of limitation. (5) If the acknowledgment falls short of admitting liability in respect of the property or right in question or falls short of admitting it as a subsisting liability, the acknowledgment is not effective and the bar of limitation would operate.

[Case-law discussed.]

Ch Raghava Rao and *T Satyanarayana* for Appellant.

P. Satyanarayana Rao for Respondents

K S.

Happell, J. — Parukutty Ammal *v.* Rayan.

18*th February*, 1946 — A. A A. O No 122 of 1945.

Malabar Tenancy Act (*XIV of* 1930), *section* 33—*One out of a number of joint tenants —If entitled to apply under section* 33 *for purchasing the kudiyiruppu rights when sought to be evicted.*

Any one of a number of joint tenants could maintain an application under section 33 of the Malabar Tenancy Act to be allowed to purchase the landlord's rights in the kudiyiruppu.

(1945) 2 M.L J 78, applied.

The fact that the tenants are members of a Mahomedan family and so co-sharers entitled each to a specific share makes no difference

K P Ramakrishna Aiyar for Appellant.

D. A. Krishna Variar for Respondent.

K S.

Chandrasekhara Aiyar, J — Ammanna *v.* Ramanna.

20*th February*, 1946. — S. A. No. 567 of 1945.

Co-sharers—Land with a common well to irrigate it jointly owned—One of the owners losing his right in such lands and getting other lands on partition—Right to take water from the well.

Where joint lands are purchased by brothers with a common well in the middle to irrigate them, if for any reason one of the purchasers loses his right in the joint lands to the ownership of which lands the right to use the well water is incident or appurtenant, he cannot insist on his right to take the water to some other property, the two rights being so intimately connected and interdependent. Where by reason of a partition one of the parties is allotted some other lands but in a suit claiming that that party had his share in the well it was conceded that the well was kept joint the only relief which having regard to the peculiar facts can be given is to declare the plaintiff's right to the share admitted in the well and to restrain the defendants from interfering with his right to take the water from the well, limited to his share provided that the plaintiff does not infringe the defendants' exclusive right to the ownership of the land surrounding the well. How the plaintiff can exercise this right must be left to his genius.

P. Somasundaram for Appellant.

P. R. Ramachandra Rao for Respondents.

K.S.

Happell, J. Gopalaswami Chettiar *v.* Doraiswami Pillai.
21*st February*, 1946. A.A.A O. No. 3 of 1945.

Civil Procedure Code (*V of* 1908), *section* 65—*Sale of immoveable property in execution —Date of vesting of title of purchaser.*

X filed a suit to enforce a mortgage on 30th January, 1941. He obtained a decree and purchased the property himself in sale held by the Court on 7th December, 1942 When however, he sought to take possession, he was resisted by *A* who claimed to be a purchaser of the same property from *S* who had herself purchased the property in a Court sale held in execution of a money decree obtained by her against the mortgagor of *X* on 18th July, 1940 The sale was confirmed on 5th April, 1941

Held. As by virtue of section 65 of the Code of Civil Procedure on confirmation of the sale the property is deemed to have vested in *S* from the date of sale (18th July, 1940) she is in the same position as if she had purchased the property outright on 18th July, 1940. Accordingly *S* and her alienee were entitled to notice of the proceedings in the mortgage suit.

I L R. 2 Cal 141 and I.L.R 11 Cal 341, relied on.

S not having been impleaded in *X's* suit, *S* and *A* were not bound by the mortgage decree or sale in pursuance of it.

S. Panchapakesa Sastri and *P S Ramachandran* for Appellant.

M S Venkatarama Ayyar for Respondent.

K.S.

Happell, J Satyam Ramudu *v* Rayalamma.
21*st February*, 1946. C R P No 975 of 1945.

Contract Act (*IX of* 1872), *section* 45—*Scope —Joint promisee disclaiming any interest in the debts sued on—Need not be impleaded in the suit*

Section 45 of the Contract Act is intended to protect a promisor from a multiplicity of suits If, however, the suit is brought for the whole amount of the debt by all the joint promisees except such of them as disclaim all interest, the promisor would be as well protected as if all the joint promisees were impleaded in the suit. The rule enunciated in section 45 that a suit to enforce a promise made to two or more persons jointly cannot be maintained unless all the promisees are parties to the suit, is subject to an exception that a joint promisee who has ceased to have any interest in the debt is not a necessary party to the suit. The question whether such promisee has ceased to have any interest is one of fact.

9 I C 111, approved.

Accordingly where the heirs of a deceased joint promisee had ceased to have any interest in the debts, they need not be impleaded in a suit to enforce the debt by the other promisees

A V Avudainayagam for Petitioner

Ch. Raghava Rao for Respondent.

K S.

Happell, J. Ponnuswami Servai *v.* Venugopala Thevar.
22*nd February*, 1946 A. A A O No. 69 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 16—*Assignee of* ex parte *decree —If entitled to execute revised decree passed after setting aside the* ex parte *decree*

An assignment of an *ex parte* decree is no doubt an assignment of the assignor's interest in the *ex parte* decree, but that interest ceases when the *ex parte* decree is set aside and it cannot be regarded as revived in the fresh decree passed in the suit so as to enable the assignee to execute the new decree.

Such an assignment may however be made to include terms which would entitle the assignee to execute any decree that may ultimately be passed in the suit.

[Leave to appeal granted.]

A. V. Viswanatha Sastri for Appellant.

M. S. Venkatarama Aiyar and *M. S. Mahadeva Aiyar* for Respondents.

K S.

Chandrasekhara Aiyar, J.
22nd February, 1946.

Corporation of Madras *v.* Janab Mir Gulam Ali.
C.C C App. No. 50 of 1945.

Madras City Municipal Act (IV of 1919), *section* 106, *clause* (4)—*Property tax—Liability—Suit against original owner after his transferring the property and decree thereon for the taxes—Subsequent suit for the same taxes against transferee—Bar of.*

Where the corporation sought to proceed against the original owner of certain property for arrears of property tax and obtained a decree thereon even though the owner had transferred the property before the filing of the suit, the claim having become merged in the decree the corporation cannot be allowed to sue again the transferee for the same arrears on the ground that they had not recovered the amount from the transferor or that the decree had been allowed to become barred as against the transferor

K. Subba Rao for Appellant.

V. Srinivasan and *R. Narasimhachariar* for Respondent.

K.S

Wadsworth, J
28th February, 1946.

Potharaju *v.* Venkatakrishnarao
A A A O. No. 168 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), *sections* 20 *and* 19—*Decision as to agriculturist status in revision against order on application under section* 20—*If* res judicata *in subsequent proceedings under section* 19.

A decision as to the status of an alleged agriculturist seeking a stay under section 20 of Madras Act IV of 1938 is only a summary adjudication on *prima facie* evidence, not necessarily after notice to the creditor and it will not bar a subsequent contest regarding the debtor's status and right to relief in the subsequent proceedings under section 19, even if it is an order in revision of an order under section 20, it will not operate as *res judicata* except as to the right to a stay.

(1939) 2 M L J 495, relied on

V. Rangachari for Appellant.

P. Sivaramakrishniah for Respondent

K S.

Kuppuswami Ayyar, J
4th March, 1946

Chockalingam Pillai and others, *In re.*
Cr. R. C. No. 1054 of 1945.
(Cr. R. P No. 988 of 1945).

Madras Criminal Rules of Practice, rule 366—*Expenses of defence witnesses—When payable by the accused himself—Offence under rule* 81 (4), *Defence of India Rules, punishable with three years' imprisonment or with fine—Whether bailable offence—Test for deciding—Criminal Procedure Code, Schedule II—Bailable and non-bailable offence—Test.*

Rule 366 of the Madras Criminal Rules of Practice specifically provides for the payment of expenses of witnesses by Government in cases shown in the Second Schedule of the Code of Criminal Procedure as not bailable. In a case in which an accused is prosecuted for an offence punishable under rule 81 (4) of the Defence of India Rules for ascertaining whether the case is bailable or non-bailable the maximum punishment awardable under the rule for its contravention must be taken into consideration and if there is a possibility of the accused being awarded three years' imprisonment then the case will come under class, "if punishable with imprisonment for three years and upwards but less than seven years" and the offence will not be a bailable one according to Schedule II of the Criminal Procedure Code. If the offence is not bailable the expenses of the witnesses for the accused will be payable by the Government. A.I R. 1944 Nag 149, referred to.

A. C Krishnaswami for Petitioners

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Wadsworth, J. Periasami Mooppanar *v* Venkatapathi Raju.
25th February, 1946 S. A. No 2336 of 1944

Transfer of Property Act (IV of 1882), section 59—Suit to enforce mortgage—Defendants, if can show that mortgage was not for cash advance but to secure a fluctuating balance of account

In a suit to enforce a mortgage while it is open to the defendants to show that there was failure of consideration or that the consideration was advanced in a different way than that recited in the bond, it is not open to them to say that the mortgage was not one for sums advanced, but was a security bond for a fluctuating debt made up not merely of sums advanced under the deed but partly of future sums to be advanced after the balance between the parties had been reduced below the amounts stipulated in the deed That will be a totally different contract affecting immoveable property and creating what is in effect a mortgage for a fluctuating amount, which under section 59 of the Transfer of Property Act will have to be in writing and registered.

S. K. Ahmed Meeran for Appellant.

N. Rajagopala Ayyangar and *M. Seshachalapathi* for Respondents

K.S

Chandrasekhara Ayyar, J. Singara Mudali *v.* Ibrahim Baig Sahib.
25th February, 1946. S. A. No. 797 of 1945.

Minor—Purchaser from of property subject to a covenant to reconvey—If specific performance of that covenant can be enforced against such purchaser.

