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NOTES OF RECENT CASES

Mockett, J. Viswanathan and others *v.* Varadacharyulu.
20th November, 1942. **C.R.P. Nos. 252 to 254 of 1942.**

Civil Procedure Code (*V of* 1908), *section* 115—*Scope.*

Section 115 of the Code of Civil Procedure does not apply to an order of a lower Court refusing to grant a review of its decision as such an order could have been appealed against. 26 All. 572 and 26 Bom.L.R. 284, approved.

Y. G. Krishnamurthi for Petitioner.

K. Kameswara Rao for Respondent.

K.S.

Kunhi Raman, J. Lakshmana Koro *v.* Visveswara Patrudu.
23rd November, 1942. **A.A.A.O. No. 257 of 1941.**

Civil Procedure Code (*V of* 1908), *section* 47—*"Final order"—What is.*

An order on an execution petition was as follows:—

"the judgment-debtor (respondent) is *ex parte*. Sale papers and encumbrance certificate are not filed. Dismissed. No costs. Attachment to cease."

On the question of the *locus standi* of the decree-holder to appeal against that order,

Held, that the order is one falling under section 47 of the Code of Civil Procedure and consequently an appeal does lie from that order which cannot be treated as one of dismissal for default under Order 21, rule 57 of the Civil Procedure Code.

57 I.C. 905 and I.L.R. 11 Lah. 402, applied; A.I.R. 1936 Cal. 267, distinguished.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

Respondent not represented.

K.S.

Kuppuswami Ayyar, J. Maharaja of Pithapuram *v.* Municipal Council, Cocanada.
25th November, 1942. **C.R.P. No. 235 of 1942.**

Madras District Municipalities Act (*V of* 1920), *sections* 81 *and* 83—*Property tax levied—Gift of premises subsequently in the half year to educational institution—No right to claim refund of property tax.*

Where subsequent to the levy of property tax, in the same half year the owner makes a gift of the property to an educational institution there is no scope for a refund of a proportionate share of the property tax merely because the building came to be used as an educational institution subsequent to the levy of the tax. Exemption can be claimed under section 83 only if at the time of the levy the building is used as an educational institution.

Ch. Raghava Rao for Petitioner.

K. Bhimasankaram for Respondent.

K.S.

King, J. Dharmasamrajayya *v.* Sankamma.
27th November, 1942. **S.A. No. 1333 of 1941.**

Provincial Insolvency Act (*V of* 1920)—*Gift by* N *to his wife—Adjudication of* N *as insolvent—Gift set aside at the instance of Official Receiver—Annulment of adjudication—Effect on the gift—Subsequent will disposing of the property—Validity.*

In 1926 *N* made a gift in favour of his wife of certain properties. In October, 1926, *N* was adjudicated insolvent and in March, 1927, the gift deed was set aside. In March 1928, the adjudication was annulled. It had not been necessary for the Official Receiver to dispose of the property dealt with by the gift deed. *N* executed a will on 11th August, 1927, in which he assumed that as the gift deed had been set aside the property had reverted to himself and bequeathed the properties to his wife and after his wife's death to their three daughters. After *N's* death his widow granted a permanent lease of the lands in favour of

a stranger and one of the daughters sued for a declaration that the lease was not valid beyond the lifetime of the widow.

Held: The annulment of an alienation of this kind by the Insolvency Court is solely in the interests of the insolvent's creditors and to the extent that those interests do not require the annulment, the annulment is automatically cancelled by the annulment of the adjudication.

In re Parry. Ex Parte Salaman, (1904) 1 K.B. 129, applied.

The rights under the gift deed are automatically restored by the annulment of the adjudication and the will in the present case is therefore of no effect.

B. Sitarama Rao and *M. K. Devaraj* for Appellant.

K. Y. Adiga for Respondents.

K.S.

Chandrasekhara Ayyar, J.
27th November, 1942.

Rudra Pillai—*Petitioner.*
C.R.P. No. 1542 of 1942.

Criminal Procedure Code (V of 1898), *section* 476 (b)—*Scope—Person against whom a complaint has been directed to be filed—Right to move superior Court to set aside order.*

There is no reason why the words in section 476 (*b*), Criminal Procedure Code should not be read as including also a person against whom a complaint has been directed to be filed. Where a Court gives a direction for a complaint to be made one may take it that it will be made and there is no particular reason why a man against whom such an order has been passed should wait till the complaint has been actually lodged before going to the superior Court asking for the setting aside of the order.

V. Rajagopalachari for Petitioner.

K.S.

Byers, J.
1st December, 1942.

Nagulatiah, *In re.*
Crl.R.C. No. 568 of 1942.
(Crl.R.P. No. 541 of 1942).

Motor Vehicles Act (IV of 1939), *sections* 42 (1) *and* 123 (1)—*Scope—Driver of bus carrying passengers in excess of the number specified in permit—Not liable if the bus carries a conductor.*

The responsibility for exceeding the sanctioned carrying capacity of a public bus exclusively belongs to the conductor when one is carried. Under rule 219 of the rules under the Motor Vehicles Act, this duty devolves on the driver, only in the absence of a conductor.

P. C. Parthasarathi Aiyangar for Petitioner.

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

K.S.

Horwill, J.
10th December, 1942.

Kannabiran Pillai *v.* Govindaswami Pillai.
C.R.P. No. 83 of 1942.

Practice—Decree passed after Madras Act IV of 1938 *containing a clause reserving liberty to apply to have the decree scaled down—Validity.*

A decree passed after the coming into force of Madras Act, IV of 1938 contained a clause reserving liberty to apply to have that decree scaled down. On a question as to the validity of such a decree,

Held: The decree is a conditional decree or one made subject to the condition of being scaled down, the passing of which decree is not illegal or unwarranted by the Civil Procedure Code according to the ruling in (1941) 2 M.L.J. 855 (F.B.), even though the practice of passing such decrees has been condemned by that ruling.

S. Amudachari for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

K.S.

Kuppuswami Ayyar, J.
11th December, 1942.

Peran Ambalagaran *v.* Venkatarama Naicker and another.
C.R.P. No. 1634 of 1941, etc.

Madras Estates Land Act (I of 1908), *section* 192 (2) *(as amended)—Application to set aside* ex parte *decree in a rent suit—Order of dismissal—Appealability.*

By reason of the amended section 192 (2) of the Madras Estates Land Act, the provisions of the Civil Procedure Code are made applicable to cases under the Madras Estates Land Act. Accordingly an appeal lies by virtue of Order 43, rule 1 of the Civil Procedure Code against an order of dismissal of an application to set aside an *ex parte* decree passed in a rent suit under the Madras Estates Land Act.

