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PUBLISHED BY
M. R. NARAYANASWAMI IYER, B.A., B.L.,
Advocate, High Court, Mylapore, Madras.

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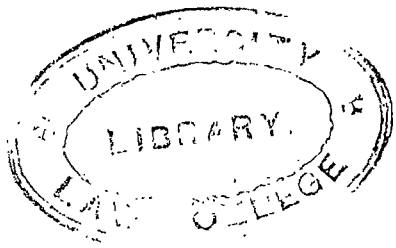

NOTES OF RECENT CASES.

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Mr. DORAISWAMI AIYAR

The legal world in Madras is the poorer for Mr. Doraiswami's retirement from it. We are sure we are voicing the opinion of the whole bar in saying so. He is loved by all the members of the profession, and has no enemies, a true *Ajatasatru*. The best of us have on occasions uttered hasty words and repented or incurred the undying enmity of some few. Mr. Doraiswami's unruffled temper reflected in his smiling face and native genial kindliness to all have saved him from all such errors and their inevitable consequences. It is needless to add that juniors who came into close contact with him became deeply attached to him.

There will always be two opinions on retirement from the world of affairs. Which is better, to retire from the world and cut off all contact with it except on extraordinary occasions, or to be in it and do all its work in a spirit of detachment? Perhaps there should be men in both paths. Having chosen his life's guide long ago, Doraiswami could have had no doubts or difficulties or vacillations in choosing his path. We all know how easy it is to speak of detachment and how difficult it is to attain it in the midst of life in the sordid surroundings of a distracting world. No one who knows this can or will withhold admiration from Doraiswami's renunciation which treats the ideal as the truly real and rejects the so-called realities of life as its illusions.

We wish him a long life of usefulness in his own sense of what it is to be really useful and of achievement according to his own ideals. Those who remain in the sublunary world can yet feel the retirement from their midst of one who set an example of how to keep aloof from all contention amidst work in perhaps the most contentious profession in the world. When all around were rushing about in pursuit of all sorts of real and unreal honours and distinctions and preferments, he walked his chosen path with slow unhurried dignity and without any of the all-too-common ambitions and avidities of life. His mode of exit from the profession is in keeping with the spirit in which he performed its duties while he remained in it.

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FEDERAL COURT AND JUSTICIABLE DISPUTES UNDER THE GOVERNMENT OF INDIA ACT, 1935.

BY

C. UNIKANDA MENON, *Advocate, Egmore.*

The Federal Court under the Government of India Act, 1935

The Government of India Act of 1935 marks the change in the Constitution of India from Unitary to Federal. "A Federal form of Government is found when communities, which possess for certain definite purposes a distinct political existence, join together to form a common whole without losing their separate organisation." The component parts of a federal system must, in the words of Professor Dicey, 'desire union but not desire unity'. *See* Egerton's Book on Federation and Unions within the British Empire, p. 8. In all Federal Constitutions, one of two things occur. Either the central sovereign government parts with a portion of its powers essentially dealing with all local or provincial subjects, to the provinces or states; or the provinces or states that are sovereign part with a portion of their powers in favour of the central government, essentially dealing with matters of common concern.

I. The need for a Federal Court in Federal Constitutions

After the establishment of a federal legislature whose laws are to bind directly the citizens, the need for the existence of a federal court would evidently be felt to interpret and apply those laws and to compel obedience to them. The alternative would have been to entrust the enforcement of the laws to the provincial or state courts. But they are not fitted to deal with matters of a quasi-international character. They supply no means for determining questions between different pro-

First of a series of lectures delivered under the auspices of the Madras Bar Council in 1937.
Lecture I.

vinces or states. They could not be trusted to do complete justice between their own citizens and those of another state. Being under the control of their own provincial or state governments, they might be forced to disregard any federal law which they disapprove. And they being authorities co-ordinate with and independent of one another with no court of appeal placed over them to correct their errors or harmonise their views, they would be likely to interpret the federal constitution and statutes in different senses and make the law uncertain by the variety of their decisions. These reasons point imperatively to the establishment of a new tribunal altogether detached from Provinces or States, as part of the machinery of the new Government. *See* Bryce's American Commonwealth, Vol. I, p. 229. As regards the need for a federal judiciary Poley says in his book on the Federal Systems of the United States and British Empire, p: 2:

"In all Federal Constitutions, there are special characteristics. Among them will be found elaborate distribution of powers for the most part capable of exercise directly on the citizens of the Federation by the Federal or State authorities independently of each other; a recognition of the part played by the states in creating the union acknowledged as a rule in the composition of one branch of the Federal Legislature; the extent of a judiciary to decide the extent of the Federal and State powers and the State powers *inter se*; and a supreme law embodied in a written constitution giving effect to these principles".

Burgess in his Political Science and Comparative Constitutional Law, Vol. II, p. 326, sums up the reasons for conferring the judicial power upon the courts of the central government as follows:—

"The preservation of the supremacy and uniformity of the Federal law; the defence of International responsibility; the vindication of the sovereign dignity; the prevention of self-help between the commonwealths; the attainment of impartial decisions—these are all the commanding reasons."

Any failure in the preservation of the equilibrium of the powers of the constituent units and their integrity would involve either in the disruption of the Federation or in the development of an Imperialism. The ancient federal constitutions of the world bear clear traces of this safeguard, namely, a Federal Judiciary, in however crude a form, to regulate and settle interstate disputes.

II. Judiciary in such Federations (Ancient, Mediaeval and Modern)

The Amphictyonic Council, the members of which retained the character of independent sovereign states possessed the right to decide all controversies between the members, to fine the aggressive party and to employ the whole force of the

confederacy against the disobedient. So too the Achaian League which flourished between B.C. 281-146. So also in the Lycian Federation. In the Germanic Federation, a confederation of sovereign states, an Imperial Chamber and an Aulic Council were the two judicial bodies having supreme jurisdiction in controversies concerning the Empire or happenings among its members. In the Swiss Confederation, whenever there was a dispute between the cantons provision is made that the parties at variance shall each choose four judges out of the neutral cantons, who, in case of disagreement choose an umpire. The tribunal under the oath of impartiality pronounces definite sentences which all the cantons are bound to enforce. In the United States of America, the judicial power is vested in the Supreme Court and such other inferior courts as Congress might establish and the decision of all federal disputes is vested in the Federal Court. Section 2 of Article III of the Constitution declares that:

> "the judicial power of the United States shall extend to all cases arising under this constitution; the laws of the United States and Treaties made or which shall be made under their authority to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states; and between a state or the citizens thereof and foreign states, citizens or subjects."

In consequence of an early decision of the supreme court that a state could be sued by a citizen of another state (*Chisholm* v. *Georgia* 2 Dall U.S. Reports 419) the eleventh amendment was passed which enacted that the judicial power of the United States should not be construed to extend to any suit in law or equity against one of the United States by citizens of another state, or by citizens or subjects of any foreign state. The Supreme Court is the final court of appeal both in civil and criminal matters. The Congress has established as inferior courts (1) Circuit court of appeals. (2) District court, the former of which heard appeals from the latter. The claims of private persons against Federal Government are dealt with by a Court of Claims.

In Canada in 1875, a Supreme Court was established by the Parliament of Canada as authorised by the Dominion Act. In addition to its appellate jurisdiction, the Supreme Court decides important questions of law or fact touching—

(*a*) The interpretation of the British North America Acts 1867 to 1886.

(*b*) The constitutionality or interpretation of any Dominion or Provincial legislation.

(*c*) The appellate jurisdiction as to educational matters by the British North America Act, 1867, or by other act or law vested in the Governor-General in Council; or

(*d*) The powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed.

(*e*) Any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council seems to submit any such questions.

The Governor-General in Canada is empowered to refer any questions coming within the above category to the court to hear and consider it. The court certifies to him its opinion on each question with liberty for a judge to write a dissenting judgment. Notice is given to the interested parties before they are heard. The opinion, though advisory is treated as final for purposes of an appeal to the Privy Council.

The Supreme Court also exercises a jurisdiction to determine disputes—

(*a*) Where the parties have raised the question of the validity of an Act of the Parliament of Canada when in the opinion of the judge of the court in which the proceeding is pending the question is material.

(*b*) Where the parties have raised the question of the validity of an act of the legislature of the Province, where in the opinion of the judge of the court in which the proceeding is pending such question is material.

In such cases the proceeding is removed to the Supreme Court for decision whatever be the value of the matter in dispute.

These particular provisions apply to civil cases and only exist where a province has passed an Act giving the jurisdiction to the Supreme Court to hear it, thus submitting itself to the jurisdiction. The Supreme Court will in all such cases decide the validity of a Provincial as well as a Dominion or Federal Statute.

In the Commonwealth of Australia, the High Court is a Supreme Court of Federal Jurisdiction and is also a general court of final appeal for Australia. In the United States, the

Supreme Court is the highest Federal Court but is not a court of final appeal in other matters; and although the Supreme Court of Canada exercise Federal Jurisdiction, it is in its nature a general court of final appeal for Canada. Under S. 75 of the Commonwealth Act, the High Court possesses original jurisdiction in all matters, (1) arising under any treaty, (2) affecting consuls or other representatives of other countries, (3) in which the commonwealth, or a person suing or being sued on behalf of the Commonwealth is a party, (4) between states or between residents of different states, or between a state and a resident of another state, (5) in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth. Under S. 76, the Parliament of the Commonwealth may make laws conferring original jurisdiction on the High Court in any matter—

(1) Under the constitution or involving its interpretation.

(2) Arising under any laws made by Parliament.

(3) Of Admiralty and Maritime jurisdiction.

(4) Relating to the same subject-matter claimed under the laws of different states.

The High Court has jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences—

(1) Of any justice or justices exercising the original jurisdiction of the High Court.

(2) Of any other Federal Court or court exercising federal jurisdiction or of the Supreme Court of any state, of any other court of any such state from which at the establishment of the Commonwealth an appeal lies to the King in Council.

(3) Of the inter-state commission, but as to questions of law only and the judgment of the High Court in all such cases shall be final only. The constitution of South Africa under the South Africa Act (1909) is in no sense federal. The field of legislation left open to the Provincial legislature amounts to little more than "Gas and Water Government." *See* Journal of Comparative Legislation, Vol. XV (1933), p. 209. And so no reference is made to its Federal Court and its jurisdiction.

It will be seen from the above that in the United States a complete system of the Federal Courts was established, ramifying all over the Union and exercising exclusive jurisdiction in all cases arising under Federation statutes, the state courts remaining independent in state matters with no appeal from their decisions. In Canada the same courts deal with federal and

provincial questions. The Australian High Court follows a course between these extremes.

III. Indian Federal Court—(a) Its purpose

In regard to the Federation under the Government of India Act of 1935 what was said by Munro regarding the American Supreme Court in his book on the "Constitution of the United States" might well be applied to the Indian Federal Court.

"The Supreme Court is often called the Guardian of the Constitution. It has the right to declare the unconstitutionality of any law, whether passed by Congress or by a State Legislature if the court feels the law to be in conflict with the national constitution. This power to declare laws unconstitutional is not given to the Supreme Court in express terms. The court merely assumed this power in early days and has continued to exercise it. It has been beneficial in its exercise. It has held both Congress and the State Legislatures to a strict observance of the national constitution."

The same view is expressed much more tersely in the Joint Select Committee Report that:

"The Federal Court is at once the interpreter and guardian of the constitution and a tribunal for the determination of disputes between the constituent units of the Federation."

Upon the grit, the independence and the impartiality of the Federal Court depends the success of the Federation.

The Native States that join the Federation and part with a portion of their powers under the Instruments of Accession are also sovereign bodies except to the extent of the powers surrendered to the Federal Government, keeping apart considerations of paramountcy which has nothing to do with the federation under the Act. Inter-disputes between the constituent units or between any unit and the federation might arise, either constitutional regarding the interpretation of the Government of India Act of 1935 or laws passed thereunder, or regarding other disputes such as disputes over boundaries, water-rights, fisheries, etc. These disputes will await for solution either in the original or appellate jurisdiction of the Federal Court as the case may be.

III. (b) Federal Judges

Such a Federal Court is constituted under the Government of India Act of 1935. It is to be a court of record, sitting at Delhi or in such other places as the Chief Justice with the approval of the Governor-General may appoint. It consists of a Chief Justice and such number of puisne judges to start with, as His Majesty thinks fit (now the total number is fixed at three), subject to the number of puisne judges not being increased to more than six except on an address being presented by the

Federal Legislature to the Governor-General for submission to His Majesty. The Supreme Court of America has 9 judges, that of Canada 6 and the High Court of Commonwealth of Australia 7. Only a Judge of a High Court in British India or a Federated State of 5 years' standing, a Barrister of England or Northern Ireland or an Advocate of Scotland of ten years' standing or a pleader, of a minimum standing of ten years practising in British India or in a Federated State—should be a Judge of the Federal Court provided in the case of Chief Justice, he should be of fifteen years' standing. In calculating the years of standing, his tenure of judicial office after he became such barrister, advocate or pleader should be included. The age limit of the judges is fixed at sixty-five. The judges sit during good behaviour and not for pleasure of His Majesty as before and are removable by warrant under sign-manual only on the ground of misbehaviour or of infirmity of mind or body, if the Judicial Committee of the Privy Council on reference being made by His Majesty, report that he should be removed on such ground. The report of the Joint Committee on Indian Constitutional Reform, 1933-34, Vol. I, Part I, para. 322, says about the Federal Court:

"The Judges are to hold office during good behaviour and not as is at present the case with Judges of the Indian High Courts at pleasure." *See also* Chairman's Draft Report in the Report of the Joint Committee on the Indian Constitutional Reform (1933-34), Vol. I, Part. I, para. 310.

The view expressed in Hamilton's Federalist, p. 395 about the tenure of judges is deserving of notice:

"The standard of 'good behaviour' for the continuance in office of the judicial magistracy is certainly one of the most valuable of modern improvements in the practice of Government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is no less an excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any Government to secure a steady, upright and impartial administration of the laws."

During the temporary absence of the Chief Justice his vacancy is to be filled up by one of the other judges of the Federal Court as the Governor-General may appoint in his discretion. How is the vacancy of a puisne Judge so caused to be filled up? The Act makes no provision for such an emergency. But the Act (S. 214, cl. 2) fixes the minimum of three judges for the decision of a case and the present number of judges is only three. What is to happen if, for the temporary vacancy of a Chief Justice, a puisne Judge is promoted and no fresh puisne Judge is created, seeing the absence of such a provision in the Act. It is submitted in such case the judiciary will cease

to function. But this could be avoided by a temporary Judge being appointed by His Majesty, as he could appoint a permanent one. The judges are entitled to such salaries and allowances as may be fixed from time to time by His Majesty. By an order in Council dated 18th December 1936, the salary of a Chief Justice is fixed at Rs. 7,000 and that of a puisne Judge at Rs. 5,500 per month. S. 201 proviso says that:

"Neither the salary of a judge nor his rights in respect of leave of absence or pension shall be varied to his disadvantage after his appointment."

Note the corresponding proviso in S. 221 regarding the salary of a Judge of the High Court. This section is intended to preserve the independence of the judiciary. It shall not be cut or it shall not be diminished. Is a cut or diminution valid with his consent? If the word "shall" is imperative, it suggests a negative answer. The words "after his appointment" are suggestive. Can it be varied just before his appointment? The Federal Legislature is incompetent to touch the salary of a Judge and nothing short of a Parliamentary Act can alter. The view of the Federalist by Hamilton at p. 402 as to the idea behind such proviso is worth quoting:

"Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."

This prohibition against diminution holds good if his salary is sought to be reduced even by an Income-tax Act. But the judicial opinion does not seem to be uniform and to this we shall advert later in the fourth discourse.

S. 318 of the Government of India Act lays down that the Federal Court should begin to function even before the Federation is established, as it is possible for disputes to arise between the constituent units, or with respect to the powers of the various legislatures to enact a particular law.

III. (c) (i) Jurisdiction of the Federal Court—Original.

The jurisdiction of the Federal Court is original, appellate, advisory and miscellaneous. The original jurisdiction is exercised in the settlement of disputes between the Federation on the one hand and the provinces or Federated States on the other, or between such states and provinces or between provinces *inter se* or such states *inter se*, provided that,—

(*a*) A dispute to which a State is a party should concern itself (1) with the interpretation of the Government of India Act of 1935 or of an Order in Council made under it, or with

the extent of the legislative or executive authority vested in the Federation by virtue of the Instrument of Accession of that State; or (2) a dispute arises under an agreement under S. 125 by which the administration of any Federal Law in a Federated State is entrusted to the ruler thereof, or otherwise concerns some matter with respect to which the Federal Legislature has power to make laws for that State; or (3) arises under an agreement entered into after the establishment of the Federation, with the approval of His Majesty's representative for the exercise of the functions of the Crown in its relations with the Indian States, between that State and the Federation or a Province, the agreement being one expressly providing that the said jurisdiction shall extend to such dispute. The original jurisdiction will not apply to disputes arising under an agreement expressly excluding such jurisdiction. The Federal Court will pronounce only declaratory judgments.

Inter-State and Inter-Provincial disputes would come up before the Federal Court in its original jurisdiction. Boundary disputes between the various constituent units, water disputes, disputes relating to the ownerships of rivers, ferries and fishery rights, questions relating to *intra vires* or *ultra vires* character of Acts passed by legislatures under the Government of India Act, or, other questions requiring for solution the aid of the Local Law, the Federal Law and Public International Law may arise. Financial disputes, questions of bankruptcy and insolvency, of citizenship, of trade and commerce-interstate, federal and foreign—of impairment of contracts, of corporations, of labour, of insurance, of maritime law and of aviation, of taxation and the fulfilment of treaty obligations—in fact all disputes arising out of enactments pertaining to subjects mentioned in the three lists of Schedule VII of the Act, will have to be decided in its original jurisdiction. In the case of a Federated State the original jurisdiction of the Federal Court is limited by the extent of the powers surrendered under the Instrument of Accession. But it is not competent for the Federal Legislature to give to the Federal Court original jurisdiction in subjects other than those specially enumerated. *See* Willoughby's Constitutional Law of the United States, Vol. II, 2nd edition (1924), s. 794, p. 1262.

III. (c) (ii) Appellate Jurisdiction of the Federal Court—Civil and Criminal

An appeal shall lie from every judgment or decree or final order of a High Court, if the High Court certifies that it involves a substantial question of law, on the interpretation of

the Government of India Act, 1935 or any order in Council made thereunder. And in every case, the High Court is enjoined to consider of its own motion whether there is or not such question and then to grant or refuse certificate. On the grant of the certificate, any party may appeal to the Federal Court on the ground that such question of law was wrongly decided, and on any ground on which that party could have appealed without such leave to the Privy Council, and with the leave of the Federal Court on any other grounds.

The Federal Legislature may provide for appeal from the High Court to the Federal Court without such certificate (*a*) in all civil cases in which the amount or value of the subject-matter of the suit or appeal is not less than Rs. 50,000, or such other sum not less than Rs. 15,000 as may be specified by the Act; or (*b*) in civil cases where the Federal Court gives special leave to appeal.

If such a law is made, the Federal Legislature may abolish direct appeals from High Courts in British India to the Privy Council in civil cases, wholly or in part either with or without special leave. The introduction of the above legislation and its amendment will require the previous sanction of the Governor-General.

Appeals to Federal Courts from State High Courts

An appeal shall lie to the Federal Court from a High Court of a Federated State—

(*a*) on an erroneous decision of a question of law arising from an interpretation of the Government of India Act of 1935 or of any orders in Council made thereunder;

(*b*) on a question arising from the extent of the legislative or executive authority vested in the Federation under the Instrument of Accession of that State;

(*c*) on a question arising under Part VI of this Act in relation to the administration in that State of a law of the Federal Legislature. The appeal shall be by way of special case to be stated by the High Court, and the Federal Court may require a case to be stated in order that further facts may be stated therein. (*See* S. 207.) Whenever the Federal Court wants a special case to be stated or re-stated or orders stay of execution in a case from a High Court in a Federated State or requires the aid of judicial authorities in that State, the Federal Courts shall cause letters of request to be sent in that behalf to

the ruler of that State. There cannot be any more typical example of the formal observance of nominal sovereignty of the Federated States. Though sovereignty in the Austinian sense has no place in Native States that have to recognise the paramountcy of Great Britain yet the Federated States exercises a semi-sovereignty and hence the dignified names of "Letters of Request" and "Appeals by way of special cases" in place of "orders" and "appeals". The judgment of the Federal Court shall be the opinion of the majority, the dissenting judge being at liberty to write his dissenting judgment as in the Supreme Court of United States. The Federal Court when allowing the appeal shall send it down to the lower court to give effect to its decision. All authorities, civil and criminal throughout the Federation, shall help in enforcement of the orders of the Federal Court. The Federal Court in India is not the ultimate judicial tribunal to decide all federal questions.

Has the Federal Court criminal appellate jurisdiction?

S. 205, cl. (1) says that an appeal shall lie to the Federal Court from *any* judgment, decree or final order of a High Court in British India. The word *any* and not *a* seems to be advisedly used to indicate that the Federal Court has criminal appellate jurisdiction. S. 41 of the chartered High Courts of India is specially intended to confer appellate jurisdiction on the chartered High Court and does not help. Nor does S. 73 of the Australia Constitution Act, for there the word "sentences" is specifically used. It may be noted that the Supreme Court Act of Canada of 1875 confers upon the Supreme Court appellate criminal jurisdiction. Having regard to the fact that there is no criminal court of appeal to hear appeals from sentences in criminal cases on the original side of the various High Courts in India, it might be suggested that the Legislature intended to confer criminal appellate jurisdiction on the Federal Court. But there is nothing in the Select Committee Report to warrant this. Order XVI of the Federal Court rules proceeds on the basis that it has such appellate criminal jurisdiction. That rule says that:

> "where any High Court in British India makes any final order in the exercise of its criminal jurisdiction whether original, appellate or revisional, and gives such certificate as is mentioned in S. 205 of the Act, any party in the case may appeal to the Federal Court within 30 days from the date of the order."

Judicial Power to suspend Sentences

Supposing the Federal Court has criminal appellate jurisdiction, the question whether it may in a criminal appeal suspend

sentence during good behaviour, so as to permanently exempt from punishment is a difficult one to answer. The right has been recently pronounced upon in the negative by the Supreme Court of the United States, as far as Federal Courts are concerned. (Ex parte *United State*, (1916) 242 U. S. 27.) That tribunal declared that there is no such right inherent in a court of law, but that the right to create crimes and establish punishments is under the Federal Constitution a legislative right. The English courts under the Common Law never exercised such a right; the farthest that they went was to suspend sentence temporarily if justice deemed to demand further legal proceeding or an appeal to executive clemency. *See also Burdick's* The Law of the American Constitution, p. 142.

III. (c) (iii) Advisory Jurisdiction of the Federal Court

The Federal Court exercises an advisory jurisdiction under S. 213, whenever the Governor-General refers to it a question of law of public importance which has arisen or is likely to arise. This advisory jurisdiction of the Federal Court is similar to the one conferred upon the Privy Council by S. 4 of the Judicial Committee Act of 1833 which provides that His Majesty may refer to the Committee for hearing or consideration any matter whatsoever as His Majesty thinks fit and the Committee shall thereupon hear and consider the same and shall advise his Majesty thereon. This method was adopted in Re *Piracy jure gentium*, (1936) A.C. 586. From very early times the Crown and the House of Lords have called upon the English judges for advisory or consultative 'opinion'. (*See* Thayer Legal Essays, p. 46). In the Dominion of Canada the Governor-General has the right to refer such questions to the Supreme Court to find out whether an enactment is *ultra vires* or *intra vires* of the powers of the enacting legislature. Upon such reference all the parties in interest are heard, and from the decisions arrived at, an appeal lies to the Privy Council. This is practically a declaratory judgment. In Australia, the judiciary is not under a duty to give advisory opinion. In the United States of America in 1793, President Washington inquired of the Supreme Court whether their advice would be available to the executive on matters with regard to the interpretation of treaties and laws. The judges declined their advice in view of the separation of the departments of government into three, *i.e.*, the Legislature, the Judiciary and the Executive, and in view of their being judges of a court of last resort. According to article 13 of the German Constitution of 1919,

"if there is a doubt or difference of opinion the State authorities may appeal for decision to the Supreme Federal Court in accordance with the more detailed provisions to be prescribed by a Federal Law."

The Indian Federal Court might, in case of such a reference, hear the parties interested. As in the Dominion of Canada notices might be given to the Advocate-General of the Province interested. The whole court will have to sit and the opinion of the majority will be treated as the opinion of the court. The dissenting judge may write out his opinion and may send the same along with the opinion of the majority. Amongst the occasions that might arise for calling for such opinions may be included the one when the Federal or the Provincial Legislature is enacting a law which is likely to be *ultra vires* of its powers. The Governor-General might refer the question to the Federal Court before the act proposed, formed part of the Statute Book. But how far such an opinion is binding on the Federal Court when a case is brought before it in the ordinary way is a difficult question to be answered. Sir Shafa'at Ahmad Khan in his book on "The Indian Federation" (1937), p. 243, thinks that it does not preclude the Federal Court from reversing its opinion. It may be noted that the word used in S. 213 is "opinion" and not "judgment." Though there is nothing illegal in reversing its opinion, it is not likely.

Certain mischiefs are likely to arise from the exercise of this advisory jurisdiction. Questions referred may be of a kind which it is impossible to answer satisfactorily as the whole records and evidence in the case are not before them. Secondly the right of future litigants may be prejudiced by the abstract proposition laid down by the Court without reference to facts. Thirdly, it might afford a convenient opportunity for the Governor-General to shift his responsibility. Fourthly, it may prevent the Federal Court from keeping aloof from all political or administrative controversies. A case came for consideration before the Privy Council in *Attorney-General for British Columbia* v. *Attorney-General for Canada*, (1914) A.C. 153, on appeal by the Government of British Columbia against answers given by the Supreme Court of Canada on a question of the fishery rights of the Province. The question did not arise in litigation. The Privy Council observed:

"The practice is now well established and its validity was affirmed by this Board in the recent case of *Attorney-General of Ontario* v. *Attorney-General of the Dominion*, (1912) A.C. 571. It is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure and should have confined itself to adjudication on the legal rights of litigants

in actual controversies. But this refusal is based on the position of that Court in the Constitution of the United States, a position which is different from that of any Canadian Court, or of the Judicial Committee under the Statute of William IV. The business of the Supreme Court of Canada is to do what is laid down as its duty by the Dominion Parliament, and the duty of the Judicial Committee, although not bound by any Canadian Statute, is to give to it as a Court of review such assistance as is within its power. Nevertheless, under this procedure questions may be put of a kind which it is impossible to answer satisfactorily. Not only may the question of future litigants be prejudiced by the Court laying down principles in an abstract form without any reference or relation to actual facts, but it may turn out to be practically impossible to define a principle adequately and safely without previous ascertainment of the exact facts to which it is to be applied."

Advisory Jurisdiction of the High Court

A question might arise whether in view of the fact that the Governor-General is given such a right of reference to the Federal Court, can Provinces pass laws authorising the Governor also to refer important questions of law to the Provincial High Court? Evidently such a power is not conferred by the Government of India Act of 1935. Such a case arose in the Dominion of Canada. In 1875, 1891 and 1906, acts were passed by the Dominion Parliament authorising the executive authority of the Dominions to obtain by direct request answers from the Supreme Court of Canada on questions both of law and of fact; and nearly all Provinces have passed acts in similar terms authorising their own Courts to answer questions put by the Provincial Government. It was held that it was *intra vires* of the respective legislatures to impose this duty on the Courts. Though powers to that effect were not granted in express terms by the British North America Act of 1867, they were not repugnant thereto but incidental to the complete Self-Government of Canada which was contemplated by that Act. [See *The Attorney-General for Ontario* v. *Attorney-General for Canada*, (1912) A.C. 571.] The same kind of legislation might be made by the Legislature of the Provinces in India.

III. (c) (iv) Miscellaneous Powers

The Federal Court and the Judges have other duties of a miscellaneous character to discharge. When, under Part VI of the Act, the Governor-General under S. 124 (1) entrusts a Province or a State to carry on the Federal administration of a Province or State, if no sum has been agreed upon to be paid, then the Chief Justice may appoint one arbitrator to determine the costs of the administration incurred. (*Vide*, S. 124, cl. 4.) Again if any questions were to arise as to the existence and extent of the executive authority exercisable by a State under

the Constitution, the question may be referred to the Federal Court at the instance of the Federation or the State. Again in cases of water disputes regarding any natural source of supply between the various units forming the Federation, the Governor-General may appoint a commission for their settlement. The Federal Court if requested by the Commission shall issue such orders and letters of request in the exercise of its jurisdiction, to help the Commission in carrying on its investigation. Again, if after ten years of the formation of the Federation, a corporation tax is levied on a Federated State and if the ruler of that State is dissatisfied with the determination as to the amount payable by it in any year, he may appeal to the Federal Court, which, if satisfied with the excessive character of the amount shall reduce it; and no appeal shall lie from that decision. Again in a Railway Tribunal of three persons to be constituted to decide disputes relating to the disputes under the Federation, the President of the Tribunal is to be chosen from the Judges of the Federal Court, by the Governor-General in his discretion after consultation with the Chief Justice of India. And an appeal shall lie to the Federal Court on a question of law against any decision of the Railway Tribunal.

III. (d) Practice and Procedure.

Rules of practice and procedure may be framed and are being framed by the Chief Justice for settling periods of limitation for preferring appeals, for settling the costs of proceedings and fees chargeable on them and for summary dismissal of frivolous and vexatious appeals. The minimum number of Judges for the decision of a case shall be three, provided that when the Federal Legislature chooses to enlarge the appellate jurisdiction of the Federal Court the rules shall provide for the constitution of a special division of the Court for dealing with cases within its jurisdiction. The Chief Justice shall decide upon the sittings of Judges. The judgment shall be delivered in open Court with the concurrence of the majority, the dissenting Judge delivering separate judgment if he likes. The Government of India Act, 1935, has not conferred on the Federal Court any express power of transfer to itself of cases involving the question of the validity of any Federal or Provincial Law. But S. 225 confers on the High Court on the motion of the Advocate-General for the Federation the right to transfer from the lower courts cases involving questions relating to a Federal Act. Similarly the Advocate-General for the Federation or a Province has got the power to apply for transfer from the lower court to

the High Court if they involve questions relating to a Provincial Law. This section is evidently intended to minimise the inconvenience caused by the possibility of such acts being challenged as *ultra vires*. The Federal Court possesses by necessary implication, the powers necessary to maintain its dignity and order, including the power to punish for contempt. The Federal Legislature may under S. 215 confer such ancilliary powers on the Federal Court to enable it to exercise more effectively the jurisdiction conferred upon it. It has to be remembered that the Federal Court is a court of limited jurisdiction and in cases brought before it, the records must show the grounds upon which the Federal jurisdiction is claimed. By the Federal Court Act 25 of 1937, the Federal Court is empowered to make rules for regulating the service of process issued by the court, including rules requiring a High Court from which an appeal has been preferred to the Federal Court to serve any process issued by the Federal Court in connection with that appeal.

IV. Appeals to Privy Council

S. 208 provides for an appeal to the Privy Council from the decision of the Federal Court, (*a*) without any leave of the Federal Court from a judgment given in the exercise of its original jurisdiction (1) on a dispute involving the interpretation of this Act or any Order in Council, (2) on a dispute relating to the extent of executive or legislative authority vested in the Federation by virtue of the Instrument of Accession of any State, or, (3) on a dispute arising under an agreement under Part VI of this Act relating to the administration in any State of a law of the Federal Legislation, (*b*) by leave of the Federal Court or of His Majesty in Council in any other case.

In *Prince* v. *Gagnon*, (1882) 8 A.C. 103, the Privy Council laid down the principles under which it acted in granting special leave, as follows:

"Their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character". See also *Clergue* v. *Murray*, (1903) A.C. 459.

When a suitor, having his choice whether to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy it is not the practice to give him special leave, except in a very strong case. (*Clergue* v. *Murray*: Ex parte *Clergue*, (1903)

A.C. 521. See also *Canadian Pacific Ry.* v. *Blain,* (1904) A.C. 453 and *Victorian Ry. Commissioners* v. *Brown,* (1906) A.C. 381).

V. Punishment for contempts

"The power to punish for contempts is inherent in all courts: its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, writs of the court, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." (*See* Ex parte *Robinson,* (1873) 19 Wallace 505 at 510. *See* The Law of the American Constitution by Burdick, p. 140.) It is submitted that the Indian Federal court possesses similar powers of punishment for contempt.

VI. Appointment of Staff

The Governor-General may direct that all appointments to the Federal Court may be made only after consultation with the Federal Public Service Commission and all rules framed by the Chief Justice relating to salaries, allowances, leave or pensions require the approval of the Governor-General. The expenses of the Federal Court shall be a charge on the Federation.

VII. Interpretation

The Government of India Act of 1935 being a Parliamentary Act, the English Interpretation Act of 1889 was made applicable by an Order in Council, dated 18th December 1937. The General Clauses Act of 1897 which is the corresponding Indian Interpretation Statute was modified by an Order in Council, dated 17th March 1937. It may be remarked that the English Interpretation Act keeps in view only the wording of the section for constructing the Act, unlike the continental method of interpretation which goes to the root to understand the meaning, *i.e.,* to the debates, reports, etc.

VIII. The Federal Court and the Common Law

There is no Federal Common Law, in other words, the law which the Federal Courts apply consists wholly and exclusively of the Federal Constitution, namely, its statutes, treaties and the laws common and statutory of the several Provinces or States. The Federal Court has no Common Law jurisdiction and there is no Federal Common Law, as distinguished from Federal Statute Law. Each Province or State may have its

local usages, customs and common law, but there is no principle which pervades the federation and has the authority of law that is not embodied in the constitution or laws of the federation. The common law could be made a part of the Federal system only by legislative action.

IX. Laws administered by the Federal Court

The law declared by the Federal Court and the Privy Council shall be binding on all courts. But what is the law that would guide the Federal Court? They are the State Law, the Federal Law and the principles of International Law.

(*a*) *State Law.*—The Federal Court will follow generally the construction put on provincial or statal statutes by local courts. The following rules are laid down in Willoughby's Constitution of the United States, Vol. II (2nd Edition), p. 1306, for guidance of Federal Courts (1) when administrating State Laws (and provincial laws), and determining rights accruing under those laws, the jurisdiction of the Federal Court is an independent one, not subordinate to but co-ordinate and concurrent with the jurisdiction of the Province or State Courts.

(2) Where before the rights are accrued, certain rules relating to real estate have been so established by decisions of Provinces or States as to become rules of property and action in the Provinces or States, those rules will be accepted by the Federal Court as authoritative declarations of the law of the Province or State.

To put in other words, (1) The Federal Court has to follow the interpretation given to it by the local courts of the Province or the State that enacted it.

(2) Where a State Court has changed its former construction of a law, the Federal Court upon a subsequent case coming before it should do likewise and thus keep ever in accord with latest decision of the State Courts.

(3) But when the case before it depends upon the doctrines of commercial law and general jurisprudence and where the law of the Provinces or States has not been settled, on those points, it is not only right, but the duty of the Federal Court to exercise its own judgment.

(*b*) *Federal Law.*—The Federal Court may apply the law passed by the Federal Legislature on subjects covered by the Federal and concurrent lists.

(*c*) *International Law.*—The Federal Court may apply also established doctrines of international law. In *Hilton* v. *Guyot*, 159 U.S. 113, the Supreme Court said:

> "International Law in its widest and most comprehensive sense—including not only questions of right between nations governed by what has been appropriately called the law of nations but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public; done within the dominion of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man duly submitted to their determination."

These principles of international law need not be proved by means of experts as in the case of foreign municipal law, but may be taken judicial notice of by the federal court and if they are not already known to the court, they may be ascertained by the court of its own study of the proper sources of information.

X. Execution

The judgments of the Federal Court are only declaratory in form. The duty of executing the decree is left to the lower courts. The act binds the civil and judicial authorities in the federation to aid in the enforcement of its declaratory judgments.

The Indian Federation like the German and the Swiss Federations, stand in striking contrast to the Federations of Canada and the Commonwealth of Australia. In the latter in all matters which fall within the sphere of federal courts the central government executes by means of its officials. In the former, the federal courts must depend for their execution upon Provincial, State and Canton officials.

XI. Habeas Corpus: Power of Federal Courts to Issue

In the United States of America, the Congress has provided in express terms that the Supreme Court, its several justices, the circuit courts of appeal and their several judges and the district courts have power to issue writs of *habeas corpus*.

Has the Federal Court such power under the Government of India Act, 1935? No such power is expressly given by the Act, though S. 215 authorises the Federal Legislature to grant some subsidiary powers to give full effect to the jurisdiction conferred by the Act. The High Court in England derives such power under the common law. The date of the origin of the writ is unknown, but it is supposed to have been in use from the date of Magna Carta. *See Short and Mellor* Crown Practice (2nd Edn., 1908, p. 306). The right to a *Habeas Corpus* is

by the common law, and is not created by statute. *See Besset, In re,* (1844) 6 Q.B. 481.

"The powers of the King's Bench to issue writs of *habeas corpus* and *certiorari* were not given by any statute, for the first time, but belonged to them as representing the high prerogative powers of the King. The *habeas corpus* Act 31 of Charles II, ch. 2, did not create the power in the Court of the King's Bench for the first time and as Norman, J., remarked during the course of the argument in *Ameer Khan's case,* (1870) 6 Beng. L. R. 392, the Statute assumes the power of the judges to issue writs of *habeas corpus* at common law." *Per* Sadasiva Ayyar, J., in In re *Nataraja Iyer*, (1912) 23 M.L.J. 393: 36 Mad. 72.

Where the Federal Court is constituted by Statute, and powers of limited jurisdiction are conferred upon it, no question of any such rights under the common law arises. So it is submitted that the Federal Court possesses no right to issue the writ of *habeas corpus* under common law or under S. 215 which is only intended to clothe the Federal Legislature with authority to pass laws conferring ancillary powers on the Federal Court. That the Federal Court should be vested with powers of issuing writs such as *habeas corpus,* etc., is imperative. The glaring instances in the United States of America which rendered the vesting of the Supreme Court with the rights to issue *habeas corpus* writ are likely to arise in India. What will happen to a foreigner committed to jail in a Province or State for an alleged offence committed by him under the authority of his foreign sovereign, where the validity of his offence depend upon the law of nations; or to a federal officer committed to jail in a Province or a State while acting under Federal authority.

The development of the law of *Habeas Corpus* in the Supreme Court of the United States given in In re. *Neagle* (135 U.S. 1) is worthy of quotation here, as the law would have to be developed on similar lines in India. "The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon the Congress by the attempts of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the Federal Government or foreign Governments, which the States denied. The original act of the Congress on the subject of the writ of *habeas corpus,* by its 14th section, authorised the judges and courts of the United States, in the case of prisoners in jail or in custody under or by colour of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make enquiry into the cause of commitment, 1

Stat. 81, c. 20, S. 14. This did not present the question, or, at least, it gave rise to no questions which came before the courts, as to releasing by this writ parties held in custody under the laws of the State. But when, during the controversy growing out of the unification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the same authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the Act of Congress of March 2, 1833, 4 Stat. 634, c. 57, S. 7, among other remedies for such condition of affairs, provided by the 7th section, that the Federal Judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or before any authority or law, for any act done or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

"The next extension of the circumstances on which a writ of *habeas corpus* might issue by the Federal judges arose out of the celebrated *McLeod case,* in which McLeod, charged with murder in a State court of New York, pleaded that he was a British subject, and that what he had done was under and by the authority of his Government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The Federal Government acknowledged the force of this reasoning and undertook to obtain from the Government of the State of New York the release of the prisoner but failed. He was, however, tried, and acquitted and afterwards released by the State of New York. This led to an extension of the powers of the Federal judges under the writ of *habeas corpus,* by the Act of Aug. 29, 1842, 5 Stat. 539, c. 257, entitled:

"An Act to provide further remedial justice in the courts of the United States. It conferred upon them the power to issue a writ of *habeas corpus* in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the Law of Nations, and showing this, the writ of *habeas corpus* is awarded to try that issue.

"The next extension of the powers of the Court under the writ of *habeas corpus* was the act of February 5, 1867, 14 Stat. 385, c. 28, and this contains the broad ground of the present revised statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the constitution or a law or treaty of the United States and declares that the said Court or Judge shall proceed in a summary

way to determine the facts of the case by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the constitution or laws of the United States, he or she shall forthwith be discharged at liberty."

XII. Two questions of importance

While considering the powers of the Federal Court two questions of greatest importance to political science and comparative constitutional law have to be noted. They are (1) whether the constitution has conferred upon the Judiciary a power to stand between the constitution and legislature and to impose its interpretation of the constitution upon the legislature; and (2) whether the constitution has conferred upon the Federal Court the power of independent interpretation in all the branches of their jurisdiction.

The Federal Court has power or can assume the power to stand between the constitution and the legislature and pronounce an act of the legislature null and void, whenever it comes into conflict with such private rights as, according to the interpretation to be placed upon the constitution by the Judiciary, are guaranteed in that instrument. Secondly such pronouncements of nullity could be made only when concrete cases come before it for decision.

XIII. The duty of the Federal Court onerous

The duty of the Federal Court is found to be very onerous in Federal Constitutions where Legislatures have divided their powers into Federal and Provincial. In infant Federations where the sense of civic life is not fully developed, the temptation for the party in power, to consolidate its strength, is greater. On account of this temptation, the legislatures of even such full fledged constitutions are viewed with great distrust. Much more so would it be the case of infant federations where under the guise of Cabinet Government, both the executive and legislative functions are centred in one and the same hands. In the wielding of such powers concrete instances of glaring *ultra vires* enactments are bound to arise and it will then be time for the Federal Court to exercise its chastening influence and pronounce on their validity or otherwise and keep the Provincial Legislature within bounds.

SUMMARY OF ENGLISH CASES.

GEORGE LEGGE AND SON, LIMITED *v.* WENLOCK CORPORATION, (1938) A.C. 204.

Public Health Act, 1875—*Rivers Pollution Prevention Act*, 1876—*Natural stream—Later sewage water discharged into it—If status changed to a sewer.*

The plaintiffs are the owners of certain lands situated in the borough of Wenlock and they carried on brick and tile works at Blest Hill, Madeley. There was a watercourse running through their property. The watercourse began as a natural stream and flowed through Madeley, passing by a culvert through part of the plaintiffs' property. The culvert had been made by plaintiffs' predecessors-in-title and then this was a natural stream not vested in or repairable by the local authority. For several years past about 20 houses in Madeley town discharged sewage into the watercourse and later there were 44 more houses discharging sewage likewise. The defendant is the corporation of Wenlock liable to repair all sewers vested in them and to prevent sewers becoming a nuisance. The plaintiffs sued the defendants for a declaration that the watercourse was a sewer and that the defendants were liable to repair it.