X purchased from three minors and their mother some property subject to an agreement to reconvey it to *Y* and his two brothers. In a suit by *Y* to enforce specific performance of the agreement to reconvey,

Held, as *X* stands in the shoes of the minors the defences open to them would be available to him generally speaking As there could be no decree for specific performance against the minors, *X* who claims under a purchase from them, is not liable either. *Y* could have specific performance only as far as the share of the mother of the minors was concerned The question whether specific performance should be decreed or not depends not so much on the void or voidable nature of the contract but of its being executory or executed so far as the minors are concerned.

V. T. Rangaswami Ayyangar and *R Santanam* for Appellant

C. A Muhammad Ibrahim and *T S Santhanam* for Respondent.

K.S.

Happell, J. Kalidasa Chetty *v.* Dodda Siddha Chetty.
27th February, 1946 C R P. No. 953 of 1945.

Civil Procedure Code (V of 1908), Order 21, rule 89—Deposit to have a sale set aside short by Rs 1-4-0 due to mistake of party—Making up deficiency after thirty days had expired —Court has no jurisdiction to extuse the delay—Amendment of Order 21, rule 92—Effect.

The responsibility for paying the correct amount under Order 21, rule 89 of the Code of Civil Procedure lies with the payer who wishes to have the sale in execution set aside and not with the clerk who receives the lodgment schedule. Where the deposit is short by Rs. 1-4-0 owing to a mistake of the party and is made good after the expiry of thirty days the Court has no jurisdiction to excuse the delay.

It cannot be said that the shortage could have been adjusted by appropriating it from the amount of poundage to which the thirty days limitation does not apply.

21 M L J 631 followed ; A I.R 1934 Pat 246, not followed.

The amendment of rule 92 of Order 21 does not affect the position as the mistake which led to the depositor paying Rs 1-4-0 too little was clearly within his control.

K Krishnaswami Aiyangar and *N. C. Raghavachari* for Petitioner

A C Sampath Aiyangar and *S Krishnamachari* for Respondent

K. S

Yahya Ali, J
27th February, 1946.

Kasivisvanadham *v* Nagayya.
C R P No. 1076 of 1945.

Civil Procedure Code (V of 1908), Order 37, rule 3—Leave to defend—Triable issue —Right to unconditional leave—Order under rule 3 of Order 37, if open to revision under section 115.

Where in a summary suit on a negotiable instrument there is a triable issue based on a plausible defence leave to defend should be granted unconditionally. The discretion vested in the Court under Order 37, rule 3 of the Civil Procedure Code should not be exercised in such a case to impose terms as to deposit or security before grant of leave to defend. The High Court in revision has jurisdiction under section 115 of the Civil Procedure Code to interfere with an order made under Order 37, rule 3

P Somasundaram and *P Suryanarayana* for Petitioner.

P Sivaramakrishniah for Respondent

K.S

Wadsworth, J.
27th February, 1946

Rajah of Venkatagiri *v.* Ramaswami.
A A A O. No. 28 of 1945 & C R. P. No. 158 of 1945.

Madras Estates Land Act (I of 1908), sections 131 and 132—Setting aside of sale in execution of rent decree—Section 47 and Order 21, rule 90 of the Civil Procedure Code not applicable.

The Madras Estates Land Act contains a simplified law of procedure for execution of rent decrees which excludes the application of the execution provisions of the Code of Civil Procedure. An order by a sub-Collector setting aside a sale held in execution of a decree for rent under the Madras Estates Land Act cannot therefore be treated as an order either under Order 21, rule 90 or under section 47 of the Code of Civil Procedure and no appeal lies against such order.

(Case-law discussed).

K. Subba Rao for Appellant

M. V Nagaramayya for Respondent.

K.S

Rajamannar, J.
28th February, 1946.

Basi Reddi *v* Veerayya.
S A No. 372 of 1945.

Declaration—Suit for, at instance of party in possession though without title—Maintainability

A suit for declaration on the basis of possession is maintainable. But if the plaintiff seeks to rely on it, it should be clearly set up, so that the contesting defendants may know what they have to meet. 25 I C 935, relied on.

Where the suit is not framed on the basis of possession it is not open to the Court when the plaintiff fails to establish title to the property to grant a declaration that the plaintiff is entitled to possession though he is not the owner, until such time as he is ousted in due course of law by the person entitled to possession by virtue of title to the property.

Ch Raghava Rao for Appellant.

Respondent not represented.

K S

Chandrasekhara Aiyar, J.
4th March, 1946.

Gopalakrishnamurthi Reddi *v.* Subramania Mudaliar.
S A No. 2286 of 1944.

Transfer of Property Act (IV of 1882), section 59—One of the attesting witnesses stating that he signed the deed as first attestor but omitting to say that the other witness also attested the execution of the deed—Opportunity to supply such lacuna to be given.

Where one of the attesting witnesses to a mortgage deed deposed that he signed the deed as first attestor but omitted to say that the other witness also attested the execution of the deed, an opportunity should be afforded to the plaintiff to supply the lacuna especially where there was no specific denial that the document had been attested by two witnesses and the defence only vaguely pleaded that "the defendant does not know anything about the suit hypothecation."

V. S. Rangachari for Appellant.

K. V. Krishnaswami Aiyar and *A. K Muthuswami Aiyar* for Respondents.

K S

Wadsworth, J.
7th March, 1946

Lakshminarayana *v.* Lakshminarasamma.
A. A A. O No. 182 of 1945.

Madras Agriculturists' Relief Act (IV of 1938), section 19—Finding that debtor is agriculturist—If appealable

There is no right of appeal against a mere finding that a petitioner is an agriculturist entitled to the benefits of the Act The person aggrieved by such finding must await the final decision as to the amount if any due and in the appeal against that decision he can canvass the correctness of the preliminary finding

N V B Shankara Rao for Appellant.

Respondent not represented.

K S.

Kuppuswami Ayyar, J.
7th March, 1946

Manikyala Rao, *In re*.
Cr. R. C No. 1128 of 1945.
(Cr R. P No 1044 of 1945).

Criminal Procedure Code (V of 1898), section 145—Parties to proceedings under—If can be compelled to appear in person or execute bonds for appearance—Right to appear by pleader or remain ex parte

Persons who are parties to proceedings under section 145, Criminal Procedure Code cannot be compelled to appear in Court in person It may be open to the Magistrate to summon them as witnesses if they are wanted either as Court witnesses or witnesses for the other side But then they will be attending Court as witnesses and not as parties Accordingly such persons cannot be compelled to execute bonds for appearance or appear in Court. They can appear by pleader or if they do not appear and let in evidence the case will be disposed of *ex parte*

S Kothandarama Nainar for Petitioner

P Sivaramakrishnayya and *K. Bhimasankaram* for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Kuppuswami Ayyar, J.
8th March, 1946.

Narayana Singh *v.* Seetharatnamma.
Cr R. C No. 936 of 1945.
(Cr. R P No 876 of 1945)

Criminal Procedure Code (V of 1898), section 253 (1)—Discharge of accused under—Cannot be ordered without examining all the witnesses cited by the complainant

In respect of a complaint of cheating by failing to return some jewels borrowed from the complainant a number of witnesses were cited and it was stated that three persons were present at the time of the delivery of the jewels The Magistrate took evidence and also examined a court witness but passed an order of discharge under section 253 (1) of the Criminal Procedure Code on the evidence taken by him without examining the investigating officer and one of the persons cited as a witness to prove delivery of the jewels to the accused When the matter was taken in revision, the Additional District Magistrate dismissed it saying that what the Magistrate must have meant was that he was discharging the accused under section 253 (2). On further revision to the High Court,

Held, that there was no justification for thinking that the Magistrate intended to discharge under section 253 (2) when he definitely stated in his order that he discharged the accused under section 253 (1) The Magistrate has no power to discharge under section 253 (1) of the Code until he has examined all the witnesses.

I L.R 4 Mad. 329, relied on.

V. T. Rangaswami Aiyangar for the Petitioner

K. S. Jayarama Aiyar and *K. Ramaseshayya Chowdry* for Respondent.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S.

Kuppuswami Ayyar, J.
14th March, 1946

Satyanarayana Sastry, *In re.*
Cr R C No. 12 of 1946.
(Cr. R P No 11 of 1946.)

Criminal Procedure Code (V of 1898), section 145—Complaint that acts of counter-petitioner will lead to breach of peace—Order of warning without enquiry—Not proper—Procedure.