I.L.R. 51 Mad. 76: 65 M.L.J. 775 and 49 L.W. 649, distinguished. C.M.A. No. 298 of 1940: (1942) 1 M.L.J. 6 (S.N.), relied on.

K. V. Srinivasa Aiyar for Petitioners.

R. Gopalaswami Aiyangar for Respondents.

K.S.

Happell, J.
2nd December, 1942.

Syed Mahomed Rowther *v.* Shanmugasundaram Chettiar.
S.A. No. 1092 of 1941.

Tort—Negligence—Claim for damages—Burden of proof.

While the lessee of a house was using it as a place of business for the storage and sale of fireworks, the house was completely destroyed by fire following an explosion. In a suit by the lessor for the recovery of damages,

Held: Though as a general rule the burden of proof in an action for damages for negligence rests primarily upon the plaintiff there are exceptions to this rule such as for instance, cases to which the maxim *res ipsa loquitur* applies, cases in which the fact of an accident is itself *prima facie* evidence of negligence, and in which there is a duty cast on the defendant to take special care. A duty to take special care is cast on the defendant when the things which he keeps are particularly dangerous, such as fireworks. Where therefore the fact that the fire broke out in the lessee's premises is not disputed the burden is on the lessee to show that the fire was not due to his negligence.

A. V. Narayanaswami Aiyar for Appellant.

R. Rajagopala Aiyangar for Respondent.

K.S.

Happell, J.
9th December, 1942.

Doraippa Dikshidar *v.* Sundar Thandava Dikshidar.
C.R.P. No. 249 of 1942.

Provincial Small Cause Courts Act (IX of 1887), *Article* 31—*Scope.*

It cannot be said that a suit for money had and received is never maintainable by a principal against his agent but only a suit for an account, and it cannot be said that merely because the appropriate article of the Limitation Act may be Article 89, a suit in respect of which this Article is applicable must be a suit for account. Accordingly a suit by one co-tenant against another for the plaintiff's share of profits alleged to have been collected by the defendant on an understanding in the partition arrangement between them that the property was to be enjoyed in common and the nett income was to be divided equally does not fall within the scope of Article 31 of the Provincial Small Cause Courts Act and is therefore cognisable by the Subordinate Judge on the small cause side of his jurisdiction.

I.L.R. 45 Mad. 648 (F.B.), explained.

A. V. Viswanatha Sastri for Petitioner.

T. E. Ramabhadrachariar for Respondent.

K.S.

Happell, J.
10th December, 1942.

Govur Ammal *v.* Nachiar Ammal.
S.A. No. 1003 of 1941.

Specific Relief Act (I of 1877), *section* 42—*Suit for declaration when maintainable without prayer for further relief.*

A suit was brought for a declaration that certain property belonged to the plaintiff exclusively and that it was not liable to be attached and sold in execution of a decree held by the 1st defendant against the 2nd defendant, a sister of the 1st defendant who was the husband of the plaintiff. The plaintiff claimed title by virtue of a sale-deed of 2nd March, 1936, in her favour by her husband the 1st defendant. The 2nd defendant had already attached the property by the date of the suit for declaration and the property was sold and purchased by the 2nd defendant herself before the decree in that suit had been passed. Possession of the property had not been delivered but remained with a usufructuary mortgagee from the plaintiff. It was contended that the suit being one for a mere declaration was not maintainable since the plaintiff could seek further relief, namely, an injunction restraining the 2nd defendant from proceeding with the execution of her decree but had omitted to do so.

In the circumstances *held*; that the suit is maintainable without any further prayer. The position would be different if the 2nd defendant had obtained delivery of possession of the property under her decree, for in that case a mere decree declaring title would be infructuous unless it had been accompanied by the further relief of a direction for delivering possession. In the present case however possession had not passed from the plaintiff and if delivery of possession was sought under the 2nd defendant's decree it could be resisted on the footing of the declaration of title alone. The fact that the usufructuary mortgagee is in actual possession makes no difference.

Sundaresa Aiyar v. *Sarvajanasowkiabi Virdhi Nidhi, Ltd.*, I.L.R. (1939) Mad. 986, applied.

Bibi Zabidia v. *Mohan Ram Sahu,* A.I.R. 1937 Pat. 229, distinguished.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

V. Ramaswami Aiyar for Respondent.

K.S.

Abdur Rahman, J.
15*th December*, 1942.

Venkata Satya Narayanamurthi *v.* Sreemanthu.
C.R.P. No. 2593 of 1941.

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 9—*Indorser of promissory note —Date as from which liability under section* 9 *to be determined.*

The extent of the liability of the indorser of a promissory note can only be determined under section 9 of the Madras Agriculturists' Relief Act as on the date on which the liability came into existence. Even if the decree was made realisable from the indorser only in case the amount could not be realised from the original maker, the liability of the indorser cannot be said to have come into existence before he indorsed the note in favour of the plaintiff.

(1940) 2 M.L.J. 575, explained and relied on.

A. Lakshmayya for Petitioner.

P. Sivaramakrishnayya for Respondent.

K.S.

Kunhi Raman, J.
16*th December*, 1942.

Simhadri Veerabhadra Reddi *v.* Official Receiver, Guntur.
C.R.P. No. 2732, etc., of 1941.

Provincial Insolvency Act (*V of* 1920), *section* 50—*Creditors' names included in schedule of "proved creditors"—Application by succeeding Receiver for expunging names—Burden of proof.*

Where debts on promissory notes were already proved to the predecessor in office of the Official Receiver, before he directed that the names of the creditors should be entered in the schedule of proved creditors and there is nothing to show that the admission of proof was based on the presumption under section 118 of the Negotiable Instruments Act, and the successor in the office applies under section 50 of the Provincial Insolvency Act for expunging the name of such creditors, *prima facie* the burden is on the Official Receiver to establish the grounds which would justify the removal of the names of the creditors from the schedule of proved creditors *Ram Lal Tandon* v. *Kashicharan*, A.I.R. 1928 All. 380, considered and *Subbiah* v. *Official Receiver, Cuddappah*, (1941) 2 M.L.J. (N.R.C.) 13, relied on.

B. V. Ramanarasu for Petitioner.

K. Kameswara Rao for Respondent.

K.S.

Kuppuswami Ayyar, J.
17*th December*, 1942.

Syed Sultan Alavudin Sahib *v.* Batch Bi Begum and others.
S.A. No. 1453 of 1941.

Mahomedan Law—Gift by father to minor child—Transfer of possession—Not essential for validity of gift.