Held, that it is not in law possible to say that a flowing watercourse could change its status as a natural stream and become a sewer within the meaning of the Public Health Act, 1875, by the discharge into it of sewage water after the coming into operation of the Rivers Pollution Prevention Act, 1876. Such discharge is illegal as offending the Rivers Pollution Act and cannot have the effect of changing the status of the channel.

SOLLOWAY *v.* MCLAUGHLIN, (1938) A.C. 247.

Broker—Stocks and shares—Shares bought for the customer and shares deposited by customer sold out by brokers—Subsequent purchase of the same by brokers at profit—Nature of transactions—Fraud—Nature of the brokers' transactions kept secret from customer—Rights of customer—Conversion—Damages.

O. Company carried on business as stock brokers. In October 1929, the plaintiff instructed the company to buy for him 7,000 shares in a particular company S. on margin at market price, then 7$ a share. At the same time he deposited 3,500 shares of the S. Co. as margin. He duly received a contract note purporting to show that the transaction had been carried out in accordance with the rules of the appropriate stock exchange. The shares speedily declined in value and requests were made from time to time by the O. company for further margin or cash. The plaintiff duly complied with these requests and as a result between October and December he deposited with O. company a further 10,500 shares of

S. Co. and paid $8,000 cash. He received monthly statements showing the shares as being carried for him. In January the plaintiff decided to close the account. He paid the balance that was shown against him and got 21,000 shares (7,000 originally bought, 3,500 originally deposited and 10,500 subsequently deposited). It was found that O. company was doing this business as a scheme of fraud. The company purporting to buy and in fact making valid contracts of purchase for their clients, contemporaneously sold shares of the same company and used their clients' shares to complete these sales. When the client closed his account, the brokers O. company went into the market and bought the required shares at the then market price which was very much lower than the rate at the date of the original order by the client.

Held, that the transactions as far as the company were concerned were part of a fraudulent system of business, and were themselves fraudulent in their inception, continuance and completion. A broker is not under an obligation to retain for his client the specific shares which may be delivered to him under the contract made for his client. But he has to get into his possession and retain an equivalent number of shares. The company were employed as agents but as the agents had engaged in a scheme of fraud to defraud their principal they forfeited the right to an indemnity in respect of transactions which form part of the fraud. The principal on discovering the fraud is entitled to recover back the money paid on the footing of an honest transaction, giving credit for any benefit which he has received. As to the deposited shares, in the circumstances of the case the company never had any right to deal with them. If the transaction had been originally honest, the company would only have had a special property which, on the facts of the case, even had the transaction been honest throughout, would not have given them the right to dispose of the shares, for there never had been default. On the actual facts the disposal of the deposited shares amounted to nothing short of conversion and the client on each occasion on which the shares were sold had vested in him a right to damages for conversion which would be measured by the value of the shares at the date of the conversion.

BYNOE *v.* GENERAL FEDERATION OF TRADE UNIONS APPROVED SOCIETY, (1938) 1 Ch. 164.

Insurance (National Health)—Dentist treating a patient—Claim from patient's society approved under the National Health Insurance Act—Dentist not one registered under the Dentists' Acts of 1878 *to* 1923*—Claim against society not maintainable.*

Dr. B. was a duly qualified and registered medical practitioner under the Medical Acts who has practised for many, many years. For the last 39 years of his life, he had been confining himself to the practice of dentistry and under the law now in England one is entitled to practice dentistry though he is not a dentist regis-

tered in the Dentists' register kept under the Dentists' Acts of 1878 onwards. Under the National Health Insurance Acts of 1924 to 1928, certain benefits are secured for insured persons but those benefits are to be administered through approved societies and a medical man who treats a patient who is a member of those approved societies is entitled to obtain his remuneration not from the patient but from the society to which he belongs. Dr. B. supplied dental treatment to one *E* and applied to the defendant society of which *E* was a member for the regulation charges for such treatment. But the society declined to pay the charges on the ground that Dr. B was not on the Dentists' register.

Held, that a 'dentist' under the Dentists' Acts of 1878 to 1923 means a person who is duly registered in the Dentists' register kept under the Dentists' Acts of 1878 to 1923 or any Act amending those Acts and does not take in a person who is entitled to use the name dentist and to practise dentistry. To claim the charges from the society and not from the patient treated, the dentist must be such a dentist under the Dentists' Acts and the plaintiff Dr. B. not being one registered under those Acts would be entitled to recover from the patient but not from the society.

SUTHERLAND PUBLISHING COMPANY, LIMITED *v.* CAXTON PUBLISHING COMPANY, LIMITED, (1938) 1 Ch. 174.

Copyright—Infringement—Conversion—If cumulative or alternative damages—Limitation of time for commencement of action for conversion—Limitation Act, 1623—*Copyright Act,* 1911 *S.* 10 —*Act of conversion—Whether order to bind or sale.*

The plaintiffs, publishers of a book, sued the defendants for damages for infringement of copyright and for conversion, in that the defendants incorporated into his book part of the plaintiffs' book. The question arose as to the period of limitation, nature of the damages, etc. It was held that the damages were cumulative and not alternative. On the question of limitation,

Held, by the Court of Appeal (MacKinnon, J, dissenting) that in respect of the claim in conversion the period is six years running from the date of conversion under the Limitation Act, 1623 and not three years under S. 10 of the Copyright Act, 1911, as this is not a claim for infringement but an additional claim based on conversion.

Held, by the Court of Appeal that the act of conversion as at the date of which the value of infringing copies ought to be ascertained is not the order to the binders to bind the sheets which contained the infringing matter but the delivery by the defendant of the bound copies to the purchasers. The delivery is the first clear evidence of an intention on the part of the defendant to deal with the infringing copies in a way adverse to the plaintiff.

In re BRIDGEN: CHAYTOR *v.* EDWIN, (1938) 1 Ch. 205.

Will—Construction—Will of 1930—Bequest of "all my possessions to be.....divided equally amongst all my relations"—Testatrix a spinster—Ascertainment of beneficiaries—If whole estate disposed of—Administration of Estates Act, 1925.

A testatrix *B*, a spinster, died in 1930 having executed a will a few days before. The will provided that she wished "Ethel and Hilda Harding to take possession of all my possessions to be held in trust after my death and divided equally amongst all my relations". The testatrix had no nearer relations than her sister's children, her sisters also having predeceased her. There were also remoter issue. The question was (*i*) if the estate was divisible in equal shares *per capita* amongst those who would have been entitled thereto under Part IV of the Administration of Estates Act, 1925, if the testatrix had died intestate, or (*ii*) if it was divisible as on an intestacy on the footing that the will contained no effective disposition.

Held, that it was not a case of intestacy, but a general universal gift of all that the testatrix could bequeath or devise by will.

Held, further, that before the 1925 Act the expression "all my relations" would not take in any more extensive class than would the words "my relations" and they would have been persons, other than a husband or wife, who would have been entitled to the personal estate of the deceased by virtue of the Statute of Distributions, had there been an intestacy. If the court were to read a gift to "relations" as covering everybody between whom and the testatrix there was a nexus of blood, the result would be to embark upon an inquiry which would be infinite. The result of the direction in the will that the relations should take equally is that the persons entitled under the statute having been ascertained, they would not have taken in the shares indicated by the statute, but would have taken equally.

The 1925 Act has not made any change in this respect. Only the persons to take will be the persons under the Administration of Estates Act, 1925 and not under the Statute of Distributions. It does not take in all the relations recognised by the 1925 Act as potential beneficiaries.

TRIPLEX SAFETY GLASS COMPANY *v.* SCORAH, (1938) 1 Ch. 211.

Employer and employee—Contract of employment—Express terms in contract regarding inventions, etc., by employee—Contract unenforceable as being in restraint of trade—Invention by employee in the course of employment—Cessation of employment—If employee can use the invention for his own benefit after leaving the employment—Implied term of such contracts—Employee a trustee for employers.

Under a written agreement the plaintiff company agreed to employ the defendant as an assistant chemist for three years. In 1932, in the course of his employment he discovered a method of producing acrylic acid. This discovery he made in the course of his employment, during the company's hours and using the company's materials. The company took no steps to patent the discovery or do anything in the matter while the defendant was in their employ. In 1934 the defendant left the employment and set up on his own account as a manufacturer of laboratory glass and as he discovered that acrylic acid could be used for that manufacture also he applied for a patent to protect the discovery he made in 1932. The plaintiff company thereupon sued for a declaration that the patent was held by the defendant as trustee for them, etc. It was contended for the defendant that as the contract of employment contained express provisions relating to the duties of the defendant as regards discoveries and inventions by him, the implied term implied by law was excluded and as the express terms were unenforceable as far too wide, the suit must fail.

Held, that *prima facie,* every contract made between an employer and an employee which is in restraint of trade is illegal as against public policy and not enforceable and the onus is on the employer to show that it is a contract which can be enforced because the restraint imposed is not more than is reasonably necessary for the protection of himself and his business and is not injurious to the public as a whole. But whether restrained by express contract or not, no employee is entitled to filch his employer's *property* in whatsoever form that property may be, whether it is in the form of a secret process or in some other form. On the other hand, no employer is entitled to prevent his employee from making use, in the service of any persons or on his own account, of any experience or skill which that employee has gained during his term of service with the employer.

In a case of this sort, it is a term of such employment, apart altogether from any express covenant, that any invention or discovery made in the course of the employment of the employee in doing that which he was engaged and instructed to do during the time of his employment, and during working hours, and using the materials of his employers, is the *property* of the employers and not of the employee, and that, having made a discovery or invention in course of such work, the employee becomes a trustee for the employer of that invention or discovery and he is therefore as a trustee bound to give the benefit of any such discovery or invention to his employer.

In re BRITISH GAMES, LIMITED, (1938) 1 Ch. 240.

Company—Borrowing money by—Memorandum and promissory note signed by a director and secretary—Seal of company not

affixed—If signed personally by borrower as required by S. 6 of Moneylenders Act, 1927—Note indicating that borrowing was in consolidation of prior loans—Sufficient memorandum.

A company B.G., Ltd., borrowed money from time to time after 1931 from a money-lending company G.I.F., Ltd., and on 1st December, 1936, entered into a contract with G.I.F., Ltd., under which G.I.F., Ltd., agreed to advance 4,950*l*. upon the security of a promissory note and B.G., Ltd., agreed to pay interest at 27½ per cent. per annum thereon and pay the amount in certain instalments. This was the sum that was then owing to G.I.F., Ltd., on previous borrowings by B.G., Ltd., as for principal and accrued interest. In default of payment the whole amount became payable. A memorandum of the contract and the promissory note were executed and signed by a director and secretary of the B.G., Ltd., "for and on behalf of B.G., Ltd." But they were not sealed with the company's seal. The B.G. Co. defaulted in payment of the instalments and G.I.F. thereupon applied for the amount due in the liquidation of B.G., Ltd. It was contended by the liquidators that the contract was unenforceable as (*i*) the memorandum was not signed by the company personally and was not sealed; and (*ii*) that the memorandum was bad as it did not specify full particulars.

Held, that the contract was duly executed in accordance with S. 29 of the Companies Act, 1929 and was therefore signed "personally by the borrower" within the requirement of Moneylenders Act, 1927. It was not necessary that it should be under seal. The memorandum was sufficiently full in particulars as it indicated that it was in consolidation of previous loans.

MUSSEN *v.* VAN DIEMEN'S LAND COMPANY, (1938) 1 Ch. 253.

Contract—Vendor and purchaser—Contract to sell land—Payment to be by instalments—Failure in payment of certain instalments—Clause providing for forfeiture of instalments paid if default in payment of further instalments—If in the nature of a penalty—Court, if can relieve, against it and direct return of instalments paid.

By an agreement in writing dated 2nd November, 1927, it was agreed that the defendant company would sell and the plaintiff would purchase for 321,000*l*. the lands, etc., belonging to the defendant company in Tasmania. Of this 4,000*l*. was paid by the date of the agreement and the balance was made payable in certain instalments on the dates specified in the agreement. Cl. (12) of the agreement provided that "if the purchaser shall make default in the payment of any of the other instalments mentioned in cl. (2) hereof or any part thereof on the due dates as provided in the said clause the land company may. . . . . by notice in writing. . . . . rescind

this agreement and may either enter into possession of any lands, etc., remaining unsold whereupon all moneys already paid by the purchaser shall be absolutely forfeited to the Land company and this contract shall subject as aforesaid thereupon become absolutely null and void....." Certain sums were paid by the plaintiff in instalments as provided in the agreement but subsequently he failed to pay an instalment that fell due in May, 1931. Thereupon the defendants gave him notice that they rescinded the contract under cl. (12) of the agreement and forfeited the amounts already paid. In an action to recover the instalments already paid,

Held, that though cl. (12) provided that on rescission the contract became null and void, it did not mean that the contract became void *ab initio* in the sense of treating the contract as though it had never existed at all. The claim to refund could not be as for recovery of money had and received because the money was rightly paid under the contract and thereon it became the money of the defendants. The provision in the contract that if the plaintiff should fail to pay any of the instalments the defendant should be entitled to retain the money paid is not in the nature of a penalty as there is nothing unconscionable in the stipulation. There is nothing unconscionable on the part of the vendor, who has contracted to part with his land on agreed terms, to enforce the contract if he so desires. This is not a case where the plaintiff says that he is now willing to carry out the contract and wants relief on that basis.

Steadman v. *Drinkle,* (1916) 1 A.C. 275, distinguished.

In re NICHOLSON'S SETTLEMENT: MOLONY *v.* NICHOLSON, (1938) 1 Ch. 308.

Power of appointment—Settlement—Power to appoint in favour of one—Prior attempt with trustees of settlement to secure a benefit for appointer—Failure of—Later exercise of power in favour of the object of the power—Motive to defeat the trustees—If exercise of power fraud on the power.

A woman had a power of appointment which she could exercise in favour of any husband that may survive her for his life or for any less period and upon such conditions and with such restrictions as she shall think fit. In 1933 when she was over 80 years of age she wanted to make a provision for certain relations with whom she was living and she therefore negotiated with her relations and trustees of the settlement that if she should release her power of appointment, they should give her half of the capital to enable her to dispose of it as she pleased. Since they did not agree, she married one N.Q. in 1934 and by a deed of later date she exercised the power of appointment in favour of that husband. She died in 1936. It was contended that the appointment was bad as a fraud on the power of appointment.

Held, the question of a fraud on a power of appointment where there is one object and one object only of the power, differs widely from the question of a fraud on a power by which the fund can be given to one or more of several objects. Where there is one object only of the power it is impossible to establish a fraud unless there is evidence of some arrangement between the appointor and the appointee, not necessarily a legal bargain, but some arrangement under which the appointee is to give effect to the purpose of the appointor to benefit some one other than himself.

In re WYLES: FOSTER *v.* WYLES, (1938) 1 Ch. 313.

Will—Construction—Legacies—Provision that certain legacies shall abate if estate insufficient for paying all—Estate found insufficient—Delay in paying legacies—Interest on legacies—If also to be taken from the abated legacies and paid to the benefiting legatees.

By his will a testator bequeathed a large number of pecuniary legacies. Among them were two legacies to W.N.W. and C.D.W. two of his nephews. The will contained a clause that in the event of the estate not being sufficient to pay all the funeral and testamentary expenses, etc., and legacies in full, then "in such case the pecuniary legacies hereinbefore given to my nephews, W.N.W. and C. D. W. (they being otherwise provided for) shall abate equally....." The legacies were not paid within one year after the death of the testator. The estate also proved insufficient for payment of all legacies. Interest became payable on the other legacies under the law as the legacies were not paid within one year. The question arose whether interest should be added to the respective legacies entitled to the benefit of the direction as to abatement so as to be payable in priority to the pecuniary legacies subject to the burden of that direction.

Held, that where the estate is sufficient to pay the whole of the legacies in full, and there is a residue, it may be unjust that the residuary legatees, who are entitled to nothing until all the legacies have been paid, should benefit by the delay in paying them which they would do if the interest which the money has been earning in the meantime was paid to them and therefore the legatees will be entitled to interest on their legacies. But interests payable to a legatee is not a legacy given by the testator. It is a sum given in the course of administration to the legatee because justice requires that owing to the failure to pay his legacy in due time he should be put in the position in which he would have been had it been so paid. But here the interest cannot be taken out of the nephew's legacies.

In re LAWRY: ANDREW *v.* COAD, (1938) 1 Ch. 318.

Will—Construction—Bequest to A for life—Superadded power to deal with property as if it were her own—If the power exercisable by will or only inter vivos.

By his will a testator provided as to the residue of his estate after certain bequests as follows:—"All the remainder of my property.....I give and bequeath unto and equally between my said two sisters (C.L. and A.L.) for their respective lives with full power to deal therewith as if it were their own and on the death of either of them or in the event of either or both of them predeceasing me then I give and bequeath her or their share or shares to my said nephew W.B.A. absolutely". The testator died. His sister A.L. predeceased him and the other sister C.L. died after having made a will and the question was raised if C.L. had an absolute power because if she has a general power of appointment over the property given to her by her brother's will, the will will operate as an exercise of that power.

Held, that the power was not merely an administrative power but a beneficial power which gives the donee power to deal with the property in which the testator has given her a life interest as if it were her own. There was given in this will a power to the donee of disposing of the property both during her life and after her life by a testamentary power of appointment.

HOLDEN *v.* HOWARD, (1938) 1 K.B. 442.

Landlord and tenant—Rent Restriction Acts—Rent and Mortgage Interest Restrictions Act, 1923, *S.* 2, *sub-ss,* (1) *and* (3)—*Tenant of controlled premises—Death of—Trespasser entering into possession—If landlord entered into possession thereby within the meaning of sub-s.* (1) *and sub-s.* (3).

Until her death in 1931, one Mrs. F was the tenant of a house and had sublet three rooms therein to the defendant retaining two rooms in her occupation. On her death the defendant entered into and occupied also the two rooms which were before in Mrs. F's occupation without any tenancy agreement with the landlord plaintiff. Later the landlord's agent called on him to collect rent and finding the defendant there as a trespasser with regard to the two rooms of Mrs. F, he agreed to let them to him on a rent of 22*s.* 6*d.* a week. That offer was accepted by the defendant, who paid rent on that basis for some years also. In 1936 he stopped payment on the ground that all the five rooms were controlled premises under the Rent Restriction Acts and only proper rent can be claimed. It was found that the three rooms occupied by him were *controlled* rooms but with regard to the other two, the County Court Judge held that on the death of Mrs. F they became decontrolled under S. 2, sub-s. (1) of Rent and Mortgage Interest Restrictions Act, 1923, as on the death of Mrs. F, the landlord

must be deemed to have come into possession: inasmuch as the defendants' possession was only as trespasser.

Sub-s. (1) of S. 2 of the Rent and Mortgage Interest Restrictions Act of 1923 provides that "Where the landlord of a dwelling house to which the principal Act applies is in possession of the whole of the dwelling house at the passing of this Act, or comes into possession of the whole of the dwelling house at any time after the passing of this Act," then as from certain dates set out therein "the principal Act shall cease to apply to the dwelling house". Sub-s. (3) defines possession as meaning "actual possession" and that a "landlord shall not be deemed to have come into possession by reason only of a change of tenancy made with his consent".

Held, by the Court of Appeal, that the words "actual possession" meant the actual taking of possession by the landlord by his entering on the land by himself or by his agent. It is a misconception to treat a landlord who is excluded from possession by a trespasser as being himself in possession. He is not. His proper procedure if he wants to eject the trespasser is to proceed against him for recovery of possession. After the agreement of tenancy the relationship became one of landlord and tenant. So there was no point of time after Mrs. F's death when the landlord was in possession and the premises had not therefore been decontrolled.

Observations of Scrutton, L.J., in *Goudge* v. *Broughton*, (1929) 1 K.B. 103 discussed and distinguished.

MURRAY *v.* REDPATH, BROWN & COMPANY, (1938) 1 K.B. 449.

Costs—County Court Rules, 1936—*Scale of costs—Jurisdiction of Judge to increase the scale of costs—O. XLVII of the County Court Rules*.

O. XLVII of the County Court Rules, 1936, provides as follows:—R. 1. "Subject to the provisions of any Act or Rule, the costs of proceedings in a county court shall be in the discretion of the court".

R. 2. "The Scales of Costs in Appendix B shall have effect for the purpose of regulating the costs of proceedings in a County Court subject to and in accordance with the Rules of this Order and the directions contained in the Scales of Costs".

Rule 5 provides for certain scales. R. 13 provides for power in the Judge to award costs on such scale as he thinks fit where he certifies that the question in dispute was of importance to a class or body of persons or involved a difficult question of law or that the decision of the court affects issues between the parties beyond those directly in the proceedings. There were certain other rules providing for fees beyond the maximum prescribed.

Held, that under these rules no discretion is conferred on the County Court Judge to award costs over and above the maximum allowed by the scale of costs except in the cases where power is given to him to certify for higher costs as under r. 13.

MERCANTILE UNION GUARANTEE CORPORATION, LIMITED *v.* WHEATLEY, (1938) 1 K.B. 490.

Hire purchase contract—Vendor not owning the article on date of agreement—Purchase by vendor later—Delivery of same to hirer—Hirer accepting it—Hire in arrear—Vendor taking possession terminating the contract—Hirer if can plead that vendor showed no title—Date when vendor should show title.

At the end of 1935 *W* (defendant) entered into negotiations with D. Co. (plaintiffs) for the purchase of a motor lorry. *W* could not pay cash for it and he entered into a hire purchase agreement on February 7. The plaintiffs bought a lorry some days later and delivered it to the defendant. The defendant having got into arrears of hire amount, the plaintiffs exercised the right which they had under the hire purchase agreement of terminating the hiring and possessed themselves of the lorry. In an action by D. Co. for the balance of agreed depreciation money and arrears of instalments due, the defendant pleaded that it was an implied condition of the agreement that the plaintiffs owned the lorry on the date of the agreement, that as the plaintiffs admittedly did not own it on that date but only some days later, they had no title to hire and the contract was bad.

Held, that the material time when the implied condition as to warranty of title arises is the date when the bailment or delivery takes place and not the actual moment of signing of the agreement. On the date of delivery the plaintiffs were the owners and therefore the agreement was satisfied.

Karflex, Ltd. v. *Poole*, (1933) 2 K.B. 251, explained.

CHAJUTIN *v.* WHITEHEAD, (1938) 1 K.B. 506.

Aliens Order, 1920, *Art.* 18, *para.* 4 (*d*)—*Alien—Possession of an altered passport—Alien ignorant of the fact of alteration—If a valid defence.*

The Aliens Order, 1920., Art. 18, para. 4 provides that "any person shall be guilty of an offence against this order if, in reply or in relation to any immigration officer, ... or other person lawfully acting in the execution of the provisions of this order he .....cl. (*d*) without lawful authority uses or has in his possession any forged, altered or irregular certificate, passport, or other document, or any passport or document on which any visa or endorsement has been altered or forged".

The appellant C was convicted of being in possession of a certain altered passport contrary to Art. 18, para. 4 (*d*) of the Aliens Order, 1920. It was proved that the appellant's passport was altered and it was found by the Quarter sessions that the appellant did not know that the passport had been altered and honestly believed on reasonable grounds that it had been issued to him in the ordinary course by the proper authority.

Held, that the article would be reduced almost to waste paper if the offence could not be established unless the prosecution proved that the person having in his possession the forged passport had guilty knowledge of the fact that it is forged. The words of the article do not put any such burden upon the prosecution and the words of the article negative the view that the prosecution is required to carry such a burden.

JOTTINGS AND CUTTINGS.

MARRIAGE UNDER SPECIAL MARRIAGE ACT (III OF 1872) :—

Two Hindus who do not disavow their religion, get married before the Registrar of Marriages in England. Can S. 22 (as amended in 1923 by Indian Act XXX of 1923) of the Indian Special Marriage Act (III of 1872) be deemed to apply to the case to effect "a severance from such family"? That this is not merely a hypothetical question will be clear from the increase of such marriages in England.

One principle is clear in private international law that whether a marriage is monogamous or polygamous depends solely upon the *lex loci celebrationis;* [*Hyde* v. *Hyde,* (1866) L.R. 1 P. & D. 1307; *Chetti* v. *Chetti,* (1909) P. 67; Ex parte *Mir Anwaruddin,* (1917) 1 K.B. 634; *Lendrum* v. *Chakravarti,* (1929) Scots. Law Times Report 96; and *Nachimson* v. *Nachimson,* (1930) P. 217.]

Thus, a marriage valid according to English law would be treated as valid in India also, subject to this restriction that the Indian Courts would not enforce rights arising under such a marriage in India. In *Jnanendra Nath Ray,* In re, (1922) I. L. R. 49 C. 1069; it has been held by the Calcutta High Court that a Hindu married under the Special Marriage Act (III of 1872) even after the declaration made by him (it is no longer necessary after the amendment, XXX of 1923) does not cease to be a Hindu. The Lahore High Court has held in *Sainapatti* v. *Sainapatti and another,* A.I.R. 1932 Lah. 116, that even where the marriage is in the English form, the Hindu husband would not thereby lose his right to take another wife in India according to Hindu law, though such an action by him may enable the first wife to obtain a dissolution of marriage in Indian Courts on the ground of "marriage with another woman with adultery", while the first marriage is subsisting. This case also serves to reinforce the doctrine that despite

the marriage contracted in England, the parties would retain their original status and would in India be subject to the rights as well as liabilities flowing therefrom.

The provision in the Indian Special Marriage Act (III of 1872) regarding compulsory severance in joint family status is of no avail to the question raised herein. For, alteration in status is the result of a specific provision in S. 22 (III of 1872)—an exception to the general rule that a valid marriage in a form other than the one contemplated by the *Shastras* will not destroy the status of the parties.—The husband in the problem mooted will continue to be a member of the joint-family, subject to all the liabilities arising thereunder. *K.R.K. Sastry.*

Citations.—Judgments delivered in the early nineteenth century appear to be characterised by an outstanding brevity in their summary of facts and exposition of law. Would it not be true to observe—with becoming respect—that the judgments of their successors tend towards a greater detail in analysis and juristic argumentation? Judges there are, to be sure, even in recent times, whose utterances gained in clarity and vigour from a nice economy in their choice of words: Lord Halsbury was one. The speeches of Lord Loreburn rarely cover more than two or three pages; the citations are few, short and nothing if not completely apposite. The judgments of Horridge, J., do not contain many quotations; those, too, illuminate the dark places. See, for instance, *Phillips* v. *Brooks*, (1919) 2 K.B. 243. Avory, J., was a master of terseness and precision; nor does the learned Lord Chief Justice waste his words in prolixity or undue citation. After all, an authority is an authority for what it decides alone; no two actions can be precisely similar in their facts: the reasoning's the thing. No doubt the unusual circumstances in *Lloyd* v. *Lloyd & Leggeri*, (1938 2 All. E.R. 480, 487)—what was "connivance"? demanded a lengthy review of the cases. But this was the exception to the admirable rule proposed by Langton, J.: "I endeavour to avoid lengthy citations from authorities in dealing with matters of this kind, because a little further study very often enables one to condense one's citations, and makes the matter easier for a Court of review."—*L.J., 1938, p. 373.*

The Briton and the Foreshore.—Another illusion of the sea-girt Briton is that he would be committing no trespass if he walked or played anywhere on the foreshore of his native land. Such ignorance rebuts the presumption that he is acquainted with the legal Scriptures of his country. Had he referred, for example, to Halsbury's Laws of England relating to waters and water-courses he would have known how very limited is the *jus publicum*

on the seashore apart from the restricted common law rights of navigation and fishing.

There is no common law right to use the shore as a promenade, to pick shells thereon or seaweed; to hold thereon a public meeting, or to bathe.—*L J., 1938, p. 383.*

A Good Cause.—Nevertheless the law, under our elastic Constitution, can be changed, and existing rights may by statute be preserved. All well-disposed Britons whose heritage is the sea will (it is thought) approve and help in their present arduous task the Coastal Preservation Committee, being a Committee appointed by the Commons, open spaces and Footpaths Preservation Society, the National Trust, and the Council for the Preservation of Rural England.

They urge that the enjoyment of the foreshore by the public should be made a statutory right irrespective of whether it is owned by the Crown, a local authority or a private person. They call attention to the increase of Holidays with Pay, to the growing annual exodus of workers from inland areas to the sea; and they say that "unless control can be exercised over the disastrous exploitation now proceeding, very little of the coast will remain unspoiled."

The Committee is engaged in collecting statistics and other facts relating to the problem, and has considered in some detail the remedies as well as the difficulties. The chief obstacle, as usual, is financial: "the cost of compensation, actually claimed or anticipated". "Either the rules governing compensation under planning schemes should be modified with respect to areas where development is not likely to occur to any great extent, or some financial assistance should be made available to the poorer authorities to enable them to meet it, which on the present basis they cannot do".—*L.J., 1938, p. 383.*

Lord Macmillan and Lord Jeffrey.—In his speech recently on the occasion of receiving the freedom of the City of Edinburgh, where he achieved his first forensic successes, Lord Macmillan declared with sturdy patriotism that he had avoided acquiring "that most dangerous thing, an English veneer," contrasting himself in this respect with an earlier distinguished advocate of the Scots Bar, Francis Jeffrey, who, later, became one of the Judges of the Court of Session with the title of Lord Jeffrey. In his youth Jeffrey spent some time at Oxford, where, according to Lord Cockburn, his biographer, he succeeded in the abandonment of his habitual Scotch and only gained, according to another friend, "the narrow English". Lord Macmillan's version of the change

effected in his pronunciation, however, is the best we have met with. According to the noble Lord, Jeffrey, on regaining Edinburgh, thought he was to carry everything before him in the Parliament House, and so, when he got a brief, he went into the Division and delivered himself in the best Oxford manner of an hour's address to the four judges, and then sat down waiting for applause. There ensued a dreadful pause, until one of the old judges said in a little voice: "Can any body tell me what the laddie's wanting? Lord Braxfield, the prototype of Weir of Hermiston, is said to have declared on hearing Jeffrey that "the laddie had clean tint (lost) his Scotch and found nae English". That he had not altogether escaped from his native tongue, however, is clear from a letter of Macaulay's dated the 15th April, 1828, in which, describing Jeffrey, he said that "he possesses considerable power of mimicry, and rarely tells a story without imitating several different accents . . . . Sometimes Scotch predominates in his pronunciation; sometimes it is imperceptible."—*L.T., 1938, p. 418.*

Jeffrey and Boswell.—One of the many interesting incidents in Jeffrey's career is that which connects him with James Boswell, who, like himself, was a member of the Faculty of Advocates. The link between them dates, however, from long before Jeffrey was admitted to the Bar; indeed, he was only a boy at the material time, namely, about 1790 or 1791, when he had the honour, as Cockburn puts it, of assisting to carry the biographer of Johnson, in a state of intoxication, home to bed. Next morning we are told that Jeffrey was rewarded for thus playing the part of the good Samaritan, by being patted on the head by Boswell and being told that he was a very promising lad, and that "If you go on as you've begun, you may live to be a Bozzy yourself yet". Jeffrey must, one would think, have told Macaulay this interesting reminiscence, but, if so, it has been omitted from the review in which the historian lashed poor Croker to his very heart's content. In this connection is it generally remembered how Croker took his revenge? In one of the later issues of his edition of Boswell he stoutly defends himself from the attack made on him by Macaulay for expurgating certain passages in the Life on the alleged ground of their indelicacy if not indecency, and then he has a Parthian shot at his antagonist in the index where may be found this entry: "Indecency and indelicacy, see Macaulay, T. B." *L.T., 1938, p. 418.*

Jeffrey at the Bar.—Despite his supposed handicap by reason of his alleged fantastic pronunciation, Jeffrey before long made considerable headway at the bar. Like Henry Erskine he

acquired a considerable practice in the General Assembly of the Church of Scotland in defending bibulous clergymen when arraigned for conduct unworthy of the cloth. As illustrating how even a skilful advocate may occasionally make a *faux pas* in the heat of his eloquence and in his championship of his client, mention may be made of an early effort of Jeffrey's to obtain the acquittal of his clerical client on the charge of drunkenness. In the course of his impassioned address he asked rhetorically "if there was a single reverend gentleman in that house who could lay his hand on his heart and say that he had never been overtaken by the same infirmity". For grave and reverend seniors, and clergymen to boot, to be as a class roundly accused of so gross an impropriety was more than they could stomach, and so, immediate cries of "Order!" and demands for an apology sounded in his ears. Regaining his self-possession, Jeffrey thus sought to make amends: "I beg your pardon, Mr. Moderator it was entirely my ignorance of the habits of the church"—a sally which evoked a peal of laughter and smoothed away all acerbity.—*L.T., 1938, p. 418.*

Jeffrey's Wig.—Francis Horner, who was reputed to have the Ten Commandments written on his countenance, but for whom Sir Walter Scott had little patience, declaring that he always reminded him of Obadiah's bull, one who, although, as Father Shandy observed, he never produced a calf, went through his business with such a grave demeanour that he always maintained his credit in the parish, was, like Jeffrey, a member of the Scots Bar, and we are told that when he migrated from Edinburgh for London he bequeathed his forensic wig to Jeffrey, who afterwards wrote to the donor: "Your wig attracts great admiration, and I hope in time it will attract great fees also. But in spite of the addition it makes to my honour and beauty, I must confess that the Parliament House appears duller and more ridiculous this season than usual". Commenting on this bequest, Cockburn says that the hairdresser who made one wig fit those two ought to have been elevated to the deaconship of the craft, for nature never produced two heads less alike either in form or bulk. But all wigs, we are told, were anathema to Jeffrey, and it is added that throughout the last fifteen or twenty years of his practice he very seldom wore one. When engaged in appeals from Scotland to the House of Lords he had perforce to be equipped with a wig, and in one of his letters he bemoans being obliged to "sit six hours silent, in a wig".—*L.T., 1938, p. 418.*

As Dean of Faculty and Judge.—In 1829 Jeffrey was elected to the highest honour that can be conferred on a practising mem-

ber of the Scots Bar, namely, election as Dean of the Faculty of Advocates, that is, head of the bar, for, whereas here in England the Attorney-General is the head of the Bar, his Scottish counterpart, if that term is permissible, namely, the Lord Advocate, does not have this pre-eminence outside the Court. Meetings of the Faculty are presided over by the Dean, and it is always accounted a very great distinction to be elected by his confreres to this exalted position. In 1830 Jeffrey exchanged this office for that of Lord Advocate, on the accession to power of the Whig party, and this occasioned him to write to a friend thus: "You will find me glorious in a flounced silk gown and long cravat. I wish my father had lived to see this". The next stage in his legal career came in 1834 when he was appointed a Judge, in which capacity he was said to exhibit that very common failing of members of the Bench, namely, of being too talkative, a foible which in his case was aptly characterised by one of his colleagues, who said that whereas the normal form of an interlocutor ran thus: "The Lord Ordinary having heard parties' procurators, etc.," those of Jeffrey should run: "Parties' procurators having heard the Lord Ordinary, etc."—*L.T., 1938, p. 419.*

His Posthumous Fame.—It might have been thought that his long editorship of the *Edinburgh Review* and the fact that he attracted Macaulay to be its most distinguished or at least most read contributor, would have been Jeffrey's best title to fame, but it is to be feared that his own articles in the pages of that once all-important but now defunct periodical are now never read; indeed, only Macaulay's have enjoyed the fame of diuturnity; but to lawyers, Jeffrey's career has a very great attraction. He was a consummate advocate. His defence of, among others, one Nell Kennedy, whom he saved from the gallows by a fine display of advocacy, was long talked of, and, as Carlyle described it, so bewildered the poor jury into temporary deliquium or loss of wits that their foreman, Scottice Chancellor, on whose casting vote the question turned, said at last with the sweat bursting from his brow: "Mercy, then mercy". On awaking next morning the foreman it is added in Carlyle's dramatic account, smote his now dry brow with a gesture of despair, and exclaimed: "Was I mad?".—*L.T. 1938, p. 419.*

The Lord Chancellorship.—The statement by Lord Maugham last week in the House of Lords, in the course of a political debate on mining royalties, that he had occupied his present office for a very short time and—to use his own words—"It may be that I

shall not very much longer continue to occupy it", has naturally aroused not a little speculation, both in political and legal circles whether this forbodes an early demission of his high office. Adverting to this, the usually well-informed writer of the political notes in *The Times* says that while it is known that Lord Maugham much prefers the legal to the governmental work of his department, finding the latter in some ways a burden, it is nevertheless not necessary to take the words he used in the course of the debate *au pied de la lettre*, and to assume an early resignation. In the past history of the office of Lord Chancellor there have been several instances both of long and short tenure. The Earl of Hardwicke, one of the greatest masters of equity, occupied the woolsack for something like twenty years; Lord Eldon, like the provost in the old Scotch song, seemed to be perpetual, going on for a quarter of a century and filling by the decisions volume after volume of "Vesey's Reports"; while, nearer our own times, Lord Halsbury held the Great Seal for sixteen years. Since he passed away from the legal scene, his successors in office have enjoyed a much less extended period: Lord Buckmaster little over a year; Lord Haldane about four years; Lord Finlay two; Lord Cave six; Lord Sankey about four; Lord Birkenhead four; and Lord Hailsham the same. Of ex-Lord Chancellors two only survive, Lord Sankey and Lord Hailsham.—*S.J., 1938, p. 421.*

Art and Charity.—The encouragement of useful arts has, in several cases, been held to be an object of charity. Even in 1850 good domestic service was not universal, and in that year a gift for the increase and encouragement of good servants was upheld. But the fine arts are not as a rule regarded as objects of charity though such cases as Re *Alsop* (1884) show that if the element of instruction is introduced they may be supported. In that case a gift for an art school was held to be good. In Re *Murray; Cooper* v. *Llewellyn*, which was disposed of by Mr. Justice Simonds on Tuesday last, the facts were very shortly these: Sir David Murray, the gifted painter, who died in 1933, by his will gave his residue to the trustees of the Royal Academy upon trust that "if the sum should prove in itself enough to found and carry into effect for the future that method of landscape painting with an out-of-door residence where students could live and receive in the neighbourhood where schools were such direct training from landscape visitors of members or associates of the Royal Academy." The value of the residue was about £40,000, and the trustees of the will asked, *inter alia*, whether the residue was held on valid and

effective charitable trusts, and, if so, how those trusts were to be carried out.—*L.T., 1938, p. 428.*

The Judgment.—Mr. Justice Simonds, in giving judgment, said that he found the words quoted above "rather obscure", and readers accustomed to something more definite may think that the expressions used have more in common with a misty landscape than with a strong architectural drawing. But, his Lordship continued, it was clear in the first place that the testator had a general purpose, charitable in law, of encouraging education in the art of landscape painting, and, secondly, of doing this where the landscapes were being studied. The particular method might be difficult to carry out, but the general purpose was clear, and there was no reason to say that the gift failed for uncertainty. As there was a good charitable intention shown, he (his Lordship) would direct a scheme to be settled in chambers, and it would be more convenient if such scheme were brought in by the trustees of the Royal Academy than by the trustees of the will. In the course of the hearing counsel for the Academy trustees read an affidavit by the President, Sir William Llewellyn, in which it was said that schools of art gave no direct instruction in landscape painting, and that students who wished to take it up were left very much on their own. The testator was fully aware of this state of things, and strongly advocated that instruction should be given to students by members of the Royal Academy. Although the Academy has recently been subjected to a certain amount of criticism many will consider that, in the case at any rate of average students, the study of the appearances which nature offers us would be better undertaken with the guidance of experienced academicians than with that of votaries of the latest artistic craze or caprice. Apart altogether from any question of law most readers will find the decision satisfactory.—*L.T., 1938, p. 428.*

Puisne Judges and the Judicial Committee.—In several recent issues of *The Times Literary Supplement* some correspondence has appeared regarding puisne judges of the past, who, during their tenure of office, have been appointed members of the Judicial Committee of the Privy Council. Several of those thus honoured have been mentioned—Mr. Justice Bosanquet in September, 1833, and in more recent time Mr. Justice Kekewich and Mr. Justice Darling; but apparently it has been overlooked that of the original members on the reconstitution of the Committee in its present form in August, 183[illegible], one of the most notable was Baron Parke, afterwards Lord Wensleydale, around whose name has grown quite

an accretion of stories all illustrative of his passion for strict compliance with regularity of form and love of the old style of pleading. Is it not told that on one occasion he took what he called a "beautiful demurrer" to the bedside of a sick friend to cheer him in his illness. While there were those who regarded him, as Mathew Arnold regarded Professor Freemen, as a "ferocious pedant", there can be no gainsaying his greatness as a master of the common law, and the wonder is that so far no substantive life of him has been published. It is rumoured, however, that a very learned lawyer of our time is at work on a memoir of the Baron, which is sure of a very hearty welcome as filling a conspicuous gap in English legal biography.—*S.J., 1938, p. 441.*

Birthday Honours.—In view of the exigencies of publication, we can only make reference to some of those included in the list of honours conferred by His Majesty in celebration of his birthday. First, we note, with much satisfaction, that Sir Donald Somervell, of whom it can truly be said that he has adorned his high office of Attorney-General, has been created a Privy Councillor—a well-merited distinction. Time was, and that not so very long ago, that the Attorney-General of the day was never sworn of the Privy Council; and it may be recalled that Sir Henry James, afterwards Lord James of Hereford, while holding office as Attorney-General, on being sounded on the question of being made a Privy Councillor, refused to accept the proffered honour on the ground that it might preclude him, as he thought, from practising before the Judicial Committee. In this he was believed to be mistaken; and certainly several of his successors in office before Sir Donald Somervell saw no incompatibility in conjoining their function as chief law officer of the Crown with that of membership of the Privy Council—not, of course, with the Judicial Committee of that body. Of others connected with the law who are included in the list is Sir William Prescott, who now becomes a Baronet. He is a member of the Bar, although the greater part of his activities has been in connection with his other profession, that of engineering, and his public work as chairman of the Metropolitan Water Board. Also Mr. Stephen Philpot Low, a son of the late Mr. Justice Low, and himself Solicitor to the Board of Trade, who has received a knighthood; as have also Mr. Francis Edward James Smith, President of the Council of the Law Society; Colonel Edward Geoffrey Hippisley-Cox, Secretary of the Parliamentary Agents' Society; and Mr. Frank Henry Cufaude Wiltshire, Town Clerk of Birmingham, and Vice-President of the Society of Town Clerks. The full list of legal honours will appear in our next issue.—*S. J., 1938, p. 461.*

The Woolsack.—While we are all familiar with the fact that many words in our language have, in the course of the centuries, become divorced from their original signification or explanation of their formation, it must have come with something of a shock to be told, as we were last week, that the Woolsack, which has been regarded as a working synonym for the highest office in the law, is not, and apparently has not been for a long time, as generally it was supposed to be, stuffed with wool at all, but with horsehair. Happily, as we learn, this departure from ancient usage is now to be corrected, for the Lord Great Chamberlain has given his sanction for the Woolsack to be re-stuffed, this time with a blend of British Dominion, and English, Scottish and Welsh wool. The commonly accepted explanation of the name of the crimson-covered backless sofa on which the Lord Chancellor sits while presiding in the House of Lords is that compendiously given in that very useful work of reference, the Oxford Companion to English Literature, namely, "to serve as a reminder to the Lords of the importance to England of the wool trade," but Lord Campbell, who occupied the Woolsack for some years, was inclined to the more prosaic view that in the rude simplicity of early times a sack of wool was frequently used as a sofa, and such a seat was provided for the Chancellor, while the ordinary judges had to be content with a hard wooden bench, and the advocates had to stand behind a rough wooden rail called the Bar. Whatever be the real origin of the name, the Woolsack has for centuries carried with it its present association with the office of the Lord High Chancellor. It is curious to note, however, as the late Sir William Anson pointed out in his treatise on the Law and Custom of the Constitution, that "the Woolsack on which the Speaker of the House of Lords sits is outside the limits of the House, so that the office may be discharged, and has been so discharged when a commoner has been Lord Keeper of the Great Seal, or when the Great Seal has been in commission." Thus, we find under date 22nd November, 1830, in the list of those present in the Upper House this entry: "Henricus Brougham Cancellarius," but on that date he had no right to debate or vote. On the following day, however, we find this entry: "Dominus Brougham et Vaux, Cancellarius," the meaning of which is that he had now received his peerage, and as a peer he could intervene in debate and vote.—*S. J., 1938, p. 461.*

Legal Careers.—The *Spectator* in the course of a series of articles on "The Choice of a Career" dealt last week with "The Bar". In the previous week it had dealt with Local Government service, and in due course, we presume, it will outline the

prospects for a solicitor. These are the three careers which require legal aptitude and training, though elsewhere, too—for instance, in certain appointments in the Civil Service—the same qualities are required. For an assured prospect a youth with an inclination to the law could not, save under special circumstances, be advised to choose the Bar. As between a solicitor's office and local government service, there is much to be said for the latter. Its advantages were forcibly described in a paper read at the Law Society's Provincial Meeting at Hastings in 1935. At the top is a town clerkship, and that should satisfy any reasonable ambition. And a boy entering a solicitor's office, and having the necessary character, ability and industry, should ordinarily be confident of a livelihood and something more. But the Bar, save under favourable circumstances, is the least certain of careers. The writer in the *Spectator* describes these circumstances as relation to one or more influential solicitors and capacity to seize the opportunities offered. The union of these is safe to bring success, but "influence", unless accompanied by capacity to take advantage of it, does not go far. Influence, however, is not essential. What is essential is ability and the resolve to take advantage of every opening. This, indeed, will mean waiting. The *Spectator* article gives four or five years as the time before a living can be made: at the Chancery Bar somewhat longer. These are moderate estimates. The waiting time may run to many years. So only those who are prepared to stay the course should go to the Bar.—*L. J., 1938, p. 406.*

Judges and the Current Conscience.—Lord Wright was, I believe, the true originator of all the recent controversy regarding the Judicial Office; and whether the judges should interpret the law—written or otherwise—in accordance with the Conscience of the Day. His address on the Study of Law, published in the April *Law Quarterly*, was delivered to the Law Society of London University as long ago as October of last year.