The petitioner filed a petition before the Joint Magistrate of Chandragiri complaining that the counter-petitioners and their party had no right to recite *sankalpam* at the tank at Tirumalai Hills at Tirupati and that there was a likelihood of a breach of the peace Instead of taking evidence and going into the matter the Joint Magistrate directed the police to warn the counter-petitioners not to create a breach of the peace by reciting such *sankalpams* The matter was taken in revision to the Sessions Judge who set aside the order of warning On revision,

Held, the trial Court had no jurisdiction to issue such a warning without taking evidence and deciding whether such a right was there or not. Nor has the Sessions Judge any jurisdiction to sit in revision over such an order and pass an order himself. The Sessions Judge if he finds that the order of the Joint Magistrate was wrong, should write to the High Court asking it to interfere

V. T. Rangaswami Aiyangar and *K Kalyanasundaram* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

Chandrasekhara Aiyar, J — Panchapakesa Aiyai *v* Rajamani Ayyar.
22*nd February*, 1946 — S A No. 476 of 1945

Civil Procedure Code (*V of* 1908), *Order* 34, *rule* 14—*Sale in contravention of—If void or voidable—Limitation for setting aside—Sons of Hindu judgment-debtor—How far bound by sale in execution.*

As regards sales held in contravention of Order 34, rule 14, Civil Procedure Code, it is now settled law that such a sale is not void but only voidable and is good until it is set aside The violation of the provision in Order 34, rule 14, Civil Procedure Code, confers on the person affected only a right to have the sale set aside either by way of application or by way of suit, if a suit is permissible. But the application or suit must be filed within the time provided by law namely one year from the sale The sons and grandsons of a Hindu judgment-debtor are bound by a sale held in contravention of Order 34, rule 14 if it is not set aside The fact that the son or grandson was not *eo nomine* a party to the suit is of no consequence as the interests of the son or grandson is capable of being sold in execution of the decree against the father

Quaere · Whether where a separate promissory note is executed for arrears of interest and a sale is held in execution of a decree on the promissory note there is contravention of Order 34, rule 14, Civil Procedure Code

V S Rangaswami Aiyangar for Appellant

S T. Srinivasagopalachariar for Respondent

K.S

Lakshmana Rao, J — Achuthan Nair *v.* Devaki
22*nd February*, 1946. — S A No 150 of 1945

Malabar Tenancy Act (*XIV of* 1930), *section* 20 (6)—*Person evicted from holding on ground that holding was required by landlord* bona fide *for building purposes—Subsequent transfer of land to stranger—Suit by evicted tenant for restoration—Section* 43 (1) (b)—*Limitation under—If applicable*

A tenant was evicted under section 20 (6) of the Malabar Tenancy Act on the ground that the holding was required by the landlord *bona fide* for building purposes for his tarwad The lands were transferred to a stranger on 8th June, 1942 and the tenant filed on 22nd December, 1942, a suit for the restoration of the lands On a contention that the suit was premature,

Held Under the circumstances the tenant shall be entitled to the right of suit under sub-section (1) of section 21 and the suit can be instituted within one year from the date of transfer by the landlord as provided for in section 43 (1) (*a*) Section 43 (1) (*b*) is not applicable and the right to sue cannot be postponed until the expiry of six years after eviction of the tenant Section 43 (1) (*b*) relates to the right of suit conferred by sub-section (2) of section 21, that is the right to sue for restoration of the lands if the building for constructing which the eviction was obtained is not erected on the lands within six years of such eviction

D A Krishna Variar for Appellant

S. R. Subrahmania Aiyar for Respondents

K.S

Happell, J — Thukra Shetty *v* Sarasamma Shedthi
25*th February*, 1946 — C R P No 484 of 1945.

Penal Code (*XLV of* 1860), *section* 206—*Complaint of removal of attached properties—Court making complaint if should decide whether case fell within section* 206

In directing that a complaint should be made against the accused of removing attached property (which may amount to an offence under section 206 of the Penal Code) it is sufficient if the District Munsiff who gave the direction is satisfied that there was a *prima facie* case against the accused · It is not necessary that before giving the sanction the District Munsiff should have considered whether the case fell under section 206 of the Penal Code by being " fraudulent " rather than " dishonest ".

The distinction between " fraudulent " and " dishonest " is a fine one and if the definition of the two words has any importance in the case the question can

be decided by the Criminal Court. Even if the decision of the Court is unnecessary it would only be a superfluity and will not vitiate the proceedings.

1936 M.W.N. 1150 and (1937) 2 M L J. 802, distinguished.

T E. Ramabhadracharıar for Appellant

K Y Adiga and *K. P. Adiga* for Respondent.

K.S.

Happell, J. Muthal Achi *v.* Somasundaram Chettiar.

27*th February*, 1946. C.R P No 657 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 1, *rule* 10 (2)—*Scope—Third party claiming interest adverse to parties already on record—If can be impleaded*

The language of Order 1, rule 10 (2) of the Code of Civil Procedure is not wide enough to include a third party who seeks to be impleaded as defendant or plaintiff merely on the ground that he has an interest adverse to the plaintiff already on record. (Case-law discussed)

Accordingly a third party cannot be impleaded in a suit on his own motion simply on the ground that he and not the plaintiff is entitled to the decree claimed, when his application is supported neither by the plaintiff nor by the defendant already on record.

V Ramaswami Aiyar for Petitioner.

N. G Krishna Aiyangar for Respondent.

K S.

Yahya Ali, J. Muthappudayan *v* Chinna Ekammai Achi.

28*th February*, 1946. C.R P No. 1198 of 1945.

Civil Procedure Code (*V of* 1908), *sections* 63 *and* 73—*Combined operation and scope of —Claim to rateable distribution—Application to Court actually executing decree—If essential.*

In order to entitle a creditor to rateable distribution all that is necessary is that he shall have made an application for execution of his decree before the Court executing the decree has received the assets of the judgment-debtor. If he has made an application to a Court of competent jurisdiction, although not to the Court executing the decree, he is entitled to rateable distribution without any other application, although as a matter of prudence he should notify the Court actually executing the decree of his claim I L R. 1940 Mad. 526 : (1940) 1 M.L J 482 (F B) and A I R 1937 Nag 80, relied on.

N R Govindachari for Petitioner

R. Kesava Aiyangar for Respondent

K S.

Happell, J. Thiruvengadam Pillai *v* Dharmasiva Pillai

1*st March*, 1946 C.R.P No. 1234 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 9, *rule* 13—Ex parte *decree—Application for setting aside—Missing a train—If sufficient ground*

It cannot be said in all cases that missing a train is an insufficient cause for setting aside an *ex parte* decree

A I R 1936 Rang 204, referred to

If it is found that the applicant tried to catch the train and missed it the *ex parte* decree must be set aside.

M S Venkatarama Aiyar for Petitioner

C. R. Rajagopalachari for Respondent.

K S.

Wadsworth, J Venkata Seetharamayya *v* Veeraraghavulu.

4*th March*, 1946. A.A O No 109 of 1945.

Civil Procedure Code (*V of* 1908), *section* 47—*Order recording compromise of a proceeding under section* 19 *of Madras Act IV of* 1938—*Not one in execution.*

The proceeding under section 19 of the Madras Agriculturists' Relief Act is a proceeding for the amendment of the decree and it is only if that amendment wipes out the decretal amount that a declaration is made that the decree has been satisfied. This is not a process in execution at all. An order recording a compromise of a proceeding under section 19, Madras Act IV of 1938, is not one in execution and would not fall under section 47, Civil Procedure Code. It cannot be

said that the recording of the compromise amounted to a recording a satisfaction of the decree under Order 21, rule 2, Civil Procedure Code.

P Somasundaram and *P. Suryanarayana* for Appellant

V. Suryanarayana for Respondent

K S.

Happell, J. Sri Venkataramana Devara Bhandram *v* Ramanna Rai.
4th March, 1946. C R.P No. 1196 of 1945

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Deposit made under —If unconditional—If can be recovered as paid under coercion—Contract Act* (*IX of* 1872), *section* 72.

A person interested in property sold in execution who deposits the amount under Order 21, rule 89 to avoid the sale can sue for the recovery of the money so deposited on the ground that it was made under coercion within the meaning of section 72 of the Contract Act. It is immaterial whether the deposit was or was not made under protest. The payment under Order 21, rule 89 must be unconditional only in the sense that the auction purchaser cannot be required to give security for the money which he withdraws, nor can the depositor impose any condition on his withdrawal of the money or any part of it.

K Vittal Rao for Petitioner.

N Kotyswara Rao and *S Ramayya Nayak* for Respondent.

K S

Happell, J Vasudevan Nambudiripad *v* Madhava Valia Raja.
4th March, 1946 A A A O No 334 of 1944.

Malabar Tenancy Act (*XIV of* 1930), *section* 51 (1)—*Michavaram due—Commutation before renewal—Crucial date.*

Section 24 (2) (*c*) of the Malabar Tenancy Act provides that an order shall be made for the payment of all arrears of rent before an order for renewal is made and "rent" here is clearly used in a general sense and covers michavaram. Michavaram is therefore payable under a specific provision of the Act and the provisions of section 51 (2) can be applied for commuting the paddy rent on the basis of the average prices ruling in the previous five years The commutation cannot be based on the prices prevailing on the dates when the michavaram fell due but must be based on the average prices contemplated by section 51 (1) of the Malabar Tenancy Act.

P Govinda Menon and *D H Nambudripad* for Appellant

C A Vaidyalingam for Respondent.

K.S

Happell, J Adiraja Arasala Kinnyakka Ballel *v* Naranapayya.
5th March, 1946 C R P No. 1054 of 1945.

Madras Hindu Religious Endowments Act (*II of* 1927), *section* 78—*Application for delivery of property of a temple—Nature and scope of—Order appointing trustee—If can be questioned*

An application by a trustee for delivery of properties of a temple under section 78 of the Madras Hindu Religious Endowments Act is in the nature of an application for execution and it is not open to a person objecting to an application for delivery made under that section to question the order of appointment of the trustee who has made the application. Where a person takes no steps to set aside the order of appointment of trustees made by the Board that order becomes final and even if such order is alleged to be one without jurisdiction the question cannot be raised in an application under section 78.

T Krishna Rao for Petitioner.

K Y. Adiga and *K. P Adiga* for Respondent.

K S

Wadsworth, J Venkateswarlu *v* Venkatasubbayya Sastri.
5th March, 1946. A A.O No 222 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938), *sections* 19 *and* 25-*A—Order of Small Cause Court amending its decree—Appealability—New section* 25-*A—Scope.*

Where a Court which passed a decree is a Small Cause Court against whose orders appeals are excluded by the provisions of section 27 of the Provincial Small

Cause Courts Act an order by that Court amending its decree under section 19 of the Madras Agriculturists' Relief Act will not be appealable under section 47 of the Civil Procedure Code. Accordingly, the new section 25-A of Madras Act IV of 1938 confers no right of appeal against such an order

K. Kameswara Rao for Appellant.

N Subrahmanyam for Respondent.