Under Mahomedan Law no transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward and all that is necessary is to establish a *bona fide* intention to give. If a father happens to be the guardian, a statement by him that he had delivered possession or that he had given the properties to the donees, is sufficient to indicate that he was holding possession of the properties from that date on behalf of the donees, his wards.

V. Ramaswami Aiyar and *V. Meenakshisundaram* for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondent.

K.S.

[S.B.]

The Chief Justice, Lakshmana Rao and Krishnaswami Ayyangar, JJ.
17*th December*, 1942.

In the matter of a Pleader.
R.C. No. 28 of 1942.

Legal Practitioners Act (*XVIII of* 1879), *section* 15—*Dismissal by Subordinate Court of complaint of professional misconduct against a pleader—No power to award costs—High Court taking up the matter under section* 15 *of the Legal Practitioners Act—Power to order payment of costs.*

Where a Subordinate Court dismisses a petition against a pleader charging him with professional misconduct it has no power to award costs. But when the matter is taken up by the High Court under section 15 of the Legal Practitioners Act the High Court can, if it deems just—as for instance where the complaint is found to be vexatious—pass an order for the payment of costs.

The Advocate-General (*Sir Alladi Krishnaswami Ayyar*) for the Crown.

K. Umamaheswaram for the Pleader.

B. V. Ramanarasu for the Complainant.

K.S.

Abdur Rahman, J. Palaniappa Chettiar *v.* Venkatarama Aiyar.
17th December, 1942. **S.A. Nos. 639 and 847 of 1941.**

Transfer of Property Act (IV of 1882), section 41—Applicability and scope—Mortgagee entitled to protection of section—If loses the right by becoming purchaser of the property in Court auction.

If a mortgage is found to be unassailable by the true owner by reason of the provisions of section 41 of the Transfer of Property Act, the mortgagee would be justified in having a decree for sale of the property passed in his favour on the basis of that mortgage and to get the property sold as that of the mortgagor and the true owner would be estopped from questioning the sale on the ground of any title vesting in him. The mere fact that the property had been purchased by him in a Court auction would not take away from the mortgagee the advantage of the protection he had under section 41.

The *Explanation* 2 to section 3 of the Transfer of Property Act, added by Act XX of 1929, cannot be extended to a mortgage which had come into existence long before the amendment came into force.

V. Ramaswami Aiyar and *R. M. Halasyam* for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S.

Byers, J. Aswatha Narayana Gupta *v.* Muneppa and others.
21st December, 1942. **Crl.R.C. No. 363 of 1942.**
(Crl.R.P. No. 353 of 1942).

Criminal Procedure Code (V of 1898), section 522—Scope and applicability—"Criminal force"—Construction.

The expression "criminal force" in section 522 of the Criminal Procedure Code does not embrace all kinds of physical violence on persons or inanimate objects but refers only to criminal force in the limited sense in which it is defined in the Penal Code, and the section applies only to criminal force used against the person. Accordingly no order for restoration of possession can be made under section 522, Criminal Procedure Code, where the criminal force attending the dispossession complained of is used not against the person dispossessed but against the property in his absence.

A.I.R. 1938 Lah. 839, not approved.

A.I.R. 1939 Lah. 184; A.I.R. 1940 Lah. 460; 26 I.C. 168 and A.I.R. 1937 Rang. 248, relied on.

S. Krishnamurthi for Petitioner.

A. S. Sivakaminathan for the Public Prosecutor (*V. L. Ethiraj*) and *P. S. Narayanaswami Aiyar* for *A. Gopalacharlu* and *S. Narasimha Aiyangar* for Respondents.

K.S.

Happell, J. Srinivasa Aiyar *v.* Palaniappa Nadar.
4th January, 1943. **C.R.P. No. 65 of 1942.**

Practice—Money due on hundi—Suit as for money lent—Objection that suit should be based only on hundi—Not sustainable.

Where a suit is brought for money lent for which the defendant had executed a hundi which was properly stamped and which was produced along with the plaint, the objection that the suit should be based on the hundi and not on the debt is unsustainable.

N. Sivaramakrishna Aiyar and *A. Balasubramania Aiyar* for Petitioner.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

K.S.

The Chief Justice and Lakshmana Rao, J. Kuppuswami Goundan *v.* L. M. Bank.
5th January, 1943. **L.P.A. No. 14 of 1942.**

Hindu Law—Debts—Suit against father and son—Limitation—Exclusion of time under section 78 of the Provincial Insolvency Act during pendency of insolvency proceedings against father—Suit against the son also not barred.

Where a suit filed against a Hindu father and his son on a promissory note executed by the father is found to be in time as against the father by virtue of the exclusion of the period under section 78 of Act V of 1920, during which insolvency proceedings were pending against the father, the suit against the son also is not barred by limitation so long as the debt is alive against the father.

I.L.R. 1942 Mad. 95 (F.B.), applied.

Decision of Somayya, J., in S.A. No. 575 of 1940, affirmed.

K. Rajah Aiyar, T. R. Srinivasan, R. Desikan and *R. Viswanathan* for Appellant.

T. V. Muthukrishna Aiyar, N. Sivaramakrishna Aiyar and *T. S. Venkatarama Aiyar* for Respondent.

K.S.

The Chief Justice and Lakshmana Rao, J. Venkatasubbayya *v.* Venkataramayya.
5th January, 1943. **L.P.A. No. 4 of 1942.**

Hindu Law—Conversion—Effect on joint family—Division in status—Reunion with minor—Not possible.

The plaintiff's father and mother were converted to Christianity on the 2nd December, 1927, and at that time the plaintiff was only three years of age. The father continued to regard himself as being joint with his son. The father lived as a Hindu and he married his son and three of his daughters to Hindus, according to Hindu rites. In 1928 he was

reconverted to Hinduism. The son did not attain his majority till the 1st July, 1932. On the 10th March, 1930, the father created a mortgage of family properties which were subsequently sold on 24th January, 1935, subject to the mortgage at the instance of another creditor of the father. In a suit for partition on the question whether the son's interests in the properties were affected by the mortgage or sale,

Held: The embracing of Christianity by the father effected a division in status (9 M.I.A. 195) and once the family had become divided it could not become reunited without the consent of the son and during his minority he was not in a position to give his consent. 55 M.L.J. 132, *distinguished*. As at the time of the mortgage and sale the son was a minor and had become divided from his father as the result of his father becoming converted to Christianity nothing that the father himself did subsequently could affect the son's interests in the family properties. Accordingly the son is entitled to a decree for partition unaffected by the alienations.