His view was that in the matter of interpreting statutes it was the judge's duty, and his sole duty, to ascertain and give effect to the intention of the Legislature. His disagreed with the view that a statute must be construed so as to depart as little as possible from the rules of common law or equity—"to make as little change as possible". "An unsafe guide", he called it, "in these days of modern legislation, often or perhaps generally based on objects and policies alien to the common law". He had in mind chiefly, I believe, modern legislation; but he might have told us more of what the judicial attitude should be to an antique statute, unrepealed by oversight, if invoked and applied to a

modern situation. I have a feeling that the Lords would find a way out, if the application of the old Act would be grotesque or flagrantly out of harmony with the Conscience of the Day.—*L. J., 1938, p. 415.*

Lord Wright and Judicial Legislation.—In matters of common law Lord Wright appeared to admit and even to declare that the judges did rightly "legislate" and change the law, causing it to conform, if not to the Conscience of the Day, at least to the Conscience of Yesterday.

English law, he said, has reacted to the moral, social and political ideas and features of the time, which have profoundly and persistently affected not merely the Legislature but the judges. "If we compare the tone of judgments delivered (say) in 1870 it is impossible not to observe the effect of changes in prevailing ideas."

How is such a position consistent with the doctrine of *stare decisis*? "The answer is", said Lord Wright, "that the English law in fact is always growing . . . . . A decision is only an authority for what it actually decides, and the same set of facts seldom repeat themselves. There is generally, though not always, enough difference to justify a strong and liberal-minded judge, if he feels that justice so requires, to distinguish the case before him from the authority of the earlier cases cited as binding him. . . . What has been called a constant erosion of the existing authorities goes on . . . ."—*L.J., 1938, p. 416.*

Eavesdroppers.—English law "recognises" the easement of eavesdropping, and Scotland accords the same consideration to the urban servitude of eavesdrop or stillicide. These rights may be found discussed in pleasant text-books on real property, but eavesdropping as a legal offence must be sought in the grimmer volumes dealing with criminal law and practice. According to Russell on Crimes, the offences of eavesdroppers, like those of common scolds and night-walkers, are referred to in ancient books as forms of public nuisance. "They were dealt with in Courts Leet at the Sheriff's Tourn, but there is no modern precedent of indictment for any of them in England." Eavesdroppers are said to comprise "such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales." In the issue of *The Times* of the 3rd inst., there appeared a particularly good "fourth"—or rather, in this case, fifth—article under the heading "The Eavesdroppers," in which reference was made to a conviction for eavesdropping in the West London Police Court a few days earlier.

The eavesdropper, the writer of the article notes, must do his work out of doors, within the eavesdrop, or eavesdrip, which receives the rainwater thrown off the eaves—or which would be thrown off but for modern gutters. In America, a note in Russell tells us, a person who hangs about the Grand Jury room in order to hear the remarks of the Grand Jury is indictable for eavesdropping. In this country, having regard to an Englishman's love of home, however humble, and preference for the privacy of his "castle", however unbattlemented, it is difficult to imagine an offence more likely to lead to a breach of the peace, and one is grateful for the numberless forecourts and "front gardens" which, by making the offence less facile and so much more noticeable, must deter many from its commission.—*L.T., 1938, p. 448.*

Academic Honours for the Judiciary.—Last week we read that Lord Baldwin received a hearty welcome when he returned to Cambridge as Chancellor of the University in order to confer the various honorary degrees upon those whom the University had decided thus to honour. Among the recipients of the degree of Doctor of Law were the Lord Chancellor—Lord Maugham of Hartfield, and Lord Wright of Durley, both of whom had achieved academic as well as professional distinction. In presenting the Lord Chancellor for the degree, the Orator, Mr. T. R. Glover, spoke of Lord Maugham as one who had not only become supremely eminent in the sphere of law, but also as one who in his younger days achieved renown by rowing in two victorious University crews, and, further, had been President of the Union—the latter post, we may well imagine, proving an excellent training ground the for more arduous tasks now falling to him in the House of Lords, both when sitting in its legislative as well as in its judicial capacity. With regard to Lord Wright, the Orator seems to have fallen into a slight error by referring to him as Master of the Rolls as well as Deputy High Steward of the University. The noble lord, as we all remember, filled for a time the office of Master of the Rolls but vacated it not so long ago in order to return to the work falling to him as a Lord of Appeal in Ordinary. Like the Lord Chancellor, Lord Wright has shown himself a profound lawyer, but whereas the former, as befitted one who was destined to reach the Woolsack, practised almost exclusively on the equity side of the Courts, Lord Wright specialised in shipping law, of which in its various branches he became a profound expositor as he showed in the Commercial Court both as a junior and, later, as a leader, but likewise by the edition he prepared of Carver's classic on "Carriage by Sea", which he was enabled to

enrich by his practical familiarity with each of the topics there dealt with. In a sense it may seem akin to gilding the lily to bestow honorary degrees on two such notable members of the judiciary whose eminence it might be thought was attested by the positions they occupy, but those in authority in the University are naturally and justifiably proud of the distinction won by its alumni and have thus sought to record the fact by the conferring of this mark of their esteem and pride in the recipients' achievement in the judicial sphere.—*S.J., 1938, p. 481.*

Chancellors and Literature.—The speech of the Lord Chancellor at the recent anniversary dinner of the Royal Literary Fund in proposing the toast of "Literature", in which, as he truly said, the one true test of literature is when they felt inclined to kneel at her feet, was of interest as a marked tribute to the potency of letters, but also as provoking a good-humoured jest from Mr. Desmond McCarthy at the expense of lawyers when he declared that "the legal profession was a most excellent training for story-telling". Incidentally, however, the prominent part taken by the Lord Chancellor in seeking to further the claims of the Royal Literary Fund, is a reminder not only that he himself is a master of literary expression which has found an outlet in one or two volumes, but, further, that several of his immediate predecessors on the Woolsack have well-founded claim to literary, as well as to legal, fame. For instance, Lord Haldane and Lord Birkenhead; but the most prolific writer among former occupants of the Woolsack was Lord Campbell, who enriched the department of legal biography by his serried row of volumes on the Lord Chancellors and the Chief Justices, works of great value, but which, by reason of their contents not invariably being of a flattering character, provoked the jibe of Sir Charles Wetherell when he referred to Campbell as "my noble and biographical friend who has added a new terror to death". Purely legal treatises can scarcely be termed "literature", but it is worth remembering for their practical utility the numerous works dealing with various branches of the law which have come from the pens of those who have reached the highest places in the law: for example, Lord St. Leonards was an indefatigable worker in the domain of real property law, and his volumes on the subject had at one time a great vogue, and in more recent times we need hardly recall the immense boon that stately row of volumes planned and sponsored by Lord Halsbury, have proved to members of the profession.—*S.J., 1938, p. 481.*

Legacy stated in Words and Figures which did not agree.— There is an interesting case in the current *Weekly Notes*. Re *Hammond*: *Hammond* v. *Treherne*, (1938) W.N. 236.

A testator bequeathed a legacy of "the sum of one hundred pounds (£500)" and the question was whether the words or the figures should prevail. It was pointed out to Simonds, J., before whom the matter came, that there was authority to the effect that in a bill of exchange the words prevailed over the figures, reference being made to *Saunderson* v. *Piper*, (1839) 5 Bing. (N.C.) 425 and *Garrard* v. *Lewis*, (1882) 10 Q.B.D. 30.

Simonds, J., held that the maxim "*Cum duo inter se pugnantia reperiuntur in testamento ultimum ratum est*" (Co. Litt. 112-*b*) applied. Consequently the legatee was entitled to £500.—*S.J., 1938, p. 487.*

BOOK REVIEWS.

THE LAW OF LIMITATION by K. J. Rustomji, Volumes I & II (5th Edition); 1938, published by Messrs. Butterworth & Co. Price Rs. 30.

It is with great pleasure that we welcome the appearance of the fifth edition of Mr. Rustomji's Limitation Act. It was a matter for regret that a new edition had not appeared earlier. Even in the first edition Rustomji's Law of Limitation got into popularity with the lawyers and judges in this country by its intrinsic worth. It was also helped to a certain extent by the fact that Mitra's treatise on the subject had become somewhat out of date at that time. The chief merit of Mr. Rustomji's treatment is his thought-provoking and trenchant criticisms of the decisions and his clear and concise statements of the law on all the points dealt with in the course of the book. Since the appearance of the last edition of the book many important legislative changes have been made in the enactment and the learned author has dealt with them in the present edition. The case-law on the subject has grown vastly during the last few years and it has been critically noticed by the learned author in the appropriate places. A wholesome feature introduced in this edition is that the table of cases at the opening of the first volume gives the names of the cases as well which will facilitate the picking up of the cases from the other non-official reports in which the cases may be reported. The book has appeared in two volumes in this edition, as its size could not be compressed in a single handy volume. We are sure that this edition fully justifies the expectations of the bench and the bar and will therefore take its rightful place among the leading treatises on the subject.

HINDU WOMEN'S-RIGHTS TO PROPERTY ACT by Rishindra Nath Sirkar, M.A., B.L., published by S. C. Sirkar & Sons, Ltd., Calcutta, 1938 Edn. Price Re. 1.

This small book of less than fifty pages is a commentary on the Hindu Women's Rights to Property Act, Act XVIII of 1937 as amended by the amending Act of 1938. The enactment is a beneficient piece of legislation conferring right of property on Hindu women who did not enjoy it before and who had only in some instances a right to maintenance. The enactment though only consisting of five sections is a complicated one giving rise to numerous difficuties in the interpretation of its provisions. The learned author has attempted to solve the difficulties and the questions that are likely to arise under the Act. He has given reasons for the construction that he would adopt. As there has been no case-law yet under the Act, the discussions of the learned author will be found interesting and instructive. The author has previous acquaintance with this branch of law having edited Golap Chandra Sarkar Sastri's well-known book on Hindu Law where the latter expressed some views on the rights of women not generally upheld by the courts.

THE MADRAS AGRICULTURISTS' RELIEF ACT (Madras Act IV of 1938), by Sri B. Vaikunta Baliga, B.A., B.L., Pleader, Mangalore. Published by K. Bhoja Rao & Co., Mangalore. Price As. 12.

In this pamphlet, the learned author has written not a commentary but considered some of the difficult questions which are bound to arise in the course of the administration of the Madras Agriculturists' Relief Act. He has stated the pros and cons on those points and given his opinions on them. A good portion of the book is taken up with examining the question whether the Act is *intra vires* the legislative power of the provincial legislature in respect of its provisions regarding banking and the negotiable instruments. The learned author has expressed the view that the provisions of the Act are *ultra vires* in so far as they affect the banks. He is inclined to take a similar view with regard to the provisions which affect promissory notes, bills of exchange and cheques also, though he does not say so in terms and whatever may be the ultimate view that will prevail in these questions, his arguments are entitled to serious consideration. We hope that his book will be widely read and appreciated by those who have to deal with the enactment.

THE LAW OF TORTS by L. B. Bhopatkar, M.A., LL.B., New Delhi, 1938, Fourth Edition. (Re-written and Enlarged). Published by Kokate Brothers, Poona 2. Price Rs. 4.

Mr. Bhopatkar has considerable experience of the difficulties of students in mastering legal subjects and he has therefore dealt

with the subject of the Law of Torts in a manner most suited to their needs. He has analysed the various topics and stated the propositions of law in the form of sections giving their exceptions clearly. The propositions are illustrated by the cases which are noticed as illustrations under the statement of the propositions. The case-law has been brought thoroughly up to date. There are not scholarly discussions of abstruse topics as they will only embarrass the student. The recent Law Reform Acts in England are given towards the end of the book. The questions set on the subject in the LL.B. Examination of the Bombay University are also given. In devoting his attention mainly to the needs of students, the author has not overlooked the requirements of the practitioner. We therefore hope that this edition of the book will enjoy the popularity which it richly deserves.

THE INDIAN LIMITATION ACT (IX of 1908) by V. V. Chitaley, B.A., LL.B. and K. N. Annaji Rao, B.A., B.L. (Volume II). Published by All India Reporter, Ltd., Nagpur.

We had occasion to review the first volume of this book in the pages of this journal. This is the second volume and it deals with articles 1 to 140 of the first schedule to the Indian Limitation Act with exhaustive commentaries without omitting any decision of any importance, if any decision has been omitted at all. As we said elsewhere, this book collects all the information on the subject and will be found to be a useful book of reference on the Indian Limitation Law.

THE PAYMENT OF WAGES ACT (IV of 1936) by Govindlal D. Shah, B.A., LL.B., published by Messrs. N. M. Tripathi & Co., Bombay. Price Rs. 1-14-0.

This is a useful piece of legislation intended to safeguard the rights of certain classes of persons employed in industry of their regular payment of wages. So far as we are aware, there is no other commentary on the Act and the Act itself is so recent in date that no decided cases could have grown about its provisions. Under these circumstances the comments of the learned author which are in themselves very lucid will be appreciated. He has also given in the book the rules of payment of wages framed under the Act by the Bombay Government and also the Payment of Wages (Federal Railways) Rules, 1937, the various appendices give all other useful information bearing on the subject including the report of the Select Committee and the minutes of dissent. The reader will thus find collected in the book all relevant information on the subject.

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FEDERAL COURT AND JUSTICIABLE DISPUTES UNDER THE GOVERNMENT OF INDIA ACT, 1935.

BY

C. UNIKANDA MENON, *Advocate, Egmore.*

I. Justiciable Disputes and Original Jurisdiction

In this discourse, it is proposed to deal with the disputes justiciable by the Federal Court, *i.e.*, the disputes that will be taken cognisance of by that court. Unlike in the United States of America, under the Indian Federation the Federal Court does not work side by side with the state courts. Jurisdiction of the Federal Court in India is of a double nature. Upon the one side it is determined by the character of the parties to the suit; and upon the other by the character of the matter in controversy. It extends in the first place to all cases of disputes between the Federation on the one hand, and the Provinces or States on the other or between a Province and a State or between Provinces themselves or between States themselves. In this, only the character of the parties are relevant. "No question of Federal concern and no construction of Federal Law or constitutional problem need be involved. The subjects to be determined may and indeed usually, in this class of cases, do depend wholly upon the interpretation and application of laws of one or more of the States. The purpose in giving jurisdiction to the Federal courts is thus not the protection of Federal rights, privileges and immunities but the provision of tribunals presumably more impartial than would be state tribunals."

In the 2nd place, the dispute should relate to a "legal right" either in its extent or existence.

II. Provinces or States should be Real Parties

Attempts may be made by citizens of Provinces to circumvent the rule that only a constituent unit could sue in the Federal Court.

(1) Suits filed by Provinces or States as such against Provinces or States, but in behalf of their citizens, not in their own behalf are not maintainable at all in the Federal Court. Suppose the Province *A* passes an Act authorising any of its citizens owning a claim against Province *B*, arising upon a written obligation to pay money, to assign to Province *A* that obligation for payment. Suppose the Act enacts that the assignor of such claim is to be associated with the Advocate-General of the Province *A* in the prosecution of the case, and that the assignor is to pay all the expenses incurred by *A* and to receive the amount to which the assignor would be entitled after deducting the expense to which the Advocate-General of *A* would be put in the suit. Here it is clearly the claim of an individual subject that is sued upon by the State *A*. So it could not seek the aid of the Supreme Court to enforce it. In a case similar to the facts set out above it was decided by the Supreme Court of the United States in *New Hampshire and New York* v. *Louisiana* (108 U.S. 76) that such a suit is not maintainable.

(2) But a suit in which the Province or State has obtained legal title to the property in question by gift or assignment reserving no right in the donor or assignor and sues therefore in its own name is maintainable in the Federal Court. Suppose Province *B* issues certain bonds, secured by mortgage to a subject of Province *A*. The subject makes a gift of it to Province *A* to use it for some charity. It was held in the *State of South Dakota* v. *State of South Carolina* (192 U.S. 286) that a suit would lie in the Federal Court by the Province *A* against the Province *B*.

In the former case, the right vested in the assignors themselves and in the latter in the assignees. The above cases indicate the possibility of one Province adopting a quarrel of its citizens and it is an essential condition of the exercise of Federal Court's jurisdiction that citizens should not have any right or interest in the subject-matter of the quarrel. In *Osborn* v. *Bank of the United States* (9 Wheat. 738, 857), Chief Justice Marshall said:

> "It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record".

This statement is too broad and has not been followed. Even Marshall, C. J., himself departed from it, for in the *Governor of Georgia* v. *Madrazo* (Pet. 110), he says that where the Chief Magistrate of a State is sued, not by his name but by his style of office and the claim made upon him is essentially in his official character, the State itself may be considered as a party on the record. It is now well settled that whether a suit is one against a State is determined not by the names of the parties to the action, but by the essential nature and effect of the proceeding as they appear from the entire record. *Louisiana* v. *Jumel* (107 U.S. 711.) A suit to restrain a state officer from executing an unconstitutional statute is not a suit against the State. *Western Union Telegraph Co.* v. *Andrews* (216 U.S. 165). A suit to recover money or property wrongly taken and in the hands of such defendants or to enforce compensation in damages is not a suit against a State. A suit which a Province or State brings as *parens patriae* to protect the general health, comfort or the property right of its citizens when they are injured or threatened by the act of a neighbouring Province or State lies in the Federal Court because it is a suit by a State against a State. "In that capacity, the Province or State has an interest independent of and behind the titles of its citizens, in all earth and air within its dominions. *Georgia* v. *Tennessee Copper Co.* (206 U.S. 230) is a case involving the right of the State of Georgia to enjoin a Corporation in a neighbouring State from spreading noxious fumes to the detriment of her citizens and property.

Legal Rights

Secondly, *i.e.*, as regards the character of the matter in dispute, S. 204 of the Act says that the "disputes" should relate to the extent or existence of a "legal right". To attract the section, firstly, there should be a dispute. "In the constitution of the United States, the corresponding word is "controversy;" and "controversy" was held to include only suits of a "civil" nature, in *Chisholm* v. *Georgia* (2 Dall. 431). It is submitted that the term "dispute" in S. 204 contemplates only suits of a "civil" nature. Again, the dispute should relate to a "legal right". What is a legal right? Holland, while dealing with rights in his "Elements of Jurisprudence," (13th Edn., 1924, p. 86) says:

"If a man by his own force or persuasion can carry out his wishes either by his own acts or by influencing the acts of others, he has the "might" so to carry out his wishes. If irrespectively of having or not having this might, public opinion would view with approval, at least

with acquiescence his so carrying his wishes and with disapproval any resistance to his so doing, then he has a moral right so to carry out his wishes.

"If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends upon the readiness of the State to express itself. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general but a subjective support, legal right have the objective support of the physical force of the State. The whole purpose of laws is to announce in what cases that objective support will be granted and the manner in which it may be obtained. In other words, law exists for the definition and protection of rights."

Salmond in his jurisprudence, 6th Edn., 1919 at p. 185, says that

"In every legal right the five following elements are involved:—

(1) A person in whom it is vested; and who may be distinguished as the *owner* of the right, the *subject* of it, or the person *entitled*.

(2) A *person* against whom the right avails, and upon whom the correlative duty lies. He may be distinguished as the person *bound*, or as the *subject* of the duty.

(3) An *act* or *omission* which is obligatory on the person bound in favour of the person entitled. This may be termed the *content* of the right.

(4) Some *thing* to which the act or omission relates; and which may be termed the *object* or *subject-matter* of the right.

(5) A *title*, that is to say, certain facts or events by reason of which the right has become vested in its owner."

III. Justiciable Disputes Involve Legal Right.

The Federal Court takes note of only legal rights and every legal right involves the above five elements. And a right lacking in any one of such elements may not be recognised by the Court and a dispute involving the decision of such a right may not be cognisable by it. Disputes relating to a legal right are called justiciable disputes.

A legal right involves a corresponding legal obligation. The obligations are created by contract, custom and legislation. In the *Dominion of Canada* v. *Ontario* (1910 A.C. 637 at 647) it was held that the test of a matter being justiciable is "can it be sustained on any principle of law that can be invoked as applicable." It is said in *Warren* v. *Murray*, (1894) 2 Q.B. 648 at 651, per Esher, M.R., that "legal rights" may include equitable as well as common law rights. In Ex parte *State of New York No.* 1, (256) U.S. 490, it was held that not only suits in law and equity are included, but also cases of Admiralty and Maritime jurisdiction.

Not a Political Right

The right involved must not be a political right as in the case of *Cherokee Nation* v. *State of Georgia* (5 Peters 1) where

the dispute was between the Cherokee Nation and the State of Georgia which the Supreme Court of the United States was asked to decide. The bill was brought by the Cherokee nation, praying for an injunction restraining the State of Georgia from the execution of certain laws of the latter which go directly to annihilate the Cherokee Nation as a political society. The Supreme Court held that it is a political dispute and that it has no right to interfere.

The propriety of what may be done in the exercise of a political power is not subject to judicial decision. *Octyen* v. *Central Leather Company,* 246 U.S. 297. All questions touching the international relations of a country are within the political departments of the Government. The recognition of the belligerency or independence of a foreign community is a political question. *See* the *Three Friends,* 166 U.S. 1. What are the boundaries of a federation, 143 U.S. 472; who is the sovereign of a foreign territory, *Pearcy* v. *Stranaham,* 205 U.S. 257; whether a treaty is still in force, *Terlindon* v. *Ames,* 184 U.S. 270; the status of one claiming to be diplomatic representative of another country—all these are held to be political questions, not possessing a justiciable character. Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by the legislature or executive department of any government conclusively binds the jndges. *Octyen* v. *Central Leather Co.,* 246 U.S. 297. So also in the recent case of *Aksionairnoye Obschestvo Dlia Mechaniches Koyi Obrabotky* (1) *A. M. Luther* v. *James Sagor and Company,* (1921) 3 K.B. 532 where the view that the validity of the acts of an independant sovereign government in relation to property and persons within its jurisdiction cannot be questioned in courts was upheld. See also *Bank of Ethiopia* v. *National Bank of Egypt and Lignori,* (1937) 1 Ch. 513. Acts done by the paramount power in the exercise of its authority in relation to the States are acts of State which are not cognisable by Court, *Secretary of State for India in Council* v. *Kamachi Boye Sahiba,* (1859) 13 Moo.P.C.C. 22. *Salaman* v. *Secretary of State for India in Council,* (1906) 1 K.B. 613.

Claim on a debt or contract

An action brought by one Province or State against another to enforce proprietary rights is a justiciable dispute. A claim to recover debts due by one unit to the other, *Virginia* v. *West Virginia,* 220 U.S. 1; a claim to recover interest due on bonds, *United States* v. *N. Carolina,* 136 U.S. 211; a suit for account-

ing and for recovery of money due, *United States* v. *Michigan,* 190 U.S. 370; a suit to enforce a contract entered into between two provinces, *Virginia* v. *West Virginia,* 265 U.S. 568; all these are disputes of a justiciable character. A claim by one state against another for the withdrawal of a natural product from an established current of commerce is a justiciable one. What is sought must not be an abstract ruling on a question of law. The attitude of the complainant must not be that of a mere volunteer attempting to vindicate an academical dispute or to redress a purely private grievance. Accordingly, a suit by a state whose public institutions have been supplied with natural gas produced in another state, to enjoin the latter state from enforcing a statute requiring the producing companies to supply domestic demands to the full extent of their supply the effect of which will be to interfere with the supply to complainant's institutions, is a justiciable controversy. See *Commonwealth of Pennsylvania* v. *State of West Virginia,* 262 U.S. 553. There should be an actual infringement of a right and not a possible infringement. In the *Commonwealth of Massachussetts* v. *Andrew W. Mellon, Secretary of Treasury,* 262 U. S. 447 an appeal was brought in the Supreme Court of the United States, challenging the constitutionality of the *Maternity Act of* 1921. The Act provided for the initial appropriation and thereupon annual appropriation for a period of 5 years, among such of the several states as shall accept and comply with its provisions, for the purpose of co-operating with them to reduce maternal and infant mortality and protect the health of mothers and infants. It is alleged that the plaintiff's rights and powers as a sovereign state and the rights of its citizens have been invaded by the expenditures and acts; and that although the State has not accepted the act, its constitutional rights are infringed by the passage thereof, and the imposition upon that state of an illegal and unconstitutional option to yield to the Federal Government a part of its reserved rights. The Supreme Court while holding that there is no justiciable dispute before them to exercise their jurisdiction expressed as follows:—

"In so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. In that aspect of the case we are called upon to adjudicate no rights of person or property not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of Government. No rights of the State falling within the scope of the judicial power have been brought within the actual or threatened operation of the Statute, and this Court is without authority tn pass abstract opinions upon constitutionality of acts of Congress. . The party who invokes the power must be able to show not only that the Statute is invalid, but that he has sustained or is immediately in danger of sus-

taining some direct injury as the result of its enforcement and not merely that he suffers in some indefinite way in common with people generally. If a case for preventive relief be presented, the Court enjoins in effect, not the execution of the Statute, but the acts of the official, the statute notwithstanding. Here the plaintiff has no such case—''.

IV. Boundary Disputes

Boundary disputes often cause serious conflicts between nations which often result in very destructive wars. Students of history might be aware of how the long-standing unsettled disputes regarding the ownership to the Raichur Doab between the Tungabadra and the river Krishna, led to frequent boundary disputes and wars between the Vijayanagar and Bahmini Kingdoms, and to the ultimate defeat and downfall of the Vijayanagar Kingdom.

IV. (a) Mountain—as boundaries

Boundary disputes might come up before the Federal Court. It may be that a boundary between two states may be a mountain. In India, mountains form the natural boundaries between Provinces or States and the dispute might arise as to whether the boundary limit of a unit extends only to the base of the mountain or whether it takes in the whole slope of the mountain from the base to the summit. The correct solution seems to be that each unit is entitled to that half of the mountain as would fall to its share if dividing lines are drawn from the appex to the base perpendicularly and the mountain is cut right through its middle from the summit to the base. Therefore, if a mine is discovered on its slope belonging to one province of state, mining operations can be carried on by that province or state till the boring reaches the dividing line. The same rule holds good when a hill or hillock forms the dividing boundary between the two federal units. Oppenheim in his Public International Law, Vol. I, 4th Edn., p. 428, says that:

"failing special arrangements, the boundary line runs on the mountain ridge along with the water shed."

IV. (b) Water—as boundaries

The nature and kind of the questions that might arise before the Federal Court in its original and appellate jurisdiction regarding waters may be numerous. Disputes in land, in sea, in rivers, in lakes and in inland waterways may arise between riparian states on opposite sides or between states in the upper and lower reaches. Disputes about the ownership of gulfs and bays and territorial waters would be no less frequent.

The territory of a Province or State consists of lands within its boundaries. If it is one with a sea-coast the water that is touching its land, forms its boundary. These boundary waters are of two kinds, national waters and territorial waters. Territorial waters are ordinarily waters within the distance of 3 miles from the sea-coast. National waters are waters within lakes, canals and rivers together with their mouths whether they are ports, harbours, gulfs and bays. Suppose there are lakes, landlocked seas or harbours with territories of several provinces or states round them, say for instance the Gulf of Cutch or the Gulf of Cambay or the Harbour of Cochin or again lakes like those of Geneva in Europe, or lakes similar to Huron, Eric and Ontario in North America. It is likely that disputes might arise with respect to the ownership of such lakes and landlocked seas.

IV. (b1) Rivers—as boundaries.

Rivers are likely to give rise to disputes of various forms, both interstatal and interprovincial. Many rivers do not run through the lands of one and the same state or province. They may be (*a*) boundary rivers separating provinces or states at some stage of their course; or (*b*) they may run through more than one province or state. Most of the Indian rivers such as the Indus, the Ganges, the Brahmaputra, the Mahanadi, the Godavari, the Krishna and the Narmada share both features.

IV. (bb) Non-navigable boundary rivers

The boundary rivers have created many disputes between two states. Such rivers belong to the territory of the States or the Provinces they separate, the boundary line as a rule, running either through the middle of the river if it is non-navigable or through the middle of the middle channel of the river in the deepest stream if it is navigable river. Very often questions might arise for the decision of the Federal Court as to what happens to the boundary to the provinces or states when the boundary river gradually or suddenly changes its course. Sometimes in the course of such change an island or a portion of land belonging to one province or state may be separated from it, by the river running in altered course. In the case of a *sudden* change in the course of the river the boundary is the same as before; but in case of a slow, gradual, imperceptible change, the boundary is altered with it. An important case arose in the *State of Missouri* v. *State of Kentucky*, (11 Wallace, 395); there the question was whether the channel in

the Mississippi, admittedly the boundary between the two states followed the river in its wanderings or whether the boundary remained the same, although the river minded to change its channel. The possession of an island known as *Wolf Island* depended upon the question for, in 1820, when Missouri was as a State with its eastern boundary the middle of the river, Wolf Island lay to the east of the main channel of the river and therefore within the sovereignty of Kentucky, whereas at the time of the suit, the main channel of the river was to the east of the island which was therefore claimed by Missouri as within its sovereign jurisdiction. To determine the jurisdiction, the two states appeared before the bar of the Supreme Court, the State of Missouri bringing her bill claiming the island against the State of Kentucky. The question raised as to the justiciable character of the dispute was decided in favour of the Supreme Court jurisdiction and it was held that when Missouri was admitted as a State, the Wolf Island belonged to the State of Kentucky and the change in the channel of the river being sudden, the boundary must be taken to be as before and the State of Kentucky retained the sovereignty over the Wolf Island as before.

A case of a sudden change by avulsion within a year in the course of the Mississippi river, a boundary river, arose in the *State of Nebraska* v. *State of Iowa*, 143 U. S. 351; which was an original suit brought in the Supreme Court of the United States by the State of Nebraska against the State of Iowa, the object of which is to have the boundary line between the two states determined. In 1877 there were marked changes in the course of the channel of the Mississippi river so that in the latter year it occupied a very different bed from that through which it flowed in the former year. Out of these changes has come this litigation, the respective states claiming jurisdiction over the same tract of land. The Supreme Court held it was a case of avulsion and not accretion and that in 1877 the river suddenly made a new channel and that the boundary line between the two states does not follow the vagaries of the Missouri river but remained before as after, in the old channel and in the central line thereof. When land borders on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the same, although during the years by this accretion, the actual area of his possession may vary. It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such a change of channel works

no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed in law "avulsion". The same principles were applied in a boundary dispute again between the same two states in *Missouri* v. *State of Nebraska*, 196 U.S. 23, where there was a sudden change in the bed of the Missouri river in twenty-four hours and it was held to be a case of avulsion causing no change in the original boundary.

IV. (bb) (ii) Navigable Boundary Rivers.

In the case of Navigable boundary rivers, as in the case of Ganges, the Indus and the Brahmaputra running through various provinces or states, dispute might arise as to the boundary of such provinces or states. The middle of the navigable portion of the river, *i.e.*, the deepest depression in its bed will be the boundary. An exact case arose in the United States, the *State of Iowa* v. *State of Illinois*, 147 U.S. 1. The dispute was due to the conflicting claims of the two states as to the channel of the Mississippi river which separated the two states. Iowa insisted that the boundary line should be drawn in the middle of that river, equally distant from its banks, without regard to the channel of navigation. Illinois contended on the contrary, that it should be the main channel, the channel of commerce, or as it is called the steam boat channel of the river. The question arose in a very interesting way, because of a bridge spanning the Mississippi between Hamilton, on the Iowa side, and Keokuk, on the Illinois side of the river. Iowa claimed and taxed the bridge to the mathematical centre of the stream. Illinois claimed and taxed the bridge to the steam boat channel. The claims of the two states overlapped, Iowa taxing 225 ft. less of the bridge than it would be entitled to tax, taking the middle of the stream as its boundaries, and Illinois taxing 941 ft. including therein the 225 ft. of the bridge which Iowa, according to its claim, could but did not tax. To have the boundaries settled beyond dispute, Iowa filed its bill in the Supreme Court setting up these facts. The state of Illinois filed its answer. The Supreme Court held that where a navigable river separates two neighbouring states, the Thalweg, or middle of the navigable channel forms the line of separation. Formerly a line drawn along the middle of the river, the *medium filum acquae* was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as

to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered the line of demarcation of traffic. Mr. Justice Field gave his approval to a passage which Sir Edward Creasy had himself quoted from Sir Travers Twiss who observed that "Grotius and Vattel speak of the middle of the river as the line of demarcation between two jurisdictions, but modern publicists and statesmen the more accurate and more equitable boundary line of the navigable mid-channel. If there be more than one channel of a river, the deepest channel is the mid-channel for the purpose of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of the deepest depression." Again in a recent case *New Jersey* v. *Delaware* (291 U.S. 361) decided by the United States Supreme Court, the question was as to where in the Delaware river which separates the States of New Jersey and Delaware, was located the true boundary line between them. As to this question there has been more or less controversy between the two states almost from the establishment of the Union. The Supreme Court held that the boundary line was the low water-mark of the Delaware river on the New Jersey side, the true boundary was the Thalweg or middle of the main channel of navigation in the river. In a learned judgment Mr. Justice Cardozo concluded that:

> "International law to-day divides the river boundaries between states by the middle of the main channel when there is one and not by the geographical centre half way between the banks. The underlying rationale of the 'Thalweg' is one of equity and justice. A 'river' in the words of Holmes, J. (*New Jersey* v. *New York*, 283 U.S. 336 at 342) is more than amenity, it is a treasure'. If the dividing line were to be placed in the centre of the stream rather than in the centre of the channel, the whole track of navigation might be thrown within the territory of one state to the exclusion of the other. Considerations such as these have less importance for commonwealths or states united under a general government than for states wholly independent. None the less the same test will be applied in the absence of usage or convention pointing to another. International law, or the law that governs between states, has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality."

A river must be navigable throughout the year if it is to be regarded as navigable. *Sannidhiraju Subbarayadu* v. *Secretary of State for India*, (1927) 53 M.L.J. 868: I.L.R. 50 Mad. 961. The gradual nature of the accretion causing the change of the river depends upon evidence. It would not be

presumed from the obliteration of all marks on the surface of the land accreting. *Pahalwan Singh* v. *Muhessur Buksh Singh,* (1871) 16 W.R. (P.C.) 5. Land formed by accretion to a bank of the river belongs to the owner of the bank. There is no difference whether the accretion is caused by natural or artificial means. *John Deo Dem Raja Subkristo* v. *The East India Company,* 6 M.I.A. 267.

There does not seem to be in Madras as the Reg. IX of 1825 in Bengal, an express law embodying the principle that gradual accretion enures to the land which attracts it; but the rule, though unwritten, is equally well established. *Sri Balusu Rama Lakshmamma* v. *The Collector of Godavari,* (1899) L. R. 26 I.A. 107: I.L.R. 22 Mad. 464 at 467 (P.C.). In the *Secretary of State for India* v. *Raja of Vizianagaram,* (1921) 42 M. L. J. 589: L. R. 49 I.A. 67: I. L. R. 45 Mad. 207 (P. C.), it was argued on behalf of the appellants that, even if the lands in question were accretions to Raja's lands by the settled law of England, which the appellant argued was the law applicable to Madras, land to be an accretion must be formed by gradual, slow and imperceptible degrees as laid down in *Rex* v. *Lord Yarborough* (1824, 3 B. & C. 91 affirmed in 1826, 2 Bli. N.S. 147) and other English authorities and he alleged that the accretion in the present case was not formed by "gradual, slow and imperceptible degrees." On the other hand, the Board were referred to S. 4 of Beng. Reg. 11 of 1825 which applied only to the Presidency of Fort William and the law in force in the Madras Presidency is the English law of accretion of 'gradual, slow and imperceptible'. But the Privy Council did not think it necessary to decide this point. The word 'gradual' with its qualifications 'slow and imperceptible' only defines a test relative to the conditions to which it is applied. In other words the exact rate of progress necessary to satisfy the rule when used in connection with English rivers is not necessarily the same when applied to the rivers of India. At p. 212, they observe that in dealing with the great rivers of India and comparing them with the rivers in England it is necessary to bear in mind the comparative rapidity with which formations and additions take place in the former.

"The Privy Council held that the accretions must be held to be slow, gradual and imperceptible."

In *Pahalwan Singh* v. *Maharaja Mohessur Buksh Singh Bahadur,* (1871) 16 W.R. (P.C.) 5, the Privy Council divided certain alluvial accretions which had formed at the junction of two riparian estates by a line drawn from the point of such junc-

tion perpendicular to the course of the river. It is submitted that the same principle will apply even if the two riparian owners are two units of the Indian Federation.

IV. (bb) (iii) Rivers abandon their usual course and dry up

Sometimes a river suddenly abandons its usual bed altogether and dries up completely. In such a case, the boundary remains the same as before, *i.e.*, a line running through the middle of the river in the case of non-navigable river, or a line passing through the middle of the old Thalweg in the case of navigable river, *i.e.*, the old deepest stream in the middle of the river. But if the place of the old deepest stream is not ascertainable, then through the middle of the river as in the case of non-navigable rivers. (Oppenheim, Public International Law, Vol. I, 4th Edn. p. 426 & foot note 9).

V. Injury to the lower riparian state by disposal of sewage

Disposal of sewage by an upper riparian Province or State to the detriment of a lower riparian Province or State is a dispute over which the Federal Court can exercise jurisdiction. In a case reported in the Supreme Court of the United States, in *State of Missouri* v. *State of Illinois,* 180 U.S. 208, the State of Missouri charged the state of Illinois and the District of Chicago with the commission of an intolerable nuisance by emptying the sewage of that city into the Mississippi river, thus polluting the river as it flowed past the State of Missouri, to the great detriment of the people of that State and to the State itself, and a prayer for injunction to restrain the acts complained of. The State of Illinois demurred *inter alia* that the Supreme Court of the United States has no jurisdiction because the matters complained of do not constitute any controversy between the State of Missouri and the State of Mississippi. Mr. Justice Shiras had no doubt as to the jurisdiction of the Supreme Court. He said:

"It is true that no question of boundary is involved, nor of direct property right belonging to the complainant state. But it must surely be conceded that, if the health and comfort of the inhabitants of the State are threatened, the State is the property party to prevent and defend them. If Missouri were an independent sovereign state, all must admit that she could seek a remedy by negotiation and that failing by force. Diplomatic powers and the right to make war having been surrendered to the General Government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering. The health and comfort of the large communities inhabiting those parts of the States situated on the Mississippi river are not alone concerned, but contagious and typhoidal diseases may spread themselves throughout the territory of the State.

Moreover substantial impairment of the health and property of the towns and cities of the State situated on the Mississippi river, including its commercial metropolis would injuriously affect the entire state. And therefore the jurisdiction of the Supreme Court was recognised to entertain such suit."

V. (a) The threatened invasion must be clear.

Before the Federal Court can be moved to exercise its power to control the conduct of one State at the suit of another, the threatened invasion of such rights must be established by clear and convincing evidence. *New York* v. *New Jersy*, 256 U.S. 296. Hence a suit in which the plaintiff state alleged that its citizens were injured by the administration of the laws of the defendant state was held not to present a controversy between states. *Louisiana* v. *Texas*, 176 U.S. 1. The jurisdiction of the Federal Court does not extend to a suit by a state to recover penalties for the breach of its own municipal laws. *Wisconsin* v. *Pelican Insurance Co.*, 197 U.S. 265.

VI. Disputes about Water-supply

The dispute out of water-supply that might arise between the various units of the Federation are numerous: and they would be justiciable by the Federal Court, except those that are excepted under Ss. 130, 131, 132 and 134 of the Government of India Act. Under the above sections, if a federal unit is affected with respect to the use, distribution or control of water from any natural source of supply by the executive or legislative action or by the failure of any authority to exercise any of their powers, then the aggrieved unit would be entitled to appeal to the Governor-General acting in his discretion, who, unless he rejects it summarily, would appoint an Advisory Tribunal to inquire into and recommend on the question, and would decide the dispute according to his discretion. But the powers of the Governor-General is not extended to a case where one unit is desirous of securing the right to make use of water-supplies in the territory of another unit, but only to a case of one unit using water to the detriment of another.