K S

Wadsworth, J Somasundaram Pillai *v* The Official Receiver of South Arcot.
6th March, 1946. C R P No 1155 of 1945

Madras Agriculturists' Relief Act (IV of 1938), section 21—Debtor adjudged insolvent in 1930 but obtaining absolute order of discharge in 1932—Property continuing in the hands of Official Receiver for satisfying debts—Debtor if entitled to claim benefits of Act IV of 1938

Where a debtor was adjudicated insolvent but obtained an absolute order of discharge in 1932 but the properties still vested in the Official Receiver for satisfying the debts proved in insolvency, the debts are no longer the debts of the insolvent but merely the debts of the estate vested in the Official Receiver and hence the debtor is not entitled to get the debts reduced under Madras Act IV of 1938 so as to relieve the burden on the estate in the hands of the Official Receiver.

K Srinivasan for Petitioner

T E Ramabhadrachariar for Respondent

K S

Wadsworth, J Ramanathan Chetti *v* Narayanaswami Goundan
7th March, 1946. A A A.O No 151 of 1945

Maaras Agriculturists' Relief Act (IV of 1938), section 8, Explanation—Applicability—Integrity of debt broken—Effect

An indebtedness started with a joint borrowing by three brothers of Rs 500, which debt was renewed in 1926 by another joint promissory note, on which a suit was filed against the two surviving brothers and the sons of the deceased brother, leading to a decree dated 19th July, 1932, for a sum of Rs. 1,334 *plus* Rs 175-4-0 for costs and subsequent interest Somewhere about the year 1934 there was a partition between the three branches of the debtors' family and one branch was required to assume liability for paying Rs 1,000 towards this debt The creditor agreed to the splitting up of the debt and took a mortgage on 30th March, 1934, for Rs 1,000 in discharge of the liability of that branch under the decree The mortgage was to carry interest at 12 per cent The rest of the decree was not discharged and remained the liability of the other two branches In proceedings for scaling down the mortgage,

Held The debt subsisting under the decree having been split up into two portions one portion of which was discharged by the execution of the mortgage the integrity of the original debt has been broken and it cannot be said that that original debt has been renewed or included in the mortgage so as to bring into force the explanation to section 8 of the Act

(1941) 1 M L J 39 ; (1943) 1 M L J 190, applied

(1940) 2 M L J 874, distinguished

K V. Ramachandra Aiyar for Appellant

N Sivaramakrishna Aiyar for Respondent

K S

Chandrasekhara Aiyar, J Karunayanantha Nadar *v* Kuppa Raju
15*th March*, 1946 S A No 464 of 1945

Encroachment—Mandatory injunction to restrain—Delay in applying for—Effect—Relief.

A man who comes to the Court for a mandatory injunction should use due diligence in making the application Mere delay will not be fatal to the application if no mischief is caused thereby to the defendant and the delay does not exceed a reasonable period ; but the right to a mandatory injunction is gone if there has been unreasonable delay, and mischief would be caused thereby to the defendant.

K K Sridharan for Appellant

T P. Gopalakrishna Aiyar for Respondent

K.S.

Chandrasekhara Aiyar, J.

20*th February*, 1946

Govindaswami Chetty
v.
Ramaswami Chetty.
C. C. C. A No 18 of 1945.

Specific Relief Act (*I of* 1877), *section* 42—*Declaratory suit—Scope—When sustainable —Discretion of Court to entertain*

Though an action will lie by way of a declaratory suit even against persons who are interested in denying the plaintiff's title, it is not in every suit brought for a declaration that a decree has to follow necessarily The granting of a declaration is within the discretion of the Court and a Court will be well advised in refusing to exercise its discretion in the plaintiffs' favour when there are circumstances which go to show that the suit is merely an attempt to get the sanction or approval of the Court to a particular claim or contention which the plaintiffs put forward so that their title might be placed beyond any doubt or controversy when any future trouble might arise

It is for lawyers to advise parties on title and not for the Courts to help litigants when they are in doubt about their right to property.

N K. Mohanarangam Pillai and *M V Gopalaratnam* for the Appellants.

A. Ramachandran, K M Bashyam and *Messrs Pais, Lobo* and *Alvares* for the Respondents.

K S.

Horwill, J

1*st March*, 1946

Subbamma
v.
Madhavarao
C. R. P. No. 763 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 41, *rule* 11—*Dismissal of appeal* in limine *—Application for amendment of decree—To which Court to be made*

An order dismissing an appeal in *limine* under Order 41, rule 11 has precisely the same effect as an order dismissing an appeal after notice under rule 32 and an application for amendment of the decree must be made to the Court which has dismissed the appeal and not to the lower Court whose decree has been confirmed.

A. Raghaviah for Petitioner.

B. Lakshminarayana for Respondent.

K.S.

Happell, J.

1*st March*, 1946.

Balarama Reddi
v.
Govinda Reddi.
A. A. A. O. No. 59 of 1945.

Civil Procedure Code (*V of* 1908), *section* 144—*Restitution—Sale in execution of* ex parte *decree—Setting aside—Effect—Right to restitution irrespective of any fresh decree that may be passed in the suit*

Where an *ex parte* decree has been set aside, the fresh decree subsequently passed has no relation to the *ex parte* decree and cannot be regarded as varying it. Irrespective therefore of the nature of the fresh decree, a judgment-debtor is entitled to recovery of his property sold in execution of the *ex parte* decree.

42 M.L.J. 315 and I.L.R. 59 Cal. 647, Referred to.

2 L W 1066, 43 Bom 235, 14 C W N 182 and I L R. 27 Cal 810, considered.

S. Panchapakesa Sastri and *K R. Krishnaswami Aiyar* for Appellant.

M. S. Venkatarama Aiyar for Respondent.

K S

Happell, J.

4th March, 1946

New Era Banking Corporation, Ltd.
v
Muhammad Ghouse Rowther
C R. P No. 807 of 1945.

Contract Act (IX of 1872), section 74—Chit fund—Rule that in default of payment of subscription within the month the subscriber was to loose benefits and privileges—Validity —If "penalty"

In the rules of a chit fund there was a provision that if the subscription due for any particular month is not paid within that month the certificate will become lapsed and the holder of such lapsed certificate shall not thereafter be entitled to any benefits or privileges offered by the chit fund. In a suit by a subscriber who had committed default after paying for 9 years and 5 months in respect of a chit for 10 years for recovery of amounts paid by him,

Held, that the provision for the lapsing of the certificate on committing default cannot be said to be penal. Such provisions intended to induce the subscriber to stay in the scheme until its end are integral parts of the scheme itself and a defaulting subscriber is not entitled to relief against the rule on the ground that it is penal The fact that the defaulting subscriber was not a successful bidder at the chit fund auctions does not make any difference.

42 M L J 551, followed.

E R. Krishnan for Petitioner.

S. Swaminatha Aiyar for Respondent.

K.S.

Happell, J.

5th March, 1946.

Narayanan Namboodri
v.
Madhavan Nair.
A. A. A O No 58 of 1945.

Malabar Tenancy Act (XIV of 1930), section 24 (2) (c)—Arrears of rent payable before application for renewal can be granted—Commutation—Proper mode.

Where the question of commutation of rent arises in an application for renewal, the arrears of rent payable before a renewal is granted is rent payable under the Malabar Tenancy Act in money within the meaning of section 51 (2) and the commutation should be made in accordance with the provisions of that section on the basis of the average market price of paddy for the previous five years

P Govinda Menon for Appellant.

D A Krishna Variar for Respondent.

K.S.

Happell, J.

5*th March*, 1946

Varadaçhariar
v.
Sri Manavala Mahamunigal Temple.
C R P. No. 1100 of 1945.

Civil Procedure Code (*V of* 1908), *section* 115—*Small cause suit tried as original suit —Appeal—Decision in—If open to revision or second appeal*

If a small cause suit is tried as an original suit by an error and on the basis that it was an original suit an appeal is preferred, an application to set aside the appellate decree will be entertained in revision, as the appellate decree was without jurisdiction. Where, however, the parties joined issue in the trial Court as to whether the suit should be tried as an original suit or a small cause suit and the District Munsiff found that it should be tried as an original suit, an appeal will certainly lie and when in such appeal itself no question of jurisdiction is raised it cannot be contended that the appellate decree was without jurisdiction on the ground that the suit should have been tried as a small cause suit No relief by way of revision can be given to consider the question whether the District Munsiff was right or wrong in treating the suit as an original suit.

R. Sriramachari for Petitioner

A. Srirangachari for Respondent.

K S.

Wadsworth, J

6*th March*, 1946

Perumal Chettiar
v
Machammal.
A. A A O. No. 235 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 4 (*h*)—"*Other property*" *Meaning—Undefined right of widow to maintenance out of property of the family of her deceased husband—If* "*other property*"

The undefined right of a widow to maintenance out of the property of the family of her deceased husband cannot be deemed to be "other property" which would disqualify her from the protection of clause (*h*) of section 4 of Madras Act (IV of 1938). The protection afforded by the section would be made illusory if the term "property" is so stretched to its widest possible extent.

[Leave granted]

A V. Narayanaswami Ayyar for Appellant.

K. G. Srinivasa Ayyar for Respondent.

K.S.

Happell, J.

7*th March*, 1946.