(1941) 2 M.L.J. 877, affirmed.

K. Kotayya for Appellant.

V. Rangachari and *S. Sitarama Aiyar* for Respondent.

K.S.

Byers, J.
7th January, 1943.

Sadhu Suryanarayana *v.* Sadhu Lakshmi Sundaram and others.
Crl.R.C. No. 671 of 1942.
(Crl. R.P. No. 633 of 1942).

Criminal Procedure Code (*V of* 1898), *sections* 488 *and* 489—*Order for maintenance of daughter—Marriage of daughter—If can be set up as "sufficient cause" for discontinuing payment in an application for enforcement of payment.*

A father can in defence to an application for the enforcement of an order of maintenance against him in respect of his daughter plead that the daughter had married and therefore he is not bound to pay any maintenance for her subsequent to the date of her marriage. The marriage of his daughter is a "sufficient cause" within the meaning of section 488 (3) for failure to comply with the order and it cannot be said that his only remedy is by way of an application under section 489 of the Criminal Procedure Code to get the order varied in his favour on the ground of "change in circumstances". The "change in circumstances" in section 489 refers only to a change in the pecuniary or other circumstances of the party paying or receiving the allowance which would justify an increase or decrease of the amount of allowance fixed and not to a change in the status of the parties which would entail a stoppage of the allowance.

19 All. 50 and 1933 M.W.N. 121, referred to.

K. Bhimasankaram for Petitioner.

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

N. Subramaniam for the Respondents.

K.S.

The Chief Justice and Lakshmana Rao, J.
7th January, 1943.

Ramabrahmam *v.* Traffic Manager, Vizagapatam Port.
A.A.O. Nos. 678 and 679 of 1941.

Workmen's Compensation (*VIII of* 1923)—*Accident in the course of employment—Test.*

An accident in order to give rise to a claim for compensation must have some relation to the workmen's employment and must be due to a risk incidental to that employment as distinguished from a risk to which all members of the public were alike exposed.

Accordingly where a workman (whose hours of work were from 2 P.M., to 10 P.M., worked from 2 to 7-30 P.M., left to take some coffee and while returning to work crossed a railway line and was killed by an engine running into him, the accident is one which arose out of and in the course of his employment. In crossing the railway line he was following the usual practice of the workmen engaged in the harbour and the notice prohibiting the crossing of the railway lines was not an effective prohibition in the case.

V. Govindarajachari and *N. Vasudeva Rao* for Appellant.

D. V. Reddi Pantulu for Respondent.

K.S.

Byers, J.
15*th January*, 1943.

Juje D'Silva *v.* Kashmir D'Silva.
Crl.R.C. No. 784 of 1942.
(Case Referred No. 59 of 1942).

Criminal Procedure Code (*V of* 1898), *sections* 133 *and* 137 (3)—*Magistrate if can modify provisional order made under section* 133 *while making it absolute under section* 137.

Where a preliminary order issued under section 133 of the Criminal Procedure Code called upon the owner of a tree to show cause why he should not be directed to take certain steps to prevent it from damaging a house close by and the notice contemplated either cutting it or securing it with a wire, the Magistrate has no power to order the owner under section 137 of the Criminal Procedure Code, to cut the tree, giving him no option to stcure it with wires. The Magistrate sitting alone and disposing of the matter under section 137 has no jurisdiction to modify the original order. It is only when sitting with a jury and passing a final order under section 139 that he has power to modify the order originally made.

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

Petitioner and Respondent not represented.

K.S.

King, J. — Beepathumma *v.* Abdul Rahimane.
21*st January*, 1943. — **A.A.A.O. No. 57 of 1942.**

Mappilla Marumakkattayam Act (*XVII of* 1939), *section* 10—*Applicability to decree-holders who obtained their decrees before the Act came into force.*

Section 10 of the Mappilla Marumakkattayam Act deals with nothing but procedure and takes away no vested right. Accordingly the section applies to decree-holders who obtained their decrees even before the Act came into force.

(1923) 2 K.B. 193, distinguished.

B. Pocker for Appellant.

K. Y. Adiga for Respondent.

K.S.

Wadsworth, J. — Kali Govindan *v.* Annamalai Chetti.
29*th January*, 1943. — **C.R.P. No. 260 of 1942.**

Madras Agriculturists' Relief Act (*IV of* 1938), *sections* 8, 9 *and* 19—*Person purchasing mortgaged property in* 1940—*If "debtor".*

Where a person purchases property subject to a mortgage only in May, 1940, he cannot be deemed a debtor when Madras Act IV of 1938, came into force and there can be no question of his calling in aid section 19 to apply sections 8 and 9 of that Act to the debt as if it was a debt falling under either of those sections. The question as to what would be the result if the mortgagor got the decree scaled down on his own application, left open.

A. Ramakrishna Aiyar for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

K.S.

King, J. — Subbarayalu Aivar *v.* Krishna Aiyar.
5*th February*, 1943. — **A.A.A.O. No. 314 of 1941 converted into C.R.P. No. 175 of 1943.**

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 90—*No second appeal—Sale in execution of mortgage decree—Provision in preliminary decree for payment of balance to mortgagor—If sufficient to confer on insolvent mortgagor* (*after the property had been sold by the Official Receiver subject to the mortgage*) locus standi *for filing application under rule* 90 *of Order* 21.

The mortgaged property was sold in execution of a mortgage decree. The mortgagor had become insolvent before the sale in execution took place and the property had been sold by the Official Receiver subject to the mortgage. After the sale in execution, an application was made by the mortgagor under Order 21, rule 90 of the Civil Procedure Code to have it set aside. There was a provision in the preliminary decree that the mortgaged property should be sold and the proceeds paid to the mortgagee and that the "further balance, if any, shall be paid to the mortgagor or other persons entitled to receive the same." On the question of the *locus standi* of the mortgagor to apply under Order 21, rule 90 as a person interested in the result of any re-sale, a preliminary objection being taken as to the maintainability of the second appeal,

Held: There is no second appeal in matters coming directly under Order 21, rule 90 and the matter cannot be said to fall under the more comprehensive heading of section 47.

(The appeal was however converted into a revision petition as the question was essentially one of jurisdiction.)

Held (on the merits): It cannot be assumed as an abstract proposition of law that the mere mention of the mortgagor's name in the preliminary decree proved that his interests are affected by the sale. It is incumbent upon such mortgagor to show by an assertion of the necessary facts how he is still interested in the property which was sold. In the present case the property having been already sold away by the Official Receiver, the insolvent had no *locus standi* for filing his application under rule 90.