Disputes might arise regarding the regulation of water-supply of interstate or interprovincial rivers flowing through various states or provinces. The quantity of flow to the lower riparian state might be considerably reduced by the diversion of water of a river for lawful and unlawful purposes by the upper riparian state. In a suit brought by a State against another to prevent the latter from diverting from the citizens of the former, the water of an inter-state stream, the

Supreme Court of the United States held that it is a justiciable dispute and granted relief. Vide *Wyoming* v. *Colorado,* 259 U. S. 419, and *State of Kansas* v. *State of Colorado,* 185 U.S. 125. Under the Government of India Act of 1935, such disputes will be decided by the Governor-General in his discretion on the recommendation of the Committee.

Oppenheim in his "Public International Law" Vol. I, p. 381 (4th Edn.) says:—

"Apart from navigation of rivers, the question of utilisation of the flow of rivers is of . importance. With regard to national rivers, the question cannot indeed be raised, since the local State is absolutely unhindered in the utilisation of the flow. But the flow of non-national and international rivers is not within the power of one of the riparian states for it is a rule of international law that no state is allowed to alter the material conditions of the territory of a neighbouring State. For this reason a state is not only forbidden to stop or divert the flow of a river which runs from its own to a neighbouring state, but likewise to make such use of the water of the river as either causes danger to the neighbouring state or prevents it from making proper use of the flow of the river on its part."

VII. Canals—Boundary Disputes relating to

It is possible that a canal might belong to two or more states or provinces. Boundary disputes arising between the riparian owners will have to be decided by applying the same law as are applicable to boundary rivers and interstate rivers. For example, the backwaters on the Wese Coast of South India extending from Tirur to Trivandrum belong to the British India and the States of Cochin and Travancore, and many disputes are likely to arise which will have to be decided by the Federal Court.

VIII. Territorial Waters

The question as to which waters are within the territorial jurisdiction of a particular state or Province is one which the Federal Court will have to decide. *The Lockken,* (1918) 34 T.L.R. 594. Fishing and Fisheries beyond territorial waters form a Federal subject and the States or Provinces have no right over them. But fishing and fisheries within the territorial waters fall within the authority of Provinces or States and, often, disputes might arise between Federal Government and a State or a Province as to the limit of territorial waters.

Three miles limit

Those parts of the sea, lying between the low water mark and 3 miles from it into the sea are known as territorial waters

over which the riparian provinces or states have the right. Very often, disputes might arise as between the constituent units, and sometimes between the Federation and the units as to the right to fisheries, coastal trade (cabotage as it is called), etc., within the maritime belt. (*a*) The right to fisheries, whether fish, pearls, amber or products of the sea belong to the littoral states. The Presidencies of Madras and Bombay and also portion of the Chief Commissioner's province of Sind and the native states of Travancore, Cochin, Baroda, Cambay, and Cutch form the littoral provinces or states of the Arabian sea. Such Provinces or States are entitled to the products of the sea or coastal fishing within the territorial waters. Customs duties may be levied on the merchantmen entering the territorial waters of these provinces or states. (*b*) They may exclude foreign merchantmen. Each Province or State is exclusively entitled to its maritime belt and is entitled solely to its coastal trade and any interference with it will involve in disputes. (*c*) The littoral Provinces or States may exercise control within their maritime belt in the interest of customs duties. The Provincial list in Schedule VII of the Government of India Act specifically gives to Provinces the right to coastal fisheries. If an island were to arise within the maritime belt, that island should be treated as the land and the three mile limit should be measured from that island. In the case of *The Anna,* (1805) 5 C. Rob. 373, when a British Privateer captured a Spanish ship near the mouth of the Mississippi but beyond 3 miles from the mouth and when it was brought before the Prize Court, the United States laid claim to it on the ground that it was captured within its territorial waters, as the capture was within 3 miles from a small mud island within the Territorial waters of the United States, though it was beyond the three mile limit from the shore of the United States. See also *Secretary of State for India* v. *Chelikani Rama Rao,* (1916) 31 M.L.J. 324: L.R. 43 I.A. 192: I.L.R. 39 Mad. 617 (P.C.), where the island at the mouth of the Godavari was held to belong to the Government of India who was the owner of the territorial waters, and not to the Zamindar, the owner of the land adjacent. Conversely when an island within the territorial waters disappears by forces of nature, then the three mile limit of the territorial waters has to be counted from the main land. The disputes between the Federation and the units, or between the units themselves arising from the violation of the above rights are justiciable by the Federal Court.

VIII. (a) History of the territorial waters and its limit or extent

As regards the three mile limit of the territorial waters, in England, the common law was not prepared to recognise this jurisdiction over the three mile limit. *Harris* v. *Franconia,* (1877) C.P.D. 173 and *Reg* v. *Keyn,* (1876) 2 Ex.D. 63. In *Reg* v. *Keyn,* the question arose as to the extent of the criminal jurisdiction of the crown. The point at issue was whether a foreigner in command of a foreign ship and bound for a foreign port could be indicted for manslaughter of a passenger in a ship which he ran down within three miles of the English coast. It was held by a majority of the court 7 against 6 that the court had no jurisdiction to try the prisoner on the ground that prior to 28 Hen. 8, c. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships, whether within or without the limit of three miles, from the shore of England; that that and the subsequent statutes only transferred to the common law court and the central criminal court the jurisdiction formerly possessed by the admiral and that, therefore, in the absence of statutory enactments, the central criminal court had no power to try such an offence.

VIII. (b) The Territorial Waters Jurisdiction Act

As a result of this refusal of the courts to recognise the jurisdiction over territorial waters, Parliament passed the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict., c. 73) which extended to India, declaring the rightful jurisdiction of the crown to extend and to have always extended over the open sea adjacent to the coast of the United Kingdom and all other parts of Her Majesty's dominion to such a distance as is necessary for the defence and security of such dominions. It may be noted that no definite limit is given to this jurisdiction. S. 2 provides that an offence committed by a person, whether he is or is not a subject, on the open sea within the territorial waters is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person committing the offence tried and punished. In reference to the sea (S. 7), it means that part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's Dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty: and for the purpose of any offence declared by the Act to be within the jurisdiction of the Admiral, any part of the open sea within

one marine league of the coast measured from low water mark is deemed to be open sea within the territorial waters of His Majesty's Dominions. Thus the claim to territorial waters is referable to the purposes of defence and security of the realm to the extent to which international law will allow. But in regard to crime, the courts will have jurisdiction over crimes committed at sea within a marine league of the coast.

VIII. (c) Claim beyond the three mile limit

But in practice, the sovereign states have claimed jurisdiction beyond the three mile-limit seawards for certain definite purposes, those of police, revenue, public health and fisheries. Among these is to be included the right exercised by neutrals to prevent hostilities between belligerents in the neighbourhood of their coast. In the reign of George III, a series of "Hovering Acts" were passed to prevent smuggling, where in some cases, jurisdiction up to one hundred miles was given. But the law officers in 1850 expressed the opinion that that type of legislation could not be supported. The earlier Hovering Acts were repealed and in their place was a provision authorising the forfeiture of any ship belonging in whole or part to British subjects or having half the persons on Board subjects of Her Majesty if found with prohibited goods on board within the three leagues of the coast of the United Kingdom. *See* S. 179, Customs Consolidation Act, 1876. Legislation of the nature having extra-territorial effect is held recently to be within the legislative competence of a self-governing dominion. See *Croft* v. *Dunphy,* (1933) A.C. 156.

In 1916, in the *Secretary of State for India in Council* v. *Chelikani Rama Rao,* (1916) 31 M.L.J. 324: L.R. 43 I.A. 192: I.L.R. 39 Mad. 617 (P.C.), Lord Shaw approved of the dictum of Parker, J., in *Lord Fitzhardinge* v. *Purcell,* (1908) 2 Ch. 139 at 166, that the bed of the sea, at any rate, for some distance below low water-mark, and the beds of tidal navigable rivers vested in the crown. In *Lord Advocate* v. *Wemyss,* (1900) A.C. 48, the crown was treated as owner of minerals in the bed of the sea and below the low water-mark.

In the matter of the three-mile limit, the Privy Council, in *Attorney-General for British Columbia* v. *Attorney-General for Canada,* (1914) A.C. 153 at 174, expressed the opinion that the portion was one of uncertainty. It was said:

"The doctrine of the zones compromised in the former (three mile) limit owes its origin to comparatively modern authorities on public international law. Its meaning is still in controversy. The questions raised thereby affect not only the empire generally, but also the rights of foreign

nations as against the crown and of the subjects of the crown as against other nations in foreign territorial waters. Until the powers have adequately discussed and agreed on the meaning of the doctrine at a conference, it is not desirable to say that any municipal tribunal should pronounce on it. It is not probable that in connection with the subject of trawling the topic may be examined at such a conference. Until then, the conflict of judicial opinion which are in *Reg.* v. *Keyn*, (1876) 2 Ex.D. 63, is not likely to be settled, nor is the conclusion likely to be reached on the question whether the shore below low water-mark to within three miles of the coast forms part of the territory of the crown or is merely subject to special powers necessary for protective and police purposes. The obscurity of the whole topic is made plain in the judgment of Cockburn, C.J., in that case. But apart from these difficulties there is the decisive consideration that the question is not one which belongs to the domain of municipal law alone".

This opinion was approved in *A. G. for Canada* v. *A. G. for the Province of Quebec*, (1921) 1 A.C. 413. There the question raised for consideration related to the public right of fishing in tidal waters of Quebec. Viscount Haldane, in giving the opinion of the Council, said at p. 431:

"The Chief Justice, following their Lordships' view, expressed in the British Columbia case, declined to answer so much of any of the questions raised as related to the three-mile limit. As to this their Lordships agree with him. It is highly inexpedient in a controversy of a purely municipal character such as the present, to express an opinion on what is really a question of public international law."

The extent of the territorial waters, except for crimes committed within three miles of the coast is yet undefined and the court will not regard the three-mile limit as so definite a rule of international law as to be regarded as part of the law of the land.

IX. Ports, Harbours and Mouths of Rivers

Ports, Harbours and mouths of rivers are national. When foreign merchantmen enter them or when they cast anchor in the maritime belt, they and the persons therein fall within the jurisdiction of the littoral state in case peace and order outside the ship are disturbed, or persons other than the crew or passengers are affected. But this jurisdiction would be limited when the vessel is compelled to enter a port in distress, because the ship should then be regarded as ex-territorial. By an international regime of Maritime Ports convention held at Geneva on December 1923 (including Great Britain and other States) the contracting parties are to enjoy equality of treatment in and freedom of access, to their maritime ports in respect of their sea-going vessels used for foreign trade.

In the case of harbours, if one and the same littoral state or province enclose them, they belong to that state or Province. And if two or more littoral states enclose them, they belong to

those states or provinces, *ad medium filium aquae*. In the case of Bombay and Madras harbours, there is no chance of any disputes between the constituent units of the Federation. But as regards the Cochin harbour the chances of conflict between the Travancore, Cochin and the Federal Government are bound to be frequent and they will have to be decided by the Federal Court.

X. (a) Disputes relating to Gulfs and Bays

If Gulfs and Bays, such as the Gulf of Cutch, Gulf of Cambay, Gulf of Renn and Gulf of Mannar, are enclosed by one and the same littoral provinces or states such as Bombay, Sind, Cutch and Kathiawar, disputes might arise between them with respect to rights of fishery. Disputes as to the proprietary rights over them will have to be incidentally decided. Gulfs and Bays enclosed by one and the same littoral belong to that Province or State, if the width of the entrance from the sea does not extend more than six miles, *i.e.*, three miles from each side. But if the width exceeds more than six miles, *i.e.*, 3 miles from each side and they are enclosed by the land of one and the same littoral state, there is a difference of opinion amongst writers. Vide *The Fagernes*, (1927) P. 311.

Great Britain, Germany, Belgium, Holland and the United States seem to think that if the entrance of the gulfs and bays exceed ten miles, then they cannot belong to the territory of the littoral state. But the practice of other countries exceed this limit. The institute of International law has voted in favour of a twelve mile wide entrance.

But gulfs and bays surrounded by lands of more than one littoral state or province are non-territorial, even if their entrance is very narrow. They are parts of the open sea, the marginal belt inside the bays and gulfs excepted. They are open to vessels of all nations including men of war and foreign fishing vessels both in time of peace and war and those vessels are not bound to comply with the municipal regulations of the littoral State or Province in time of peace. Oppenheim in his Public International Law, Vol. I, 4th Edn. (1928), says at p. 411:

"As regards navigation, fishery and jurisdiction in territorial gulfs and bays, the majority of publicists contend that the same rules of the law of nations are valid as in the case of navigation and fishery within the territorial maritime belt. The right of fishery may, therefore, exclusively be reserved for subjects of the littoral state. And navigation, cabotage excepted, must be open to merchantmen of all nations, though foreign men of war need not be admitted, unless the gulfs or bays in question form part of the highways of international traffic."

X. (b) Disputes relating to Straits and channels

In India, there are not very many Straits, to create disputes to call for adjudication by Federal Courts. All Straits which are not more than 6 miles wide are territorial. If the Straits divide the land of one and the same province or state, it belongs to that province or state (*i.e.*, territorial). But when it divides the territory of two different provinces or states, it belongs to both, the dividing line being the mid-channel. When a Strait is more than 6 miles wide and enclosed by land of the same state and if it can be commanded by coastal batteries, then the majority of writers agree that it can be territorial. All rules of the law of nations concerning navigation, fishery and jurisdiction within the maritime belt apply likewise to navigation, fishery and jurisdiction within the Strait. Once Great Britain claimed the narrow seas, namely, St. George Channel, the Bristol Channel, the Irish Sea and the North Channel as territorial. A recent case, *The Fagernes,* (1927) P. 311, shows that Great Britain is giving up its claim to such an unlimited degree. In 1926, a collision occurred in Bristol Channel between an Italian vessel and a British vessel and as a result the Italian vessel was sunk. The plaintiff, the owner of the British vessel commenced an action for damage caused to the ship. The place of collision was 10 or 12 miles distant from the English coast and 9½ or 7½ miles from the Welsh coast. The defendant contended that the place where the collision took place was not within the jurisdiction of the Court. Hill, J., held that it was within the jurisdiction. It went upon appeal where the Attorney-General in consonance with the general trend of the more recent opinion informed the Court that the crown is not going to claim jurisdiction over the place where the collision occurred. But Bankes, L.J., said at p. 320, that the question has never been authoritatively answered, except in cases (1) where some effective occupation has been proved, or (2) some statutory recognition established, or (3) where the opening is so narrow as to admit of no doubt. The answer to the question can be sought in the domain of international law, or in the case of our own country, in our common law". In *Anna Kumaru Pillai* v. *Muthupayal,* (1903) 27 Mad. 551, we find an application of the principles that rights beyond 3 miles could be acquired by a province by user. It was held in this case that the right to collect shell-fish in the gulf of Mannar was acquired through user by the coastal population for centuries, by licences granted to collect shell-fish by the rulers of the littoral states. It may be noted that this gulf is so extensive as

to be bounded on the west by the Indian mainland, on the east by Ceylon, on the north by Adam's bridge, while to the south it is open to sea: and the shell-fish beds are beyond the three-mile limit. If, instead of the user by the coastal population, the user is by a constituent unit of the Federation, its right will have to be recognised by the Federal Court.

XI. Disputes over air—cujus et solum, usquae ad coelum, ad et inferos

The development of aerial navigation might give rise to various aerial disputes, consequent upon the assertion of right over the air by States or Provinces. Various units of the Federation may like to have an air-craft and may like to go from one end of the country to the other and will in the course of the journey, have to travel through several units. It is true that under the new constitution, to the Federal Legislature is given the power to enact laws for Air-craft, Air-navigation, the provision for aerodromes, regulation and organisation of Air-traffic and of aerodromes. Till the Federal legislature chooses to make laws of guidance for settling disputes between them, the Federal Court will have to call in aid the principles of Public International Law. In the words of Oppenheim, Vol. I, p. 424 (4th Edn.):

"The practice of states seems to accord with the theory of the sovereignty of the subjacent state in the air-space over its territory and waters, both national and territorial, unmitigated by any servitude or other right of innocent passage."

Grotius was of opinion that the air, like the open sea, was incapable of appropriation. But in modern times, this holds good only as regards the air over the open space and unoccupied territory.

XI. (a) Three theories

Various were the views entertained regarding the right to air superincumbent on land and territorial waters, namely, (1) that the air space is free to all nations, (2) that the air space of the lower zone is national, belonging to the state and of the higher zone is international belonging in common to all nations, (3) that the air space belongs to the subjacent state subject to a servitude of other nations, namely, a right of innocent passage for foreign civil but not military air-craft.

XI. (a-1) Three theories—examined

James Wilford Garner in his Tagore Law Lectures, (1922) on "Recent Developments in International Law" gives a detailed

history. The air space above a subjacent space may be divided into three zones, the remotest, the nearest and the middle. The remotest zone is closed to man on account of its temperature. The nearest zone immediately above the earth may be regarded as a sort of an appurtenance to the soil upon which it abuts. In this zone, buildings are erected, telegraph and telephone wires stretched, and in it take place many of the activities of man which the state regulates or prohibits. The height of it may be extended to that of the tallest buildings plus the height of any telegraphic or other installations which may be erected upon them. Professor Rolland places this height at 330 meters. The *middle* zone is available for international navigation and the transmission of wireless correspondence.

(*a*) There are those who maintain the general principle of the freedom of the air, but allow the subjacent state a certain right of control for purposes of protection and conservation without restriction as to height. The Institute of International Law at its meeting in Ghent declared in Art. 1 that

> "the air is free: states have over it in times of peace and in times of war only the right necessary for their preservation"

but in Art. 3 recognised the right of each state so far as is necessary for its security to prevent above its territory and territorial water, and "as high as need be", the passage of hertzian waves. This view was re-affirmed by the Institute at its Madrid meeting in 1911.

(*b*) There is also the view that the subjacent state is absolutely sovereign over the whole aerial space above its territory without regard to height, but that it is limited by the right of innocent passage by aviators of other states. This view was reached by an unofficial Congress of Jurists held at Verona in 1910. This is also the view enunciated in the convention relating to international navigation, agreed to by the representatives of the allied and associated powers at the Peace Conference at Paris in 1919.

The advocates of the theory of absolute freedom of the air were older jurists who wrote when aerial navigation and the use of air as a medium of telegraphic communication was unknown. In 1902, they claimed the absolute freedom of air upon the analogy of the freedom of the High Seas. But the analogy is fallacious, in that the sea abuts the riparian state horizontally,

while the air rests upon it vertically. There is no danger to the riparian state by acts resulting from the navigation of the High Seas, such as collision, etc., but such acts occurring in the air space above the subjacent state may directly affect it and prove a danger to its inhabitants below. Further, a limited control is essential for its national defence and self-preservation, and also for prevention of violation of its laws relating to criminal, revenue, immigration, health and neutrality, etc. On the above grounds, the principle of absolute freedom of the air space is not recognised to-day.

The opposite extreme, *i.e.,* the absolute sovereignty of the state below over air space above it, both in times of peace and war seems also hardly defensible, on the ground that in the case of landlocked states, which have no sea border, they would be entirely dependent upon the will of the states which lie across the path of voyage. To prevent the passage of air ships etc., which have no idea of landing on or causing injury to the subjacent state, except the possible falling of wrecked air-craft, without limitation as to height, would be pushing the doctrine of sovereignty too far. At the meeting of the Institute of International Law in 1906, Westlake advocated the solution which recognised the sovereignty of the subjacent state over the superincumbent air space without limitation as to height but subject to a servitude of innocent passage by aviators of other countries. He had few supporters to start with but his view gained more adherents and it was approved by the majority of the delegates at the International Conference of the Powers at Verona. The British Aerial Navigation Acts of 1911 under which the Home Secretary, for the purpose of protecting the public from dangers arising from the navigation of air-craft, was empowered by order to prohibit their navigation over areas prescribed by the order, and the Aerial Navigation Acts of 1913 under which the power of the Home Secretary was extended to include purposes for the defence and safety of the realm. By virtue of this the Secretary of State could prescribe the areas in which the air-craft coming from abroad must land. Under this newly acquired authority the Home Secretary, by order in Council (1st March, 1913) limited the entry to the country by certain strips of coast, specified compulsory landing grounds and described the procedure to be observed by visiting air-craft. By S. 1 (2) of the latter Act, the power of prescribing by order the areas within which air-craft coming from outside the United Kingdom were to land and other conditions to be complied with by them:

XI. (b) Peace Conference at Paris, 1919

This principle was agreed to by the allied powers at the Peace Conference at Paris 1919. Art. 1 of the Convention declared that:

"of the contracting states, every state has complete and exclusive sovereignty in the air space above its territory and territorial waters."

By Art. 2, each contracting party undertakes to accord in times of peace freedom of innocent passage above its territory and territorial waters provided that the conditions established in the Convention are observed. The undertaking to grant freedom of passage applies only in times of peace. By Art. 39, it is declared that in case of war the provisions of the convention do not affect the freedom of action of the contracting states either as belligerents or as neutrals. By an Act of 1920, Great Britain affirmed the full and absolute sovereignty and rightful jurisdiction of His Majesty over the superincumbent air space above his dominions and territorial waters. The 5th paragraph of Art. 34 of the Convention of Paris, by a Protocol dated in London, 30th June, 1923, was amended to read, that each state represented on the commission (Great Britain, the British Dominions and India counting for this purpose as one state) shall have one vote. With regard to the vote of Great Britain and the Dominions an important alteration was made to the Convention by a Protocol dated in Paris, 11th December, 1929, which entered into force on the 17th May, 1933. By this, each of the Dominions and India acquired equal voting rights with the other States. According to the Warsaw-Convention dated 12—10—1924, the unification of certain rules to international carriage by air, the United Kingdom passed Carriage by Air Act of 1932 to give effect to that: S. 4 of of which says that any liability imposed by Art. 17 of the said first schedule on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law and the provisions set out in the second schedule to this Act shall have effect with respect to the persons for whose benefit the liability so imposed is unenforceable with respect to the manner in which it may be enforced. In 1933, a Convention took place at Rome known as the Rome Convention of 1933, to regulate the damage caused by air-craft to 3rd parties on the surface, signed by 26 countries including India. Subsequently the Air Navigation Act of 1936 was passed in England, amending in certain respects the Air Navigation Act of 1920. As stated above, from 1933, India had come to be recognised as a

separate unit entitled to a single vote and it has been provided in S. 106 of the Government of India Act of 1935, that the Federal Legislature has power to enact a law by way of implementing treaties and agreements with other countries, but it shall do so only with the previous consent of the Governor of a Province or of the ruler of a Federated State. In the Dominion of Canada, a conflict arose between the Dominion and the Provincial legislature as to the rights to legislate in matters of aerial navigation. An appeal was brought by way of a case stated to the Privy Council to decide whether the Parliament and the Government of the Dominion has the legislative and executive authority to perform obligations of Canada or any of its provinces under the Convention of Paris, 1919. The Privy Council regarded the subject of aerial navigation as of such national interest and importance to the Dominion of Canada and based its reasoning upon the obligations which the Dominion had undertaken as a signatory to the Paris Convention and held that the whole field of legislation in relation to aerial navigation in Canada belongs to the Dominion. *The Regulation and Control of Aeronautics in Canada*, In re, (1932) A.C. 54.

By the Indian Air-Craft Act 32 of 1934, the Governor-General in Council by notification in the Gazette may make rules regulating the manufacture, possession, use and operation of any air-craft or class of air-craft. By S. 100 of the Government of India Act of 1935, the Federal Legislature has and a Provincial Legislature has not power to make laws with respect to air-craft and air navigation the provision of aerodromes and the regulation and organisation of air traffic and of aerodromes.

XI. (c) (i) Private air-craft

The texts of the Paris Convention regulating the Aerial Navigation in 1919 modified by the International Commission for Air Navigation of 1934 may be accepted with necessary alterations as rules of guidance for settling disputes that might arise between the various constituent units of the Federation regarding Aerial Navigation. Air-craft must be registered in the State of which their owners are nationals and the nationality of the air-craft is that of the state in which they are registered. Every private air-craft must carry a certificate of its registration and air-worthiness, certificates of competency, licences of the operating crew, a list of passengers, and special licences for wireless equipment for wireless operators, etc. The establishment of international airways should be subject to the consent

of the state, flown over by an air-craft. Cabotage is reserved for the air-craft of the territorial state, and each state will have the right to reserve to itself the right to carry for hire persons between two points on the territory. With regard to the ships wrecked at sea, the rules applicable to the salvage of ships will govern. The authorities of the state have the right to examine every foreign private air-craft and verify its documents.

Each is to accord free innocent passage in time of peace to the air-craft of other states on observance of certain conditions laid down; and for military reason, a state can prohibit air-craft of other states from flying over certain areas of its territory and each state in times of peace in exceptional circumstances prohibit altogether flight over its territory by other states. Every air-craft used in public transport and capable of carrying ten or more persons shall be equipped with the sending and the receiving-wireless-apparatus. Every air-craft of a state has the right to cross the air space of another state without landing; but it shall follow the route prescribed by the state over which the flight takes place. But for reasons of general security, it will be obliged to land, if ordered to do so by means of signals. No air-craft capable of being flown without a pilot shall, except by special authorisation, fly without pilot over the territory of another contracting state. Every air-craft which passes from one state into another shall, if regulations of the latter state require it, land in one of the aerodromes fixed by the latter.

Prohibited Transport

The carriage, by air-craft, of explosives and of arms and munitions of war is forbidden in international navigation. No foreign air-craft shall be permitted to carry such articles between any two points in the same contracting state. A state may, in aerial navigation, prohibit or regulate the carriage or use of photographic apparatus.

XI. (c) (ii) State air-craft

State air-craft may be military air-craft commanded by men in military service, and non-military air-craft such as used for ports, police and customs. Military air-craft are not allowed to fly over land or water of a state, unless specially authorised. The states are to arrange for themselves as regards ports, police and customs.

XII. Radio Telegraphy

The space of the territorial atmosphere has become equally important as the territory, on account of wires for telegraphs

and on account of the wireless. Every state can prevent neighbouring states from putting up wires for telegraphs and telephones, passing through its air space. Since the use of the air space as a medium for the transmission of radio-telegraphic correspondence does not expose subjacent states to danger from falling objects used for purposes of navigation, there is no need of state-control over it. Nevertheless the transmission of dispatches through the air from stations in one country to another may interfere with local telegraphic communication in intervening states through the interruption which it may cause to the movement of the air waves. For this reason states are entitled to exercise some control over the sending of radio-telegrams through the air space over them. Oppenheim's view is that as regards the wireless, the principle of sovereignty in the air space over subjacent state applies with equal force to prohibit the disturbance of the air space over the State's territory by means of Hertzian waves caused for the purpose of wireless communications and emanating from a foreign source. The resolutions arrived at the International Radio-Telegraphic Convention of 1912 signed at London, superseded by the International Radio-Telegraphic Convention signed at Washington in 1927 will govern such questions. For fuller particulars, *vide* Hudson's International Legislation, Vol. III, pp. 2197 to 2276.

SUMMARY OF ENGLISH CASES.

BRITISH SUGAR MANUFACTURERS, LTD. *v.* HARRIS, (1938) 2 K. B. 220 (C.A.).

Income-tax—Profits or gains of business—Subsidiary companies—Payment of share of profits in lieu of services rendered—Reduction for income-tax purposes—Income-tax Act, 1918, Sch. D, r. 3 (a).

A company which was carrying on business as manufacturers of beet sugar agreed to pay two other bodies as between them for a period of four years "20 per cent. of the net profits of the company in consideration of their giving to the company the full benefit of their technical and financial knowledge and experience and giving to the company and its directors advise to the best of their ability respectively on all questions relating to manufacture and finance and disposal of the company's products."

Held, that the sums paid to the subsidiary companies in respect of the 20 per cent. of the profits payable to them was disbursement or expense "wholly and exclusively laid out or

expended for the purposes of the trade" of the company within r. 3 *(a)* of the Rules applicable to cases I and II of Sch. D of the Income-tax Act and that it should be deducted for arriving at the profits or gains of the company for income-tax purposes.

TUDOR-HART *v.* BRITISH UNION FOR THE ABOLITION OF VIVISECTION, (1938) 2 K.B. 329 (C.A.).

Practice—Action for libel—Plea of fair comment—Rolled up plea—Direction for particulars—Rule regarding.

A defendant pleading the rolled-up plea of fair comment as a defence to an action for libel cannot be ordered to deliver particulars stating which of the statements in the words complained of the defendant relies on as statements of fact and which as expressions of opinion; nor can the Court order such defendant to give particulars of the facts he relies on as being the basis of his comments if the plea limits those facts to the said facts.

Aga Khan v. *Times Publishing Co.*, (1924) 1 K.B. 675, followed.

HIBERNIAN BANK, LTD. *v.* GYSIN AND HANSON, (1938) 2 K.B. 384.

Bill of Exchange—Words "not transferable" across bill—Bill made payable only to named payee—Effect—Suit by transferee of bill—Maintainability—Bills of Exchange Act, 1882, S. 8 (1).

S. 8 (1) of the English Bills of Exchange Act provides as follows: "When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto but is not negotiable."

A Bill was in the following terms: "Three months after date pay against this first of Exchange to the order I. C. Co., Ltd., only the sum of . . . . effective value received". The bill which was crossed "not negotiable" was drawn upon the defendants and was accepted by them, and then indorsed by the drawers and transferred to the plaintiffs for value; the bill having been dishonoured on presentation the plaintiffs sued for the amount of the bill and interest.

Held, that the words "not negotiable" coupled with the words "to the order of I. C. Co. Ltd., only" in the bill were sufficient to prohibit the transfer of the bill and that the plaintiffs' action was not sustainable.

National Bank v. *Silke*, (1891) 1 Q.B. 435, considered.

HAILE SELASSIE *v.* CABLE AND WIRELESS, LTD., (1938) 1 Ch. 545.

International law—Ex-Emperor of Abyssinia — Suit for recovery of amounts due under contract—Rival claim by Italy—Jurisdiction of British Court.

The plaintiff, the ex-emperor of Abyssinia instituted an action for an account of what was due under a contract made between the Director-General of Ports, etc., of Ethiopia and the defendant company which was in Great Britain. It was ascertained from the Foreign Office that His Majesty's Government still recognised the plaintiff as the *de jure* Emperor of Ethiopia and that His Majesty's Government recognised the Italian Government as the Government *de facto* of virtually the whole of Ethiopia. The defendants proved that a claim to the moneys payable under the suit contract had been made by the Italian Government.

Held, that the Court had no jurisdiction to decide on the plaintiff's claim as there was a rival claim by another Sovereign State, namely, Italy.

Observations of *Scrutton, L.J.*, in (1921) 3 K.B. 532, relied on.

In re FROY (DECEASED) : FROY *v.* FROY, (1938) 1 Ch. 566.

Will—Construction — Gift to compound class — Whether grandchildren take as joint tenants or tenants in common—Double words of severance when necessary.

The rule stated in Jarman on Wills, 7th Ed., p. 1772, that, where there is a gift to a compound class, for example to *A* for life and at his death to be divided amongst his children then living and the issue of children then dead the issue to take their parents' share, only the children take as tenants-in-common, and double words of severance are required to enable the issue as well as the children to take as tenants-in-common and not as joint tenants, will not apply where the gift is in a very condensed form and it is practically impossible to insert double words of severance, and in such a case the words of division can be taken to apply to the original class of children as also to the substituted sharers, namely, the grandchildren.

In re HARWARD : NEWTON *v.* BANKES, (1938) 1 Ch. 632.

Will—Construction—Absolute legacy—Modification to life-estate by codicil—Death of legatee before testatrix—Effect—Legacy whether lapses.

A testatrix by her will after bequeathing certain specific legacies directed that her trustees should stand possessed of the residue of her real and personal estate in trust for a certain sum to her married daughter *G*. By a codicil of later date the testatrix directed that her trustees should hold the legacy given to *G* upon trust to invest the same and to pay the income thereof to her during her life without power of anticipation and after her death to hold both the capital and income in trust for the persons who would on the death of her daughter be the testatrix's own statutory next of kin under the Administration of Estates Act, 1925, as if the testatrix had died possessed thereof intestate and without having been married. *G* having predeceased the testatrix the question was raised whether the legacy bequeathed to her lapsed on her death.

Held, that the legacy was a settled legacy and the death of *G* the tenant for life did not cause a lapse.

In re *Pinhorne*, (1894) 2 Ch. 276 and In re *Powell*, (1900) 2 Ch. 525, relied on.

In re CLEADON TRUST, LIMITED, (1938) 1 Ch. 660.

Company—Advances to subsidiary companies—Secretary of company applying for loans—Legality—Ratification by Directors—No proper quorum—Liquidation of company—Application for recovery of loans—Maintainability.

The applicant from time to time made advances by way of loan to two subsidiary companies at the request of the Secretary of the main company. At a subsequent Board meeting of the company it was resolved that the several advances should be confirmed. But there was no independent quorum for the Board meeting and the action of the Board was not in any way approved by the shareholders. The company having gone into voluntary liquidation the applicant sought to recover his advances.

Held, that as the Secretary had no authority to borrow the company was not liable to repay the moneys paid for its benefit.

Held, further, that the company was not bound to repay the loan on the theory of ratification because there was no proof that a quorum of directors competent to act had knowledge that the payments were made and that the payer expected to be repaid by the company.

HUSSEIN OTHERWISE BLITZ *v.* HUSSEIN, (1938) P. 159.

Contract—Invalidity—Nullity of marriage—Marriage brought about by fear—Test.

It is not a correct statement of the law to say that in order to avoid a contract entered into through fear, the fear must be such as would impel a person of ordinary courage and resolution to yield to it. Whenever from natural weakness of intellect or from fear—whether reasonably entertained or not—either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no consent.

Observations of *Butt, J.*, in *Scott* v. *Sebright*, (1886) 12 P. D. 21, followed.

JOTTINGS AND CUTTINGS.

A Stipendiary on J.P.s and their Clerks.—At Leeds on June 15 at the Conference of the Magistrates' Association held in that place, Mr. J. Wellesley Orr, the Manchester stipendiary, made reference to some unpaid persons of his own occupation as "virtually deadheads," who "turned to the clerk at the end of a case, instead of applying their common sense to the facts, and asked: 'What would you do, Mr. Clerk?'" Magistrates should certainly allow the clerk to advise them as to law, but they should decide upon the facts for themselves." He also criticised the practice obtaining in some Courts of the clerk retiring with the bench of magistrates to consider a case. "I do not think," said he, "that the clerk should influence them in their decisions, for it is the magistrates' responsibility." He also made a remark which in the past has been pointedly directed to certain High Court Judges, that "the magisterial function is not the censorship of morals, but the administration of the law."

The just observations of Mr. Orr were supplemented by those of another stipendiary, Dr. Coddington of Bradford, touching a matter which has long called for adverse and fair comment: "The tendency, in matrimonial cases, to take so much from a man's weekly wages as represented his 'bacca, beer and pictures,' leaving him an automaton earning money and being left with nothing more than his lodgings and his keep. No wonder that the man chucked up his work and went on the dole"—preferring, no doubt, in such cases the prison to the treadmill.—*L.J.*, 1938, *p.* 450.

Distinguishing Law and Fact.—Such criticism was not, of course, directed and could not fairly be directed to all courts of summary jurisdiction; but those in respect of which it is fair comment are far too many.

In a letter to the *Times*, having read the comments of the stipendaries aforesaid, Mr. H. Ramsbotham wrote of "a case in point to the contrary." "I was then," he said, "a young magis-

trate, and was asked by the chairman of a certain bench to attend a meeting of that bench. The clerk, a most competent and highly respected man, certainly seemed to be taking too much on himself in the conduct of a case. I was very much struck by the chairman's remark, which was, to the best of my recollection: 'Mr. Clerk, on all questions of law this bench is glad to have your advice, but on matters of fact, leave them to the bench'."

One may sympathise with both; for magistrates must look down to the clerk for legal guidance, while in other courts a jury can for the like purpose look up at the judge. And there are so many matters of mixed law and fact that it must be difficult for clerk and bench to keep within their respective bounds.

Why not make the lawyer the chairman, and give him not more than two J.P.'s, one on either hand, selected in alphabetical or other order, one from the special and the other from the common jurors' list? This would be very democratic, and would give nearly all citizens a chance of assisting in the administration of the law, in addition to their present chances of receiving it in the dock for motoring or matrimonial offences.—*L.J., 1938, p. 450.*

Life, Joy and Expectation.—Expectation of life continues to be great fun in the Law Courts; and, one after another, the Judges are showing how various are the viewpoints from which you may regard it, how inexhaustible is the field it provides for judicial and philosophic speculation, and how illimitable the damages might be. I think perhaps the best contribution to the debate so far is that of Langton, J., who, in the Admiralty Court on Tuesday, had the opportunity of looking at the problem from the maritime aspect in the matter of expectation of lives lost in a collision accident at sea. And whereas Greaves-Lord, J., had relied chiefly on poetry, Charles, J., on his innate sense of what was fitting, and another judge on what is known as the Business Estimate, Langton, J., felt (and with respect I say quite properly) that 'he could not, in exploring the intangible, ignore arithmatic". He did not go so far as to say that arithmetic alone would get him anywhere, and after some references by O. L. Bateson to $x + y$ he felt that algebra could not be wholly ignored.

A certain Registrar had dealt with the case from the Joy of Living aspect, but the Judge had no difficulty in showing that *joie de vivre* was largely as a matter of temperament, and that an old dustman might have more of it in expectation and in fact than a young and blase millionaire. He saw, too, but little joy (in some cases) in the expectation (said to be valuable) of maintaining one's juvenile and adult dependants.

C. a. v., I look forward to the judgment of Langton, J.—*L.J., 1938, p. 450.*

No Royal Monster.—The Loch Ness monster having again, according to report, appeared in its home waters, big fish hunters are all agog, and deep laid schemes are being woven for the monster's undoing. It would appear, however, should the monster prove to be a fish, even of the mammalian order, that the successful fisherman or captor may send it with a clear conscience to Billingsgate, for it is not, to quote the words of the Dean of Durham, regarding Durham's Whale, a fish, either "by nature royal or by accident episcopal." Whales, sturgeons, lunatics and natural fools have their relation to royalty, and felons may have an episcopal as well as a royal connection; but the Loch Ness fish appears to be a wild thing, and unappropriated, insomuch that the catcher may be the lawful keeper, and is under no obligation to send it to Balmoral.

It was the 17 Ed. 2, c. 11 ("Of the King's Prerogative"), which enacted: ('Item habet warectum maris per totum regnum . . . . Wallenas et sturgiones captos in mari vel alibi infra regnum, exceptis quibusdam locis privilegiatis per Reges". That is to say, "Also the King shall have wreck of the sea throughout the realm, whales and sturgeons taken in the sea or elsewhere within the realm, except in certain places privileged by the King"—as in the Durham diocese.—*L.J., 1938, p. 451.*

Other Prerogatives.—It was by the same Act the sovereign was granted the custody of the lands of "natural fools", likewise the custody of lands of "lunatics"; he was to have "escheats of felons" where the felons held lands of an archbishop or a bishop; and he was to have "the goods of all felons attained and fugitives whersoever they may be found".—*L.J., 1938, p. 451.*

Law of the Crossings.—The belief that contributory negligence does not run against a pedestrian with the car that kills him on the crossings between Belisha Beacons received only a slight shock from Wrottesley, J., in *Knight* v. *Sampson,* for in that case, according to the findings, the driver of the car was not negligent at all. The injured party had been negligent in stepping out too suddenly from the pavement, giving the oncoming driver no chance to comply with the Regulations numbered 3 and 4, to which reference was made in *Bailey* v. *Geddes and Chisholm* v. *London Passenger Transport Board*. Mrs. Sampson's case as defendant was that the plaintiff had stepped off into the roadway without regard to the traffic, and thus came suddenly and immediately in the path of the defendant's car at a time when it was impossible for her to avoid a collision.

"I suppose," said Wrottesley, J., "that one reading of the earlier decision (as cited) might lead to the proposition that it was impossible to knock down a person on a pedestrian crossing by means of a motor-car without being liable for the result; but I do not think it was intended to lay down that proposition in *Bailey*

v. *Geddes*"; and he cited a passage from the judgment of Greer, L. J.

It is difficult not to agree with the words of the Judge, when he declared his belief that it was possible for a pedestrian so to step on to a pedestrian crossing as, in effect, to "commit suicide".—*L.J., 1938, p. 451.*

Defamatory Words about Libel?—I believe there are few lawyers who would withhold their approval of the words of what Mr. MacLaren, general secretary of the National Federation of Retail Newsagents, who, at Whitley Bay, described as "obnoxious, stupid and archaic", the law whereby distributors of books and newspapers could be joined as defendants in a libel action. The result of that law, in his opinion, amounted in effect to a press censorship.

He went on, and called that law "grotesque", and who will dare to say that it is not? But he did not confine himself to adjectives, epithets and destructive criticism. His constructive proposal was that the Bill promoted by the Empire Press Union should be altered or amended so as "to give newsagents complete immunity in respect of the contents of newspapers and magazines sold by them, so long as the publications are not obscene; for it is impossible that they can be aware of the contents of all the publications they handle. The principle that any libellous matter they may contain should be the sole responsibility of the producer, publisher and editor should be clearly defined if the injustices of the libel law are removed". He moved a resolution demanding "reform of this unjust law," and it was passed unanimously.

Some reform, something like that suggested, will in time occur; with, of course, the usual safeguards concerning the distributors who "knew or ought to have known".—*L.J., 1938, p. 451.*

Aftermath of the Woolsack.—It is not yet known whether Lord Maugham, L. C., finds the Imperial wool on which he now sits in the Upper House more comfortable than the Victorian horsehair which for so long made "the Woolsack" a misleading and fictitious name; and you may have noticed that Public Confidence, the European Situation, and British Prestige at Home and Abroad has sesnsibly improved from the moment the Keeper of the King's Conscience took his seat on a Woolsack that was a Woolsack indeed, truly filled with the best of British and Imperial fleece.