Narayanamurthi
v.
Mangayammal.
C R. P Nos. 979 and 980 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 23, *rule* 1 (1)—*Withdrawal of suit for partition—Effect.*

It cannot be said that a partition suit should not be dismissed on its withdrawal by the plaintiff simply on the ground that the defendant may be entitled to relief

at some stage; and a defendant who has not acquired any rights in respect of the suit is not entitled to be transposed as a plaintiff on the withdrawal of the suit.

The Advocate-General (*K Rajah Ayyar*) and *D. Narasaraju* for Petitioner.

V. Govindarajachari for Respondent.

K.S.

Wadsworth, J.

7th March, 1946

Rukminiamma
v.
Guravayya.
S A No. 857 of 1944.

Madras Agriculturists' Relief Act (IV of 1938), section 8—Open payment less than interest due—If can be construed as intention to appropriate towards interest only.

When a payment is in excess of the interest, the excess portion must necessarily have been intended to be appropriated towards the principal. But it cannot be said that when a payment is less than the interest the intention must be to appropriate it towards interest only.

(1942) 2 M.L J. 724, explained.

But where a term in the contract provided " In respect of the document, accounts shall be taken once a year and the interest remaining due *after deducting the payment made till then* shall be added to the principal and as regards the same, I shall pay the interest on the said interest also at the aforesaid rate of interest " when the end of an year is reached, it would no longer be within the capacity of either party to alter the manner of adjustment therein contemplated.

K. Kotayya for Appellant.

V. Rangachari for Respondent.

K.S.

Kuppuswami Ayyar, J.

26th March, 1946.

Ramaseshayya, *In re.*
Cr. R. C No. 1024 of 1945.
(Cr. R. P. No. 958 of 1945).

Defence of India Rules, rule 119—Order by Commissioner of Civil Supplies—Person prescribing the manner of publication and person notifying it same—Effect—Presumption of validity.

Where the person said to have directed the notification to be published is also the same person (in this case the Commissioner of Civil supplies) who has signed the notification, the manner of publication must be presumed to be in the manner in which it was published in the *Fort St George Gazette*, especially where there is no suggestion that the officer who passed the order directed it to be published in any different manner.

There is also the usual presumption that an official act has been done properly.

(1945) 1 M.L J. 273, distinguished ; I.L R. 1945 All. 682 and A I R. 1945 Bom. 368, distinguished and not followed

N. V. B. Shankar Rao for Petitioner.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S.

Wadsworth, J.
1st March, 1946

Sankara Kurup *v.* Ryru Nambiar
C R. P. No 437 of 1945.

Limitation Act (IX of 1908), *section* 19—*Endorsement on promissory note "amount paid in this* (ithil) *Rs.* 10 "—*If acknowledgment saving limitation.*

In respect of an endorsement on a promissory note " amount paid in this (*ithil* in Malayalam) Rs. 10."

Held, the word "*ithil*" in Malayalam does not necessarily connote the existence of any balance after the payment. The endorsement cannot be regarded as an acknowledgment of liability within section 19 of the Limitation Act.

(1942) 1 M L J. 469 I.L.R. (1942) Mad. 590 (F.B.) and (1941) 2 M L J. 848: I.L.R. (1942) Mad. 405, distinguished. 57 L W. 280 (Headnote criticised as erroneous and decision held not applicable). Same case reported in (1944) 1 M.L J. 347.

P. Govinda Menon for Petitioner.

O. K. Nambiar for Respondent.

K.S.

Rajamannar, J.
4th March, 1946

Rudrayya *v.* Maharajah of Pithapuram
S A No. 1032 of 1945.

Madras Estates Land Act (I of 1908), *section* 112—*Rent decree—Sale in execution—Absence of notice to some of the defendants—Effect—Whole sale if to be set aside*

In execution of a rent decree an extent of 1 acre and 24 cents in the holding was sold as property belonging to the first defendant. But it was found that 1 acre belonged to defendants 2 to 5 who had no notice of the sale and only 24 cents belonged to the first defendant.

Held, the sale in its entirety cannot be set aside In respect of the 24 cents belonging to the first defendant it is valid. The sale can be set aside only as regards the 1 acre belonging to defendants 2 to 5 on the ground that it is invalid because of want of notice to them.

69 M L J. 850, relied on; 61 M L J. 203 (206) and I L R. 58 Cal. 825, applied; A.I R. 1940 Pat. 62, distinguished.

D. Narasaraju for Appellant

Ch. Raghava Rao for Respondent.

K.S.

Happell, J.
6th March, 1946.

Narasappa *v.* Chinnarappa.
C. R P. No 851 of 1945.

Civil Procedure Code (V of 1908), *Order* 39, *rule* 2 (3)—*Temporary injunction against defendant subject to undertaking by the plaintiff—Breach of undertaking by plaintiff—Liability to punishment.*

In a suit for a permanent injunction restraining the defendants from interfering with the plaintiff's right to take water to his land, the plaintiff applied for an *interim* injunction against the defendants and this was granted on an undertaking given by the plaintiff that during the pendency of the suit he would not dig a channel in the defendants' land for taking water to his land. The plaintiff dug a channel in contravention of the undertaking. On a complaint by the defendants of a breach of the undertaking,

Held, that the breach would be punishable under Order 39, rule 2, sub-rule (3) of the Code of Civil Procedure as a breach of injunction.

A I.R. 1936 Mad. 651, relied on

K. Kuttikrishna Menon and *V. V. Chowdari* for Petitioner.

V. S Narasimhachar for Respondent.

K.S.

Happell, J.
7th March, 1946.

Kunhy Pakky *v* Narayan Nair.
A A A O No. 108 of 1945.

Malabar Tenancy Act (XIV of 1930), *sections* 17, 23 *and* 25 (2) (1)—*Scope and effect —Holding including a ware-house to which Act does not apply—Application for renewal of kanom—Sustainability.*

In a suit for eviction under the Malabar Tenancy Act the defendants applied under sections 17 and 23 of the Act for renewal of their kanom which included a ware-house belonging to the landlord.

Held, a renewal under section 25 can be granted only in respect of the whole of the holding As the ware-house which formed part of the holding could not be included in the renewal deed because the Act does not apply to it, it is not open to the Court to split up and rewrite the kanom in respect of the remaining items of property. The Malabar Tenancy Act does not permit of a renewal of a demise in respect of a part only of the holding

(Leave to appeal granted)

D. A. Krishna Variar for Appellant.

K. Kuttikrishna Menon for Respondent.

K S.

Bell, J.
8th March, 1946.

Vijayal *v.* Nachammai Achi.
A. A. A. O No 160 of 1945.

Execution—Pre-decretal agreement that decree was not to be executed against a particular defendant—If can be pleaded in bar of execution.

No executing Court has any right to go behind a decree. Where a decree for money is passed against two defendants and their assets, the assets of both are liable. Any pre-decretal agreement that the decree was to be executed against only the first defendant will be unenforceable there being no consideration for the plaintiff's agreeing not to execute the decree against the second defendant In any event such an agreement will be an attempt to evade the liabilities of the second defendant which will amount to committing a fraud upon the Court. Such an agreement cannot therefore be pleaded in bar of execution of a decree passed against both defendants in the ordinary way.

N. C. Srinivasan for Appellant.

Respondent not represented.

K S.

Yahya Ali, J.
11th March, 1946.

Kotiratnam *v* Manikya Rao.
C. R P. No. 1265 of 1945.

Court-Fees Act (VII of 1870), *section* 7, *clause* (5) *and Article* 17-B—*Suit asking for declaration that plaintiffs were trustees—Necessity to claim possession of properties of trust—Madras G. O. No.* 5791 *of 17th May*, 1943—*If applicable—Court-fee payable.*

The plaintiff and the second and third defendants were brothers. With regard to a charity and properties appertaining thereto, there was a trust arrangement under which the trust had to be managed by each of the three brothers by annual rotation. When it was the turn of the third defendant he resigned his trusteeship and the plaint averred that he solicited permission that his place should be taken by his son the first defendant The first defendant managed the institution for a year, but at the end of that period, instead of turning over the management to such other trustee among them as was appointed by the remaining trustees continued to be in possession and refused to deliver the same There were further averments that he committed malfeasance The suit was brought paying a fixed court-fee under article 17-B of the Court-Fees Act.

Held, (1) the trustees cannot sue only for the office without asking for possession of the property belonging to the trust and article 17-B of the Court-Fees Act will not apply to the case. It is covered by section 7 (v) and court-fee payable should be *ad valorem* according to the market value of the subject-matter in dispute

(*ii*) As the plaint altogether denied the character of trustee of any kind to the first defendant, the plaintiff cannot contend that the case falls within the scope of Madras G. O No 5791 of 17th May, 1943, prescribing a reduced fee for a suit for possession or joint possession between trustees.

P. Satyanarayana Rao for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *M Appa Rao* for Respondent.

K.S.

Yahya Ali, J.
12th March, 1946.

Ankamma *v.* Narasayya.
S A No. 64 of 1945.

Gift—Construction—Expression in deed of belief that donee would maintain donor during lifetime—If makes gift revocable—Transfer of Property Act (IV of 1882), section 41—If applicable to confer any equity on the donor.

The provision in a deed of gift " I have a belief that you would maintain me well during my lifetime And as I bear affection towards you I have got the idea of conveying my property to you. Therefore, I have conveyed to you under *dhakal* the property worth Rs 800."

Held, in the absence of any express reservation of a power of revocation, the donor had no right to revoke the gift (on the ground that the donee failed to maintain him) after he had divested himself of all the right, title and interest in the property by means of gift and after he had duly vested the property in the donee Where the donee was living with the donor the fact that the document was kept in the family box to which both the donor and donee had access does not lead to any adverse inference against the donee who did not take the deed away with him when he left the village.