O. V. Ramalingam for Appellant.

T. L. Venkatarama Aiyar for Respondent.

K.S.

King, J. Rangayya Naidu and another *v.* Sundaramurthy Mudaliar.
5th February, 1943. **C.R.P. No. 752 of 1942.**

Negotiable Instruments Act (XXVI of 1881), section 87—Signature of one of the executants of a promissory note forged by payee—Effect on liability of other executants—Absence of plea or argument as to applicability of section 87—Duty of Court.

Where the signature of one of the executants of a promissory note is found to be a forgery brought about by the payee, there is a "material alteration" under section 87 of the Negotiable Instruments Act rendering the note void. The fact that the forgery could make no difference in the liability of the other executants who have admittedly signed the bond is immaterial. It is unnecessary that a material alteration should be one which is prejudicial to the person who pleads it. Even if it were beneficial to the other executants it still remains a material alteration.

Amirtham Pillai v. *Nanjah Goundan*, (1914) 26 M.L.J. 257 and *Santhu Mohideen Pillai* v. *Jamal Md. Jamaludin*, A.I.R. 1928 Mad. 1092, relied on.

If the Court arrives at a finding of fact that that there is a material alteration in a promissory note it ought to find that the note was void under section 87 even though a specific plea was not raised and no argument was made on it during the trial.

V. S. Chandrasekharan and *K. Raman* for Petitioner.

R. Thirumalai Thathachariar for Respondent.

K.S.

Happell, J. Kochunni Nayar *v.* Chimmu Kutty Amma and others.
11th February, 1943. **S.A. No. 376 of 1942.**

Malabar Tenancy Act (XI of 1930), section 14 (3)—Failure to pay rent within three months after due date—Suit for eviction—No notice of termination of tenancy necessary—Transfer of Property Act (IV of 1882), sections 106 and 111.

Section 14, clause (3) of the Malabar Tenancy Act provides that a suit for eviction of a cultivating verumpattamdar from his holding shall lie at the instance of the landlord if the whole or any portion of the rent is due in respect of the holding and no notice of termination of the tenancy is necessary. The notice of termination of the tenancy under the provisions of section 106 of the Transfer of Property Act is not necessary; for that section provides only one mode of terminating a tenancy and under section 111 other modes are specified and under clause (*g*) of that section a lease of immovable property terminates by forfeiture.

K. Kuttikrishna Menon for Appellant.

Respondents not represented.

K.S.

Mockett, J. *Venkatarama Naidu*—Accused.
18th February, 1943. **Cr. Appeal No. 744 of 1942.**

Evidence Act (I of 1872), sections 159 and 160—Shorthand writer stating that transcript filed was a correct statement of a speech by the accused—Sufficiency to prove the speech.

The accused was charged under clause (6) of the Defence of India Rules with having made a "prejudicial speech" at a Peasants' Conference. The Sub-Inspector who attended and took shorthand notes gave evidence in which he said "The accused made a speech about the war and political events. Exhibit A is the shorthand note I took down. I transcribed it into Telugu. Exhibit B is the transcription. Exhibit C is the translation of the speech. In hoisting the red flag he made the speech. The effect this speech had on the audience was to incite them with revolutionary ideas." The effect of the cross-examination was to establish that the witness was a competent shorthand writer and that he did make a careful note of the speech.

Held: Such a witness should describe his attendance and the making of the relevant speech and give a description of its nature so as to identify his presence there and his attention to what was going on. After that it is quite enough if he says, "I wrote down that speech and this is what I took down". It is a question of fact in the evidence in each case whether the Court is satisfied that it has before it a correct statement of the speech.

The Public Prosecutor (*V. L. Ethiraj*) in person.

V. S. Chandrasekharan for the Accused.

K.S.

Wadsworth, J. Narayana Reddy *v.* Molakamma.
5th *February*, 1943. C.R.P. No. 728 of 1942.

Madras Agriculturists' Relief Act (IV of 1938)—Section 8—Transferee of promissory note seeking to enforce debt against endorser—Endorser scaling down debt—Date of the debt.

A transferee of a promissory note who has obtained a decree against the maker and the endorser, is entitled as against the endorser to treat the latter as his debtor only with effect from the date of the endorsement. When the endorser scales down the debt the date of the debt will be the date of the endorsement and the interest to be cancelled under section 8 of Act IV of 1938, will be the interest accruing due on the instrument from the date of the endorsement to 1st October, 1937.

P. Chandra Reddi for Petitioner.

K. Umanaheswaram and *A. Kuppuswami* for Respondent.

K.S.

Horwill, J. Nachiappa Goundar *v.* Venkatarama Naidu.
8th *February*, 1943. C.R.P. No. 1266 of 1942.

Provincial Small Cause Courts Act (IX of 1887)—Suit for rent on foot of oral lease—Defendant claiming to be in possession in pursuance of an agreement to sell and denying that he was a tenant—Court is not precluded from going into question of title arising incidentally.

When a suit is brought on a lease in a Small Cause Court it is ordinarily the duty of the Court to decide whether there was a lease or not, even though in determining that question it may incidentally have to consider pleas raised by the defendant which involve questions of title.

T. R. Srinivasan for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

K.S.

Horwill, J. Kotayya and Sons *v.* Sheik Imam Saheb.
8th *February*, 1943. C.R.P. No. 1138 of 1942.

Promissory note—Assignee of promissory note—If bound to enquire of the maker whether the note was discharged, for him to be a "holder in due course".

The transferee of a promissory note unless the note had been executed a long time before the proposed transfer is not bound to enquire whether or not it had not been discharged. Promissory notes are intended to pass from hand to hand and the various holders are not put on enquiry unless the note had been executed long before. Failure to make such enquiry cannot prevent the transferee from being a holder in due course entitled to a decree on the promissory note against the maker.

V. Suryanarayana for Petitioner.

Respondent not represented.

K.S.

Horwill, J. Municipal Commissioner, Bezwada *v.* Chinnoy.
9th *February*, 1943. C.R.P. No. 1136 of 1942.

Madras District Municipalities Act (V of 1920), section 82 (2)—Deduction for repairs—Mode of computation.

The deduction for repairs referred to in section 82 (2) of the Madras District Municipalities Act is to be estimated on the rental of the house together with its site and not on some hypothetical rental for the house alone apart from its site.

Except in rare cases where the house and the site are owned by separate persons the house and the site have to be assessed together and there is no means of ascertaining a reasonable rent for the house apart from its site: moreover section 82 (1) makes no provision for a separate assessment of the rent apart from the site where the owner of the house and the site is the same person.