Some free thinkers may assert that this is mere coincidence or unrelated sequence, and not a cause and effect; but all honest men will have their doubts. I foretell, at least, that trade will also improve; for was not England's first commercial success found-

ed on wool, a staple; and did not the Commercial Judge of our nation of traders and shopkeepers take his judicial seat on a bale of it? I think it not unlikely that the Commercial Court, and even common law litigation, may also improve.—*L.J., 1938, p. 451.*

The Lord Chancellor's Ecclesiastical Patronage:—A year or two ago Viscount Hailsham, who then filled the office of Lord Chancellor, in his presidential address to the members of the Holdsworth Club of the Law Faculty at Birmingham University, gave a vivid account of the multifarious duties that fall to be discharged by the occupant of the Woolsack. Among those mentioned, and once again we are reminded of it by an announcement in *The Times* of last week, is that of presenting clergymen to certain vacant livings throughout the country. This apparently dates from the reign of Henry VIII when a book called "Liber Regis" was compiled in which all those Crown livings which were then of the value of £20 or less, and of which there would appear to be some 600 in number, were to be filled on the nomination of the Lord Chancellor. As some one has said, there is some thing peculiarly English or illogical in this arrangement, but like a good many other illogicalities to be found in the English Constitution it works fairly well, although this does not mean that in every case the appointee meets with the universal acceptance of the parishioners to whom he has been sent. Is it not on record that after the exercise of the patronage in one case a letter was received by the Lord Chancellor in which the writer, an old lady, complained that "we looked for a Cedar of Lebanon, and you have sent us a cabbage!" One who many years ago filled the office of Ecclesiastical Secretary to the Lord Chancellor said that at one time the notion that politics played a part in these appointments was common, as was illustrated in a letter he received from a candidate for a vacant living in which he stated that his "strenuous efforts in His Master's service did not prevent an unobtrusive devotion to the Conservative Club twice a week in the evenings". Others seeking appointment sought to gain the heart of the Secretary by presents of game; indeed, one postulant who did this mentioned in an accompanying letter that it was a good year for pheasants in his part of the country, but, as the Secretary noted with no little amusement, the donor had omitted to remove the label of the London poulterer who had supplied the carcases.—*S.J., 1938, p. 502.*

The Regulation of Cyclists.—Whatever views may be entertained concerning the recommendations contained in the recently issued report of the Transport Advisory Council on the subject of cyclists, there can be little room for difference of opinion on the soundness of two general propositions. The council strongly deprecates the recriminations which it finds occur between certain

inconsiderate sections of the cycling and motoring interests and expresses itself as satisfied that more respect for and understanding of each other's point of view would lead each class of road user to show that increased consideration on the road which, it is said, lies at the root of the problem of road safety. The resentment caused by the thrusting motorist or by other road users anxious to assert what they consider, not always erroneously, to be their rights only too often engenders a disposition inconsistent with sound driving practice, and must have been the remote, and of its nature unrecorded, cause of many accidents. The second proposition which should receive wide approbation is the desirability of segregating traffic moving at widely varying speeds. "We are convinced," the report states, "of the importance, from the point of view of reducing accidents, of providing separate tracks for classes of vehicles whose speeds differ considerably". Segregation of fast and comparatively slow moving motor traffic is in practice effected to a considerable extent by the modern four-lane highway with undoubted advantages to all concerned, and it seems to us that the further application of this principle should prove an important factor in road safety. The desirability of an ample provision of footpaths and cycle tracks appears to be thus clearly indicated. They should, however, be adequate. Pedestrians in the past have frequently been blamed for using the roadway when the path provided for them has been of the roughest character, and cyclists can hardly be expected to use an inadequate track if the road presents greater attractions. The Traffic Advisory Council was impressed with the extent to which cycle tracks are provided on the Continent and with the fact that cyclists are required to use them. It accordingly recommends that cycle tracks should be provided on both sides of new main roads, but only where it is practicable to construct a reasonably continuous and properly surfaced track of adequate width. If such conditions are duly complied with, much of the difficulty at present experienced in inducing cyclists to use the tracks should disappear.—*S.J., 1938, p. 502.*

Rear Lights.—The council was unable to agree on the question whether it should be made a statutory obligation on cyclists to carry a primary rear light. A minority report, signed by eleven members, considers that the onus should rest on the driver of an overtaking vehicle of providing sufficient light to distinguish the vehicles or persons he overtakes. The majority report, signed by thirty members, adverts to the reduction of the effectiveness of reflectors occasioned by the dipping of car headlights. The opinion is expressed that, when considering the cost and inconvenience to the cyclist of providing a rear light, weight must also be given to the uncertainty and nerve strain to all users of the highway created by the presence of large numbers of cyclists showing no light to the rear, and the conclusion is reached that the value to all of a rear

light on cycles is so great as to outweigh the consideration of trouble and cost to the cyclist. Other recommendations of the council which should be shortly noted are that two efficient brakes should be provided on freewheel machines, and at least one on fixed gear machines; that cyclists should be prohibited from riding more than two abreast except when overtaking, and that they should be required to carry identity discs and be placed under the same obligation as motorists to report accidents. On the other hand, no action is recommended as to the fixing of an age limit for cyclists; nor are riding tests or a system of third party insurance advocated.—*S.J., 1938, p. 503.*

The Woolsack.—The recent official disclosure that the Woolsack which, in popular parlance, has long been regarded as a synonym for the high office of Lord Chancellor is not now, and has not for many years been, padded with wool as most of us believed, and as its name would indicate, but with mere horse hair, came with something like a shock to those of us who clung to the notion that the Woolsack was placed in the House of Lords as a reminder to the peers of the importance of England's early staple trade in wool. It is true that Lord Chancellor Campbell was inclined to be sceptical regarding this explanation of the origin of the Woolsack, but till better grounds for abandoning the close association of the wool trade in the days of the Plantagenets with the seat of honour in the Upper House of Parliament are forthcoming, we prefer to retain our allegiance to the connection set out above. No one who turns over the statutes of the early Edwards can fail to realise the immense importance then given to the trade in wool—an intimate relationship which long prevailed, which in the reign of Charles II, was further accentuated by the Act of Parliament which provided that every Englishman should be buried in a woollen shroud—a legacy from the far past which we might have forgotten were it not for the lines of Pope in one of his Moral Essays:

> "Odious in woollen 'twould a saint provoke
> Were the last words that poor Narcissa spoke".
> —*L.T., 1938, p. 496.*

The Rule of Law.—Under the above caption a letter was published in *The Times* last week signed by Lord Macmillan, the Chairman of the Executive Council of the International Law Association, and by Dr. Van Hamel, the President of the Netherlands branch of the same body, calling attention to the forthcoming conference—the fortieth in the history of the Association—to be held at Amsterdam from 29th August to 3rd September, and making a strong appeal for the attendance of a large contingent from the different countries to be present at the discussion of such

very practical subjects as commercial arbitration, the protection of the civil population against new engines of war, neutrality, and business contracts with foreign Governments. During its forty years of existence, the Association, which has numbered among its staunch supporters many distinguished publicits and international lawyers of eminence, including, among its English members, the late Lord Phillimore, has been able to accomplish not a little in the shape of substituting the machinery of the law for the settlement of international disputes, and although its activities suffered a severe blow during the Great War, there is no reason now, indeed all the more reason in view of the tense relationships manifested during recent months, why, if we may borrow the words of Bishop Wilson, so much emphasised by Matthew Arnold in his "Culture and Anarchy", once again the aim of the Association to make "reason and the will of God prevail", should not be realised and made effective. In certain quarters since the War there has been a tendency to treat the practicability of solving international disagreements by moral suasion as hopeless—an attitude strongly to be deprecated, and it is to be hoped that the appeal by Lord Macmillan and Dr. Van Hamel for a large attendance at the forthcoming Conference will not fall on deaf ears so far as English lawyers are concerned.—*S.J., 1938, p. 533.*

The Rule of the Road.—A recent case, in which a summons against a motorist who was alleged to have driven for 1½ miles on the wrong side of the road was dismissed, affords an interesting reminder that the rule of the road whereby the vehicles keep to the left-hand or near side has never been formulated as a statutory obligation. The Highway Code directs drivers of motor vehicles and cyclists to keep as near to the left as practicable, while pedestrians are advised that where there is no footpath it is generally better to walk on the right of the carriageway so as to face the oncoming traffic. The Highway Code is silent concerning the propriety of the long-standing practice whereby those in charge of led horses kept to the right, and merely advises these persons and those in charge of other animals to keep themselves between the animals and the traffic and to keep the animal near the edge of the road. As readers know, a failure on the part of any person to observe any provision of the Highway Code does not, of itself, render that person liable to criminal proceedings of any kind, but such failure may in any proceedings—whether civil or criminal—be relied upon by any party thereto "as tending to establish or negative any liability which is in question in those proceedings". [Road Traffic Act, 1930, S. 45 (4).] The rules of the road have been described by Lord President Clyde in *Christie* v. *Glasgow Corporation*, (1927) S.C. 273, as "not rules of law at all, but rules of common sense". Whether a departure from them is culpable or not depends, it was said in the same case, upon the circumstances in

which the departure is made. Section 78 of the Highways Act, 1835, and S. 28 of the Towns Police Clauses Act, 1847, rendered a failure on the part of the driver of a carriage to keep to the left on meeting another an offence, and so long ago as 1798 it was intimated that, when driving at night, the rule of the road should never be departed from (*Cruden* v. *Fentham*, 2 Esp. 685). Moreover, if a driver does not keep to the left side on a clear road, it is evident from *Pluckwell* v. *Wilson*, (1832) 5 C. & P. 375, that he must use more care and diligence and keep a better look-out than if he were driving on the customary side, while drivers are required by statute to have regard to traffic which may reasonably be expected to be on the highway (Road Traffic Act, 1930, S. 11), and evidence as to hypothetical traffic or traffic which might reasonably be expected to be on the highway is admissible [see *Elwes* v. *Hopkins*, (1906) 2 K.B. 1; *Beresford* v. *Richardson*, (1921) 1 K.B. 243]. The right to depart from the customary procedure in keeping to the near side of the road is thus of a somewhat precarious character, though, as the case shows, a driver who elects to drive on the off side does not *ipso facto* commit an offence.—*S.J., 9138, p. 533.*

The Limitation Bill.—The Limitation Bill, the contents of which were briefly indicated in our last issue, was read a second time in the House of Lords on Monday. Lord Maugham, L.C., indicated that the proposed amendment and consolidation of the law which the measure is designed to effect concerned twenty Acts, six of which it was proposed wholly to repeal. The law in relation to the limitation of actions was, it was said, in a state of great confusion, and a great many provisions relating to the question were of a somewhat involved nature. The Lord Chancellor commended the Bill to the House as a very useful, sensible and clear consolidation of a branch of the law which had been sadly in need of it. Lord Romer described the law in regard to limitation of actions at the present time as a mass of anomalies and distinctions. It was better that there should be one period, and six years was proposed in the Bill. The learned Lord regarded the measure as a genuine attempt to produce some kind of order out of the present chaos.—*S.J., 1938, p. 534.*

A pronouncement on desertion, one of the new grounds for divorce, was made by Mr. Justice Goddard at Newcastle Assizes, on 18th June, says *The Times*: "People who have been living apart for a long time," he said, "are now rushing to the Courts for divorce on grounds of desertion. Desertion is a matrimonial offence and if there is desertion there must have been wrongful desertion on the part of either husband or wife. That is withdrawing co-habitation without the consent of the other. If a man and his wife quarrel, the wife takes herself off, and the man

says, 'Very well, go and good riddance,' that is not desertion". Finding these circumstances in a case before him, Mr. Justice Goddard refused to grant a decree.—*S.J., 1938, p. 538.*

The Week's Personality.—Lord Brougham, said of Lord Campbell that if he had been brought up to fiddling or tinkering, he would have been neither a first-rate fiddler nor tinker, but he would have made more money than any others who followed the same employment. Several of his contemporaries said the same thing in different words, and the rather mean ambition which made him judge most things by their bearing on his personal fortunes lowered both his character and his reputation. One of the most extraordinary incidents in his life was his first judicial appointment when he went to Ireland as Lord Chancellor. The choice was generally regarded as a job and the Irish Bar were furious and held a protest meeting. "What does this stranger know of equity?" cried one speaker. "What does he know of the peculiarity of Irish statute law? What does he know of the customs or things such as he would have daily to adjudicate upon? What right on earth has he to thrust himself upon a hostile Irish Bar? . . . . . What respect can the accomplished practitioners of our Chancery Bar feel towards a man whom they will have to school in the rudiments of equity practice before he can venture on the most ordinary decisions?" Public indignation penetrated even the insensitive skin of Campbell, who resigned after six weeks and returned to England, there to become Chief Justice and, finally, Lord Chancellor.—*S.J., 1938, p. 542.*

A Close Shave.—A short time ago, one of those inspectors to whom we owe the devotional quality of the English Sunday followed a seventy-year-old hair dresser five miles from Reading to Twyford and caught him red-handed cutting a farmer's hair in a farmyard contrary to the Sunday Trading Act. The magistrates who had to weigh the gravity of the offence dismissed the summons under the Probation of Offenders Act, the chairman warning the accused not to do it again, "not in the open anyway". The late Lord Birkenhead once came up against the same sort of law when he was told that he could not get a shave in Halifax on a Thursday afternoon, but a Yorkshire barber proving amenable to persuation told him: "Tha' can ef tha' kak's quart." "What's that you say?" said Birkenhead. "I don't understand a word". "I said you can have a shave if you keep it quiet", replied the barber changing to southern English. His customer was so amused at the original version that he jotted it down on his shirt cuff. When the shave was over he said: "As you are not allowed to shave me on a Thursday afternoon I am not going to pay you any money. But I will give you a good cigar". And he did. Only

next day from a photograph in a paper did the barber recognise whom he had shaved.—*S.J., 1938, p. 542.*

Reign of Terror.—Not long ago a defendant at Highgate suggested to the Bench: "Considering I have never been in Court before, I do not see why I should not be let off with a frightening". The particular method seemingly suggested is not very common, but its habitual employment was one of the reasons why Day, J., earned such a reputation for harshness. Once, a sentence of five years' penal servitude for the theft of an ordinary waistcoat aroused such deep indignation that a question was asked in the House of Commons by a barrister who had been in Court at the time. There was, therefore, profound amazement when the Home Secretary answered categorically: "It is *not* the fact that Ambrose Applejohn was sentenced at Carlisle Assizes to five years' penal servitude for stealing a waistcoat". He then proceeded: "I have in my hand the calendar and in that it appears that Ambrose Applejohn was sentenced to six months' imprisonment with hard labour." Day's method was to terrorise the lawbreaking section of the community with brutal sentences pronounced in open Court and to modify them privately when he signed the calendar.—*S.J., 1938, p. 542.*

Joint Tortfeasors.—A pretty problem in legal technique has been solved as a result of the misadventures of one of the most beautiful of our film stars. The statute concerned, of which the title Law Reform (Married Woman and Tortfeasors) Act, 1935, is not unsuggestive of Hollywood influence, provides machinery by which a tortfeasor may recover a contribution from his or her joint tortfeasor. It was held in *Croston* v. *Vaughan* (1937, 4 All.E. R. 249) that the trial Judge might properly be asked to apportion the loss. This was where drivers of different vehicles were concerned. Recently Tucker, J., at Liverpool Assizes, found himself faced with a different situation. There (*Ryan* v. *Fildes and Ors.*, unreported) it appeared that a schoolmistress, acting in excess of authority but within the scope of her employment, struck and injured a school boy. In an action for damages judgment was given against the lady and against her co-defendants the school managers, who were liable as master for servant. On an application for the managers asking for an order, it was contended that a principal or a master found "vicariously liable" was not a "joint tortfeasor", and that this was a case not of contribution but of indemnity (which is not within the statute). But the learned Judge found a precedent in the Merle Oberon case (*Thompson* v. *Bundy and Ors., Times,* May 5), where judgment was entered against Miss Oberon and her chauffeur. This enabled his Lordship to make an order in favour of the school managers against the schoolmistress.—*L.J., 1938, p. 2.*

Lord Justice Puisnes to come.—Parliament is about to give us three new L.J.s., and accordingly sub-S. (1) of S. 6 of the Supreme Court of Judicature (Consolidation) Act, 1925, shall have effect as if for the word "five" there were therein substituted the word "eight".

And so, instead of following the antique fashion of appointing more puisnes who might as required fortify the Court of Appeal when not more urgently engaged in their ordinary calling, Parliament has adopted the newer course of appointing L.J.s who will be liable for duty in the Courts below. "The duties of an ordinary Judge of the Court to Appeal", says S. 2 (1) of the Supreme Court of Judicature (Amendment) No. 2 Bill, "appointed after the commencement of this Act shall include the duties of sitting and acting as a Judge of the High Court when requested by the Lord Chancellor so to do, and of performing, when so requested, any other acts which a Judge of the Court of Appeal is empowered to perform by S. 3 of the principal Act".

So, though all be L.J.s the eight have not all the same rights and privileges; for there are the five L.J.s who may not be ordered by the L.C. to go on duty in the Courts below; and the coming three whose ordinary duty it will be to go below on request or demand.—*L.J., 1938, p. 9.*

Only Five Chancery Judges?—The legislators were no doubt not wholly uninfluenced by the fact that an L.J. costs the country no more (save in so far as his judgments are overruled and the judgment of the puisne restored by the House of Lords) than the puisne; and the device of appointing a Lord Justice whose ordinary duties include those of a puisne may be regarded as ingenious as well as inexpensive.

But while Parliament offers us three L.J.s, they threaten and appear to intend to take away, in the near future, one of the six Judges of the Chancery Division, if and when a vacancy occurs, and if there is then only work enough for five. The fear is that when the Bill becomes an Act (as it will almost immediately) a Judge of the Chancery Division may (if he is willing) be turned into one of the new L.J.s, thereby creating a vacancy at a time when it might be alleged that business in the Division was at a low ebb.

The words of the Bill before me are: "If after the occurrence of a vacancy among the puisne judges attached to the Chancery Division the number of those judges amounts to five, the vacancy shall not be filled unless and until the Lord Chancellor, with the concurrence of the Treasury, advises His Majesty that the state of business in that Division requires that the vacancy should be filled."—*L.J., 1938, p. 9.*

New Courts.—We know now that we are to have new Courts (in time) for our augmented judicial staff, and it is said that plans have already been submitted and are under consideration for the erection of a new wing as remote as possible from the Temple, in a north-north-westerly direction from the top of Middle Temple Lane. The position will not matter much; but it is devoutly to be hoped that the committee and the architects will not fall into the previous errors of design and equipment which made our present High Courts what they undoubtedly are; ill-lighted, ill-ventilated, often inaccessible to the practitioner whose business does not allow him to take a good place in the early morning queue; acoustically amongst the world's worst, and in many other respects as ill-adapted for the purposes of a Law Court as the ingenuity of man could devise. It is curious that the defects which were so apparent and the subject of much adverse and justifiable criticism in 1882 were by no means avoided, but were in many respects repeated when the new wing was built in the early years of the present century. Will the wise men of to-day, the new builders, avoid the old errors, and design and build these new courts with the single aim of making them as fit as modern architectural science and old common sense can make them for their purpose as courts of law; fit for the hearing and decision of cases; places where the demeanour of a witness may be observed without a magnifying glass or a search-light or a crick in the neck of the observer; where justice is neither inaudible nor invisible; and those good lawyers who are not good scrummagers, and even those of poor physique, may hope to get to their working place without injury or offence.—*L.J., 1938, p. 10.*

In the old days.—One writer treating of the ecclesiastical courts preserves the quaint, but as it might seem very practical, rule that advocates were only admitted to plead in those tribunals provided they did not talk too much. It is said that the Synod of Canterbury had, in an article "de puniendo advocatos garrulos", decided that prolix counsel should be debarred the right to appear in court. While the authorities thus sought to curb prolixity in others they were not blameless themselves. Readers of Boswell's great biography will recall that when Johnson read his tragedy of Irene to Gilbert Walmsley, the Registrar of the Lichfield Prerogative Court, the latter, objecting to his having brought his heroine into great distress, asked Johnson, "How can you possibly contrive to plunge her into deeper calamity?" To this Johnson, in sly allusion to the alleged oppressive proceedings of the court of which Walmsley was an official, replied: "Sir, I can put her into the Spiritual Court!" This from one so profoundly attached to the Church of England as was Johnson, was bold indeed, but with all his gravity the doctor had a vein of humour which emerged every now and again as we find recorded in the graphic pages of Boswell.—*L.T., 1938, p. 13.*

Diplomatic Privilege.—The withdrawal last week of a summons against a defendant on the ground of his immunity from prosecution by reason of diplomatic privilege, is a reminder of a famous incident which occurred in the reign of Queen Anne, and which has left its mark indelibly on our Statute Book. In 1708 the representative in this country of Peter the Great, spoken of as the Muscovite Ambassador, was arrested for debt in a London street at the instance of certain tradesmen, they being under the belief, erroneously as it turned out, that he was about to leave the country without discharging his liabilities, and he was carried to a sponging house, where he was detained till bailed out by the Earl of Faversham and a London merchant. Naturally the ambassador was very wroth at the insult thus inflicted upon him, and so was Peter the Great when the matter was reported to him; indeed, he wrote immediately requiring that the culprits should instantly be put to death, but as things are not so managed in this country he had to be placated in some other way, and this was accomplished by the most humble of apologies accompanied by an assurance that an Act of Parliament would immediately be passed which would carry a perpetual record of contrition for the untoward incident, and would also render the repetition of such a calamity impossible for the future. Such was the origin of the Statute 7, Anne c. 12, which, after reciting that "several turbulent and disorderly persons having in a most outrageous manner insulted the person of Andrew Artemonowits Mattueof, Ambassador of his Czarish Majesty Emperor of Great Russia, her Majesty's good friend and ally, by arresting him, and taking him by violence out of his coach in the public street, and detaining him in custody for several hours, in contempt of the protection granted by her Majesty, contrary to the law of nations, and in prejudice of the rights and privileges which ambassadors.....have at all times been thereby possessed of and ought to be kept sacred and inviolable," proceeded to declare all proceedings against the ambassador to be utterly null and void, and to enact that all suits, actions and proceedings against any ambassador were to be absolutely null and void. It is said that a copy of this Statute gorgeously bound was in solemn pomp conveyed to the Czar, but whether this placated him is not recorded. It has been held that the substantive part of the Act was only declaratory of the common law and of the law of nations. It may be added that Ss. 1 and 2 of the Act of Anne, those containing the narrative of the outrage on the Ambassador and vacating the proceedings against him, were in 1867 repealed by a Statute Law Revision Act of that year, but the substantive provisions preserving the privileges of ambassadors and other diplomatic persons continue in full force.—*S.J., 1938, p. 553.*

The Punishment of Young Offenders.—The large proportion of crime committed by persons under twenty-two years' of age is a

matter of common knowledge and concern. One of His Majesty's judges recently said at the opening of Assizes that he and his brother judges were much troubled at this fact and adverted to a method of correction which doubtless has its place among other forms of punishment as a factor calculated to bring the youthful offender to a better mind. "There is no man or woman in this country", the learned judge observed, "who would say I was guilty of inhuman ideas, but I know myself, looking back on my own youth which was not too good, that I became what I hope I am, and grew up what I believed my parents would hope me to be, because when I did wrong I was corrected not by being sent for years to an approved school, but by that manner of correction which is so valuable to youth and which prevents them again from doing wrong without any loss of self respect, and without loss of humanity in those who administered that correction". The learned judge expressed himself as well assured that the "wave of sentimentalism" which was passing over the country was not good for young people. If, he said, one could see a way of reasonable and yet impressive correction for misdoings by young people it might bring them back to the straight path again, whereas they wandered away and were found in a court of that sort at the ages of seventeen or sixteen and a half".

Another aspect of the problem was considered by the Court of Criminal Appeal (Branson, Hawke and Macnaghten, JJ.) on the following day when a number of applications by young men against sentences to Borstal detention were refused. According to the note on the matter in *The Times* a number of separate offences were committed in each case before the offender was captured. Macnaghten, J., observed that some young persons seemed to think that they were entitled to say: "However numerous the crimes I commit before I am caught, it is the law of England that I must be put on probation". It was, the learned judge said, time to dispel any such idea. Similar observations were made by Branson, J., in another case. In a third case Hawke, J., adverted to the reluctance on the part of judges to send young offenders to prison, and to the judicial appreciation of the value of probation. There were, however, the learned judge intimated, cases where a deterrent as well as a reformative element was necessary, and Borstal had the advantage in such cases that offenders did not like it.—*S.J., 1938, p. 553.*

Commercial Cases.—Some three years ago the London Chamber of Commerce urged in the course of a memorandum submitted to the Royal Commission on the Dispatch of Business at Common Law that judges in charge of special lists, such as those of the commercial court, were too frequently changed, with the result that the judge taking the interlocutory proceedings in a case frequently did not try it. According to a recently issued statement the Chamber is

given to understand that the frequent changes and lack of continuity in the judges taking the list of commercial cases has caused much dissatisfaction among litigants in the commercial court. When the commercial list and the commercial court were instituted, the intention, the Chamber understands, was that the judge sitting in that court should also deal with interlocutory applications in those cases before trial, and this was for many years carried out the judge of the commercial court sitting continuously for long periods. The Chamber also urges the importance of judges appointed to take the commercial lists being men who while at the Bar have practised regularly in the commercial court and so are completely familiar with this class of work. This is regarded as being especially important in cases where questions relating to charter-parties, bills of lading and marine insurance are involved, as otherwise unnecessary prolongation of trials with its attendant increased expense to litigants is likely to occur. It is stated, moreover, that in certain types of case commercial litigants might prefer to bring their disputes before the commercial court rather than arbitrate if they could be certain that their cases would be heard by a judge thoroughly familiar with the subject, and who would sit in the commercial court for a period of not less than, say, a year, so as to ensure that in the majority of cases tried by him he would also have heard the interlocutory applications. As readers are probably aware, the London Chamber of Commerce has during recent years had under consideration, from the point of view of the litigant, the whole subject of the state of business in the courts and the questions of delay and expense, and the subject was referred to a sub-committee consisting of two legal and four non-legal members. The matter referred to in the present paragraph was recently under the consideration of the Chamber's Parliamentary and Commercial Law Committee, and it is stated that a communication has been addressed to the Lord Chief Justice in the hope that it may be possible for the position to be remedied.—*S.J., 1938, p. 554.*

Poor Man's Lawyer.—In the course of a letter sent to a meeting of the London Council of Poorman's Lawyers, recently held at The Law Society's Hall, to receive the annual report of the Bentham Committee for Poor Litigants, the Lord Chancellor expressed his interest and sympathy in the work which he described as of great benefit to the poor litigant and to society at large. The total number of cases for the past year, 675, is very similar to those of recent years, but the proportion of cases sent to honorary solicitors was very much larger. It is of some interest to observe, and should, it is contended, afford a complete answer to certain criticisms which appear to have been directed against the committee, that out of the 283 cases sent to honorary solicitors, 226 were settled out of court. The cases dealt with are of an infinite variety, but tenants' difficulties, matrimonial differences, and

running down cases, form a large proportion of the whole. The least satisfactory side of the report appears to be the financial, a deficit of £339 having accumulated over the last five years. A garden party which was arranged by a committee of ladies, under the chairmanship of Lady Hewart, took place recently, with the object of raising funds to deal with the deficit.—*S.J., 1938, p. 554.*

BOOK REVIEWS.

THE HINDU CODE by Sir Hari Singh Gour, M.A., D. Litt., D.C.L., L.L.D., published by The Central Book Depot, Nagpur. (1V Edition: Revised and re-written). Price Rs. 20. Postage extra.

Sir Hari Singh Gour is a well-known and learned lawyer and his books on the various legal subjects have become recognised text books on those branches of law. The book under review is the fourth edition of his well known Hindu Code. The scheme of this book is familiar to Indian Lawyers and treats the whole subject of Hindu Law in the form of the sections of an enactment giving the statements of law as established by the decisions and otherwise in a succinct form and giving their exposition and the decided cases elaborately under each section. The task of the learned author in this respect has been rendered more difficult by the conflicts of decisions which are common where there are several superior courts of equal jurisdiction and by the fact that there are provincial differences in the matter of Hindu Law. That he has succeeded to this extent in presenting the comprehensive subject in the shape of an enactment is a matter for gratification. This mode of treatment is of special value at this time when " it is obvious that the age of legislation has now come " in the field of Hindu Law, in the words of a very learned and acute lawyer. When the legislature takes up the task of legislating on the branches of Hindu Law, Dr. Gour's book will form a basis to work upon. In the course of such vast work covering the whole field of Hindu Law, the slipping of a case here and there will not detract from the usefulness of the book. In this edition the learned author has omitted all obsolete principles and decisions. In many respects, the book has been re-written having regard to the more recent statements of the law and decisions. The legislature has recently passed some important enactments bearing on some branches of the Hindu Law modifying the pre-existing law. They have been incorporated and noticed in the book, though it cannot be said that all of them have been critically examined. We have every hope that this edition will fully maintain the reputation of its predecessors as an up to date text book on the subject of Hindu Law.

TRANSFER OF PROPERTY ACT (IV of 1882), by Darashaw Jivaji Vakil, B.A., LL.B., Bombay (First Edition 1938). Price Rs. 14. Postage extra.

This is the most upto date commentary on the Transfer of Property Act as amended upto 1st April, 1930. Besides being an upto date commentary on the enactment, the learned author has kept in view the difficulties of the conveyancer and has attempted to solve them. He has given information on matters not usually contained in a commentary on the Act, such as, a stock mortgage, power-of-attorney, income-tax payable by a mortgagor, broker's position in a transaction, conditions on a sale by auction, transfers by limited holders, etc. He has also given helpful suggestions on drafting and the various stages through which a draftsman has to pass in the preparation of a conveyance, a mortgage, a lease and other documents and also on requisitions on title. In other respects, such as giving an upto date statement of the law and noticing all the important decisions bearing on the subject, the learned author has given the fullest information. We hope that the book will be looked upon as a recognised text-book on the subject by all branches of the profession.

LECTURES ON COMPANY LAW by Shantilal M. Shah, Barrister-at-Law. Published by The Popular Book Depot, Bombay. (III Edition 1938).

This is a book of practical utility mainly intended for businessmen and students of law. This subject has not been dealt with as a commentary on the Indian Companies Act, but by a series of lectures on Company Law in logical manner which will be easily intelligible alike to the layman and to the student of law. It is not without its use to the practitioners in courts. Reference to all except the important cases has been omitted to enable the businessman and the beginner in law to follow the subject easily. We hope that the book will be widely appreciated by those for whom it is intended.

INDIAN COMPANY LAW by M. J. Sethna, Barrister-at-Law. Published by D.B. Taraporevala Sons & Co., Bombay, (1938). Price Rs. 4—8—0. Postage extra.

The object of the author in this book is to explain the principles underlying the Company Law embodied in the Indian Companies Act of 1913 and by the various Amendment Acts up to 1938, in the course of a number of chapters dealing with the various branches of the subject. The learned author has dealt with the subject in a lucid manner so as to be easily understood by

the students and the businessmen. The text of the Indian Companies Act and the rules and tables are given at the end of the book. The case-law has been referred to only wherever necessary to support the propositions so far as may be required for a beginner. We hope that the book will be found useful both by students and businessmen.

THE NAGPUR LAW NOTES, A fortnightly Legal Publication, Edited by P. S. Chiney, B.A., LL.M., Advocate, Nagpur. Annual subscription: For local Rs. 6, Mofussil. Rs. 6—6—0. Postage extra.

We have the honour to acknowledge receipt of the above publication with thanks.

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THE POLYGAMY AND DIVORCE BILLS.

BY

S. VENKATARAMAN, B.A., M.L., *Advocate, Madras.*

Reform proposals:—

Quite a number of Bills (L. A. Bill, 23 of 1938; C. of S. Bills, 3 and 4 of 1938) designed to amend and modify the Hindu familial law in various directions are at present before the Central Legislature. They are intended to regulate if not altogether to abolish polygamy and also to introduce the institution of divorce among Hindus. The question arises whether there is any necessity for such legislation and if so on what lines it should proceed. In this connection it is salutary to remember that:

"The institution of marriage is the first act of civilisation and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws[1]."

In the words of Lord Russel of Killowen:

"It is in the interests of the State that family life should be maintained, and that homes should not be broken up by the dissolution of the marriage of parents. But even in the absence of children, it is in the interest of the State that if possible the marriage tie should remain stable and be maintained[2]."

Early Hindu marriage ideal:—

Marriage among Hindus took on a sacred character from the Vedic times. It was a lifelong union where the wife was regarded as a gift from the Gods[3], an associate in religious observances and a partner in the joys and sorrows of life.

1. *Noice* v. *Brown*, 20 Am. Rep. 388.
2. *Fender* v. *Mildmay*, (1937) 157 L.T. 340 at 348.
3. Rig. Veda, X, 15, 36.

Polygamy was not allowable according to the spirit of the law and a second wife was styled a wife not for duty but for lust. When in course of time the political integrity of the Aryans came to be assailed by frequent foreign invasions raising apprehensions regarding the security of their racial and cultural purity the marriage laws were stiffened; pre-puberty marriages for women were ordained and second marriages deprecated. This resulted in a disparity in the marriage laws between the sexes. The rules were, however, acquiesced in and acquired all the sanctity attaching to tradition.

Causes of discontent:—

Indian social life was till recently practically closed to all outside influences. Ancient traditions remained unassailable and the cake of custom was found hard to break. The advent, however, of newspapers, telegraph and telephone, air-travel and the radio brought about an annihilation of time and distance. The glamour of western civilisation, the equality of status achieved by women in Europe and America in the political and other spheres and the scepticism as regards the value of religion engendered by its failure to avert the cataclysm of 1914 all produced their repercussions and these coupled with the increasing deterioration in the observance of the rules of varna-asrama dharma, the growing divorce between precept and practice in actual life and the perpetuation of forms and ceremonials whose spirit had already fled, have produced a ferment in Hindu social life with a demand for a revision of our sense of values and a readjustment of our laws.

Factors to be remembered:—

Hindu opinion in the matter of reform of marriage laws may be said to run on three different lines. At one end there are people who regard marriage as a purely religious concern outside the pale of any legislation. At the other end are people who are critical and rationalistic in outlook, regarding marriage as a contract whose incidents can be regulated by statute. Neither of these classes asks for any special reform at present of the marriage laws, the former because of its disbelief in the competency of the legislature in this behalf, and the latter because of the existence of the Special Marriage Act of 1872 attracting to marriages under its auspices

the provisions of the Indian Divorce Act and the Indian Succession Act. In between these two classes there exists a body of people who are not sceptical enough to repudiate the religious character of marriage nor willing enough to accept all its implications, people who will not tolerate a marriage without rituals but do not desire it to be indissoluble under all circumstances. It is this body of people whose views have to be met.

Shastraic rules:—

Under the Shastras, as regards men, in spite of the eulogy of monogamy, polygamy was permitted[1], usually through anuloma alliances[2]. According to the texts:

"Three wives are allowed to a Brahmana in accordance with the order of castes. Two to a Kshatriya and one to a Vaisya. One Sudra wife besides, to all, according to some teachers without using mantras[2]."

Even within the caste a man was allowed to marry a second wife under certain circumstances. A text of Manu[3] indicates that originally it was permitted only after the death of the first wife. According to Apastamba a second wife cannot be taken while the first wife was willing and able to perform her share of religious duties or if she bears sons and it was only where she was deficient in either of these qualities that a second wife could be married[4]. Subsequently the category of exceptions was enlarged and the Shastras declared[5]:

"She who drinks spirituous liquor, is of bad conduct, rebellious, diseased, mischievous or wasteful may at any time be superseded by another wife.

A barren wife may be superseded in the eighth year, she whose children all die in the tenth, she who leaves only daughters in the eleventh, but she who is quarrelsome without delay."

Even where a second wife was permitted in one's own caste the first wife alone, if blameless, was to be associated in all religious works[6]. In still later times polygamy became a matter controlled exclusively by caprice and economic factors.

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1. Ait. Br. III, 2, 12.
2. Paraskara Grihya Sutra, cit., on p. 831 of Ghose's Hindu Law, 3rd Edn., Vol. I; Vishnu, cit., on p. 846, *ibid.*; Vasishtha, cit., on p. 849, *ibid.*
3. V, 168.
4. II, 5, 11, 12-13.
5. Manu, IX, 77-82.
6. Vishnu, cit., on p. 846 of Ghose's Hindu Law, 3rd Edn., Vol. I.

As regards women the Shastras prohibited polyandry.[1] A second marriage was according to some permissible on the death, asceticism, degradation, or impotency of the husband or desertion on his part.[2] It is however doubted whether the texts contemplated a remarriage after the first marriage has been completed in all its stages, or after a betrothal merely. According to Kautilya marriages contracted in accordance with approved forms could not be dissolved but divorce could be had in some cases where the marriage was in the unapproved forms and remarriage permitted.[3] While the rules were gradually relaxed in the case of males they were stiffened regarding women. "Once alone is a maiden given in marriage," and "neither by sale nor by repudiation is a wife released from her husband"[4], said the Shastras. To prevent as far as possible undesirable alliances it was laid down:

"The hunch-back, the dwarf, one born blind, the impotent person, the lame and one afflicted with distressing incurable disease—to all these persons abstinence from marriage is surely enjoined for life[5]."

A marriage in contravention of this and like injunctions, will, however, not be a nullity but will justify the wife in living apart from the husband in most of these cases. It was also laid down that on supersession a superseded wife should be provided for by the husband[6], and such provision may go up to a third of the husband's property. Monogamy, remarriage after wife's death, remarriage during her life time if she bore no son, remarriage under certain other circumstances as well, and finally remarriage at will have been the successive stages in the development of the rules relating to marriage of males. While prohibition of marriage by disqualified men gave place to rules tolerating them but conceding to the wife the right to live apart, remarriage by women was made impossible.

Criticism of the rules:—

Disparity thus resulted in the marriage laws as applicable to the two sexes. The theory of marriage being a lifelong union sat lightly upon man in that despite the absence of divorce

1. Ait. Br. III, 2, 12.
2. Narada, XII, 97-101; Vasishta, XVIII, 13; Katyayana, cit., Col. Dig., II, 171; Devala, cit., *ibid.* 165.
3. Arthasastra, III, 3 and 4.
4. Manu, IX, 45-47.
5. Vishnu, cit., on p. 847 of Ghose's Hindu Law, 3rd Edn., Vol. I.
6. Manu, IX, 77-82; Yajnavalkya, II, 148.

he can always discard a wife and take another at his inclination, whereas it worked hardship in the case of a woman as she can never get out of a union under any circumstances whatever. Further the safeguards provided against any arbitrary supersession of a wife have proved illusory in practice. For a second marriage is regarded as valid by the Courts under whatever circumstances contracted and the rule regarding the giving of a solatium to the superseded wife has never been effective due to its indefiniteness. Also remarriage by the husband is not accepted by the Courts as a ground entitling a wife to live apart from him.

Lines of reform:—

At the same time it has to be remembered that public opinion has always viewed marriage as a religious tie, cemented by mantras, incapable of being sundered, and hence will not easily reconcile itself to the sanctity of the institution being violated by the intrusion of divorce. Any reform, therefore, of the marriage laws, if it is not to remain a dead letter, must take note of this factor. Since the enactment of the Child Marriage Restraint Act, it can't be said that the bride is not a girl who has attained her discretion and as such capable of making her wishes in the choice of a husband respected, thereby minimising to a large extent the chances of incompatible and unequal alliances. The prevalence on a large scale of the practice of adoption eliminates the necessity for taking a second wife for the sake of male progeny, which according to the Shastras was the main ground for a second marriage. Polygamy at will being opposed to the Shastras there can be no legitimate objection to its being rendered punishable by statute. A statutory rule making it an implied condition of every marriage that a wife on being discarded unjustifiably by her husband will be entitled to a provision analogous to mahr among Muslims but more definite in character and easily enforceable will operate as a salutary check against any arbitrary conduct on the part of the husband. Even if a second marriage were to be permitted in exceptional cases as where the first wife is insane or is afflicted with hideous diseases, a similar safeguard may be provided for the first wife. The argument that suppression of polygamy means the promotion of immorality is without validity; for no one will admit that the morals of women have become affected by the age-long denial to them of

the right to remarry under any circumstances, and what is true of women in this respect must be equally true of men.

Dr. Deshmukh's Divorce Bill:—

[L. A. Bill 23 of 1938.] Dr. Deshmukh's Divorce Bill in the Legislative Assembly seeks to achieve for Hindu women what has become possible in England under the Matrimonial Causes Act, 1937. It purports to confer a right of divorce on women exercisable on (*i*) impotency, (*ii*) apostacy, (*iii*) second marriage, or (*iv*) desertion for a continuous period of three years by the husband. The Bill proceeds on the principle that what is good for England must be good for India and makes no allowance whatever for the difference in outlook and facts of life as they obtain in the two countries. It gives the right of divorce to women only, under the cloak of conferring on them equality of status with men. No woman of good family or sensitive feeling would rush to the Court for relief on any of the grounds stated in the Bill. The Bill if passed into law is bound to remain a dead letter but will have succeeded in depriving the Hindus of a matter which was justly a source of pride to them, namely, that theirs was a conception of marriage unique, sanctified by religion, lasting for ever, wherein no sordid consideration intrudes and which is intended to be a training in dharma.

Mr. Susil Kumar Roy Chowdhury's Bill:—

[C. of S. Bill 3 of 1938.] Mr. Chowdhury's Bill in the Council of State aims at regulating polygamy in British India by penalising it except under certain circumstances. The Bill allows liberty to remarry where the first wife is (*i*) permanently invalid, or (*ii*) insane, or (*iii*) suffering from incurable and loathsome diseases, or (*iv*) unchaste, or (*v*) living away from the husband's protection unjustifiably, or (*vi*) unfit without grave injury to her to fulfil her marital obligations habitually. The Bill provides that before remarrying a person must obtain the sanction of Court. The Bill is unnecessary and is bound to operate as an irritant. The Statement of Objects and Reasons appended to the Bill concedes that the percentage of polygamous marriages is very small but states that the very possibility that the husband can marry without any reasonable and probable cause lowers the position of women in this country. There is no halfway house between monogamy

and polygamy and the recognition of special circumstances as entitling a man to marry a second wife will result often in the manufacture of evidence against an unwanted wife and her being harassed and humiliated by all sorts of enquiries. Far from protecting women and elevating their status, the legislation if made, would defeat its very purpose.

Mr. G. S. Motilal's Bill:—

[C. of S. Bill 4 of 1938.] The Bill introduced by Mr. Motilal has the merit of simplicity. It prohibits polygamy outright and makes a second marriage during the subsistence of an earlier marriage an offence under Ss. 494 and 495 of the Indian Penal Code. The principle, if accepted, would ensure equality between the sexes in the matter of their marriage laws. In view, however, of the dependency of women on their husbands for their maintenance and the practical impossibility of a woman who has gone through a form of marriage once, obtaining a proper husband again by reason of the social sentiment operating against her it will be well to drop the provision in the Bill regarding the invalidity of the second marriage.

Mrs. Radhabai Subbarayan's Bill:—

The Bill proposed to be introduced by Mrs. Radhabai Subbarayan in the Central Legislative Assembly contains two sets of provisions, namely, (*i*) the prohibition of polygamy and (*ii*) the conferment of a right of divorce at the instance of either spouse under certain circumstances. Under S. 3, a person having a husband or wife living shall not during the lifetime of such husband or wife marry again unless the previous marriage has been dissolved, and any person marrying in contravention of that rule shall be deemed to have committed an offence under S. 494 or 495 of the Indian Penal Code, and such subsequent marriage shall be held to be void. Under S. 4 either spouse can present a petition to the Court for dissolution of marriage on the ground (*i*) that the other spouse has for a continuous period of five years been suffering from an infectious or incurable disease, or a loathsome venereal disease or virulent leprosy or incurable lunacy; or (*ii*) that there has been desertion by the other spouse unjustifiably for a continuous period of five years; or (*iii*) that the other spouse has been guilty of habitual adultery; or (*iv*) that the other spouse has been guilty of such habitual cruelty as would endanger health or safety.