A I R 1930 All. 669, distinguished.

If the donor had the power of revocation and he validly revoked the gift he became the ostensible owner. If he had no power of revocation at all, he ceased to have any interest or right in the property on his divesting himself of his title in favour of the donee. Therefore there is no question of the donor continuing after the gift to be an ostensible owner and of any equity arising in his favour within the meaning of section 41 of the Transfer of Property Act

N Subramaniam and *D V. Reddi Pantulu* for Appellant

Ch. Raghava Rao and *G. C V. Subba Rao* for Respondent.

K.S.

Chandrasekhara Aiyar, J. Rajagopala Aiyar *v.* Karuppiah Pandithan.
13*th March*, 1946. A. A O. No. 337 of 1945.

Transfer of Property Act (*IV of* 1882), *section* 76 (1) *as amended in* 1929—*Scope*—*Liability of mortgagee for mesne profits after redemption decree*—*House tax paid by mortgagee after tender of amount due under decree by mortgagor*—*Cannot be deducted from mesne profits*

Where after the mortgagor has tendered the amount due to the mortgagee under the redemption decree the mortgagee has paid public charges in the shape of taxes for the house property mortgaged, he cannot claim to deduct it from the mesne profits decreed to the mortgagor

There is no warrant for limiting the word "expenses" in section 76 (*i*) as amended in 1929 to what has to be spent in connection with the management and in respect of the collection of rents and profits Clause (*h*) of the section refers to public charges also as expenses and the mortgagee cannot deduct such expenses. The object of making the provision so stringent against the mortgagee is obviously to see that he does not delay the delivery of possession by the adoption of some device or another.

I L R 47 Mad. 7, distinguished as a decision under the section before its 1929 amendment.

S Ramachandra Aiyar for Appellant.

Respondent not represented.

K S.

Happell, J. Ramanathan Chettiar *v.* Ramanathan Chettiar.
14*th March*, 1946. C. R. P. No. 105 of 1945.

Court-Fees Act (*VII of* 1870), *sections* 7 (iv-A) *and* 7 (iv-C)—*Suit by party executing sale deed for declaration that it was sham and nominal*—*Prayer for cancellation*—*Necessity*—*Proper court-fee.*

Where in a suit the plaintiff prays for a declaration that a sale deed executed by him was a nominal and sham transaction and that the vendee had no title to the property covered by the sale deed, a relief for cancellation of the deed must be included and court-fee should be paid under section 7 (*iv-A*) of the Court-Fees Act.

(1944) 1 M.L J 497 and A. I R. 1929 Mad. 478, distinguished ; I.L R. 1940 Mad. 73, relied on.

R. Kesava Aiyangar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *G. N. Chari* for Respondent.

K.S.

Kuppuswami Ayyar, J. Asuram and others, *In re.*
25*th March*, 1946. Cr. App. No. 1928 of 1945.

Hoarding and Profiteering Prevention Ordinance (1943), *sections* 9 *and* 13—*Merchants who were not dealers in camphor having a stock and refusing to sell them on the ground that they were not dealers*—*If offence.*

Where persons are charged with refusing to sell camphor when it was demanded, it is found that though they were in possession of camphor they were not " dealers " in camphor as defined in the Hoarding and Profiteering Prevention Ordinance they are not liable to be punished for the offence with which they are charged.

V. L. Ethiraj for *V. Rajagopalachari* and *T. A. Rajagopal* for Accused.

The Crown Prosecutor (*P. Govinda Menon*) on behalf of the Crown.

K.S.

Wadsworth, J. — Satyanarayana Row *v.* Rattamma.
11*th March*, 1946. — C. R P. No. 1134 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 37—*Annulment of adjudication—Effect on protection to debtor—Post annulment debt—Suit to enforce—Maintainability.*

There is nothing in the Provincial Insolvency Act which gives any protection at all to a debtor whose adjudication has been annulled and there is no prohibition against any creditor after the annulment, particularly in respect of post annulment debts, from filing a suit.

M. Appa Rao for Petitioner.

P. Sivaramakrishnaiah for Respondent.

K S.

Chandrasekhara Aiyar, J. — Atchayya *v.* Appalaraju.
14*th March*, 1946 — A. A. O. No. 512 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 12 (3) (*Madras*)—*Scope—Future mesne profits not claimed in plaint or allowed in decree—If can be ordered on an application.*

Order 21, rule 12 (3) (Madras) merely provides for the procedure to be adopted in ascertaining mesne profits. When there was no claim for future mesne profits in the suit and the decree therefore did not award any, the Court has no jurisdiction on an application to proceed to ascertain such mense profits and pass a final decree for such profits.

M. Appa Rao for Appellant.

G. Rama Rao for Respondent.

K S.

Wadsworth, J. — Venkatanarayana *v.* Narayanamurthi.
14*th March*, 1946. — A. A A. O Nos. 54 and 55 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 34, *rules* 4 (1) *and* 5—*Execution for lesser amount than mentioned in mortgage decree and waiving balance—Sale of property in execution—Deposit—Setting aside—If to be of whole decree amount or the lower amount for which execution was taken out.*

The judgment debtor in a mortgage suit cannot get a sale in execution of the mortgage decree set aside by depositing merely the amount for which execution has been taken out together with poundage, etc , when the execution is for less than the amount due on the face of the decree The judgment-debtor cannot get the benefit of Order 34, rule 5 of the Code of Civil Procedure by paying less than the amount contemplated under Order 34, rule 4 (1)

I.L R 57 Bom. 468, not followed ; I.L R. 38 Mad. 199 and I.L.R. (1940) 2 Cal. 520, relied on

The Advocate-General (*K Rajah Aiyar*) and *V. Seshadri* for Appellant.

P. Somasundaram, P. Suryanarayana and *P. Satyanarayana Raju* for Respondent.

K.S.

Wadsworth, J. — Antony Cruz Nadar *v* Jacob Nadar.
15*th March*, 1946. — S. A No. 2089 of 1944.

Adverse possession—Permanent tenancy—Right to—When can be acquired by prescription.

There is no legal bar to the acquisition by prescription of a right to a permanent tenancy by a person who is in possession without any subsisting tenancy.

62 M.L.J. 496, I.L R. 47 Mad. 337 (P.C) and I.L.R. 7 Pat. 649 (P.C.), considered

K. S. Sankara Aiyar and *V. Sundaresan* for Appellant.

J. S. Vedamanickam for Respondent.

K.S.

Horwill and Shahab-ud-din, JJ.
19*th March*, 1946.

Neeladri Appadu, *In re.*
Crl. R. C. No. 116 of 1946.
(Case Refd No. 5 of 1946).

Criminal Procedure Code (V of 1898), section 421—Summary dismissal of jail appeal —Appeal presented by counsel in Court on behalf of same accused—Jurisdiction to hear.

When an appeal has been disposed of, the Court is *functus officio* and cannot hear the appeal again Accordingly where a jail appeal has been summarily dismissed under section 421 of the Criminal Procedure Code, the Court has no jurisdiction to hear another appeal presented in Court by counsel on behalf of the same accused and any order passed allowing such subsequent appeal must be set aside. I.L R 46 Mad. 382 and I.L.R 47 Mad. 428, followed ; A.I R. 1943 All. 988 (1) held to be based on the practice obtained in that Court and not followed.

The High Court however will interfere in revision where the ends of justice require it.

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) on behalf of the Crown.

Accused not represented.

K.S.

Happell, J.
21*st March*, 1946

Thangasami Nadar *v.* Ayyakutti.
C. R. P. No. 1556 of 1945.

Limitation Act (IX of 1908), sections 19 and 20—Endorsement on promissory note, "Paid Rs. 3 only"—If acknowledgment saving limitation.

Where an endorsement on a promissory note was in these terms " Paid Rs. 3 only " and signed by the debtor,

Held, "Paid Rs. 3 only " is a common form used in cheques and means no more than that Rs. 3 and not any other sum is intended to be paid. If there was nothing else than "Paid Rs. 3 only " it could not be taken as an acknowledgment of liability. Where however the debtor pleads in defence that in effect he did acknowledge the liability the question whether the endorsement amounts to an acknowledgment of liability does not really arise.

G. R. Jagadisan for Petitioner.

K. Venkateswaran for Respondent.

K.S.

Happell, J.
22*nd March*, 1946.

Razack Rowther *v* Mahammad Hanif Sahib.
C. R. P. No. 1459 of 1945.

Civil Procedure Code (V of 1908), Order 23, rule 1 (2)—Duty of Court to give reasons for order allowing plaintiff to withdraw suit with liberty to institute a fresh suit.

The reasons for holding that an application under Order 23, rule 1 (2) of the Code of Civil Procedure should be granted must be stated in the order and failure to state them amounts to a material irregularity in exercising jurisdiction.

I L R. 50 All. 199, approved.

The terms of Order 23, rule 1 (2) themselves make it clear that the Court must state either what the defect is or what are the other sufficient grounds which have moved it to grant permission to withdraw from the suit with liberty to institute a fresh suit.

D Ramaswami Ayyangar and *P. S. Srinivasa Desikan* for Petitioner.

S. K. Ahmed Meeran for Respondent.

K.S.

Wadsworth, J.
25*th March*, 1946.

Ramanamma *v.* Rattamma.
A. A. A. O. No. 2 of 1946.

Execution petition—Order "struck off" because of order of stay under section 20 *of Madras Act IV of* 1938*—No proceedings instituted under section* 19 *of the Act for getting decree scaled down—Effect—New application for execution—If can be treated as revival of the previous petition—Limitation*

A prior execution petition was "struck off" because of an order of stay under section 20 of Madras Act IV of 1938 No proceedings under section 19 of that Act were instituted, so that the stay would cease to operate after 60 days. Subsequently the decree-holder filed an execution petition and sought to treat it as a revival of the previous petition.