S. Srinivasachari for Petitioner.

P. Sivaramakrishnayya for Respondent.

K.S.

King, J. Puzhithara Moidin Haji *v.* Puthummannil Thithiya Kutti Amma.
11th *February*, 1943. A.A.A.O. No. 167 of 1941.

Madras Agriculturists' Relief Act (IV of 1938), sections 8 and 9—Surety for decree amount—Scaling down as against judgment-debtor—Surety liable only for scaled down amount of decree.

After a mortgage decree had been granted the mortgagor filed a suit for redemption which was dismissed. The mortgagor appealed and obtained an order for stay of execution on security "for the decree amount" being given by a surety. That was in 1935. The appeal was eventually dismissed and the decree-holder sought to execute the decree against the surety. He filed the execution petition against both the judgment-debtor and the surety and as both were agriculturists they claimed to be entitled to have their liability scaled down. On the question of the extent of the right of the surety to the benefits of Act IV of 1938, *held*: that the terms of the surety's liability must be strictly construed.

N.R.C.

and having regard to the fact that the security was for "the decree amount" the surety's liability is for no more than the amount of the decree as ultimately scaled down in favour of the judgment-debtor.

Subramanian Chettiar v. *Batcha Rowther,* (1941) 2 M.L.J. 751, distinguished.

K. Kuttikrishna Menon for *Appellant.*

P. Govinda Menon for Respondent.

K.S.

Mockett, J.
17*th February,* 1943.

Venkatappayya *v.* Ramachandrayya.
C.R.P. No. 596 of 1942.

Court-fees—Suit for dissolution of partnership with token Court-fee—Undertaking to pay court-fee on amount to be decreed—Decree-holder if can ask for the decree to be reduced to smaller amount than decreed.

The plaintiff filed a suit for the dissolution of a partnership in which he valued the suit for purposes of court-fee at Rs. 50 but gave a definite undertaking in the plaint that he would pay court-fee on the amount ultimately decreed. He got a decree for Rs. 38,500. The plaintiff without paying the court-fee on that amount as undertaken by him, estimated that the defendant was not likely to be able to pay more than Rs. 13,839-0-3 and so asked for leave to reduce the amount of the decree which had already been passed to that amount.

Held, that the plaintiff after paying in the first instance some token court-fee could not claim to pay court-fee only on such amount (not being more than the amount decreed) which according to his notions he thought he was likely to recover in execution.

K. Kotayya for Petitioner.

P. Satyanarayana Rao for Respondent.

K.S.

King; J.
19*th February,* 1943.

Parankusa Naidu *v.* Ayyanna Naidu.
C.R.P. No. 1334 of 1942.

Limitation Act (IX of 1908), *Article* 182 (5)—*Execution petition returned endorsed "Vakil has no power. Returned. Time 7 days"—Subsequent order rejecting application for non-compliance—If "final order".*

An application for execution was made on 21st June, 1937. The Court endorsed thereon, "Vakil has no power. Returned. Time 7 days". In fact the application was not taken away from the Court but allowed to remain in the Office and subsequently in December an order was passed rejecting it.

Held, that the order is a "final order" as contemplated by Article 182 of the Limitation Act and a subsequent application within three years of such order is within time.

(1941) 2 M.L.J. 1018 and (1942) 2 M.L.J. 768 at 772, distinguished.

K. G. Srinivasa Aiyar for Petitioner.

T. M. Venugopala Mudaliar for Respondent.

K.S.

Horwill, J.
26*th February,* 1943.

Bagvandass Moopanar *v.* Muhammad Gani Rowther.
Cr.R.C. No. 3 of 1943.
(Cr.R.P. No. 2 of 1943).

Criminal Procedure Code (V of 1898), *section* 148 (3)—*Successor to Magistrate who passed a decision under sections* 145 *to* 147 *cannot pass orders as to costs under section* 148 (3).

A successor to the Magistrate who passed an order under sections 145 to 147 of the Criminal Procedure Code, cannot pass an order as to costs under section 148 (3).

29 Mad. 373; 55 All. 301 (F.B.); 24 C.W.N. 672 and A.I.R. 1929 Pat. 93, discussed.

A. S. Sivakaminathan for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

S. Sitarama Aiyar for *T. V. Ramanatha Aiyar* for Respondent.

K.S.

Horwill, J.
26*th February,* 1943.

Satyanarayanamurthi, *In re.*
Crl. Rev. Case No. 75 of 1943.
(Crl.R.P. No. 71 of 1943).

Criminal Law Amendment Act (XX of 1938), *section* 7 (1)—*Procedure—Sub-Inspector's report disclosing facts constituting only a particular offence—No jurisdiction to try accused for other offences.*

In respect of an offence under section 7 (1) of the Criminal Law Amendment Act unless a report by a Sub-Inspector is filed disclosing facts which constitute the particular offence the Court is not entitled to frame a charge and try the accused for that offence. Accordingly although a number of offences punishable under section 7 may be disclosed in the police officer's report, no Magistrate can take cognizance of any one of those offences unless that particular offence is constituted by the facts set out in the Sub-Inspector's report.

V. T. Rangaswami Aiyangar and *K. S. Sankararaman* for Petitioner.

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

K.S.

Horwill, J.
1st March, 1943.

Ramachandra Aiyar *v.* Sesha Aiyangar.
C.R.P. No. 1523 of 1942.

Civil Procedure Code (V of 1908), section 60 (1) (b)—Cooking vessels with which a hotel keeper prepares sweetmeats—If tools of an artisan exempt from attachment.

The cooking vessels with which a hotel keeper prepares sweetmeats are not tools of an artisan within the meaning of section 60 (1) (*b*) of the Civil Procedure Code and they are not exempt from attachment.

A.I.R. 1935 All. 848 and I.L.R. 54 All. 399, dissented from.

(1941) 2 M.L.J. 671, applied.

In any event the hotel keeper cannot claim exemption from attachment of the vessels used by his employee in the preparation of food which he sells to the public as the employee is not the judgment-debtor.

K. S. Desikan for Petitioner.

N. Suryanarayana for Respondent.

K.S.

Shahabuddin, J.
10th March, 1943.

Rangana Gowd *v.* Kamakshamma.
C.R.P. No. 754 of 1942.

Civil Procedure Code (V of 1908), section 115—Revision petition can be admitted in part.

A revision petition can be admitted in part, for instance with regard to properties other than those of a particular defendant.

Eswariah v. *Rameswarayya*, 78 M.L.J. 587, distinguished.

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

V. S. Narasimhachar for Respondent.

K.S.

Horwill, J.
15th March, 1943.