The first set of provisions is almost identical with what is found in Mr. Motilal's Bill and is unexceptionable except in so far as it seeks to render void the second marriage in all cases. As already pointed out such a provision is not called for at present, in a case where the offender is a man, inasmuch as under our existing social conditions the woman who is the victim of such a marriage will always have to suffer if the marriage was annulled, particularly where it is done after the parties have lived together as man and wife for some time.

Regarding the second set of provisions, the criticisms urged against Dr. Deshmukh's Divorce Bill will almost equally apply here. It is not so much a question of alleviating distress as of removing the root causes, that has to be tackled. The Statement of Objects and Reasons mentions that the Bill is called for because:

"There are numerous instances where a man who is already married has married a second wife without any reasonable justification, ill-treated his first wife or otherwise caused her untold misery and unhappiness."

If polygamy is rendered an offence, if the provisions of the Child Marriage Restraint Act are strictly enforced, and if a provision analogous to mahr is implied as a condition of every marriage many of these grievances will disappear and equality practically ensured between the sexes regarding the marriage laws.

There are certain other criticisms to which the Bill is open. It is difficult to see why any distinction should be made between habitual adultery and occasional misconduct, particularly where the latter act is deliberate, as a ground for divorce. Enquiry in Court relative to matrimonial unhappiness and the reasons therefor, far from enhancing respect for the marital tie will lead to its being regarded as a mere contract and no more. It will often result in the fabrication of evidence to sully the fair name of the unwanted spouse and to achieve that person's permanent humiliation. From the point of women, if the average wife seldom takes advantage of the right available to her under the existing law, to claim maintenance from the husband in cases where she has been obliged to live apart on account of his cruelty or other justifiable cause, because of the fear of publicity and a natural disinclination to have her marital unhappiness made the subject of a judicial adjudication, it will be much more so

where it is a question of making and proving more unsavoury allegations. Above all, when all is said and done, polygamy is rare and cases of marital unhappiness due to oppression by the husband are not very frequent. The remedy proposed by the Bill is out of proportion to the evil sought to be relieved against.

Conclusion:—

It may, in conclusion, be stated that no reform of our marriage laws will be successful in any appreciable degree if it does not recognise that marriage is a lifelong union cemented by religion, and indissoluble in character. Polygamy may be heavily penalised and thereby rendered practically impossible. A suitable statutory provision definite in character and easily enforceable may be made in favour of the wife as an incident of every Hindu marriage, to protect her against any arbitrary desertion by the husband and to operate as a check even against the creation by him of circumstances compelling her to live apart. The adoption of these measures coupled with the better enforcement of the provisions of the Child Marriage Restraint Act will eliminate many of the root causes of the evils sought to be remedied by the various Bills now before the Central Legislature and at the same time preserve to the Hindus their distinctive conception of marriage.

SUMMARY OF ENGLISH CASES.

HERNIMAN *v.* SMITH, (1938) A.C. 305.

Malicious prosecution—Reasonable and probable cause—What is—Rule in Hicks *v.* Faulkner*—How far correct—Functions of the judge and jury.*

H (plaintiff) together with one *R* was charged with conspiracy to defraud *H. S.* (the defendant) and with obtaining money from him by false pretences. On the information of *S* they were charged before the justices at *E*, committed for trial to the Central Criminal Court, tried there by the Recorder and convicted. On appeal, the Court set aside the conviction, being of opinion in the case of *H* that there was not a sufficient case to go to a jury. Plaintiff *H* was found to be innocent but the question was as to the effect on *S's* mind.

Held, that reasonable and probable cause is as defined by Hawkins, J., in *Hicks* v. *Faulkner*, (1878) 8 Q.B. 167 at 171, "an

honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed". The question of the defence of reasonable and probable cause is for the Judge. To ask the general question whether the defendant took reasonable care to inform himself of the true state of the facts is, in many cases, to ask the jury what the Judge has to decide for himself. The facts upon which the prosecutor acted should be ascertained. When the Judge knows the facts operating on the prosecutor's mind, he must then decide whether they afford reasonable or probable cause for prosecuting the accused. In so far as Hawkins, J., in *Hicks* v. *Faulkner*, (1878) 8 Q.B.D. 167 says at p. 172 that the reasonableness of the accuser's belief in the existence of the facts on which he acted is a question of fact for the jury not approved. That question together with the question whether the facts so believed amount to reasonable cause for believing the accused to be guilty, are for the Judge.

PATON *v.* INLAND REVENUE COMMISSIONERS, (1938) A.C. 341.

Income-tax—Income-tax Act, 1918, S. 36 (1)—Loan from bank—Account debited with interest—If payment of interest from customer to bank so as to fall under S. 36 (1).

H. F. had a total income of 26,301*l.* Out of the income certain charges were paid. They were all deducted. There was a balance of income of 7,777*l.* after allowing for these charges. *H. F.* had borrowed from *M* bank 250,000*l.* on security. Up to the date of hearing nothing had been paid on that account either for principal or for interest. But the interest was being debited by the bank to the loan account each year and added to the principal. The question was if "in view of the bank's practice of adding the interest of each half-year to the amount advanced, the interest had in fact and in law been paid each half-year" and further "to the extent that *H. F.* had taxed income for the year in question, the interest must be deemed to have been paid out of profits or gains brought into charge and tax within S. 36 of the Income-tax Act".

S. 36, sub-S. (1) of Income-tax Act, 1918, provides that "where interest payable in the United Kingdom on an advance from a bank carrying on a *bona fide* banking business in the United Kingdom is paid to the bank without deduction of tax out of profits or gains brought into charge to tax, the person by whom the interest is paid shall be entitled, on proof of the facts to the

satisfaction of the Special Commisoners, to repayment of tax on the amount of the interest".

Held, that in the circumstances there was no ground for holding that the interest in question was paid by *H. F.* All that has happened is that, because the interest has not in fact been paid, the creditor has added the amount of the unpaid interest to the debtor's principal indebtedness. Interest which is so dealt with cannot be interest 'paid to the bank', still less can it be interest "paid to the bank without deduction of tax out of profits or gains brought into charge" within the meaning of S. 36.

THE LORD ADVOCATE *v.* INZIEVAR ESTATES, (1938) A.C. 402.

Customs and Inland Revenue Act, 1889—Estate duty—Life assurance policy—Assignment of during life—Some premiums paid by assured even after assignment—Basis for estate duty—Proportion payable.

In 1910 *S* took out a policy of assurance on his own life for 20,000*l.* The annual premiums thereon was payable on April, 1930, in each year. In 1925, *S* assigned the policy to the respondents gratuitously. 14 premiums had by then been paid regularly by *S*. *S* died in April, 1935. After the assignment also, *S* paid four annual premiums and thereafter till his death the respondents paid the seven premiums. On death of *S* the policy amount of 21,800*l.* was paid to the respondents. The question was as to the amount of estate duty payable, namely, whether it is to be 4/25 or 4/11 of the policy amount. S. 11, sub-S. (1) of Customs and Inland Revenue Act, 1889, provides that "the charge under the said section (that is, S. 38 of Act of 1881) shall extend to money received under a policy of assurance effected by any person dying on or after 1889 on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit".

Held, the meaning of the sub-section is that "where the policy is partially kept up by such person for the benefit of a donee whether nominee or assignee, the charge shall extend to a part of the policy moneys in proportion to the premiums paid by that person". The proportion designated in the sub-section is the proportion in which they have paid such premiums after the donation, that is, 4/7th. The language shows that the proportion is to be determined by events which take place after the donation.

COMPANIA NAVIERA VASCONGADO *v.* STEAMSHIP "CRISTINA", (1938), A. C. 485.

International law—Ship of Spain—Ship in English port—Possession of ship taken by Spanish Government—Claim by the private owner of the ship for declaration of ownership and for possession—If maintainable.

A Spanish company, carrying on the business of ship owners at Bilbao in Spain, initiated an action for a writ *in rem* claiming as sole owners of S. S. "Cristina" for a declaration of ownership and for possession. The "Cristina" is a Spanish ship. She was lying at Cadiff dock, where she had arrived under the charge of a Captain F. appointed by the shipowners. As the Captain F. failed to obey a decree of the Spanish Government, the Consul dismissed him and put a new master appointed in the name of the Government. Since the new captain took charge the ship's expenses had been disbursed by the Spanish Government. The shipowners (company) then issued this writ *in rem* claiming as owners. The respondent (Spanish Government) entered a conditional appearance and stated that they were the owners or parties interested and also moved for the writ and all subsequent proceedings thereon being set aside inasmuch as it "impleads a foreign sovereign state, namely, the Government of Spain".

Held, that the Spanish Government was in fact impleaded and they were intended to be so impleaded. The order sought in the present case would necessarily displace the *de facto* possession of the Spanish Government. No such writ can be upheld against the foreign sovereign state unless it consents, because a sovereign state cannot, directly or indirectly, be impleaded without its consent.

REFUGE ASSURANCE COMPANY, LIMITED *v.* PEARLBERG, (1938) 1 Ch. 687.

Mortgage—Law of Property Act, 1925—Mortgagee entering into possession—If can appoint a receiver to take possession.

It is open to a mortgagee to exercise the power given to him under S. 101, sub-S. 1 (3) of the Law of Property Act, 1925, to appoint a receiver of the income of the mortgaged property or any part thereof, even after he has gone into possession of the properties. The words in which the power to appoint a receiver is expressed are clear words which are not limited so as not to apply where the mortgagee is in possession at the date when he makes the appointment. On such appointment, the mortgagee must be treated as having gone out of possession without any further liability to account on the footing of wilful default.

LEWIS *v.* CATTLE, (1938) 2 K. B. 454.

Official Secrets Act, 1911, S. 2, sub-S. (1)—Police officer—If a "person who holds office under His Majesty".

The Official Secrets Act, 1911, S. 2, sub-S. (1) provides that "If any person having in his possession or control any . . . information . . . which has been entrusted in confidence to him by any person holding office under His Majesty . . (*a*) communicates the . . . . information to any person, other than a person to whom he is authorised to communicate it, . . . that person shall be guilty of a misdemeanour", and Official Secrets Act, 1920, S. 6 provides that "It shall be the duty of every person to give on demand to a chief officer of police, or to a superintendent . . . any information in his power relating to an . . offence under the Principal Act (1911) . . . he shall be guilty of a misdemeanour".

The appellant was a journalist in employment on the staff of *D.D.* newspaper and the respondent was a superintendent of police of borough *S*. A warrant for arrest of a man *T.M.* was issued by *S* borough police and information was circulated by *S* police to other police forces. A paragraph almost identical with the police circular appeared in the *D.D.* newspaper written by the appellant. The circular was only for police use and confidential. The respondent (superintendent of *S* police) called on the appellant and asked him to disclose the name of his informant under S. 6 of the Official Secrets Act, 1920. He declined and contended that a police officer, who communicated the information to him was not "a person who holds office under His Majesty".

Held, that every police officer in England and Wales, whether he be a member of the Metropolitan Police Force, or a member of the Police force of a county, city or borough, holds the office of a constable, and within his constablewick he has all the duties and rights conferred by common law or statute on the holders of that office. He is required to take an oath of office and his primary duty is to preserve the King's peace. He is therefore "a person who holds office under His Majesty" within the meaning of the Official Secrets Act.

PRATT *v.* A. A. SITES, LIMITED, (1938) 2 K. B. 459.

Justices—Summary jurisdiction—Justices deciding that they had no jurisdiction—If can nevertheless state a case.

Once the justices expressed the view that they had no jurisdiction to hear certain complaints which were before them, they have thereafter no jurisdiction to state a case for the opinion of the

superior Court. The proper course is for the aggrieved party to apply for a rule by way of mandamus calling on the justices to hear the case, and not for the justices to state a case.

Wakefield Local Board v. *West Riding Ry. Co*, (1866) 30 J. P. 628, followed.

ALLEN *v.* TREHEARNE, (1938) 2 K. B. 464.

Income-tax—Income-tax Act, 1918, Sch. E—Finance Act, 1927, S. 45 (5) and (6)—Sum payable to employee on termination of service—Service terminated by death of employee—Assessment on executors—Basis of.

One *M* was in the employment of a company under a service agreement under which he was appointed managing director for a period of 10 years from 1—8—1930. It contained provisions for determination of the agreement by notice on either side. In addition to salary, the agreement provided for payment of "a terminal sum of 10,000*l* . . . to be payable by the company to the managing director or his personal representatives upon the termination from any cause whatsoever (other than wilful default of the managing director in the performance of his duties) of his service with the company". *M* died on 17—1—1934. He became entitled to the 10,000*l* and that was paid to the executors of *M* on 5—7—1934. An assessment was made on the executors in respect of that sum under Schedule E for the year ending April 5, 1934. The question was if the executors were assessable.

S. 45 (5).—"Where in any year of assessment a person ceases to hold an office or employment or to be entitled to an annuity, pension or stipend chargeable under Sch. E, tax shall be charged for that year on the amount of his emoluments for the period beginning on the sixth day of April in that year and ending on the date of the cessation. . . . .".

S. 45 (6).—"In the case of the death of a person in whose case, if he had not died, tax would, under the provisions of the last preceding sub-section, have become chargeable for any year, the tax which would have been so chargeable shall be assessed and charged upon his exeeutors or administrators, and shall be a debt due from and payable out of his estate."

Held, that this was remuneration, though the occasion when it became payable is the death of *M*. It is therefore in the nature of an income payment and subject-matter of Schedule *E*. It is assessable under S. 45 cl. (6). Under that clause what the commissioners have to see is "whether if the person had not died, tax would have become chargeable under sub-S. (5) in the circum-

stances which have happened. They are not directed to make any other supposition except that the deceased has not died. For the rest, the facts which have actually happened, namely, that he has ceased to hold office and has received or become entitled to certain emoluments, must be looked to and the same tax charged upon his executors as would have been charged upon him".

LLOYD *v.* LLOYD AND LEGGERI, (1938) P. 174.

Divorce—Adultery of wife—Husband conniving at it—Later adultery with knowledge of husband—Husband tolerating it—If later can apply for divorce.

At the time of the marriage in 1928 the husband was a divorced man and the wife was a widow who was then living with two men as their mistress. After the marriage the parties came to India and the wife committed adultery with one *K*. The husband knew of that fact afterwards. Again when the husband was ill she committed adultery with one *M* and after the adultery the husband knew of it. The husband returned to England with her and expected she would thereafter behave better. In 1935 she was living as the mistress of one *L* and the husband became aware of it and begged his wife to give up her association with *L*. She did not heed. During week ends she came to her husband and lived with him as husband and wife. Finally in 1936 the husband applied for divorce on the ground of her adultery with *L*.

Held, the petitioner was not entitled to divorce. He knew of his wife's adultery with *L* and permitted it and sought the Divorce Court only when he found that her affections had passed from him more to *L*. It fell within *Gipps* v. *Gipps and Hume*, (1864) 11 H. L. C. 1, and the petitioner was guilty of connivance.

JOTTINGS AND CUTTINGS.

The Week's Personality.—Thorough competence generally leads a judge to the speediest oblivion, since cases calmly conducted to an uneventful and satisfactory conclusion rarely provide much in the way of wit, anecdote or sensation, in short, anything that the world at large would care to talk about. That is why nobody remembers anything about Lord Chief Justice Eyre, who, in his day, was a model of the highest judicial qualities. He was impartial. "Though he soon discerned the merits and foresaw the issue of a cause he never betrayed any impatience nor relaxed his attention. It was scarcely possible to discover the opinion which he had formed before the moment when he was called upon

to deliver it publicly". He was dignified. "He was convinced that the observance of solemnity in the Courts of Justice contributed to excite veneration for their proceedings. His judicial deportment, therefore, was calculated to convey an impression of awe and respect. But though his manner was grave and punctilious, it was marked with the greatest courtesy". His decisions excited acknowledgment even from unsuccessful parties that their cases had been fairly, fully and dispassionately determined. His knowledge of law was based on broad principle and was skilfully applied. In short, he was an excellent judge.—*S.J., 1938, p. 563.*

Plain Words.—"A grave sin against justice and the honour of this Court". "Statements made without warrant, evidence or justification". It is a long time since it was fashionable for such resounding phrases to be addressed by well-known leaders to the Bench, and they must have fallen amazingly on the ears which heard them during a recent sensational case at Gibraltar. In Ireland, of course, at various periods, a sort of civil war has raged between the judges and the Bar. There was no foreseeing what men like O'Connel or Curran would think fit to say. "Good God! My Lord", the former once said to a judge who had taken a day to think over a point, "if your lordship had known as much law yesterday morning as you do this, what an idle sacrifice of time and trouble would you not have saved me, and an injury and injustice to my client". It is well within living memory that O'Brien, J., sitting as the ultimate Court of Appeal in the County Court cases carried to the assizes, said that there was a reason why certain authorities could be distinguished. "I know the reason", interrupted counsel, "it is because there is no appeal from your order and you can do injustice with impunity". The judge only said: "Your ould father was the most impudent man in Cork, but you're worse than him", and finished his judgment.—*S.J., 1938, p. 563.*

When Counsel were Bold.—A century and less ago there were fierce counsel at the English Bar who tolerated little. Take the following passage of arms during a witness's examination. Park, J., "That's a very improper question." Sgt. Taddy: "That is an imputation to which I will not submit. I am incapable of putting an improper question." Park, J.: "That is a very improper manner for a counsel to address the Court in." Sgt. Taddy: "And that is a very improper manner for a judge to address a counsel in". Park, J.: "I protest, sir, you will compel me to do what is disagreeable to me." Sgt. Taddy: "Do what you like, my

lord". Park, J.: "I hope I shall manifest the indulgence of a Christian judge." Sgt. Taddy: "You may exercise your indulgence or your power in any way your lordship's discretion may suggest. It is a matter of perfect indifference to me." One of the last of that school of advocacy was poor Kenealy, whose ill-considered attacks on Lord Chief Justice Cockburn during the *Tichborne Case* ultimately brought him to grief. The judge certainly had the last word when he characterised the language used as combining cowardice and insult. "If my name shall be traduced," he said, "if my conduct shall be reviled, if my integrity shall be questioned, I leave the protection of my memory to the Bar of England." —*S. J., 1938, p. 563.*

Judges at the Mansion House.—The Lord Mayor's dinner to H. M. Judges on Tuesday was, as usual, a great function, the Lord Mayor (unfortunately without the Lady Mayoress who was indisposed) receiving the Judges not only of England but of the Empire. The L.C., the L.C.J., Law Lords, L.Js., Puisnes, County Court Judges and Metropolitan Magistrates—all were strongly represented; and not they only, but C. Js. and Puisnes from all parts of the Empire overseas. One of the most pleasing passages in the new Lord Chancellor's admirable speech was his reference to those Judges who, throughout the Empire, "administer honest and incorruptible justice". Lord Maugham knows more of the Continent and the continental point of view than any other of our Judges, and France, its language and its laws are to him familiar; and he was able to say that foreigners, speaking voluntarily and unanimously, expressed admiration for the Judges of England.—*L.J., 1938, p. 30.*

What Judges Cannot Do.—As the journey is long and term is still in being, the Free State, Northern Ireland and Scotland were not, apart from Law Lords, represented at the Lord Mayor's banquet, but the Rt. Hon. the Lord Provost of Edinburgh, Sir Louis, S. Gumley, with the Lady Provost, were observed at the high table in the immediate vicinity of the President of the P. D. and A. Division. Otherwise the Home, Dominion and Colonial Judges were strongly represented, and over a score of overseas judges, most of them with their wives, had come, as the L. C. observed, "from all over the world". The longest journey, I believe, was that made by the Hon. Mr. Justice Smith, of the High Court of New Zealand, and Mrs. Smith.

As the years go by the speeches at this dinner grow shorter and shorter, and for brevity I think those of Tuesday night con-

stitute a record. Perhaps the briefest and the best was that of the L. C. J., who in his response to the Lord Mayor's toast of H. M. Judges was able to accept some praise on their behalf and for their services in applying the "force of law as contrasted with the law of force"; nor did he fail to admit their limitations, confessing that they could not "on all occasions and in every respect perform miracles". They had not yet discovered, for example, how to be in two places at once or how to hear cases before they are set down.

Lord Hewart is undoubtedly well and in his old best form; and after respectful observation of Lady Hewart, I share the view expressed some time ago by another observer that the cause of his youth renewed is mainly, if not wholly, matrimonial.—*L.J., 1938, p. 30.*

Lawyers are Good.—It was Lord Atkin who proposed the toast of the legal profession, and he did it well, quoting from three authorities in support of his case and indicating by a well-known remark of Rousseau on the Life of Man how nasty, brutish (as well as short) life would be without the lawyers. In a company composed mainly of lawyers and their wives it is perhaps not surprising that his high and just estimate of the legal profession was accepted without audible indication of dissent by the attentive audience. The Attorney-General, held up by his duties in connection with the Administration of Justice Bill, No. 1, in the House, was unable to be present, but Sir Terence O'Connor, S.-G., at the banquet as so often in Court and Parliament, made a successful deputy. He and Sir Francis Smith, President of the Law Society, made reference to the work done in Law Reform and in rendering free legal service for Poor Persons; and declared the readiness of the legal profession to do still more. Having heard all the words said, one formed a very favourable opinion indeed of the lawyers, and felt that they were good, but not too good to be true.

There was evidence, too, of personal harmony between the great men of our profession; and it would appear that L.C., L.C.J., Law Lords, President and Law Officers are on the best of terms and in complete accord as to the question of the Rule of Law.

As the Lord Mayor (Sir Harry Twyford), the Alderman (Sir Alfred Bower) and the Sheriff (Major Champness) so nobly entertained the Judges, speaking of their unrivalled quality as administrators of justice, and of the great business and high integrity of the merchants of London, I wondered why, having regard to the magnitude of business and the proximity and excellence of

the Judges, the Commercial Court is so depressed.—*L.J., 1938, p. 30.*

Impleading a Foreign Sovereign.—Several cases recently have involved a consideration of the scope of the principle that the court will not entertain proceedings which implead a foreign sovereign State. Not the least interesting of them is *Haile Selassie v. Cable and Wireless Limited*, Mr. Justice Bennett's decision in which has just been reversed by the Court of Appeal. The matter arose out of a contract between the Director-General of Posts, Telegraphs and Telephones of Ethiopia and the defendant company relating to the transmission of wireless messages between radio-telegraphic stations situated respectively in Addis Ababa and Great Britain. The parties agreed at the hearing that the sum payable by the defendants under the contract was £10,613 11*s.* 3*d.*, and the matter to be decided was whether the plaintiff was entitled to recover judgment for that amount against the defendants having regard to the recent happenings in Ethiopia and to the attitude taken up by His Majesty's Government in relation to the plaintiff and to the rule of the Italian Government in Ethiopia.—*L.T., 1938, p. 21.*

The Decision.—The learned judge found that the contract was made by the Director-General aforesaid on behalf of the plaintiff as the sovereign authority of Ethiopia, and that the rights and liabilities under the contract were not those of the plaintiff but of the Ethiopian Empire, of which he was the sovereign head. The Italian Government had made a claim to the sum in question, and his Lordship intimated that if he were to give effect to the plaintiff's argument, he would be indirectly deciding against the claim put forward on behalf of His Majesty the King of Italy to the moneys which the defendants admitted they owed under the contract sued on. He therefore held that he had no jurisdiction to decide the rights of the plaintiff and stayed all further proceedings in the action. The substantial defence to the action was that by reason of the conquest of Ethiopia by the armed forces of His Majesty the King of Italy, coupled with the recognition by His Brittannic Majesty's Government of the King of Italy as the *de facto* Sovereign of Ethiopia, the right to recover the sum from the defendants had become vested in the King of Italy. The learned judge declined to express any opinion on this point and ordered a stay of proceedings on the ground that the right of the plaintiff to recover judgment could not be determined without determining

whether the claim put forward on behalf of the King of Italy was well founded.—*L.T., 1938, p. 21.*

"Impleading Indirectly".—As has already been stated, the Court of Appeal, (Sir Wilfrid Greene, M. R., Lord Justice Scott, and Lord Justice Clauson) reversed this decision. The Master of the Rolls said that the action was one to which the Italian Government was not a party and not a necessary party. The question which fell to be decided was whether or not the defendants were liable to the plaintiff and, although the claim of the Italian Government was one which, if made by a private individual, could have been dealt with in interpleader proceedings, no such proceedings were possible without the consent of Government. It was indicated that that fact could not deprive the plaintiff of his right to have his claim adjudicated on by the Courts of this country unless there was some rule of English law which precluded the courts from entertaining the claim, and that no such rule existed. The case did not involve bringing the foreign sovereign before the court in his ow person or that of his agent or interfering with his proprietary or possessory rights in the event of judgment being obtained. To say that where a foreign sovereign had made a claim the proceedings in effect amounted to impleading that sovereign was wrong. The expression "impleading indirectly" did not mean adjudicating on such a claim as was made by the Italian Government in the present case. It referred to such proceedings as Admiralty proceedings *in rem* when the action in form was an action against the ship. In this connection comparisons might be made between the present case and those of *The Cristina* and *The Arantzazu Mendi.* The appeal was, therefore, allowed and the action was remitted to the Chancery Division for hearing.—*L.T., 1938, p. 22.*

Sir George Talbot.—The death is announced of Sir George Talbot, who, from 1923, when he was appointed as a Judge of the King's Bench Division to fill the vacancy caused by the retirement of Lord Darling, till last year, when he himself retired, was a very learned and able and courteous member of the Bench. At the Bar he attained a reputation as an ecclesiastical lawyer, and held a number of diocesan chancellorships, and, as Chancellor of Lincoln, he tried and gave judgment against Archdeacon Wakeford, a judgment which was afterwards affirmed on retrial upon appeal to the Judicial Committee. It was held, also, (1921, 1 A.C. 813; 90 L.J. P.C. 174) that a clergyman can be convicted in a criminal court only on evidence which would support a verdict of guilty in a criminal court. Ecclesiastical litigation is now rare, but in the case

of *Bowman* v. *Secular Society, Ltd.*, (1917, A. C. 406; 86 L.J. Ch. 568), Talbot showed his great learning in a similar field when, as counsel for the appellant, he argued that Christianity is part of the law of England. He had Lord Finlay, then Lord Chancellor, with him, but the contrary view was expressed by Lord Sumner in a well-known judgment, and was adopted by the rest of the House. Talbot when at the Bar had a large practice also in rating and local government cases, and on the Bench, besides being a very effective Judge in civil cases, he showed equal ability on the criminal side, a sphere till then less familiar to him. One of his cases was the trial of Alfred Rouse at Northampton in 1931 for murder—the "Burning Car" case. In learning and character Sir George Talbot well maintained the high traditions of the Bench.—*L.J., 1938, p. 37.*

Justice Cardozo.—The fierce light that has been said to beat upon a throne has in the last few years beat upon the Supreme Court of the United States. The question has been whether on what we call here the "true construction" of that written document, the Constitution of the United States, it was possible to reconcile President Roosevelt's "New Deal" with its provisions. But to reconcile the terms of a paramount document a hundred and fifty years old, with the totally changed condition of social life now, implies a certain adaptability in the mental equipment of the judge. Some of the justices of the Supreme Court have had this adaptability in a marked degree, and have been known as the "liberal" element. Conspicuous among these was Justice Cardozo, who, we regret to see, died on the 9th inst. at the age of 66. He had made a lifelong study of the law and of the functions of a judge. His views were expressed in *The Nature of the Judicial Process*, published in 1921, and in *Paradoxes of Legal Science*, published in 1928; and he was able to act upon them when for many years he was a Justice, and then Chief Judge, of the New York Court of Appeals, until in 1932 he was appointed to the Supreme Court. It fell to him to write some of the notable judgments in 1937 when the liberal view of the Constitution was affirmed and the New Deal upheld; in particular in the Social Security Cases which upheld laws allowing Federal assistance to States unable to give essential relief to the old and the unemployed. "There was", he said in one case, "need of help from the nation if the people were not to starve". The cases were on the "general welfare" clause of the Constitution, a concept which he said in another judgment was not static. "Too old at forty" struck in him a note of sympathy, and "needs", he said, "that were narrow or parochial a century ago may be interwoven in our

day with the well-being of the nation. What is critical or urgent changes with the times". In describing in *Paradoxes of Legal Science* his personal conflicts in arriving at decisions, he said: "Suddenly a fog has lifted. I have arrived at a stage of mental peace". And he was a liberal not only in judgment, but in opinion. To him liberty of opinion was essential for the safety of the State. In this he ranked with Holmes and Brandeis as a trio of great judges.—*L.J., 1938, p. 37.*

Provocation.—A case in the Court of Criminal Appeal this week brought up once more the question of provocation as an extenuation of murder. The appellant killed his wife, but it seems to have been accepted that, at the moment when he did so, he knew that she had murdered two of their children by strangling them. He even may have seen her do so before his eyes. Such terrible events do not, we are thankful to say, often occur; and it is no cause for surprise that the husband, when convicted of murder, came to the Court of Criminal Appeal. That Court, whatever its feelings, has only to see whether the Judge below charged the jury properly, and whether the evidence tendered was admissible. The conditions under which, when murder is charged, a jury may find a verdict of manslaughter on the ground of provocation are well known. No later judges have improved on Lord Tenterden's charge in *R.* v. *Lynch* (5 C. & P. 324), and Chief Justice Tindal's in *R.* v. *Hayward* (6 C. & P. 157). "Provocation so *recent* and strong that the prisoner might not be considered at the moment master of his own understanding". That is the test. But, so long as it is carefully explained to the jury, the question whether the defence is made out must be decided by them alone. The Court of Criminal Appeal is not there to disagree with them.—*L.J., 1938, p. 38.*

Damages for the Dead.—We have now a fresh attempt by a judge of the highest reputation to assess damages for loss of expectation of life (*Aizkarai Mendi*, 1938, 3 All. E. R. 483). Mr. Justice Langton had to consider the case of a number of sailors and members of a crew who were drowned when their vessel, the *Boree*, was run down by the defendants' vessel. The defendants were found four-fifths to blame, and the Registrar, after having given generous sums under Lord Campbell's Act, proceeded to assess the value of life to the deceased men. This he put at the same figure for all of them, though their ages varied by as much as 20 years. The learned Judge thought this was wrong, and divided up the nine claims into three classes—roughly according as the deceased were in the 20's, the 30's or the 40's. We suppose it i

true to say that if two men are in the same occupation with the same risk and the same health, the younger is the more likely to survive, and in one sense is the heavier loser if both are killed together. On the other hand, the Registrar seems to have thought that if the pleasure of anticipation is larger in one case, the pleasure of retrospection is greater in the other. On that head, the older man loses more by the disaster of death. This is to us a new and original view: but we are far from saying it is incorrect. Men who drank 1834 port, or broke the Hindenburg Line in 1918, have memories which no luckless youngster can ever enjoy.—*L.J., 1938, p. 38.*

What is a "Workman"?—An acute difference of opinion arose this week in the Court of Appeal. The question in issue was whether a nurse, while applying treatment in a hospital ward to a patient under the orders of the "sister" in charge of the ward, is a workman in the employ of the proprietors of the hospital (*Wardell* v. *Kent C. C.*, 1938,3 All E.R. 473). The County Court Judge had thought that the nurse's contract with the hospital was a contract for services but not a contract of service. She was, in his view, like the hypothetical music-master of whom Cozens-Hardy, M.R., spoke in *Simmons* v. *Heath Laundry Co.*, (1916) 1 K.B. 543, 548. Lord Justice Greer upheld this view, and was for dismissing the nurse's appeal. She might, he thought, be a workman when doing administrative work in the hospital, but was only a contractor for services when she was doing actual nursing work. The other two Lords Justices thought otherwise. Both when nursing and (*e.g.*) sweeping floors the appellant was under the orders of the respondents, whether they themselves gave them or appointed a deputy to do so. We cannot but regret that after so much litigation a point like this has not yet been settled. *Ryan* v. *Limerick R.D.C.* (13 B.W.C.C. 556) seems the nearest case; but is just on the other side of the line.—*L.J., 1938, p. 38.*

Lenient Justices.—We often hear critics nowadays who say that magistrates appear unduly lenient in dealing with offending motorists. It is always risky for those who have not heard all the facts of a particular case to say that the hand of justice has not been firm enough. The case may not be fully reported, and extenuating circumstances, which may not be apparent on the surface, may exist. A case where the magistrates will undoubtedly be critised came before a Hampshire Bench this week (*Times*, July 13). Two youths pleaded guilty to charges of taking away a

motor-car without the owner's consent and to stealing two bicycles. One of the accused also pleaded guilty to driving without licence or insurance, and the other to aiding and abetting this offence. The police said that ten other charges of taking away cars could have been preferred, and it seems that it was the practice of these young men to break the law constantly in this way over a large area of Hampshire. In the circumstances, so far as shown, we should certainly say that they got off very lightly with fines of 50*s*. and a binding over for two years. The taking away of cars is a grievous offence against the owner and the State. When it is remembered that the joy-rider drives uninsured to the peril of third parties whom he may injure, his conduct assumes even a more serious aspect.—*L.J., 1938, p. 39.*

An Author's Dilemma.—Not the least anxious of a novelist's tasks must be the choice of suitable names for his characters. As readers know, a person publishing libellous matter is deemed to intend the natural meaning of his words, and where a proper name is used in a work professedly, and genuinely, fictional, the natural meaning of an author's words may be very far from his intention. The question whether matter is libellous in such cases, as Lord Alverstone, C. J., indicated in *Jones* v. *Hulton* (1909), is one of fact for the jury, and that question of fact involves not only whether the language used in its fair and ordinary meaning is libellous or defamatory, but whether the matter would be understood by persons who knew him to refer to the plaintiff. One who recklessly publishes a libel apparently intended to refer to some real person has been compared to a man who fires a gun into a crowd. The analogy may not be in all things perfect, but it brings home forcibly the perils of the situation. Novelists would appear to be confronted with a choice of evils. If they select some common name for their unpleasant characters—and it is doubtful if any work of fiction at the present time would be a commercial proposition without its full complement of such persons—the number of potential plaintiffs is naturally considerable, though the danger of identification in readers' minds of the fictional character with one person bearing the name may be lessened. If, on the other hand, they select some unusual name—unless a combination of ingenuity and good fortune enables them to hit upon some appellation not borne by any member of the community—the chances of identification in the readers' minds is correspondingly increased. And these difficulties will remain in their several degrees in the infinite variety of choices falling between these two extremes.—*L. T., 1938, p. 40.*

A Recent Decision.—In the recent case of *Canning* v. *William Collins, Sons, and Co., Limited*, the plaintiff, who bore the same name as an unpleasant character in a novel, complained that certain passages in the book imputed that he was a financial crook, a criminal, a cad, a seducer of women, and a person without any sense of morality. His real object in bringing the action was less to obtain any damages than to stop the circulation of the book, and to prevent people who had identified him with the character in question continuing to labour under that delusion. The plaintiff had retired from the Army in 1922 with the rank of captain—a rank accorded to the fictitious character—he had a sister named Mary, had hunted at one time, and was a fellow of the Zoological Society. He was, moreover, engaged in finance in the City of London, and in addition to the foregoing points of resemblance between him and the character, he was dark, powerful and broad-shouldered, and was in appearance about forty years old. He was baffled by certain impolite communications by telephone and postcard until the book was brought to his notice. It appeared that when the book was published neither the authoress nor the publishers had ever heard of the plaintiff, and the former explained that she chose the name "out of a history book". The Christian name was about as common a one as she could find, and she had taken the precaution of looking into the London telephone directory to see whether it was to be found there in conjunction with the surname she had chosen. Counsel argued that if people were to recover damages in the circumstances in which the plaintiff sought to recover them, either there would be no novels at all, or such novels as there were would have to deal exclusively with persons of the most exemplary character. The action was tried before the Lord Chief Justice and a special jury who returned a verdict for the defendants, and judgment was entered accordingly with costs.—*L. T., 1938, p. 40.*

Lost.—We are all familiar with the story of the man who asked his companion whether one could say of a thing that it was lost if one knew where it was, and who, on receiving a reply in the negative, promptly threw his companion's watch into the sea. The same question may well arise in connection with the anti-Jewish campaign in Germany. A Jew leaves Germany in haste, and with all his other possessions he leaves behind a share certificate relating to shares in an English company. The German authorities appropriate the certificate and refuse to part with it. The unfortunate exile writes to the English company and, it may be, asks for a new certificate. The company's secretary looks at his articles of association ; he probably finds that "if a share certificate is defaced,

lost, or destroyed, it may be renewed . . . . , on such terms, if any, as to evidence and indemnity, as the directors think fit (*see* Table A, art. 5), and at first blush he is likely to come to the conclusion that the certificate cannot be said to be defaced, lost or destroyed, and that a new certificate cannot be issued. The certificate is not, of course, "lost" in the common sense of "mislaid", but the concise Oxford Dictionary gives: "Be deprived of, cease by negligence, misadventure, separation, death, etc., to possess or have" as the primary meanings, and these certainly seem to cover the point. We shall be interested to see if the Court is ever asked to determine the question, for, if it were held that in these circumstances a share certificate was not lost, a number of difficulties might well arise.—*L.J., 1938, p. 124.*

Johnson Annoyed.—No reader of Boswell can forget the account of the meeting between Johnson and Edwards, with whom he had been at college some fifty years previously. They had never since encountered each other till this particular meeting, though both were living in London nearly the whole of the intervening time. When they in fact met Edwards had been in good practice as a solicitor and had made a competency. Addressing Johnson, he gave expression to the famous observation, "You are a philosopher, Dr. Johnson. I have tried, too, in my time to be a philosopher; but I don't know how, cheerfulness was always breaking in". Burke, Sir Joshua Reynolds, and other eminent men to whom Boswell mentioned this remark of Edwards thought it an exquisite trait of character. But although recognising that it was indeed exquisite, we are more interested at the moment with Edwards's profession, that of law, for it led up to a further remark by Edwards that Johnson, too, should have been of a profession. This led Johnson to say, "Sir, it would have been better that I had been of a profession. I ought to have been a lawyer." Sir William Scott, whom we best remember as Lord Stowell, took the same view, saying about the same time "What a pity it is, sir, that you did not follow the profession of the law. You might have been Lord Chancellor of Great Britain, and attained to the dignity of the peerage; and now that the title of Lichfield, your native city, is extinct, you might have had it." Upon this Johnson seemed much agitated and, in an angry tone, exclaimed, "Why will you vex me by suggesting this when it is too late?"—*L.T., 1938, p. 141.*

Dr. Scott and Dr. Johnson.—Scott, whom, as already said, we best know as Lord Stowell, early became acquainted with Johnson, the two having been brought together through their common

friend, Robert Chambers, and it was on a visit to the latter that Johnson got to know Scott. We are told that on Chambers proceeding to India to take up his appointment as a judge, Scott "seemed to succeed to his place in Johnson's friendship." How close was the friendship between them is further exemplified by the fact that Scott accompanied Johnson as far as Edinburgh on the famous trip which gave us Johnson's Journey to the Western Islands and Boswell's Journal. It will be remembered, too, that it was Scott who, on its being mentioned in the course of conversation between them that Addison wrote some of his best papers in the *Spectator* when warm with wine, remarked in confirmation of the likelihood of the story, that Blackstone, a sober man, composed his Commentaries with a bottle of port before him, and found his mind invigorated and supported in the fatigue of his great work, by a temperate use of it. This story got round to Blackstone's family on the publication of Boswell's book, and they did not relish it; indeed, so much did they resent it, that Scott thought it prudent to write and apologise although in his view there was nothing derogatory in the anecdote. But we can well understand that the family did not like the stimulus of port in the composition of the Commentaries being blazoned so prominently in the pages of Boswell. Both Stowell and Eldon liked port and each, we are told, took a great deal of it. Someone having asked Eldon if his brother took much exercise, received for answer, "None, but the exercise of eating and drinking." We all know Scott's eminence as a great master of admiralty law, which he expounded in a long list of notable cases, but is it remembered that among his other literary achievements was a large number of sermons? According to his brother, Lord Eldon, "no clergyman ever wrote as many sermons as Lord Stowell. I advised him to burn all his manuscripts of this kind. It is not fair to the clergymen to have it known he wrote them." Johnson frequently employed himself in the same way, saying on one occasion that he had composed about forty sermons. Modern judges have not, we understand, shown the like predilection for sermon writing.—*L.T., 1938, p. 141.*

Villainous Saltpetre.—The apology for science with which Lord Rayleigh concluded his Presidential Address on Wednesday of last week to the British Association is interesting for the memories it revives of the part played in the European War by Lord Moulton. Lord Moulton was one of the leading lawyers of recent times, but it so happened that his aptitude for science was still greater, and when the War broke out his services were promptly requisitioned to increase the manufacture of high explo-

sives. He became the chairman of a small committee on high explosives which first met on November 15, 1914. At the end of the year the organisation he created became a branch of the War Office, and his efforts to secure supplies of toluene and tri-nitro-toluene—known familiarly as T. N. T.—were so successful that from a ton a day Lord Moulton raised it before the end of the War to over a thousand tons a day. To this had Shakespeare's "villainous saltpetre", in the well-known lines which Lord Rayleigh quoted, grown. "During the great War itself," he said, "few scientific men in any country doubted that it was their duty to do what they could to apply their specialised knowledge to the purposes of war. Of such duty Lord Moulton was a conspicuous example, and in the House of Lords, on the occasion of his death in 1920, Lord Birkenhead, then Lord Chancellor, said that but for Lord Moulton's services he greatly doubted whether it would have been possible for the War to have been brought to a conclusion when it was. While, however, Lord Rayleigh's address was a refutation of the special responsibility of science for "frightfulness, it is equally a call to civilisation to stop this perversion to devilish ends of the beneficent purposes of man's inventions.—*L. J., 1938, p. 137.*

Noise.—There are few subjects on which people differ so much as the subject of noise. One has only to hear an ordinary Chancery action for restraining dog-keepers, or poultry-keepers, or schoolmistresses who teach children music, to realise that fact. It is, however, undoubtedly true that the age in which we live is becoming more and more noisy. The motorist is a serious offender; the aviator is fast becoming a nuisance, and now, of course, we have the "radio-fan," or, rather, radio-fiend, who is, we think, the worst of all. He is usually static with his receiver and continues listening to "jazz" or *Nachtmusik* from a continental band long after midnight. We have no doubt that the by-law making powers of local authorities under S. 249 of the Local Government Act, 1933, are sufficient to enable them to deal with the radio-fiend. Councils should be careful in drafting their by-law and insert the words "to the annoyance of persons in the neighbourhood" or something of that kind. Otherwise, as the authorities show, they may be condemned as too wide. *Johnson* v. *Croyden Corporation*, 16 Q.B.D. 708 and *Booth* v. *Howell*, 53 J.P. 678, should be looked up on this point. It is more difficult to deal with the motorist, who generally moves with his noise; but the Minister might do something to stiffen his Construction and Use Regulations, which are not strict enough on this point.—*L.J., 1938, p. 137.*