Held, the order "struck off" is in substance "adjourned *sine die*" until the Court is apprised of the removal of the bar to further proceedings This may be either by a formal application or by a mere oral request by the advocate to give the adjourned petition a fresh posting. There can accordingly be no question of the subsequent petition by the judgment-debtor being barred by limitation.

B. V. Subrahmanyam for Appellant.

V. Vyyanna for Respondent.

K.S.

Yahya Ali, J.
26*th March*, 1946.

Ramayya *v* Balakotamma.
S. A. No. 1127 of 1945.

Trusts Act (II of 1882*), section* 6*—Trust—Bequest for* samadhi *with provision that it should be enjoyed by those who perform worship at the* samadhi*—If void for uncertainty.*

A will created a kind of trust in these words : "I have given the B schedule lands for my *samadhi*. That property should be enjoyed by those who perform worship at the *samadhi*" It was contended that the trust in question was void for uncertainty under section 6 of the Trusts Act. Construing the will as a whole,

Held, the provision virtually means that any member of the family who performs worship at the testator's *samadhi* would be entitled to possession. If it is an individual there is no uncertainty whatever. But even if it refers to a class of persons, that class can at any given time be definitely ascertained. There is no uncertainty invalidating the provision.

Ch. Raghava Rao for Appellant.

P. Satyanarayana Rao for 1st Respondent.

K.S

Kuppuswami Ayyar, J.
27*th March*, 1946

Gangasani Parantahi, *In re.*
Cr. R. C. No. 77 of 1946.
(Cr. R. P. No. 74 of 1946).

Penal Code (XLV of 1860*), section* 425*—Mischief—Winnowing when wind was blowing—Chaff falling on tobacco crop in neighbouring land and damaging it—Liability.*

Where the accused by winnowing his *variga* crop when the wind was blowing with the result that the winnowed particles of the chaff damaged the tobacco crop of the neighbour,

Held, that it cannot be said that the accused did not know that by his act he would be causing loss or damage to his neighbour. Accordingly the accused is liable to be convicted for "mischief."

J. Krishnamurthi for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Wadsworth, J. — Veeraraghavalu *v.* Fathima Bibi Sahiba.

28*th March*, 1946 — S. A. No. 80 of 1946.

Madras Non-Residential Building Rent Control Order (1942), *clause* 8—*Scope—If ousts the jurisdiction of Civil Courts to grant decrees for eviction of tenants.*

Clause 8 of the Madras Non-Residential Building Rent Control Order, 1945, does not oust the jurisdiction of the Civil Court to give a decree to the landlord for the eviction of his tenant, but merely operates to suspend the execution of the decree during the subsistence of the ban imposed by that order.

(1945) 1 M.L.J. 44, dissented from; (1946) 1 M.L J. 134 and (1946) 1 M.L.J. 135, approved and applied.

V. Damodara Rao for Appellant.

G. Chandrasekhara Sastri for Respondent.

K.S.

Happell, J. — Joseph Elias *v* Ameer & Co.

29*th March*, 1946. — C. R. P. No 1071 of 1945.

Sale of Goods Act (*III of* 1930), *section* 37 (2)—*Delivery of larger quantity of goods than contracted for—Right of buyer to reject—Rejection subsequently on the ground of bad quality of goods—Buyer if can rely on right to reject based on larger quantity being tendered.*

The plaintiff, a dealer in eggs at Ernakulam, contracted to send daily two baskets of eggs to the defendant, another dealer in eggs in Bangalore. The plaintiff sent one day seventeen baskets of eggs after receiving which the defendant returned ten baskets on the ground that the whole lot was rotten but retained seven baskets. In a suit for the price of the eggs,

Held, it was not open to the defendant to retain seven baskets and then rest his defence on the plea that the eggs had been sent in excess of the quantity stipulated for in the contract. The buyer may accept the quantity contracted for and reject the rest, or he may reject the whole. Having accepted the seven baskets he should pay for them at the contract rate.

T. A Anantha Aiyar for Petitioner.

N. R. Sesha Aiyar for Respondents.

K.S.

Happell, J — Manicka Mudaliar *v* Nagamalai Chetty.
22*nd March*, 1946. — C. R P. No 150[illegible] of 1945.

Limitation Act (*IX of* 1908), *Article* 75—*Applicability—Bond payable in instalments —Whole amount payable on default in payment of any instalment—Default—Suit on bond —Limitation—Starting point*

The defendant had executed a bond for Rs 200 on the 17th February, 1932, in which provision was made for repayment in eight instalments subject to a condition that, if default was made in respect of any instalment, the whole amount due under the bond would become immediately payable with interest. The defendant never paid any of the instalments so that default was made and the whole amount became payable with interest on the 18th February, 1933. Small payments towards the amount due under the bond were made by the defendant in 1937, 1940, 1942 and 1943, the first of them being on the 1st May, 1937 The plaintiff filed a suit not on the footing that the whole amount had become due by reason of default but for recovery of the instalments which had become due within three years of the acknowledgment of liability on the 1st May, 1937, when payment towards the bond was made. On the question of limitation,

Held, Article 75 of the Limitation Act applied and there being no waiver by the plaintiff of the default the suit was barred by limitation. No waiver can be inferred merely from the fact that the plaintiff did not file a suit within three years and the few payments made from 1937 onwards are not payments of the instalments giving rise to an inference that the plaintiff had waived the provision that, in default, the whole amount shall immediately become due Nor can the bond sued on be construed as giving an option to the plaintiff either to call up the whole debt or not as he chooses.

R. Desikan and *T V Hari Rao* for Petitioner.

B V. Viswanatha Ayyar for Respondent.

K S

Horwill and Shahab-ud-din, JJ — Kumaraswamiah *v* Krishna Reddi.
26*th March*, 1946. — A A O No. 590 of 1945.
C R P No 1256 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 7, *rule* 12—*Dismissal of application for extension of time to pay deficit court-fee—If operates automatically as rejection of plaint.*

The plaintiff filed a suit on a promissory note on the last day of limitation (11—1—1945) with a nominal court-fee and with his plaint filed an application for fourteen days' time to pay the additional court-fee. That application was granted. On 24th January, 1945, the plaintiff filed an application asking for a further ten days' time That application was rejected on 25th January, 1945. The plaint however remained on file until 30th January, 1945, when the Subordinate Judge passed an order that the plaint must be deemed to have been rejected as on 25th January, 1945. But before that order was passed the plaintiff on 29th January, 1945, filed (1) an application for review of the order refusing to extend the time and (2) a petition to extend the time The Judge found that sudden illness of the sons of plaintiff prevented their taking the amount to Court and that was a sufficient ground for review and directed the plaintiff to pay the deficit court-fee by the 26th June, 1945. On revision,

Held, it cannot be said that there was no plaint with regard to which an application for extension of time could be made on 29th January, 1945. Order 7, rule 12, Civil Procedure Code, requires the Court to pass an order when it rejects the plaint giving reasons for doing so That order was not passed until the 30th January, 1945, so that when the money was tendered and the application made on the 29th January, the plaint was still in Court. The plaint did not become automatically rejected upon failure to pay the court-fee within the time allowed The effect

of the order granting review would be to automatically cancel the order of 30th January, 1945, rejecting the plaint.

A Bhujanga Rao and *D R. Krishna Rao* for Appellant.

T K Srinivasathathachariar for Respondent.

K.S

Happell, J
28th March, 1946

Venkatasubba Reddy *v* Ramadoss Reddy.
C R P No 1366 of 1945.

Court-Fees Act (VII of 1870), section 12—Registration of suit after some arguments as to question of court-fee—Reservation and trial of question as to court-fee as an issue in the suit—Not barred.

No doubt when the court-fee paid has been accepted without objection and the suit has been determined the Court may be deemed to have decided that the court-fee paid was correct within the meaning of section 12 of the Court-Fees Act even though it has passed no specific order to that effect But while a case is still pending the acceptance by a ministerial officer of the court-fee paid or the registration of the case without objection cannot be deemed to be a final decision of the question of the court-fee to be paid The only final decision is an order of the Court made after it has applied its mind to the question and it is open to the Court to take up and decide the question of the correct court-fee payable at any time before the case is determined provided that it has not already made a considered order. Accordingly though a suit is registered and numbered it is open to the Court to decide the question of court-fee as an issue in the suit itself The mere fact that some arguments on the question of court-fee were heard before the registration of the suit will not be tantamount to a decision that the court-fee paid was correct so as to bar the trial of such question as an issue in the suit.

Decisions of Byers, J , in C R P No 1310 of 1945 and of Bell, J , in C R. P. Nos 562 and 563 of 1945, approved and followed.

M. S Venkatarama Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) and *S Ramachandra Aiyar* for Respondent

K.S.

Somayya, J
28th March, 1946

Koyatti *v.* Imbichi Koya.
S A No 535 of 1945.

Evidence—Final decree for partition not drawn up on non-judicial stamp paper and not registered—Not admissible in evidence—Stamp Act (II of 1899), section 35—Registration Act (XVI of 1908), sections 17 and 49.

It is the obvious duty of the Courts in passing final decrees for partition to insist upon the parties supplying the necessary stamp paper of proper denomination and to have the final decree drawn up on such non-judicial stamp paper. Where a compromise decree for partition is not so stamped under section 35 of the Stamp Act the document cannot be adduced in evidence for any purpose whatever. Further being an instrument of partition as defined under the Registration Act, the final decree has to be registered

Quaere . Whether other evidence is admissible to prove details of the partition in addition to proof of division in status ?