Bandikara Thopanna *v.* Era Nagappa.
S.A. No. 1297 of 1942.

Civil Procedure Code (V of 1908), section 9, exception—Right to office carrying no emoluments—Suit claiming—Maintainability.

Practice—Appeal—Reversing judgment—Duty to discuss evidence and give reasons.

The explanation to section 9 of the Civil Procedure Code excepts a suit in which the right to an office is contested, from the operation of that section; and although the granting of emoluments may be an important test to see whether a claim is one to an office, a suit to an office is maintainable notwithstanding the fact that there may be no emoluments attached to the office.

In a reversing judgment the appellate Judge must discuss the evidence and give his reasons for disagreeing with the findings of the trial Court.

T. S. Narasinga Rao for Appellant.

Kasturi Seshagiri Rao for Respondent.

K.S.

Happell, J.
16th March, 1943.

Sundararaja Aiyangar *v.* Lakshmi Ammal.
C.R.P. No. 1437 of 1942.

Civil Procedure Code (V of 1908), Order 6, rule 2 and Order 41, rule 6—Pendency of application for leave to appeal in forma pauperis*—If amounts to pendency of appeal—Stay of execution, if to be granted.*

An application for leave to appeal in *forma pauperis* does not amount to an appeal for the purposes of Order 6, rule 2, Civil Procedure Code.

I.L.R. (1939) 2 Cal. 68, relied on.

71 M.L.J. 301 and 6 I.A. 126, distinguished.

It cannot be said that an appeal or suit is pending on a certain date, because an application for leave to appeal or sue in *forma pauperis* has been filed and is pending on that date; and a trial Court is not bound to stay execution on the ground that an appeal is pending when an application to appeal as pauper was made.

N. R. Govindachari for Petitioner.

Respondent not represented.

K.S.

Happell, J.
18th March, 1943.

S. KR. M. Subramanyam Chettiar *v.* Meyyammai Achi and others.
S.A. No. 476 of 1942.

Registration Act (XVI of 1908), sections 17 (1) and 49—Document creating a right of way—Necessity for registration.

A document which creates a right of way creates a right to or interest in immovable property and where the consideration for it is more than Rs. 100, the document must be registered under the provisions of section 49 of the Registration Act and if not registered cannot be received in evidence. *Obiter* in 20 C.W.N. 1158, approved. I.L.R. 31 All. 612 and 57 M.L.J. 46, explained and distinguished.

C. S. Rama Rao Saheb for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondent.

K.S.

Mockett, J.
22nd March, 1943.

Shair Mohammad Khan *v.* Rama Rao.
C.R.P. No. 1064 of 1942.

Civil Procedure Code (V of 1908), Order 20, rule 11—Discretion to order payment towards decree in instalments—Cannot be arbitrarily exercised.

In a suit on a promissory note under which a sum of Rs. 145 was due, the defendant merely pleaded that he got only a salary of Rs. 55 a month and had several debts to discharge and prayed that he may be permitted to pay such sum as may be decreed, in monthly instalments of Rs. 5. The District Munsiff without giving any reasons at all passed a decree for instalments to be paid at the rate of Rs. 3 a month. On revision,

Held: The discretion vested in the Court under Order 20, rule 11 of the Civil Procedure Code is a judicial discretion intended to be used in favour of persons who deserve consideration on proved circumstances. In the absence of materials on which such an order could be made the arbitrary order for instalments is unsustainable.

A. Gopalacharlu for Petitioner.

Respondent not represented.

K.S.

King, J.
1st April, 1943.

Kavukutti Amma Nathiyar *v.* Manmathan.
S.A. No. 1034 of 1942.

Malabar Tenancy Act (XIV of 1930), section 24 (2) (b)—Kanom—Renewal of on kanomdar's application—Renewal fee—When becomes due—Interest on renewal fee—Right of jenmi to claim from date prior to renewal of kanom.

Where in a suit for redemption of a kanom instituted after the Malabar Tenancy Act came into force, the kanomdar's application for renewal is granted with effect from the date of the plaint in the redemption suit, the jenmi cannot claim interest on the renewal fee from the date of the Malabar Tenancy Act, under section 24 (2) (*b*) of the Act. The mere fact that the period of 2 years of the prior kanom which is renewed expired long before the Act, could not create in the jenmi a right to claim renewal fee or interest thereon from an anterior date. The renewal fee cannot be said to become due until the kanomdar claims a renewal having regard to the fact that the date of termination of the previous kanom is the date on which such kanom is renewed.

P. Govinda Menon for *D. H. Nambudripad* for Appellant.

P. R. Narayana Aiyar for Respondent.

K.S.

Shahabuddin, J.
2nd April, 1943.

Soosai Manuel Perz *v.* Pushpammal Morais.
C.R.P. No. 2394 of 1941.

Limitation Act (IX of 1908), Article 60—Deposit of money with trading firm—No terms—Loan or deposit—Whether express agreement to repay on demand necessary—Whether depositee must be a banker.

Where monies were paid into a trading firm from time to time by the daughter-in-law of one of the partners and the interest was added every year, though no terms or agreement to repay on demand had been entered into between the parties the transaction is in the nature of a deposit, and no express agreement to repay is necessary as such an agreement can be implied from the surrounding circumstances and Article 60 of the Limitation Act is applicable to a suit for the recovery of such amount.

(1940) M.W.N. 1000 (P.C.), followed.

The depositee need not be a banker.

I.L.R. 39 Mad. 1081, followed.

A. Swaminatha Aiyar for Petitioner.

K. Venkateswaran for Respondent.

K.S.

Horwill, J.
26th March, 1943.

Balireddi *v.* Lakshmamma.
A.A.O. No. 476 of 1942.

Civil Procedure Code (V of 1908), Order 17, rules 2 and 3—Request for pass over and reporting no instructions subsequently—Dismissal of suit—If under rule 2 or rule 3 of Order 17.

The plaintiff engaged three vakils to appear for him and on the date of hearing, all of them were absent. Another vakil, *K* however appeared on behalf of one of the three, *V*, and requested an adjournment or that the case might be passed over for some time. The case was passed over and when called again, *K* reported no instructions on behalf of *V*. The suit was thereupon dismissed. In an application to set aside the dismissal of the suit,

Held, that the order of dismissal of the suit would be one under Order 17, rule 2 and not rule 3 of the Civil Procedure Code. Arranging the day's work is not a judicial act and a request by a practitioner to pass over a case for an hour or two is not a step taken in the prosecution of the proceedings. Accordingly an application under Order 9, rule 9, praying that the dismissal of the suit be set aside cannot be dismissed *in limine*.