Johnson Supplies Arguments to Boswell.—In our study of Boswell's famous book we are not allowed to forget that the biographer was a member of the Bar and that he had a certain amount of practice in Scotland although his endeavour to succeed at the English Bar was doomed to failure. But in the one or two cases which came from Scotland to the House of Lords the assistance of Johnson in the preparation of the argument to be presented by Boswell was invoked. There was one notable case in which a long statement was dictated by the Doctor as to the right of a school-master to administer corporal punishment to his pupils. In this Johnson insisted on the view which would scarcely be likely to find favour in these days, namely, that children, being not reasonable, can be governed only by fear, and to impress this fear is one of the first duties of those who have the care of children. In the same strain, he went on to urge that "a stubborn scholar must be corrected till he is subdued. The discipline of a school is military". There must be either unbounded licence or absolute authority. Unless the House was disposed to accept this view of a school-master's authority and duty there was little hope of the school-master succeeding in his appeal from his dismissal on the ground of cruelty to his scholars. Boswell was led by Andrew Crosbie, a prominent member of the Scots Bar, who, according to Lord Stowell, was the only man who was disposed to stand up to Johnson, and who has the further distinction of being by some identified as the prototype of Counsellor Pleydell in Guy Mannering. In the argument attributed to him we read that even were it true that the schoolmaster had been provoked to use rather more severity than he intended, it might well be justified on account of the ferocious and rebellious behaviour of the scholars, some of whom cursed and swore at him, and even went so far as to wrestle with him, in which case he was under the necessity of subduing them as he best could. This was the schoolmaster's account, but the proof led in the Court of Session showed that "scarce a day passed without some of the scholars coming home with their heads cut, and their bodies discoloured". The House reversed the Court of Session, holding that the schoolmaster had exceeded the limits of moderate chastisement. Curiously enough, this particular schoolmaster seems to have conjoined with teaching and chastising his scholars the trade of cattle grazing and farming, shipping, and herring fishing; obviously a versatile man, so that he could turn to one of his alternative callings when his school-mastering came abruptly to an end by the decision of the House of Lords.—*L.T., 1938, p. 160.*

Boswell and Westminster Hall.—In a conversation with Johnson in 1777 regarding the chances of success at the English Bar, if Boswell decided to try his fortune there, Johnson advised him not to indulge too sanguine hopes, going on to add that a very sensible lawyer had told him (Johnson) that there were a great many chances against any man's success in the profession of the law; that the candidates were nemerous and those who were successful in building up a large practice few; that it was by no means true that a man of good parts and application was sure of getting business, and that the great risk was that a man might pass half a lifetime in the Courts and never have an opportunity of showing his abilities. Commenting on this, Boswell found that the picture drawn by Johnson's friend was too true. Later, in one of his letters to his friend Temple he said that he saw not the smallest opening at Westminster for him. In another letter to the same correspondent he tells him that his chambers cost him £20 yearly, while his furniture and the salary of a lad to attend there occasionally, another £20, but he sorrowfully adds: "I doubt whether I shall get fees equal to the expense". His chambers were for a time in Farrar's Building—not, of course, the present structure, but its predecessor in title—but the fact that he had chambers and for a time was assiduous in his attendance in Westminster Hall brought him no business, and his only compensation came in the fame of the book through which, in desultory fashion, we have been perambulating, a work which won for him an assured place among the supreme masters of English biography.—*L.T., 1938, 161.*

Johnson's Dicta on Law and Lawyers.—In concluding these desultory excursions through Boswell's fascinating work we would merely recall two further conversations between him and his mentor, one relating to the correctitude from the moral point of view of a lawyer attending consultations on Sunday; the other, regarding the place which law fills in the social system. On the first of these he was invited to give his views by Boswell, whereupon Johnson said: "When you are of consequence enough to oppose the practice of consulting on Sunday, you should do it; but you may go now. It is not criminal, though it is not what one should do who is anxious for the preservation and increase of piety, to which a peculiar observance of Sunday is a great help. The distinction is clear between what is of moral and what is of ritual obligation." On the second topic it is comforting to read that in Johnson's opinion "the law is the last result of human wisdom acting upon human experience for the benefit of the public". So

lawyers generally may pat themselves on the back for being such excellent fellows!—*L.T., 1938, p. 161.*

The Dominions and War.—We still hope, and hope with confidence, that the time when this country will again have to declare war is far distant. But, as an academic matter, the question whether a declaration of war by the British Government would automatically involve the whole Empire in war is often discussed. Quite lately the Prime Minister and Deputy Prime Minister made an important contribution to the discussion by statements made in the House of Assembly at Cape Town. They agreed that if Great Britain declared war South Africa would not *ipso facto* become involved as a belligerent as was the case in 1914. But they differed as to the course they proposed to take in the unhappy event of an Imperial declaration of war. The Prime Minister said that if he was in office at the time he would in all cases advise the Crown in South Africa to support and join in the Imperial declaration. His Deputy did not go so far. He refused to bind himself in advance, and declared that, if the contingency arose, the Parliament of South Africa must decide whether to join in the war or not. We can find no authority in the Statute of Westminster, or anywhere else, for saying that South Africa will not be at war if the Imperial Government declares it. Any resolution to the effect that South Africa will remain at peace when the Imperial Government declares war would be a Declaration of Independence and nothing less.—*L. J.. 1938, p. 165.*

Murder from the Air.—The most pressing requirement in International Law at the present time is the abolition of aerial bombing. In a leading article, under the heading "Death from the Air", the *Times* of February 4 of this year said: "The horrors attending the use of this weapon in Spain and China show that if civilisation is not to be utterly destroyed in some future conflict the only safe thing is to prohibit its use altogether." As to that there is no doubt general agreement, but till this result can be attained aerial warfare should be subject, like other forms of warfare, to rules restraining its excesses and confining its operations to strictly military purposes. In the House of Commons, on June 14 of this year, the Prime Minister, referring to attacks upon ports and shipping in Spain, said: "There is no precedent for these attacks from the air, because aircraft were not previously developed. This action gives rise to a series of new problems in regard to which previous experience is not available." In a sense that is true. But

the analogy between bombardment from the sea and bombardment from the air is sufficiently close to make it relevant to refer to Convention IX of the Hague in 1907, to which all the Great Powers were parties. This forbade the bombardment of ports, towns, villages, dwellings or buildings which are not defended; and though for military reasons certain qualifications were made, yet the commander was to take all measures required to cause as little damage to the town as possible. At the Hague Conference of 1907 Sir Edward Fry was one of the British delegates, and even then, in the course of debates in which he took a leading part, he referred to the crushing burden of competitive armaments. The ultra competition of these times was not foreseen.—*L.J., 1938, p. 193.*

Geneva and Aerial Warfare.—An attempt to establish rules for aerial bombardment was made when, under a resolution passed at the Washington Conference in February, 1922, a Commission was appointed, representing the British Empire, the United States, France, Italy, Japan and Holland, to consider whether existing rules covered new methods of warfare introduced since 1907, and if not to report on the necessary changes. The rules which were recommended forbade aerial bombardment for the purpose of terrorising the civilian population, and it was declared that as we have said, aerial bombardment is legitimate only when directed at a military objective. The rules recommended by the Commission have not been formally adopted, but now the work of codifying rules for aerial warfare is being undertaken by the League of Nations, and on Tuesday, according to the League Correspondent of the *Times*, Capt. Wallace, on behalf of the British Government, stated the lines on which this should proceed, namely: (1) to declare the aerial bombardment of civilians illegal; (2) prescribe that the objects of air attack must be capable of identification; and (3) that any attack on definite objects must be carried out in such a manner as to avoid the accidental bombardment of civilian populations in the neighbourhood; and a drafting committee has been appointed to undertake the codification.—*L. J., 1938, p. 193.*

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FEDERAL COURT AND JUSTICIABLE DISPUTES UNDER THE GOVERNMENT OF INDIA ACT, 1935.

BY

C. UNIKANDA MENON, *Advocate, Egmore.*

I. Appellate Jurisdiction of Federal Court—Justiciable Disputes

Disputes will come up for decision before the Federal Court either in the exercise of its original jurisdiction or appellate jurisdiction. In the 2nd discourse, it was pointed out that controversies in which a dispute involves a legal right between the various constituent units as provided under S. 204 (cl. 1) are decided by the Federal Court in the exercise of original jurisdiction. In India, disputes from provinces involving substantial questions relating to the interpretation of the Government of India Act of 1935 or order in Council might come up in appeal before the Federal Court on the grant of a certificate by the High Court as prescribed under S. 205 of the Act. Similarly an appeal lies to it from the High Court of a Federated State on questions, involving the interpretation of this Act or order in Council or involving the extent of the legislative or executive powers vested in the Federation by virtue of the Instrument of Accession of that State or on questions, arising under an agreement under Part VI regarding the administration in that state of a Federal Law. In the United States of America in every district there is a district Federal Court functioning side by side with a state court. All disputes between the constituent units of the Federation and disputes involving questions of constitutional importance will be decided by the Federal District Court and by the Federal Court of Appeal. And if the parties are not satisfied, a final appeal to the Supreme Court is provided for.

Under the Government of India Act of 1935 questions of *ultra vires* regarding a legislation would arise, if one legislature unwittingly or otherwise intrude upon the province of the other. These questions will come up for solution in appeal before the Federal Court, in spite of the care taken in the allocation of powers between the Federation and the Provinces. As Lord Sankey said in another connection,

> "the cases which have to be decided will be legion. Many inquests will have to be held on these three lists and many great lawyers have from time to time dissect them." *See* In re *Regulation and Control of Aeronautics in Canada,* (1932) A.C. 54.

II. Distribution of legislative powers

In the Constitution of the Commonwealth of Australia, the plan adopted has been to specify exhaustively to the Federal legislature, and to assign to the provincial legislature the whole of the unspecified residue. In the constitution of the Dominion of Canada, under the North America Act of 1867, the Provinces were given legislative powers on certain enumerated topics, the Parliament of Canada reserving to itself all residuary powers. Whereas under the Commonwealth Act of 1900, the states enjoy the residuary powers, the Commonwealth Parliament exercise powers of legislation over only thirty-nine enumerated subjects. This kind of distribution of powers between the federal and provincial legislatures proved to be a prolific source of litigation on the question whether a piece of legislation falls within the competence of the enacting legislature or not. Often this unsatisfactory state of things was aggravated by the courts sticking to the letter of the law and failing to carry out its spirit. *The Toronto Electric Commissioners* v. *Snider,* (1925) A.C. 396, is an instance of the kind. Under S. 92 (13), the province is given the right to legislate on matters affecting "property and civil rights in the provinces." The Dominion Parliament enacted the Industrial disputes Investigation Act, 1907, which provided that upon a dispute arising between the employers and employees the minister for labour in the Dominion might appoint a Board which is to report after investigation with recommendation as to fair terms. The report was not binding, but satisfied the parties. After reference to a Board, the strike was to be unlawful. The measure worked satisfactorily. But in 1918, the measure was challenged and the Privy Council held that the Act was not within the competence of the Dominion Parliament and that it related to property and civil rights in the provinces, a subject reserved to the Provincial legislature. To circumvent such difficulties arising in India, in

the distribution of legislative powers, a concurrent list was prepared under the Government of India Act, 1935.

II. (a) Experience in Canada and Australia

The members of the Select Committee in their report Vol. I take note of this difficulty and observe at p. 30 as follows:—

"Experience has shown both in India and elsewhere that there are certain matters which cannot be allocated exclusively either to a central or provincial legislature, and for which, though it is often desirable that provincial legislature should make provision it is equally necessary that the Central Legislature should also have a legislative jurisdiction, to enable it in some cases to secure uniformity in the main principles of law throughout the country, in others to guide and encourage provincial effort, and in others again to provide remedies for mischiefs arising in the provincial sphere but extending or liable to extend beyond the boundaries of a single province. Instances of the first are provided by the subject-matter of the Great Indian Codes, of the second of such matters as labour legislation, and of the third by legislation for the prevention and control of epidemic disease. It would in our view be disastrous if the uniformity of law which the Indian Codes provide were destroyed or whittled away by unco-ordinated action of Provincial Legislature. On the other hand local conditions necessarily vary from province to province. Therefore a new device was introduced by creating a concurrent list including certain subjects on which both the Federal and the Provincial Legislature can enact."

II. (b) The three lists in Indian Federation—Results

The result of this statutory allocation of exclusive powers will be to change fundamentally the existing relations between the centre and the Provinces. Under the Government of India Act of 1915-1919, the Central Legislature has the legal power to legislate upon any subject, even though it be classified under by-rules under the Government of India Act as a Provincial subject, and a Provincial legislature can summarily legislate for its own territory on any subject, even though it be classified as a central subject; for the Act of each of the Indian Legislature, central or provincial, requires the assent of the Governor-General, and that assent when given, S. 84 (3) of the Government of India Act of 1915 and S. 16 (2) of the Government of India Act of 1919, provide that the validity of any act of the Indian Legislature or any local legislature shall not be open to question in any legal proceedings on the ground that the Act affects a Provincial subject or central subject as the case may be.

III. Ultra vires

But under the Government of India Act, 1935, an enactment on a matter included exclusively in the Federal list will be valid only if it is passed by the Federal Legislature; and an enactment on a matter included exclusively within the provincial list will be valid only if it is passed by the provincial legislature; and to

the extent to which one legislature invades the province of the other, its enactment will be *ultra vires* and void. *Vide* Ss. 99 and 100 of the Government of India Act of 1935. The courts will have to determine in a given case whether or not a legislature has transgressed its limits.

The questions which may arise as to the validity of legislation in the concurrent field are no less difficult of solution. Though it is necessary for the centre to possess in respect of subjects included in the list a power of co-ordinating or unifying regulation, the subjects themselves are essentially provincial in character and will be administered by the Provinces and mainly in accordance with provincial policy. At the same time, it is clear that if the concurrent legislative power at the centre is to be effective in such circumstances, the normal rule must be that, in case of conflict between a central and a provincial act in the concurrent field, the former must prevail. But an unqualified provision to that effect would enable an active centre to oust provincial jurisdiction entirely from the concurrent field and would thus defeat one of the main purposes of the latter. S. 107 of the Government of India Act of 1935 is intended to remove this difficulty. It lays down (1) that if a Provincial law is repugnant to any Federal law or any existing Indian law with respect to matters enumerated in the concurrent list, the Federal law will prevail and the provincial law shall be void to the extent of repugnancy. (2) But if the provincial law relating to one of the matters in the concurrent list is repugnant to the provisions of an existing Federal law or Indian law with respect to that matter and if it having been reserved for the consideration of the Governor-General or for the signification of His Majesty's pleasure, has received the assent of the Governor-General or of His Majesty, the Provincial law shall prevail in that Province. But nevertheless the Federal Legislature may enact further legislation or make any amendment with respect to that matter repugnant to that provincial law, provided the previous sanction of the Governor-General in his discretion is obtained. (3) If any law passed by a Federated State is repugnant to a Federal law which extends to that State the Federal law, whether passed before or after the law of that State shall prevail, and the law of that State shall, to the extent of the repugnancy, be void.

IV. Residuary power

In spite of the abundant care exercised by the draftsman in the allocation of powers to the Federal and Provincial Legislatures under the Federal, Provincial and concurrent lists, it is inevitable that certain residue of subjects must remain un-

noticed; or new subjects non-existent or subjects unallocated might come to notice in course of time. In such cases the Governor-General in his discretion, may by public notification authorise the Federal Legislature or the Provincial Legislature to enact laws relating to them, including a law imposing a tax not mentioned in any such list, and the executive authority of the Federation or the Province may extend to such law under S. 104 of the Government of India Act.

V. Precedents of Guidance

In the decision of constitutional disputes that are likely to come up before the Indian Federal Court on account of the laws enacted by the respective legislatures, the following precedents may be accepted as valuable guides in their interpretation and application. (1) The construction of the Statute shall not be literal, but shall be liberal and consonant with the spirit of the enactment. In this connection, it is worth recollecting the eloquent eulogy by Bryce to the worn of Chief Justice Marshall in bringing to light the implied powers of the American Constitution. Bryce, in his American Constitution (3rd Edn., 1895, Vol. I, p. 335), says:—

"Had the Supreme Court been in those days possessed by the same spirit of strictness and literality which the Judicial Committee of the Privy Council has recently applied to the construction of the British North America Act, 1867, the United States Constitution would never have grown to what it is now."

We are aware that

"Under the English system, decided cases effectively construe the words of an act of Parliament and establish principles and rules whereby its scope and effect may be interpreted. But there is always a danger that in the course of this process the terms of the Statute may come to be unduly extended and attention may be diverted from what has been enacted to what has been judicially said about the enactment. To borrow an analogy, there may be a range of sixty colours, each of which is so little different from its neighbour that it is difficult to make any distinction between the two, and yet at the one end of the range the colour may be white, and at the other end of the range black. Great care must therefore be taken to consider each decision in the light of the circumstances of the case in view of which it was pronounced and not to allow general phrases to obscure the underlying object of the Act which was to establish a system of Government upon essentially Federal principles. Useful as decided cases are, it is always advisable to get back to the words of the Act itself and to remember the object with which it was passed." See *The Regulation and Control of Aeronautics in Canada*, In re, (1832) A.C. 54 at 70.

(2) It has to be borne in mind that the Indian Federal Legislature and the Federated States Legislature, and the Provincial Legislature have, subject to S. 110 of the Government of India Act, plenary powers and are not delegates of or

acting under any mandate from the Imperial Parliament or from the Federal Legislature as the case may be. The words of Lord Selborne in *Queen* v. *Burah,* (1878) 3 A.C. 889, applies to the Legislatures under the Government of India Act of 1935:

> "The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

(3) The legislation, so long as it is within the limits of the Federal and Provincial legislature may not be questioned even if it is in contravention of the acknowledged principles of international law and it cannot be challenged as *ultra vires.* It may be that the legislation of the Federal Legislature may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the Government of India Act of 1935 has not conferred on the Federal or Provincial Legislature power to enact contrary to those principles. In *Croft* v. *Dunphy,* (1933) A.C. 156, the question raised before the Privy Council was whether the Parliament of Canada could pass a Customs Act under S. 91 of the British North America Act, conferring right on a Canadian customs officer to catch and bring to seashore any vessel found hovering with dutiable goods within a distance of 12 miles from the seacoast. A vessel belonging to the respondent in Nova Scotia and going out to the sea was caught at a distance of 11½ miles from the seashore by the Canadian customs officers. One of the defences raised by the respondent was whether the Parliament of Canada has the power to pass a law extending to more than 3 miles from the seashore as it is contrary to the rules of international law. This contention was overruled by Lord Macmillian holding that the Parliament of Canada is not under any such disability. Once it was found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate, their Lordships saw no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislature of a fully sovereign state.

(4) In deciding between the competency of the Federal and Provincial legislatures, the following four guiding principles laid down by the Privy Council in *Attorney-General for Canada* v. *Attorney-General for British Columbia,* (1930) A.C. 111 at 118, may equally be applied to the Indian Federation with necessary alterations:

(*a*) The enactments by the Federal Legislature, as long as it relates to subjects of legislation expressly enumerated in the Federal List is of paramount authority, even though it trenches upon matters assigned to the Provincial Legislature by the Provincial list. Vide *Tennant* v. *Union Bank of Canada,* (1894) A.C. 31. For example, in *Cushing* v. *Dupuy* (1880) 5 App. Cas. 409. An Act relating to bankruptcy, passed by the Parliament of Canada, was objected to as being *ultra vires,* in so far as it interfered with property and civil rights in the province: but inasmuch as "bankruptcy and insolvency" form one of the classes of matters enumerated in S. 91, their Lordships upheld the validity of the statute. Sir Montague Smith pointed out that it would be impossible to advance a step in the construction of a scheme for the administration of insolvent estates without interfering with and modifying some of the ordinary rights of property.

(*b*) The power of legislation conferred on the federation by the concurrent list, in supplement of the power to legislate upon the subjects expressly enumerated in the Federal list must be strictly confined to such matters as are unquestionably of national interest and importance, and must not trench upon any of the subjects within the scope of the Provincial Legislation unless the matters have attained such dimensions as to affect the body politic of the Federation. Compare *Attorney-General for Ontario* v. *Attorney-General for the Dominion,* (1896) A.C. 348.

(*c*) It is within the competence of the Federal Legislature to provide for matters which, though within the legislative competence of the provincial legislature, are necessarily incidental to effective legislation by the Federal Legislature upon a subject of legislation expressly enumerated in the Federal list. See *Attorney-General of Ontario* v. *Attorney-General for the Dominion of Canada,* (1894) A.C. 189.

(*d*) There can be a domain in which provincial and federal legislation may overlap, in which case neither legislation will be *ultra vires* if the field is clear; but if the field is not clear and the two legislations meet, the Dominion legislation must prevail. See *Grand Trunk Ry. of Canada* v. *Attorney-General of Canada,* (1907) A.C. 65; *La Compagnie Hydraulique De St. Francois* v. *Continental Heat and Light Company,* (1909) A.C. 194; In re *Silver Brothers, Ltd.,* (1932) A.C. 514, 529 and *Attorney-General for Canada* v. *Attorney-General for British Columbia,* (1930) A.C. 111 at 118.

(5) The Federal Legislature cannot interfere with the subjects given exclusively to the Provincial legislature under some colour or pretext. The courts must ascertain the true nature and character of the enactment, its "pith and substance" and it is the result of this investigation, not the form alone which the Statute may have assumed under the hand of the draftsman, that will determine within which of the categories of subjects in the legislative list the legislation falls; and for this purpose the legislation must be "scrutinised in its entirety". See *Attorney-General for Ontario* v. *Reciprocal Insurers,* (1924) A.C. 328 at 337. So also a Provincial Legislature cannot by pretending to legislate for the province intrude upon the Federal field and legislate. *John Deere Plow Company* v. *Wharton,* (1915) A.C. 330.

(6) The three legislative lists distribute all subjects of legislation between the Federal and Provincial legislatures. In assigning legislative power to the one or the other of these provinces it is not made a statutory condition that the exercise of such power shall be, in the opinion of the court of law, be discreet. In so far as they possess legislative jurisdiction, the discretion committed to the federal or provincial legislature is unfettered. It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them: but, when that point has been settled, courts of law have no right whatever to enquire whether jurisdiction had been exercised wisely or not. Vide *Union Colliery Company of British Columbia* v. *Bryden,* (1899) 24 A.C. 580.

(7) The first step to be taken with a view to test the validity of an Act of the Provincial Legislature is to consider whether the subject-matter of the Act falls within any of the classes of subjects enumerated in the provincial or concurrent list. If it does not then the Act is of no validity. If it does, then the further question may arise,

> "whether notwithstanding that it is so the subject-matter of the Act does not also fall within the enumerated classes of subjects in the Federal list and whether the power of the provincial legislature is or is not overborne".

Vide *Dobie* v. *The Temporalities Board,* (1882) 7 App. Cas. 136 at 149 and *Citizens Insurance Company of Canada* v. *Parsons,* (1882) 7 A.C. 96. Conversely in determining the validity of a Federal Act, the first question to be decided is whether the Act falls within the Federal list or concurrent list. If it does not, then the Act is of no validity. If it does, then the further question

may arise, *viz.*, whether notwithstanding that it is so, the subject-matter does not also fall within the enumerated classes of subjects in the provincial list. In such a case the rule enunciated in *Citizens Insurance Co. of Canada* v. *Parsons* and *Queen Insurance Co.* v. *Parsons,* (1881) 7 A.C. 96 at 108, may be followed. In these cases it is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent, authority to deal with matters falling within these classes of subjects exists in each legislature and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist and in order to prevent such a result, the three lists must be read together, the language of the one interpreted, and where necessary, modified by that of the other. In this way, it may be, in most cases, found possible to arrive at a reasonable and practical construction of the language of the list, so as to reconcile the respective powers they contain and give effect to all of them. In performing this difficult duty, it will be a wise course for those on whom it is thrown, to decide each case which arises as best they can, without entering more largely upon an interpretation of the statute than is necessary for the decision of the particular question in hand.

(8) Although part of an Act, either of the Federal Legislature or of a Provincial Legislature, may be *ultra vires* and therefore invalid, this will not invalidate the rest of the Act, if it appears that the one part is separate in its operation from the other part, so that each is a separate declaration of the legislative will, and unless the object of the Act is such that it cannot be obtained by a partial execution. And, in the same way, an Act may be *ultra vires* in some of its applications and *intra vires* in others. *Attorney-General for Ontario* v. *Attorney-General for Canada,* (1925) A.C. 750. Vide also *Toronto Corporation* v. *York Corporation,* (1938) A.C. 415.

VI. Legislative Power and Proprietary Rights

It will be apparent from Schedule VII of the Government of India Act of 1935 that Legislative powers are distributed between the Federal and Provincial Legislatures, and the residuary powers of legislation not included in the three lists are vested in the Governor-General under S. 204. But there is a vast distinction between legislative jurisdiction and proprietary rights. The fact that jurisdiction over a particular subject is conferred upon the federal legislature, for example, affords no evidence that any proprietary rights over it were transferred to the Federal Government. There is no presumption that, be-

cause legislative jurisdiction was vested in the Federal Legislature, proprietary rights were transferred to the Central Government. The Indian Federation came into existence under the Government of India Act of 1935. Whatever proprietary rights were at the time of the passing of the Act possessed by the Provinces remained vested in them, except such as are by any of its express enactment transferred to the Federation. *Vide* per Herschell in the Fisheries cases, *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia,* (1898) 23 A.C. 700 at 709 and *Cathering Milling and Lumber Co.* v. *The Queen,* (1888) 14 A.C. 46. In the *Fisheries case,* (1898) 23 A.C. 700, the question was whether under item 12 of S. 91 over "seacoast and Inland fisheries", the Dominion Parliament had jurisdiction to authorise the giving by lease, license, or otherwise to lessees, licensees or other grantees, the right of fishing in fisheries which before the Act vested in private individuals or in the provinces. Their Lordships hold that it has not, for S. 91 of the British North America Act did not convey to the Dominion any proprietary rights in relation to fisheries; and they drew attention to the distinction which must be borne in mind between rights of property and legislative jurisdiction. So also the power of the Federal Legislature over "navigation" does not enable it to claim property in the bed or waters of the river. *Montreal Corporation* v. *Montreal Harbour Commissioners,* (1926) A.C. 299. But the Privy Council must not be understood as meaning that under its power to legislate in relation to Federal subjects, such as Federal Railways, the Federal Parliament cannot provide for the expropriation of lands, for example, for this legislative power necessarily implies such a right to interfere with private property, and even with provincial crown lands. Vide *Attorney-General of British Columbia* v. *Canadian Pacific R. W. Co.,* (1906) A.C. 204. Again in the Fisheries cases, the Privy Council takes occasion to say that the power to legislate in relation to fisheries does, necessarily to a certain extent, enable the legislature so empowered to affect proprietary rights. An enactment, for example, prescribing the times of the year during which fishing is to be allowed, or the instruments which may be employed for the purpose, might very seriously touch the exercise of proprietary rights, and the extent, character and scope of such legislation is entirely left to the Dominion Legislature.

So also, although navigable waters may be regarded as the public property of the nation when the matter of maintaining

their navigability is concerned, and is a Federal subject for purposes of legislation, the Federal Government has no proprietary rights in them; nor does its sovereignty extend over them to the exclusion of the states or provinces in which they are situated. Thus apart from maintaining or promoting their navigability and of regulating navigation thereon, the Federal Government has no authority to exercise municipal jurisdiction over them, or to claim a property interest in their beds or banks, or to assert riparian rights in their waters, except of course, in so far as the Federal Government may itself happen to be the owners of lands through which waters may flow. In other words, the Federal Government may exercise an authority over these waters only in so far as inter-state or inter-provincial or foreign commerce, including the maintenance and promotion of their navigability, is concerned. See *Kansas* v. *Colorado,* 206 U.S. 46, where on the contention of the Federal Government that it might appropriate state waters to irrigate its own lands, the Supreme Court said:

> "It is enough for the purpose of this case to say that each state has full jurisdiction over the lands within its borders, including the beds of streams and other waters. The state may determine for itself whether the common law rule in respect to riparian rights or that doctrine of the appropriation of water for the purpose of irrigation shall control".

Again in the case of *International Bridge and Co.* v. *New York,* 254 U.S. 126, the extent of the jurisdiction of the state over a bridge constructed with the sanction of the United States was involved. The case related to an international bridge with one of its *termini* in the State of New York and the other upon the Canadian soil. The State of New York sued the Bridge Company to recover penalties for failure to comply with certain requirement of a law of the State. The bridge was originally constructed under state authority. The Supreme Court held that the sanction for its construction as a lawful bridge did not exclude the control of the state over it. The Court said "The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. The State was the source of every title to that land and of every right to use it. The nature and qualifications of ownership are decided by the State and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by State law. No doubt in the case of an international bridge the action of a State will be scrutinised in order to avoid any possible ground for complaint, but the mere

fact that the bridge was of that nature would not of itself take away the power of the State over its part of the structure.

VII. Disputes from Legislation.

We shall now consider the disputes that are likely to arise with regard to subjects within the list: and illustrate some of them by parallel instances that came before other Federal Courts. *Disputes relating to waters and incidental rights* may be taken up for consideration first. These disputes may be grouped (using the very language of the lists) under I. (*a*) Maritime Shipping and Navigation, including shipping and navigation on tidal waters and admiralty jurisdiction. (*b*) Major Ports, that is to say, the declaration and delimitation of such ports and the constitution and powers of Port authorities therein. (*c*) Fishing and fisheries beyond territorial waters. (*d*) Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft. (*e*) Carriage of passengers and goods by sea. II. Water, that is to say, water-supplies, irrigation, canals, drainage and embankments, water-storage and water power. III. Shipping and navigation on inland waterways as regards mechanically propelled vessels and the rule of the road on such waterways: and carriage of passengers and goods on inland waterways. No. I will fall within the exclusive competence of the Federal Legislature, No. II within the competence of the Provincial Legislature and No. III within the competence of both the Legislatures concurrently. Here it is possible only to suggest the nature of some of the disputes likely to come up before the Federal Court either in its original side (if it arises between the constituent units, or between them and the Federation) or in its appellate jurisdiction on appeals from different High Courts. Of these, we shall deal with disputes that might arise out of maritime shipping and Navigation, etc., and fishing and fisheries, etc.

VII. (a) Maritime shipping and Navigation including shipping and Navigation on tidal waters—Admiralty Jurisdiction

Maritime shipping would seem to mean the right to prescribe laws and regulations for vessels navigating the waters of the Federation. It would seem to relate to such matters as the law of the road, lights to be carried, how vessels are to be registered, and also to relate to evidence of ownership and title, transmission of interest and such matters. *See* Leofroy's Constitutional Law of Canada, p. 106. This power entitles the Federal Legislature to declare what shall be deemed an interference with

navigation. *See* the *Fisheries case,* (1898) A.C. 700 at 717. But concurrent powers of legislation are given to the Federal and Provincial Legislatures to legislate over "shipping, navigation over inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways; carriage of passengers and goods on inland waterways." And to the Provincial Legislature is given the right to legislate over inland waterways and traffic thereon subject to the provisions of the concurrent list, referred to above with regard to such waterways. The public right of navigation and shipping in the sea and the tidal waters is thus exclusively within the competence of the Federal Legislature. But the provincial legislature has got power under the concurrent list to enact for the incorporation of navigation companies whose operations are limited to the provinces. The Provincial Legislature may have the power to regulate traffic from port to port in one and the same province, subject to any regulation on quarantine by the Federal authority. The regulation of inland waterways and traffic is left exclusively to the provincial legislature. The Federal Legislature cannot create a public right of navigation over provincial crown lands covered by water where no public right of navigation now exists. *Attorney-General for the Dominion of Canada* v. *Attorney-General for Ontario, etc.,* (1898) A.C. 700 at 712. Accordingly, it was held in *Attorney-General for British Columbia* v. *Canadian Pacific Railway Co.,* (1906) A.C. 204 at 209, where a harbour was crown-property and used for harbour purposes as the landing of goods and the like, the Dominion Parliament can legislate for harbour-purposes as the foreshore belongs to the crown.

VII. (aa) Admiralty Jurisdiction

There is no special section in the Government of India Act of 1935 expressly conferring admiralty jurisdiction upon the Federal Court. But S. 204 of the Act confers upon that Court to decide cases between the constituent units where the dispute involves any question of law or fact on which the existence or the extent of a legal right depends. Further, item 21 of the Federal list in Schedule VII confers upon the Federal Legislature power to enact laws relating to the admiralty jurisdiction. The High Courts of various provinces are given admiralty jurisdiction by their charters. Under the Colonial Courts of Admiralty Act of 1890 (53 & 54 Vic., c. 27) the Legislature of British India may declare certain Courts to be Colonial Court of Admiralty and the Courts so declared have the admiralty jurisdiction described in the Act. Under this power the Legislature of India

has by Act XVI of 1891, S. 2 declared the High Courts at Calcutta, Madras and Bombay as well as the Courts of the Recorder at Rangoon now the High Court at Rangoon, the Court of the Resident at Aden, and the District Court of Karachi to be Colonial Courts of Admiralty. And as maritime disputes between the constituent units are not triable by the High Courts, it is apparent that the Federal Courts is the only Court competent to decide such disputes.

VII. (b) What subjects triable in Admiralty side of Federal Courts

What subjects might fall to be decided by the Federal Court in its admiralty jurisdiction is a matter purely of maritime law. In *The Belfas,* (1868) 7 Wallace 624 at 627, the Supreme Court of the United States has described the admiralty and maritime jurisdiction as follows:—

"Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts, including captures *jure belli*, and seizure on water for municipal and revenue forfeiture."

"(1) Contracts, claims or service purely maritime and touching rights and duties appertaining to commerce and navigation, are cognisable in admiralty.

(2) Torts or injuries committed on navigable waters, of a civil nature, are also cognisable in the admiralty Courts. "Jurisdiction in the former case depends upon the nature of the contract but in the latter it depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable are not maritime any more than those made to be performed on land. Nor torts cognisable in the admiralty unless committed on waters within the admiralty and maritime jurisdiction as defined by law."

As the Federal Legislature may regulate navigation, it may regulate the construction or maintenance of bridges over tidal navigable waters. In the absence of any Federal Legislation a province or a state may authorise the construction of a bridge over a tidal navigable stream, but the Federal Legislature may at any time interpose and require the alteration or removal of such a bridge. Those who act under the authority of the province or state necessarily assume the risk of Federal intervention and the consequent destruction of their property without compensation. See *Newport and Cincinati Bridge and Co.* v. *United States,* 105 U.S. 470 and *Willamette Iron Bridge and Co.* v. *Hatch,* 125 U.S. 1.

VII (c) Fishing and Fisheries

The Federal Legislature has got the right to legislate for fishing and fisheries beyond the territorial waters and the Pro-

vincial Legislature has got the right to legislate for fishing and fisheries within the territorial and inland waters. The right of fishing in the sea is a right of the public in general and does not depend on any proprietary right and the Federal Legislature has the exclusive right of legislation in regard to it. See *Attorney-General of British Columbia* v. *Attorney-General for Canada,* (1914) A.C. 153 at 173. From the discussion regarding territorial waters in the second discourse it follows that the limit of the territorial waters from the low water mark is not settled, though the Territorial Waters Jurisdiction Act enacts that for crimes committed at sea, the jurisdiction of the maritime state extends up to 3 miles into the sea from the low water mark. Though for other disputes the 3 mile-limit may not be assented to by independent nations it may be accepted as a rule of guidance to settle the disputes between the constituent units of the Federation or between the Federation and the said units, in the absence of any special definition of territorial waters by the Federal Legislature extending it beyond the 3 mile-limit. Let us next consider the dispute that might arise out of legislation on Trade and Commerce, in some of their various forms.

VIII. (a) Trade and Commerce

Trade and Commerce form a subject, equally important in creating justiciable disputes. Only the Provincial legislature has power to legislate for trade within the province, and not for trade and commerce between the provinces or states. That is, its power is confined to intra-state as distinguished from interstate trade and commerce. Only the Federal legislature has power to legislate over interstate trade and commerce. Any provincial legislation purporting to be on intra-state trade and commerce but touching interstate trade and commerce will to that extent be *ultra vires.*

VIII. (b) Involve Profit

A fair interpretation of the term "commerce" would seem to require that in order to bring a transaction within it there would have to be involved at some point a commercial element, that is, one of trade or exchange of goods or of services made or rendered *for profit. Citizens Insurance Co. of Canada* v. *Parsons* and *Queen Insurance Co.* v. *Parsons,* (1881) 7 A.C. 96. But Marshall, C.J., in the Supreme Court of America seems to have expressed an *obiter* in *Gibbons* v. *Ogden,* 9 Wheat 1, that commerce need not involve any profit and that mere intercourse will do. But in later cases this *obiter* was not

followed. Willoughby in his Constitutional Law of the United States, Vol. II, p. 374, says:—

"In order that a transaction may be said to be one of commerce, and if crossing state lines is interstate commerce, there must be involved some element of trade or business for financial profit, it seems that one answer can reasonably be given. There must be such an element. This element may enter in any one of a number of ways. If a carrier for hire is involved that is sufficient, whatever be the purpose for which the persons or commodities are carried. If a person proceeds upon his legs, or is carried in his own or any other private vehicle which is not a common carrier, there is no commerce whatever may be the purpose of the going. If goods are carried by a person upon his own legs or in a private vehicle, or if as in the case of sheep they are driven on their own legs, the operation or transaction is a commercial one only if the goods or living beings are being moved for the purpose of selling or using them for financial profit or to effect delivery under such a sale or agreement for their use".

I shall now refer to some of the cases that arose out of the meaning of the term "commerce".

VIII. (b) (i) Navigation is Commerce

In the United States of America, a dispute arose in *Gibbons* v. *Ogden,* 9 Wheat 1, whether Navigation is commerce and it has been held that it is Marshall, C.J., said:

"The counsel for the appellee would limit it to traffic to buying and selling or to the inter-change of commodities and does not admit that it comprehends navigation. This would restrict a general term applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic but it is something more. It is intercourse. The word comprehends and has always been understood to comprehend navigation within its meaning. Transportation of persons is held to be commerce".

VIII. (b) (ii) Insurance not Commerce

The writing, selling and transmission of insurance policies has been held not to be commerce. Issuing a policy of insurance is held to be not a transaction of commerce. The question arose in *Paul* v. *Virginia,* 8 Wall. 168 (reported in Evan's cases on American Constitutional Law, 3rd Edn., p. 498):

"The Legislature of Virginia passed an act providing that no insurance company not incorporated in that State should carry on its business without first depositing certain bonds of a specified character with State treasurer and receiving a license to do business. The agent of an insurance company incorporated in New York carried on business in violation of the Statute. The agent was convicted; one of the defences set up was that as the Statute of Virginia was a regulation of interstate commerce, that State had no power to enact and that the Statute is void. The Supreme Court held that the act is valid, as issuing a policy of insurance is not a transaction of commerce and hence not interstate commerce but only a local act. The policies are simple contracts of indemnity against loss by fire, entered into between the Insurance Co. and the assured, for a consideration paid by the latter. These contracts are not articles of commerce, in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of

the parties to them. They are not commodities to be shipped or forwarded from one State to another and then put up for sale. They are like other personal contracts between parties which are completed by their signatures and the transfer of the consideration. They are local transactions and are governed by the local law. They do not constitute a part of the commerce".

The same conclusion was arrived at by the Judicial Committee of the Privy Council in *Citizens Insurance Co.* v. *Parsons,* (1881) 7 A.C. 96. Sir Montague Smith says at p. 111:

"Is the business of insuring buildings against fire a trade? This business when carried on for the sake of profit, may, no doubt, in some sense of the word be called a trade. But contracts of indemnity made by insurers can scarcely be called trading contracts, nor were insurers who made them held to be "traders" under the English Bankruptcy law".

VIII. (b) (iii) Correspondence schools, Commerce

Correspondence schools giving instruction to students of various provinces or states would fall under the jurisdiction of Federal Legislature and any legislation by the provincial legislature affecting them would not bind them.

In *International Text Book Co.* v. *Pigg,* 217 U.S. 93 decided in 1910, the United States Supreme Court held that the conduct of a "correspondence school" is interstate commerce since it involves the solicitation of students in one State by local agents who are to collect and forward the fees and systematic intercourse by correspondence between the company and its students wherever situated and also the interstate transportation of books, papers, etc. This mode of instruction, the Court said:

"involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing, and in respect of which he is entitled from time to time by virtue of his contract, to information and direction. Intercourse of that kind, between parties in different States, particularly when it is in execution of a valid contract between them,—is as much intercourse in the constitutional sense, as intercourse by means of the telegraph".

VIII. (b) (iv) Driving Sheep across State Line

In *Kelley* v. *Rhoads,* 188 U.S. 1, the Supreme Court held that the driving of sheep from one State to another is an interstate commercial transaction,—that it is a proper mode of transportation—and therefore, that a State tax thereupon is an unconstitutional burden upon interstate commerce.

VIII. (b) (v) Transporting Intoxicants for one's use

In the *United States* v. *Burch,* 226 Fed. 974, the Court held that interstate transportation by a person of intoxicating

liquors for his own personal use and in his own automobile was interstate commerce. In *United States* v. *Hill*, 248 U.S. 420, the liquor was carried on by a private individual and for his own use but it was transported across the State line by a common carrier. Thus, though upon his own person, it was, in fact, transported by the common carrier and as such, might more easily be held to be a commodity of interstate commerce.

VIII. (b) (vi) Mere Production is not Commerce

Commerce does not include mere production of goods transferred. In the *United States* v. *E. C. Knight Co.*, 156 U.S. 1, Chief Justice Fuller observed that the fact that the article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the state and belongs to commerce. In *Coe* v. *Errol*, 116 U.S. 517, 525, in which the questions before the Supreme Court was whether certain logs cut at a place in New Hampshire and hauled to a river town for the purpose of transportation to the state of Maine were liable to be taxed like other property in the state of New Hampshire. In the judgment it was stated:

> "Does the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution. . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement from the state of their origin to that of their destination."

VIII. (b) (vii) Mere intention to export not Commerce

Mere intention to export articles manufactured does not constitute commerce. In *Kidd* v. *Pearson*, 128 U.S. 1, 20, 21, 22, where the question was discussed whether the right of a state to enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, could be overthrown by the fact that the manufacturer intended to export the liquors when made, it was held that the intent of the manufacturer did not determine the time when the article or product passed from the control of the state and that "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The function of commerce is different. The

buying and selling and the transportation incidental thereto constitute commerce," and that therefore it is not commerce.