(1944) 2 M L J 164: I L R. 1945 Mad 160 (F.B.) if good law after decision in Privy Council in (1946) 1 M L J. 295 (P.C).

K. P. Ramakrishna Aiyar for Appellant

S R. Subramania Aiyar and *C. D. Venkataramanan* for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Padmanabhan *v.* Perumalayya.
21*st March*, 1946. — A. A. O. No. 2 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 20, *rule* 12—*Scope—Damages for use and occupation—If can be ascertained under the rule.*

It cannot be said that damages for use and occupation cannot be determined under Order 20, rule 12 of the Code of Civil Procedure. It is not necessary for the plaintiffs to file a separate suit for such damages as Order 20, rule 12 covers such a case also and is not confined to claims for mesne profits only.

G. Chandrasekhara Sastri for Appellant

P. Somasundaram and *P. Suryanarayana* for Respondent.

K.S.

Yahya Ali, J. — Palaniswami Chettiar *v.* Chitraputra Chettiar.
26*th March*, 1946. — S. A. No. 1477 of 1945.

Travancore Nayar Regulation (*II of* 1100), *section* 8 (1)*—*Marriage of a Nayar lady with a Vellala who had a wife living—Validity.*

The marriage of a Nayar lady with a Vellala who already had a wife living is not valid under the provisions of the Travancore Nayar Regulation. Section 8 (1) of the Regulation governs section 3 which only describes what is required to constitute a valid marriage A marriage though declared to be valid under section 3 can be treated as void under section 8 It is not essential for the applicability of section 8 (1) that the prior marriage also should have been after the commencement of the Regulation. It is only the subsequent marriage which has to be performed after the commencement of the Regulation to make such marriage void. A subsequent marriage performed after the commencement of the Regulation can only mean a marriage performed within the scope of the Regulation and it cannot be said that the subsequent marriage referred to in section 8 (1) is a marriage outside the scope of the Nayar Regulation.

S. Ramaswami Aiyar for Appellant.

S. V. Rama Aiyangar for Respondent.

* Travancore Nayar Regulation (II of 1100), section 8 (1) reads thus : "*A subsequent marriage of a female or of a male during the continuance of a prior marriage, and performed after the commencement of this Regulation is void.*"

K.S.

Chandrasekhara Aiyar, J. — Umar Pulavar *v.* Dawood Rowther.
29*th March*, 1946. — S. A. No. 2098 of 1945.

Transfer of Property Act (*IV of* 1882), *section* 111 (*g*) (*as amended in* 1929)—*Principle that on forfeiture by denial of landlord's title notice in writing determining the lease must be given—Applicability to agricultural leases exempt from its operation.*

Section 111 (*g*) of the Transfer of Property Act as amended in 1929 makes it clear that even in the case of forfeiture by denial of the landlord's title a notice in writing determining the lease must be given. The principle so embodied in the section as a result of this amendment becomes, so to say, a principle of justice, equity and good conscience which must be held to govern even agricultural leases though under section 117 of the Transfer of Property Act they are exempt from the operation of Chapter V of the Act.

K. S. Rajagopalachari for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Bell, J. Virabhadra Rao *v.* Sriramamurthi.
29th March, 1946. C. R. P. No. 1275 of 1945.

Court-Fees Act (VII of 1870), section 7 (iv-A)—Suit by after-born son for partition and setting aside a decree passed against his father and elder minor brother as members of joint Hindu family—Ad valorem *valuation—Necessity.*

A suit by an after-born son for partition ignoring a decree passed against his father and elder minor brother as members of a joint Hindu family must be valued according to the subject-matter of the suit under section 7 (*iv-A*) of the Court-Fees Act. The plaintiff is bound by the decree until it is set aside and an allegation that the decree was obtained by fraud does not affect the position.

V. V. Sastri for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*), *V. Subramanyam* and *M. Subramanya Sarma* for Respondent.

K.S.

Somayya, J. Murugesa Gramani *v.* The Province of Madras
2nd April, 1946. by the Collector of Madras.
C. C. C. A. No. 46 of 1945.

Madras City Tenants Protection Act (III of 1922)—Applicability to lease of land by the Government—Crown Grants Act (XV of 1895), section 3—Scope and effect—If prevails over City Tenants Protection Act.

Section 3 of the Crown Grants Act provides that notwithstanding anything contained in any statute or enactment of the Legislature the terms of the grant should be given effect to Accordingly the Crown Grants Act prevails over the Madras City Tenants Protection Act and the terms of a lease by the Government should be enforced. The lessee is bound by the covenant in the lease to yield up the demised premises with the fixtures and additions thereto in good and tenantable repair and condition at the termination of the lease by efflux of time or earlier determination for any other cause. The lessee in such circumstances will not be entitled to claim the benefits of the Madras City Tenants Protection Act. The receipt of rent of the premises by the *karnam* subsequent to re-entry by Government will not bind the Government.

Difference between powers of private agents and public agents to bind their principal by their acts pointed out.

I.L.R. 26 Mad. 268 at 279, relied on.

K. E. Rajagopalachari and *P. B. Ananthachari* for Appellant.

The Crown Solicitor for Respondent.

K.S.

Horwill and Shahab-ud-din, JJ. Reference by Sessions Judge of Tinnevelly.
8th April, 1946.

Criminal Procedure Code (V of 1898), section 240—Separation of charges against same accused for trial and conviction on one of the charges—Application for withdrawal of remaining charges—Proper procedure—Setting aside of conviction on appeal—Withdrawal of other charges during pendency of appeal—Effect.

Three persons were charged with murder and theft in a building. The Sessions Judge purporting to act under rule 156 of the Criminal Rules of Practice separated the charges under sections 302 and 380 of the Penal Code and proceeded only with the trial under section 302, acquitted one accused but convicted the other

two who appealed. Before the appeal was heard, the Public Prosecutor withdrew the charge under section 380 against the two convicted persons and they were acquitted of that charge. In appeal, the High Court held that it had not been proved that the accused were guilty of murder but indicated that it would have convicted the third accused under section 411 of the Penal Code had it not been for the circumstances that she had already been acquitted of the charge under section 380, Penal Code.

On a letter by the Sessions Judge of Tinnevelly requesting elucidation of the practice to be adopted in cases where the charges against the same accused are separated for trial and when the accused is convicted on any one of the charges and when the Public Prosecutor applies under section 240, Criminal Procedure Code, for the withdrawal of the remaining charge,

Held, a charge must be framed by the Committing Magistrate under section 210 of the Code of Criminal Procedure against a person committed by him to Sessions. The Code of Criminal Procedure makes no provision for the framing of a fresh charge by the Sessions Court; but section 226 of the Code of Criminal Procedure enables the Sessions Court to add to or alter the charge, or to frame one if the Magistrate omits to do so. Any withdrawal of a charge against an accused would operate as an acquittal and would bar a retrial of the accused on that charge unless section 240 of the Code of Criminal Procedure operated. Section 240 only applies to charges containing more heads than one framed against the same person.

A Sessions Judge confronted with a mixed charge of murder and offence against property should take the charge framed by the committing Magistrate and adopt it. If he wishes to change the charge in any way he should include in the modified charge all the various heads found in the charge of the committing Magistrate, so that it can be seen at a glance that the terms of section 240 would apply. In any case, it is desirable even in the interests of the accused, that the Sessions Judge should not permit the withdrawal of the other charge by the Public Prosecutor until the appeal time in respect of the conviction on the charge has expired and if an appeal has been filed, the appeal has been disposed of.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S

Kuppuswami Ayyar, J.
12th April, 1946.

Villupuram Municipality *v.* Panduranga Mudaliar.
Cr. R. C. Nos. 977 and 978 of 1945.

Municipality—Complaint by for offence against public health—Sanction of Health Officer—Form of.

Where the complaint by a Municipality contains an endorsement signed by the Health Officer directing the prosecution there is sufficient compliance with the requirement as to the obtaining of the sanction of the Health Officer.

T. K. Subramania Pillai and *M. Annamalai Anandan* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Government.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram* for Respondents.

K.S.

Kuppuswami Ayyar, J.
17th April, 1946.

Govinda Rao, *In re.*
Crl. R. C. No. 74 of 1946.
(Crl. R. P. No. 71 of 1946).

Factories Act (XXV of 1934), sections 63 and 71—Charge against manager of factory of having obstructed the Additional Inspector of Factories from entering factory premises—Burden of proof.

In a charge against the manager of a factory of having obstructed the Additional Inspector of Factories from entering the factory premises no claim can be made under section 71 of the Factories Act throwing the burden on the accused to show that any other person obstructed because section 63 clearly indicates that there must be a wilful obstruction. If it was wilful obstruction the accused must have been present and obstructed. In the absence of evidence to prove that the accused himself obstructed or that he asked others to obstruct the accused cannot be convicted.

T. Ramamurti for Petitioner.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

K.S

Kuppuswami Ayyar, J.
18*th April*, 1946.

Muniswami Goundar, *In re.*
Cr. R. C. No. 1000 of 1945.
(Cr. R. P. No. 934 of 1945).

Food Grains Control Order (1942), *clause* 3—*Licence issued in name of member of joint Hindu family—Another member helping in the business—If guilty of engaging in the business without licence.*

Where one member of a joint Hindu family takes out a license for a rice trade and another member of the family is only helping in that trade, it cannot be said that the latter was carrying on any business to necessitate his taking out a license required by clause 3 of the Food Grains Control Order (1942).

P. M Srinivasa Ayyangar and *P. V. Srinivasachari* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

K.S.

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