(1939) 2 M.L.J. 611, followed.

Ch. Raghava Rao for Appellant.

K. Srinivasa Rao and *A. Gopalacharlu* for Respondent.

K.S.

Kunhi Raman, J.
1st April, 1943.

Arle Sanyasi *v.* Municipal Council, Vizianagaram.
S.A. No. 1242 of 1942.

Madras District Municipalities Act (V of 1920), sections 78 and 80—Provisions mandatory—Omission to publish levy of property tax by beat of drum—Fatal to suit for its recovery.

In a suit by a municipality for recovery of property tax levied on a ryoti alleged to be in occupation of agricultural land situated within the municipal limits it was found that the final notification of the proposed tax was not published at all and there was no publication by beat of drum specifying the date from which or the period for which such tax shall be levied.

Held, that the provisions of sections 78 and 80 of the District Municipalities Act are mandatory and must be strictly complied with. The omission to observe the formalities required cannot be treated as a technical defect and will be fatal to the suit for recovery of the tax alleged to be levied.

T. V. R. Tatachari for Appellant.

Y. Suryanarayana for Respondent.

K.S.

King, J.
2nd April, 1943.

Raghavayya *v.* Venkateswarlu.
C.R.P. No. 1652 of 1942.

Provincial Insolvency Act (V of 1920), section 78 (2)—Applicability—Promissory note renewed during pendency of insolvency—If debt ceases to be provable in insolvency—Suit on promissory note after annulment—Suit after period of limitation—Maintainability.

A debtor was adjudicated insolvent in July, 1934 and the insolvency continued until it was annulled in September, 1941. A promissory note of 1932 was renewed by the insolvent in 1935. In a suit filed by the creditor in 1942 upon the promissory note of 1935, it was contended that although the promissory note of 1932 evidenced a debt provable in insolvency when it was renewed in 1935 the debt ceased to exist and a new debt arose and that new debt having been incurred after the adjudication was not provable in insolvency; and that section 78 (2) does not apply as there would have been nothing at all to prevent the creditor from bringing a suit on the new promissory note throughout the whole period of the insolvency.

Held: In essence the promissory note is not itself a debt but only evidence of a debt. It is impossible to say that when a debt had been incurred in 1932 and merely renewed in 1935 there were two distinct debts—one provable and the other not provable in insolvency. Accordingly section 78 (2) of the Provincial Insolvency Act applies and the suit is not barred by limitation.

P. Suryanarayana for Petitioner.

Y. G. Krishnamurti for Respondent.

K.S.

Kuppuswami Ayyar, J.
9th April, 1943.

A. Krishnaswami Chettiar and another *v.* Seth Mangoomal Atma Singh.
C.R.P. No. 759 of 1941.

Provincial Insolvency Act (V of 1920), section 6 (g)—Partnership business owned by three brothers—Eldest brother declaring in creditors meeting that his brothers were divided

and not liable for debts—If amounts to a notice of suspension of payment as regards the other brothers.

Three brothers were partners of a family business. The eldest among them declared at a meeting of creditors "myself and my brothers are divided; they are not liable for the debts nor their properties. I cannot pay more than a few annas in the rupee".

Held, that though the words amounted to a notice of suspension of payment, within the meaning of section 6 (*g*) of the Provincial Insolvency Act, the other partners could not be adjudicated insolvents thereon. A person could not be said to represent others when he disavows agency and hence the explanation to section 6 cannot apply to such a case.

49 Mad. 189, followed.

71 M.L.J. 730, distinguished.

Sir Alladi Krishnaswami Aiyar and *T. R. Srinivasan* for Petitioners.

C. D. Venkataraman for Respondents.

K.S.

Kuppuswami Ayyar, J.
16th April, 1943.

Abdul Latiff, Petitioner.
Cr.R.C. No. 101 of 1943.
(Cr.R.P. No. 86 of 1943).

Penal Code (XLV of 1860), section 266—Using false measures—Gist of offence—Facts to be proved by prosecution.

The prosecution has to prove that the person in possession of a false measure knew it to be false and was in possession intending that the same may be fraudulently used. It is not sufficient merely to prove that the capacity of the measures seized did not conform to the standard fixed by Government. If a dealer has a measure in his shop which has been tested by the Government and certified to be a proper measure there is no reason to presume that he could have known that it was not a correct measure or that at the time when the stamp was put on the measure it was not up to the prescribed standard. There is in law no duty cast on the shop-keeper to have the measures tested periodically and it cannot be presumed that the shop-keeper was using the measure fraudulently merely because he did not have his measures tested regularly and the measure is found to be short. There must be evidence that he was aware of the fact that the measures were smaller than the standard ones.

Lobo for *Messrs. Pais Lobo* and *Alvares* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

K.S.

Kuppuswami Ayyar, J.
19th April, 1943.

Crown Prosecutor, Petitioner.
Crl.R.C. No. 289 of 1943.
(Crl.R.P. No. 257 of 1943).

Criminal trial—Accused granted several adjournments—Absence of accused and representation by advocate—Conviction—Propriety.

Two accused were charged before the Bench of Honorary Presidency Magistrates with having committed an offence punishable under section 75 of the City Police Act. The second accused pleaded guilty and with regard to the first accused evidence was let in. After P.W. 1 was examined the case was adjourned on several days as it was reported that the second accused was ill. On 9—3—1943 the accused was absent but was represented by his pleader and the Court found the accused guilty and fined him Rs. 3.

Held: The Bench Magistrates must be deemed to have dispensed with the personal appearance of the accused on that day, and the conviction is proper. Even if it is an irregularity there is no failure of justice calling for interference in revision.

I.L.R. 50 Bom. 250 at 258, relied on.

The Crown Prosecutor (*P. Govinda Menon*) in person.

K.S.

Horwill, J.
21st April, 1943.

Anusuyamma *v.* Gade Subbareddi.
C.R.P. No. 933 of 1942.

Civil Procedure Code (V of 1908), Order 22, rule 1—Pauper petition—Petitioner dying before enquiry—Legal representative—If can come on record.

On the death of a pauper petitioner, his legal representative cannot come on record, the cause of action being personal. The cause of action does not survive to the legal representative, even if such representative is a pauper. Distinction between death of the pauper before registration of plaint and before enquiry considered.

51 Mad. 697; A.I.R. 1925 Mad. 819; 36 Bom. 279; 33 Cal. 1163, considered.

K. Ramamurthi for *K. Kotiah* for Petitioner.

K. Krishnamurthy for Respondent.

K.S.