VIII. (c) Commerce between two Terminals

Very often questions might arise whether the Provincial Legislature or the Federal Legislature can enact a law relating to commerce between two terminals in a province or state, when a part of the route is outside that province or state. It has been held by the United States that in such cases only the Federal Legislature has got that power. Often two portions of a Federated State might be separated by a slice of territory of the provinces. In such a case, only the Federal Legislature can legislate to regulate the traffic between that part of the province and the two portions of the Federated State. In *Missouri Pac. R. Co.* v. *Stroud,* 226 U.S. 464, it was held that a state law was inapplicable where the usual route of transportation to the intended destination was partly outside the state. In *Western Union Telegraph Co.* v. *Speight,* 254 U.S. 7, the transmission of a telegram between two points in the same state was held to be interstate in character, so as to prevent the application to it of a state law, when enroute, it passes outside the state.

VIII. (d) Freedom of Trade between the Constituent Units

Absolute freedom of trade between the various constituent units of the Federation are allowed under S. 297 of the Government of India Act. From the fact that "Trade and commerce" are entered in the Provincial list, or from the fact that the Provinces are given the right to regulate the production and distribution and supply of certain commodities, the Provincial Legislature or Executive cannot restrict or prohibit the entry into or export from that province of such goods; nor can it impose any tax or duty on similar goods, manufactured in another province and thus favour its own goods; nor can it by such duty or tax on goods manufactured in one province favour similar goods manufactured in another province. Imposition of such duty or tax is invalid and will be declared as such by the Federal Court.

[END OF VOL. II.]

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NOTES OF RECENT CASES

The Chief Justice and Krishnaswami Aiyangar, J.
29th April, 1938.

O.S. App. No. 65 of 1936.

Trusts Act, S. 84—Illegal contract—Fraud on trust—Money paid to manager to induce him to defraud the trust—Illegal purpose not effected—Suit to recover money paid—Sustainability.

A plaintiff entered into an agreement with the defendant, a sole manager of a temple with a view to induce him to purchase the land of the plaintiff on behalf of the temple and the defendant was to retain a certain portion of the amount as his 'commission'. The sale could not be carried out without the sanction of the District Court. As no application was made to the District Court for sanction of the sale of the land to the temple, the property was left with the plaintiff. The plaintiff brought a suit to recover the sum of money paid to the defendant in pursuance of the agreement.

Held, that the agreement was contrary to public policy as it involved a fraud on the trust as to the extent of the 'commission'. The plaintiff was as guilty as the defendant. It could not be urged that the illegal purpose for which the money was paid had not been carried into execution. The Court would not order a refund of money paid under the agreement.

(1925) 2 K.B. 1 and I.L.R. 43 Cal. 115, relied on.
1 Q.B.D. 291 and I.L.R. 35 Cal. 551, referred to.

A. Seshadhri for Appellants.
A. Suryanarayaniah for Respondent.

G. S. V.

Venkatasubba Rao and Abdur Rahman, JJ.
2nd May, 1938.

C. R. P. No. 1004 of 1934.

Provincial Small Cause Courts Act—Second Schedule—Art. 28—Applicability—Suit to recover property by heir—Right of plaintiff not disputed by the defendant.

The plaintiff sued for the recovery of certain jewels as the heir of his deceased wife. The defendant did not dispute the fact that the plaintiff had succeeded to his wife's property.

Held, that Art. 28 of Second Schedule, Provincial Small Cause Courts Act, did not apply as the case raised by no question of a disputed succession. The article applies if there is a claim made by an heir as such, which claim is resisted by another person advancing a similar claim.

I.L.R. 27 All. 622 and 19 C.W.N. 614, relied on.

49 M.L.J. 554 and A.I.R. 1933 Mad. 346, disapproved.

I.L.R. 37 Mad. 538, explained.

M. C. Sridharan for Appellant.

J. S. Vedamanickam for Respondent.

G. S. V.

The Chief Justice and Krishnaswami Aiyangar, J.

O.S. No. 65 of 1937.

4th May, 1938.

Presidency Towns Insolvency Act, S. 58 (5)—Scope—Contempt of Court—Power to commit—Insolvent's agent obstructing lawful order of Court—Application by Official Assignee to remove obstruction—Dismissal of—Appeal against order of dismissal—Competency—Letters Patent, Clause 15.

The Official Assignee presented a petition to the Judge, stating that the insolvent's wife and others were in possession of the house as the agents of the insolvent and asking for an order of the Court directing the bailiff to remove them from the premises. The judge held that the wife was obstructing at the instigation of the insolvent, and that he had no power to commit her for contempt of Court and dismissed the application. The Official Assignee filed an appeal against this order.

Held, that the order is a judgment within the meaning of cl. 15 of the Letters Patent and an appeal lies against it. When exercising the insolvency jurisdiction the Court is still the High Court. It has inherent power to commit a person who with full knowledge deliberately obstructs a lawful order of the Court on behalf of the insolvent. The powers of committing for contempt an agent of an insolvent are not limited by the powers conferred by S. 58 (5) of the Presidency Towns Insolvency Act.

(1897) 1 Ch. 545, relied on.

M. S. Vaidyanatha Aiyar and *K. P. Mahadeva Aiyar* for Appellant.

A. S. Natarajan for Respondents.

G. S. V.

The Chief Justice and Krishnaswami Aiyangar, J.
20th April, 1938.

L. P. A. Nos. 78 and 79 of 1935.

Lease—Covenant to deliver paddy—No covenant to pay rent out of the crops actually reaped—Landlord's claim of charge on the produce—Sustainability.

Where in a lease, the lessee undertook to cultivate the land, reap the crop and deliver to his landlord the stipulated amount of paddy and there was no separate covenant that the rent would be paid out of the crops actually reaped by him,

Held, that the landlord is not entitled to a charge in the produce of the land for the amount due for rent.

R. Krishnaswami Aiyangar for Appellant.

S. Nagaraja Aiyar for Respondent.

G. S. V.

The Chief Justice and Krishnaswami Aiyangar, J.
2nd May, 1938.

O. S. A. No. 75 of 1936.

Partnership—Accounts—Partners paying amounts as bribe—If entitled to credit.

In a partnership, bribes were given by the partners to officials of various institutions in order to ensure that the contracts were placed with the partnership. These payments were entered in the partnership books as items of expenditure. Accounts were taken of the partnership transactions.

Held, that the partners will not be entitled to credit for the sum paid by them as bribes, as one partner paying the amount cannot recover from the other partner his share of the expenditure through the Court.

G. Ramakrishna Aiyar for Appellant.

T. Krishnaraja Naicker for Respondent.

G. S. V.

Madhavan Nair, J.
5th May, 1938.

C. R. P. No. 713 of 1936.

Civil Procedure Code (V of 1908), S. 115—Presidency Small Cause Court—Refusal to go into merits, as the plaintiff had no cause of action—Interference by High Court.

A Judge of the Presidency Small Cause Court found that the plaintiff had no cause of action and refused to enter into the merits of the case on this preliminary ground.

Held, on revision, that the High Court is entitled to interfere if it is found that the plaintiff had a cause of action. It is not correct to say that the High Court cannot interfere under S. 115,

Civil Procedure Code, with a decision by a Presidency Small Cause Court except in a case involving jurisdiction.

R. V. Seshagiri Rao and *B. S. Parthasarathy Aiyangar* for Petitioner.

W. V. Rangaswami Aiyangar and *K. G. Ramaswami Aiyangar* for Respondent.

G. S. V.

The Chief Justice and Madhavan Nair, J.

O. S. A. No. 31 of 1938.

6th May, 1938.

Contract—Arbitration clause—Subsequent dispute — Issues involving charge of fraud—Stay of arbitration proceedings.

The terms of *A's* employment as the guarantee broker of *B* were embodied in a written agreement which provided that in the event of any dispute arising after the agreement, the dispute should be referred to arbitration. Subsequently differences arose between the parties and grave charges of fraud were made against *A* by *B*. *B* gave notice of his intention to invoke the arbitration clause of the agreement and appointed an arbitrator. *A* then filed a suit. The trial Judge held that this was a case which should be tried in open Court and directed the arbitration proceedings to be stayed.

Held, that the discretion was exercised properly and wisely.

A has a right to ask the Court that matters which affect his honesty and integrity should be decided in open Court.

Russell v. *Russell*, (1880) L.R. 14 Ch. 471, relied on.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Appellant.

N. T. Shamanna for Respondent.

G. S. V.

Horwill, J. C.R.P. No. 261 of 1938.
6th May, 1938.

Civil Procedure Code (V of 1908), O. 32, r. 6—Applicability —Compromise between a widow and minor represented by next friend—Security for property in the hands of the Court.

O. 32, r. 6 of the Civil Procedure Code has application when a suit is compromised between a widow and a minor represented by the next friend. The provision is not restricted only to a contested suit. The next friend need not furnish security for the property which has been only temporarily in the hands of the Court during the pendency of the suit and which has not been taken from the custody of some other person.

S. V. Venugopalachariar for Petitioner.

C. S. Sundararaja Aiyangar for Respondent.

G. S. V.

Venkataramana Rao, J. C. R. P. Nos. 599 to 601 of 1935.
9th May, 1938.

Malabar Law—Contract of loan entered into by Karnavan—Ratification by other members—Essentials for—Concurrence of the senior most Anandravan—Presumption arising from—Shifting of burden of proof—Transaction by manager in Hindu family —Presumption.

There is no presumption that every contract entered into by a manager is on behalf of the family. So it must be established in every case that the contract entered into by him was on behalf of the family. In a case of a joint family or Malabar Tarwad, even though the members of a family or Tarwad were not actual contracting parties to a loan transaction entered into by a manager, it is open to them to ratify and adopt it, in cases where the contract was entered into by the manager in his capacity as manager but not for a necessary purpose. The question of ratification can only arise in such a case and not in a case where the transaction was entered into by him in a purely personal capacity. The concurrence of the senior most Anandravan in a transaction of the Karnavan raises a *prima facie* presumption of necessity.

Observations of Varadachariar, J., in C. R. P. No. 1556 of 1935, relied on.

The burden is shifted on to the other members of the family to prove that there was no family necessity.

C. S. Swaminathan and *D. H. Nambudripad* for Petitioner.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Respondent.

G. S. V.

N.R.C.

The Chief Justice and Krishnaswami Aiyangar, J.
9th May, 1938.

O. S. A. No. 34 of 1937.

Guardian and Wards Act, Ss. 7 and 25—Hindu father neglecting child for fifteen years—Marriage arranged for minor—Right of father to custody of minor and an injunction to restrain the marriage—Declaration of Hindu father as guardian—Legality of—Effect of order on his powers.

A father delivered his infant daughter to the custody of his sister for over 15 years, took no interest in her and allowed others to do what he as a father should do. His sister made arrangements to marry the minor to a person of her choice without consulting him. He applied for the custody of the child and for an injunction restraining his sister from marrying the minor to the particular person selected by her.

Held, that the father is not fit to exercise his rights as such and is not a person in whose favour the Court should pass an order under S. 25 of the Guardian and Wards Act. His prayer for injunction should be refused. A father is not entitled to apply under the Guardian and Wards Act for an order appointing him guardian of the person or property of the minor. Under the Hindu Law he is the lawful guardian of his child and a declaration by the Court cannot increase his powers.

13 Rang. 590, relied on.

A. Srirangachariar for Appellant.

M. S. Venkatarama Aiyar for Respondent.

G. S. V.

Burn and Stodart, JJ.
10th May, 1938.

S. A. No. 552 of 1933.

Civil Procedure Code (V of 1908), O. 21, r. 63—Suit under—Dismissal of claim petition—Adverse possession set up by plaintiff—Material date for considering the rights of parties—Delay in filing the suit to claim title by prescription—Duty of Court.

In a suit brought under O. 21, r. 63 of the Civil Procedure Code to set aside a claim order, the plaintiff based his title on adverse possession as against the judgment-debtor from whom he got a sale-deed. Twelve years had not elapsed on the date of the attachment or date of the dismissal of the claim petition but more than twelve years had elapsed when the plaintiff brought the present suit.

Held, that the plaintiff by waiting a few more months and delaying to file the suit cannot clothe himself with additional rights and compel the rightful owner, namely the judgment-debtor, to lose

his right to the property. This principle is not in conflict with 49 M.L.J. 656. In a suit of this nature, the rights of the parties on the date of the attachment or on the date of the order on the claim petition are the rights which have to be taken into consideration. The suit should be dismissed as the plaintiff had not been in possession for twelve years and had not perfected his title by prescription on the date of dismissal of the claim petition.

11 M.L.J. 344 and 33 M.L.J. 316, referred to.

P. V. Rajamannar for Appellants.

Y. Suryanarayana and *B. V. Ramanarasu* for Respondents.

G. S. V.

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Horwill, J. C. M. A. No. 177 of 1938.

10th May, 1938.

Civil Procedure Code, O. 39, rr. 1 and 2—Suit to set aside decree passed while plaintiff was a minor—Gross negligence of guardian—Grant of temporary injunction, to stop execution of decree—Principles applicable.

The plaintiff brought a suit to set aside a decree passed against the property in his hands at a time when he was a minor. It was alleged that the plaintiff's guardian acted with gross negligence in not putting forward a proper defence to the suit claim. The lower Court refused to grant a temporary injunction to restrain the decree-holder from executing the decree.

Held, that the lower Court was right in not granting the injunction. The decree passed was not void but only voidable and is binding so long as the present suit continued. Further the lower Court had no sufficient material on record to come to the conclusion that the decree was void and was being wrongfully executed. A temporary injunction cannot be granted merely to maintain the *status quo*.

I.L.R. 59 Mad. 744 and 23 L.W. 85, relied on.

I.L.R. 33 All. 79, 25 L.W. 451 and 42 C.W.N. 409, referred to.

(1937) 2 M.L.J. 37, explained.

I.L.R. 1 Pat. 356 and 9 I.C. 227, not followed.

T. V. Ramiah for Appellant.

C. A. Mahomed Ibrahim, T. S. Santhanam and *King & Partridge* for Respondents.

G. S. V.

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Madhavan Nair, J. C. R. P. No. 1115 of 1937.

12th May, 1938.

Stamp Act, S. 36—Construction—"Admitted in evidence"—Promissory note—Endorsement by the Judge that it was insufficiently stamped—Admission of document—Effect.

A promissory note was insufficiently stamped. On the back of the document it was endorsed under O. 13, r. 4, Civil Procedure Code, by the District Munsif that the promissory note was insufficiently stamped and it was allowed to go in. It bore a rubber stamp with the initials of the Judge and he admitted it.

Held, that the mere admission of the document in this case will amount to admission within the meaning of the words in S. 36 of the Stamp Act. The question of its admissibility cannot be raised again. S. 36 of the Stamp Act does not require a judicial determination of the question of admissibility. The words 'admitted in evidence' in S. 36 are deliberately used in order to avoid complicated enquiries regarding the admission and the difficulties necessarily attendaut upon such enquiries. The policy of the law is to allow admission of documents which have been admitted under the rules of the Civil Procedure Code.

12 M.L.J. 351, followed.

65 M.L.J. 673, not followed.

I.L.R. 53 Mad. 137, distinguished.

A.I.R. 1929 Mad. 622, A.I.R. 1937 Mad. 431 and A.I.R. 1935 Mad. 888, relied on.

V. Rangachari for Petitioner.

A. Lakshmayya for Respondent.

G. S. V.

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Burn, J. C. R. P. No. 1361 of 1937.

12th May, 1938.

Civil Procedure Code (V of 1908), S. 115—Interference under—Error in framing issues—Burden of proof wrongly thrown on a party by the lower Court.

Where the burden was wrongly thrown on a party in certain issues and there was no allegation that the lower court acted perversely.

Held, that this is not a ground for interference in revision under S. 115, Civil Procedure Code. It is not the duty of the High Court to help the lower Court to frame issues. The lower Court alone has jurisdiction to frame the issues in the suits which come before them for trial.

I. L. R. 17 Mad. 410 (F.B.), followed.

69 M. L. J. 239 and A. I. R. 1936 Mad. 526, not followed.

K. V. Ramachandra Aiyar for Petitioner.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondents.

G. S. V.

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Wadsworth, J. S. A. No. 318 of 1936.
26th July, 1938.

Court-Fees Act, S. 7. cl. (iv-A) (as amended in Madras) and S. 7 (v)—Alienations by lawful guardian—Suit by minor to set aside and for possession of the properties—Nature of the relief to be sought—Method of valuation.

The plaintiff brought a suit to set aside certain alienations improperly made by his lawful guardian during his minority and to recover possession of the alienated properties from the alienee. The question arose about the proper method of valuation.

Held, that the cancellation or avoidance of the document of alienation is an essential part of the relief sought and the case comes under S. 7 (iv-A) and the plaintiff must pray for the cancellation of the document executed by the guardian.

A. I. R. 1936 Mad. 470 and A. I. R. 1928 Mad. 816, distinguished.

A. I. R. 1929 Mad. 668, relied on.

S. 7 (iv-A) is based on the actual value of the property as shown in the sale deed, which the plaintiff seeks to avoid.

The method of artificial valuation prescribed in S. 7 (v) should not be adopted.

I. L. R. 56 Mad. 212 and 63 M. L. J. 764, distinguished.

I.L.R. 59 Mad. 240, followed.

Kasturi Seshagiri Rao for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

G. S. V.

Burn and Lakshmana Rao, JJ. S. A. No. 1232 of 1932.
28th July, 1938.

Madras Hereditary Village Offices Act (III of 1895), S. 13—Madras Subordinate Collectors and Revenue Malversation (Amendment) Regulation (VII of 1828), S. 3, Third—Conflict between—If exists—District Collector's power of revision.

There is no conflict between Regulation VII of 1828 and Hereditary Village Offices Act (III of 1895). The right of suit given by S. 13 of this Act is not in any way inconsistent with the continuance of the power of 'superintendence, control and revision' given to the District Collector by S. 3, Third, of the Regulation. The District Collector's power of revision created by the Regulation must be held to continue unless it is expressly taken away,

K. Rajah Aiyar and *U. S. Ramaswami Aiyar* for Appellant.

K. V. Sesha Aiyangar for Respondent.

G. S. V.

Pandrang Row, J. Crl. R. C. Nos. 230 and 232 of 1938.
29th July, 1938.

Legal Practitioner—Citation of, as witness in a charge-sheet—Appearance as counsel for accused—If barred.

The mere fact that a lawyer is cited as a witness by the Police in a charge-sheet will not disqualify him from appearing as counsel for the accused in the case.

Obiter: It is not in accordance with professional etiquette for a lawyer who has given evidence as a witness for the prosecution to accept or to continue to hold a brief from the accused.

R. Sundaralingam for Petitioner.

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

G. S. V.

Pandrang Row, J. Crl. Appeals Nos. 683 to
2nd August, 1938. 689 of 1937.

Prevention of Cruelty to Animals Act, Ss. 1 and 3 (a)—Charge under S. 3 (a)—Requirements under S. 1—If necessary to decide the case.

Where the accused were charged with having overloaded their pack ponies and thereby committed an offence punishable under S. 3 (*a*) of the Prevention of Cruelty to Animals Act, the requirements under S. 1; *viz.*, the determination by the Local Government of the maximum weight to be carried by ponies and the publication of the District Magistrate's orders in the local Gazette are not necessary for the decision of the case on the merits. The Court has to decide whether as a matter of fact there was overloading or not.

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

L. V. Krishnaswami for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 331 of 1935.
26th July, 1938.

Hindu Law—Self-acquired property of father—Mortgage of the property by father and son for family debt—Property if thrown into common stock.

A father and his son executed a hypothecation of the suit house in favour of a third party. It was established as a fact that the house was purchased by the father with his separate funds many years before the mortgage and that they lived together in the house. The mortgage deed recited that the house was the self-acquired property of the father and that it was in their 'enjoyment and possession' and that the consideration for the mortgage had been received in cash for the purpose of the family trade carried on by them.

Held, that from the above circumstances, in the absence of any other evidence, it was not possible to draw the inference that the father intended to throw his self-acquired property into the common stock of the family and treated it as a joint family property.

A. I. R. 1933 Mad. 565, distinguished.

K. Kotayya and *S. Sitarama Aiyar* for Appellant.

S. Muthiah Mudaliar for Respondent.

G. S. V.

King and Stodart, JJ. C. M. A. No. 31, etc., of 1934.
27th July, 1938.

Civil Procedure Code (V of 1908), O. 21, r. 90—Suit on mortgage—Decree—Sale in execution—Judgment-debtor's application to set aside sale—Later mortgages by judgment-debtor over same properties—If possibility of no surplus to judgment-debtor a ground to hold judgment-debtor is not affected by the sale—Reduction of upset price without notice—If irregularity.

In a suit on a mortgage the decree-holders purchased properties in execution of the mortgage decree. The judgment-debtors applied under O. 21, r. 90 to set aside the execution sale. Their petitions were dismissed by the District Judge as not maintainable as he held that they could not come under clauses 1 and 2, nor even under clause 3 of O. 21, r. 90 because they were not persons "affected by the sale" inasmuch as the judgment-debtors had executed three other later mortgages and could not therefore get any surplus even if a fresh sale should be held. He did not make any enquiry into the facts. Certain attaching decree-holders of the equity of redemption also applied to set aside the sales. These petitions were also dismissed.

Held, that the petitions by the judgment-debtor and the attaching decree-holder were maintainable and that the question whether the judgment-debtor or attaching decree-holders would get any surplus may be relevant only in an enquiry as to whether they sustained substantial injury.

Held, further, that reduction of upset price during the conduct of the sale without notice to the judgment-debtor is not an irregularity which can be urged under O. 21, r. 90.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar, K. Swaminathan, A. Swaminatha Aiyar and *S. Tyagaraja Aiyar* for Appellants.

S. Pachapakesa Sastri, V. K. Srinivasa Aiyangar for *K. R. Rangaswami Aiyangar* and *V. V. Ramadurai* for Respondents.

S. V. V.

Wadsworth, J. S. A. No. 394 of 1934.
27th July, 1938.

Registration Act (XVI of 1908), Ss. 17 and 49 and Evidence Act, S. 91—Family arrangement—Document transferring title from father to other members of family—Need for registration.

A document recited that the father had purchased properties out of the funds of the maternal grandmother of his sons for their benefit but in his own name, that there had been a subsequent dispute and as a result of arbitration, all those items of the properties were to be held and enjoyed by the sons and a small portion of the properties by their mother and certain properties belonging to the father were set apart for the share of the sons.

Held, that the document purported to carry out a transfer of title in immovable property from the father to his sons and their mother. It was intended to be a formal embodiment of arrangement come to for division of the properties in dispute between the various members of the family. It is not admissible in evidence without being registered. Registration is necessary under Ss. 17 and 49 of the Registration Act and S. 91 of the Evidence Act.

I.L.R. 51 All. 79 (F.B.), relied on.

T. L. Venkatarama Aiyar for Appellant.

E. R. Balakrishnan for Respondent.

G. S. V.

Burn, J. C. R. P. No. 468 of 1937.
29th July, 1938.

Civil Procedure Code (V of 1908), O. 33, rr. 6 and 7 and O. 44, rr. 1 and 2—Application for leave to appeal in forma pauperis*—Respondent objecting to pauperism—Respondent's side*

affidavits stating that petitioner was able to pay court-fee—Petitioner's request to examine deponents of affidavits—Refusal thereof—Court if can act on mere affidavits.

In an application for leave to appeal in *forma pauperis* the respondent objected to the grant of leave on the ground that the appellant was possessed of means to pay court-fees and in support of that he filed affidavits of various persons in proof of his plea. The appellant therefore prayed to the court to have those respondent's deponents summoned for purposes of cross-examination. But his prayer was refused.

Held, the appellate court ought to have summoned the deponents since the petitioner objected to the statements of the respondent's deponents. Affidavits cannot be properly acted upon unless both parties agree to have them treated as evidence.

A. Gopalacharlu for Petitioner.

The Government Pleader (*B. Sitarama Rao*) and *K. R. Gupta* for Respondents.

S. V. V.

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Krishnaswami Aiyangar, J. C R. P. No. 1183 of 1937.

29th July, 1938.

Stamp Act (II of 1899), Sch. I, Art. 45—Construction—Value—Market value of the property to be ascertained.

The expression 'value' in Art. 45 of the Stamp Act means the true value of the share at the date of the partition. Neither the face value nor any notional value can be regarded as relevant for the purpose of computing the duty. The market value at the date of the partition must be ascertained to decide the question of stamp duty or penalty leviable from the parties.

B. Somayya for Petitioner.

C. M. Ramalingayya for Respondent.

G. S. V.

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Burn, J. C. R. P. No. 621 of 1937.

1st August, 1938.

Civil Procedure Code (V of 1908), O. 21, r. 58 (2)—Applicability—Pendency of claim petition—Issue of proclamation of sale.

Where the lower Court ordered the issue of a proclamation of sale during the pendency of a claim petition,

Held, the order is without jurisdiction. O. 21, r. 58 (2) does not apply to this case.

D. Ramaswami Aiyangar for Petitioner.

R. Ramamurthi Aiyar for Respondent.

G. S. V.

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Pandrang Row, J. Crl. App. No. 666 of 1937.
1st August, 1938.

Penal Code (XLV of 1860), S. 146—Unlawful entry on land by a party—Harvesting of crop by that party prevented by the party entitled to it—Common object if unlawful.

The accused's party prevented by force the harvesting of crop belonging to some of them, by another party *A* who had no right whatever to it. A party were actually on the land before the accused's party could prevent the harvesting of the crop. The accused's party were charged with rioting.

Held, that the taking of possession by *A* party would not be possession in the eye of law and their entry was unlawful.

113 E. R. 950, relied on.

The common object of the accused's party was not unlawful as they only prevented the commission of an offence like theft or mischief which was threatened. As the accused were acting in exercise of their lawful rights to property, they cannot be convicted of the offence of rioting.

I.L.R. 51 Mad. 91 and I.L.R. 24 Cal. 686, relied on.

K. S. Jayarama Aiyar, G. Gopalaswami and *C. R. Pattabhirama Aiyar* for Appellant.

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

G. S. V.

Wadsworth, J. S. A. No. 308 of 1934
2nd August, 1938. and
C. R. P. No. 732 of 1934.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (i)—Wrongful use of water—If amounts to diversion of water-course.

The plaintiff sued for what is called *theerva* alleged to be due from the defendants, holders of inam land within the plaintiff's estate for the wrongful use of water coming from a tank belonging to the plaintiff. It was alleged in the plaint that the defendants raised wet cultivation in dry inam land and have unjustly diverted the water of the plaintiff's tank and used the water thereof. The defendants argued that the water came from their adjacent lands which were entitled to the use of it.

Held, that the averment of the plaintiff that water was diverted and taken to land which was not entitled to it was sufficient to amount to an averment of diversion of a water-course. The suit was one for compensation for diversion of a water-course. It was not a suit of a small cause nature.

I.L.R. 18 Mad. 28 and 32 L. W. 316, referred to.

Ch. Raghava Rao for Appellant.

P. V. Vallabacharyulu for Respondent.

G. S. V.

Pandrang Row, J. Crl. App. No. 114 of 1938.
3rd August, 1938.

Penal Code (XLV of 1860), S. 489-C—Possession of counterfeit notes—Knowledge of their being counterfeit—Inference of intention.

Where it was proved that the accused was in possession of 38 counterfeit currency notes, knowing the same to be counterfeit,

Held, that the number of counterfeit notes found in his possession and the circumstances in which they were so found may by themselves constitute a sufficient ground for drawing an inference that the intention was to use them as genuine or that they may be used as genuine. The accused should be convicted of an offence punishable under S. 489-C of the Penal Code.

(1937) M.W.N. (Cr.) 111, distinguished.

R. Venkata Rao for Accused.

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

G. S. V.

The Offg. Chief Justice and
Krishnaswami Aiyangar, J. C. M. P. No. 2066 of 1938.
4th August, 1938.

Civil Procedure Code (V of 1908), O. 45, r. 13 (c) and (d)—Appeal to Privy Council from preliminary decree only—Stay of execution of final decree—Jurisdiction of High Court.

An appeal to the Privy Council from a preliminary mortgage decree was admitted, and pending disposal of the said appeal, the petitioner-judgment-debtor, whose share of the mortgaged property was sought to be proceeded against in execution of the final decree which was passed later and against which no appeal was preferred, applied for stay of execution in the High Court. A preliminary objection was raised by the decree-holder as to the jurisdiction of the High Court to stay, on the ground that the final decree was not appealed against.

Held, that though O. 45, r. 13 (*c*), Civil Procedure Code, might not be applicable since the final decree was not appealed from, the High Court was competent to act under r. 13 (*d*) and stay execution by imposing conditions on the petitioner.

M. Patanjali Sastri for petitioner.

T. M. Krishnaswami Aiyar, T. V. Ramiah and *K. Parasurama Aiyar* for Respondent.

B. V. V.

King and Stodart, JJ. S. A. No. 592 of 1932.
4th August, 1938.

Court-Fees Act (VII of 1870), S. 7, cl. (iv-A) and cl. (v) (b) —Suit for partition by minor coparceners on attaining majority— Alienations (Sales) of joint family property by plaintiffs' brother and mother acting as testamentary guardians in pursuance of a will of father—Alienations by Court guardian with permission of Court and without permission—No express prayer in plaint to set aside those alienations—Plaintiffs impeaching the alienations as not binding on them and suing for possession on the statutory value of their shares—If bound to sue for cancellation of sales— Whether S. 7 (iv-A) or cl. (v) applies.

Where a suit was filed by minor coparceners on attaining majority against the other members of the joint family to which they belonged regarding certain sales effected of the joint family property by their mother acting as court guardian without permission of Court and there was no express prayer in the plaint to set aside the alienations as they were not binding on them and the court-fee paid was on the statutory value of their share,

Held, court-fee payable is the same whether S. 7 (iv-A) or S. 7 (v) be taken as the basis of calculation and that the court-fee already paid is sufficient.

53 M.L.J. 267 and I.L.R. 56 Mad. 212 at 222, followed.

K. Rajah Aiyar and *K. Venkateswaran* for Appellant.

K. R. Rangaswami Aiyangar and *R. Krishnaswami Aiyangar* for Respondents.

K. C.

Pandrang Row, J. Crl. R. C. No. 5 of 1938.
5th August, 1938.

Penal Code (XLV of 1860), S. 379—Cattle causing damage to crop—Seizure of, by a person, other than the owner of crop— Pound-keeper not taking charge of cattle—Removal of cattle by owners—If an offence.

The cattle belonging to the accused were taken to the pound by a person *A*, who had no connection with the crop which the cattle were said to have grazed. At the time when the cattle were taken to the pound, neither the pound-keeper nor anybody on his behalf was there. The accused drove away their cattle from the pound.

Held, that the seizure by *A* was not legal and it conferred no right of possession either on himself or the persons whose crop had been damaged. The accused cannot be convicted with theft as the cattle were throughout in the possession of the owners and the custody of the animals did not pass to the pound-keeper or any one acting for him.

P. Chandra Reddi and *R. Ramalinga Reddi* for Petitioner.

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

G. S. V.

Lakshmana Rao, J. Crl. App. No. 144 of 1938.
9th August, 1938.

Criminal Procedure Code (V of 1898), S. 196—Offence under S. 171-F of the Penal Code—Sanction of the District Magistrate for prosecution—Copy of the order of sanction signed by head clerk—If sufficient proof of sanction.

An accused was convicted by Sub-Divisional Magistrate under S. 171-F of the Penal Code for false personation at an election. On appeal the conviction was set aside on the ground that the requisite sanction of the District Magistrate was not proved. A copy of the order of the District Magistrate sanctioning the prosecution was filed with the complaint and it was signed by the Head Clerk for the District Magistrate and the existence of the order was not denied or disputed, nor was exception taken to the filing of the particular copy.

Held, that the acquittal of the accused on the ground that the requisite sanction was not proved was unsustainable.

M. Sriramamurthi for Accused.

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

G. S. V.

Lakshmana Rao, J. Crl. R. C. No. 935 of 1937.
9th August, 1938.

Madras Gaming Act (III of 1930), S. 9—Servants of keeper of gaming house—Conviction under S. 9—Legality.

Where it was not the case that the servants of the keeper of a common gaming house were gambling, they cannot be convicted under S. 9 of the Madras Gaming Act.

V. T. Rangaswami Aiyangar and *G. N. Chari* for Petitioner.

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

G. S. V.

Randrang Row, J. C. C. C. A. Nos. 83 and 84 of 1935.
10th August, 1938.

Madras City Tenants' Protection Act (III of 1922), S. 2 (2) and (4)—Person deriving rights of tenant neither by succession nor by transfer—Status of—Sub-tenants of lessee—If included under 'tenants'—Lease of vacant land along withshop—Vacant land not appurtenant to shop—Nature of lease.

Where the defendant is not entitled by the law of succession to the rights possessed in certain property by the previous tenant, nor has he got a document of transfer in respect of the rights of the previous tenant and the previous tenant left a will and had a son,

Held, that the defendant is a trespasser and is not entitled to any protection under the Madras City Tenants' Protection Act.

Where a person entered into possession under a document which purported to be a counter-part of a lease, the sub-tenants under that original lessee are not mere licensees but must be deemed to be tenants as defined in the above Act.

Where the properties demised were described as the market, houses, shops and vacant land in a garden and there was no evidence to show that the vacant land was appurtenant to the shops,

Held, that the lease must be regarded as a lease of land, so far as the land in the garden was concerned.

O. T. G. Nambiar and *W. S. Krishnaswami Naidu* for Appellant.

S. Rangachari for Respondent.

G. S. V.

King and Stodart, JJ. C. M. S. A. No. 164 of 1934.
29th July, 1938.

Civil Procedure Code (V of 1908), O. 21, r. 23—Order to produce sale papers—Nature of.

An order to 'produce sale papers' is not the order contemplated by O. 21, r. 23 of the Civil Procedure Code, that the decree shall be executed.

A.I.R. 1928 Mad. 1052, distinguished.

P. Somasundaram for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

G. S. V.

Lakshmana, Rao, J. S. A. No. 729 of 1933.
29th July, 1938.

Water rights—Claims to—Basis of—Possessory title.

A person is not entitled to claim rights to water on the strength of his possessory title. He must establish his rights to water by grant or prescription.

I.L.R. 38 Mad. 280, relied on.

5 M.L.J. 24 and I.L.R. 34 Mad. 173, referred to.

K. Kuttikrishna Menon and *C. Vasudeva Mannadiar* for Appellant.

Ch. Raghava Rao and *M. Chinnapan Nair* for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 123 of 1934.
2nd August, 1938.

Guardianship—De facto *guardian—Status of—General recognition by family of minor—Power to give discharge of debt due to minor.*

A *de facto* guardian is one who is already a guardian owing to something which has happened previously.

Where a person, who makes an alienation or receives a payment, is, at the time of the transaction, regarded by common consent, in the eyes of the family of the minor and those interested in the welfare of the minor, as the person who is entitled to act on behalf of the minor, and that person so recognised has consented to act as guardian, that person is a *de facto* guardian and it is not necessary to wait for a series of transactions in the capacity of guardian in order to clothe that person with authority to represent the estate of the minor.

I.L.R. 51 Bom. 1040 and 55 M.L.J. 861; referred to.

A *de facto* guardian who is validly in charge of the minor's affairs may, for the benefit of that minor, give a good discharge in respect of a debt due to a minor.

A.I.R. 1937 Mad. 280, dissented from.

V. Govindarajachari and *K. Krishnamurthi* for Appellants.

K. Kotayya for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 381 of 1934.
4th August, 1938.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 43 and 73—Dismissal of hereditary Archaka for physical disability—If proper—Special remedy of appeal in S. 43—Dismissed office-holder—Suit in Civil Court to set aside order of dismissal—Competency of.

Where a hereditary Archaka is dismissed by the trustee on the ground that he suffered from a physical disability which made him unfit to hold office,

Held, that this was a sufficient ground for passing an order of dismissal under S. 43 of the Madras Hindu Religious Endowments Act.

S. 73 is a clear indication that the provisions of S. 43 setting up a special machinery of appeal and conferring finality on the decisions in appeal by a dismissed office-holder are intended to oust the jurisdiction of the Civil Court to question the propriety of the order of dismissal passed under that section.

69 M.L.J. 695, relied on.

T. V. Muthukrishna Aiyar for Appellant.

M. Subbaroya Aiyar for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 431 of 1934.
5th August, 1938.

Madras Estates Land Act (I of 1908), S. 151 (2)—Suit for compensation—Damage to a portion of holding—Maintainability of the suit.

A suit for compensation for damage or for an injunction under S. 151 (2) of the Madras Estates Land Act will only lie when the value of the holding has been materially impaired. The holding in S. 3 (3) means the holding as a whole unless there is any special agreement between the land-holder and the ryot that a particular parcel of land should be taken as a separate holding. The question whether there has been material or substantial damage must be

answered with reference to the size of the holding and the extent of the damage.

I.L.R. 39 Mad. 673, followed.

(1935) M.W.N. 1213 and A.I.R. 1936 Mad. 220, referred to.

P. Satyanarayana Rao for Plaintiff.

V. Parthasarathy for Respondent.

G. S. V.

Pandrang Row, J. C. M. A. No. 73 of 1936.
8th August, 1938.

Civil Procedure Code (V of 1908), O. 41, r. 27—Admission of additional evidence before hearing of appeal—Transfer of appeal to Subordinate Judge—Remand by Subordinate Judge—Proper procedure.

A District Judge admitted additional evidence before hearing of the appeal. He then transferred the appeal to the Additional Subordinate Judge for disposal. The latter reversed the decree of the trial Court and remanded the case to the lower Court for fresh disposal.

Held that (1) the order of the District Judge is without jurisdiction.

I.L.R. 10 Pat. 654 (P.C.), followed.

(2) the correct procedure to be adopted by the Subordinate Judge is to have the additional evidence taken either by himself or by the lower Court and then dealt with the appeal.

A. V. Narayanaswami Aiyar for Appellant.

S. Amudachari for Respondent.

G. S. V.

Pandrang Row, J. C. M. A. No. 8 of 1938.
8th August, 1938.

Civil Procedure Code (V of 1908), O. 38, r. 12 and Ss. 60 and 61—Agriculturist—Meaning of.

The word 'agriculturist' found in O. 38, r. 12 of the Civil Procedure Code must be interpreted in the same sense in which it is to be understood in Ss. 60 and 61 of the Code.

A person cannot be deemed to be an 'agriculturist' within the meaning of O. 38, r. 12, if he possesses a large extent of land most of which is cultivated by tenants.

K. Subrahmanyan for Appellant.

P. Chandra Reddi and *R. Ramalinga Reddi* for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 527 of 1934.
8th August, 1938.

Madras District Municipalities Act (V of 1920), S. 83—Choultry—Portion of building let to tenants—If exempt from taxation.

Where a building was dedicated for use as a choultry but half of the building was let for rent to tenants, and the remainder was partly used as choultry and partly as the residence of the trustee and the rent was used for the upkeep of the premises,

Held, that the Municipal Council was entitled to levy house-tax and latrine-tax on the portion of the building which was let out to tenants though that portion was a choultry in the past and might become one again in the future.

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

Respondent not represented.

G. S. V.

Madhavan Nair, O. S. A. No. 50 of 1938.
Offg. Chief Justice and
Krishnaswami Aiyangar, J.
10th August, 1938.

Original Side Rules, O. 7, r. 7 (2)—Leave to defend—Unconditional order, when given.

In order to entitle a defendant to ask for leave to defend without any condition the defence must be a *bona fide* one and not a mere attempt to prolong or delay the case. It is not necessary that the Court should enter fully into the merits of the case and decide. But it should be satisfied that the defence raised shows that there is a fair issue to be raised before a competent tribunal.

5 Times Rep. 72 and 85 L.T. 262, followed.

I.L.R. 58 Mad. 115, explained.

V. Ramaswami Aiyar and *S. Narasinga Rao* for Appellant.

V. Rajagopalachariar and *K. P. Raman Menon* for Respondents.

G. S. V.

King and Stodart, JJ. C. M. A. No. 134 of 1936.
10th August, 1938.

Hindu Law—Joint family property—Partition deed—Contingent charge reserved under—Decree for enforcement of—If family property.

In a Hindu family, the elder brother undertook to pay some of pre-partition debts and accordingly it was stipulated in the family partition deed that if on account of his default the other members had to pay such debts, the latter were entitled to a charge on the

former's properties. The former made default and the latter's entire family properties were sold through Court for some of such pre-partition debts. So the other members obtained a decree for enforcing the charge against the elder brother's properties. The remaining pre-partition creditors obtained decrees against the 'family properties' of the other members.

Held that, that the enforcement of the charge was an item of property which was contingent, but when it came into existence it did so by virtue of the partition deed and it must be deemed to be 'family properties' of the judgment-debtors.

N. A. Krishna Aiyar and *S. R. Subramanian* for Appellants.

B. Sitarama Rao (Government Pleader) for Respondent.

G. S. V.

Burn, J. C. M. A. No. 261 of 1938.
16th August, 1938.

Madras Agriculturists Relief Act (IV of 1938)—Scaling down of debt—Duty of creditor—Power of sale vested in mortgagee—Mortgagee bringing property to sale without scaling down debt—Injunction to restrain—Grant of.

The plaintiff executed a deed of mortgage in favour of the first defendant who was given a power of sale without intervention of Court. The plaintiff prayed for an injunction under O. 39, r. 1 of the Civil Procedure Code to restrain the 1st defendant from exercising the power of sale. His complaint was that the defendant did not scale down the debt as provided for in the Agriculturists Relief Act.

Held, that after the passing of that Act, it was the duty of the creditor to scale down the amount due to him by his debtor. The scaling down need not necessarily be the act of a Court. The action of the creditor in bringing the debtor's property to sale for a sum in excess of the amount scaled down is *prima facie* an injury to the debtor. So an injunction should issue as prayed for. It is no answer that the debtor will have a remedy under S. 69 (3) of the Transfer of Property Act.

S. Krishnamachariar and *K. Subba Rao* for Appellant.

V. S. Arunachalam for Respondents.

G. S. V.

Lakshmana Rao, J. Crl. R. C. Nos. 189, 209, 210 and 211
17th August, 1938. of 1938.

Madras District Municipalities Act (V of 1920), S. 347—Affixing advertisement without licence—Prosecution for—Limitation.

When a person was prosecuted for affixing Cinema advertisement on vehicles and road sides vested in the Municipal Council without licence,

Held, that under the proviso to S. 347 of the Madras District Municipalities Act, the offence is to be deemed to be a continuing one and the complaint may be made within a period of twelve months and not three months, from the commencement of the offence.

N. Gopala Menon and *V. Karunakara Menon* for Petitioners.

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

P. Viswanatha Aiyar for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 620 of 1933.

22nd August, 1938.

Inam—Darmilla inam for personal service—Resumption of—Presumption—Inam to be enjoyed during the pleasure of Zamindar—Effect.

A grant was made of *darmilla* post-settlement personal service inam. The grant was hereditary. There was an entry in a register prepared by a Government official that the inam should be enjoyed 'during the pleasure of the Zamindar.' The question arose about his right to resume the inam.

Held, that there is the presumption that the grantor has the right to resume the inam and it is incumbent on the holder of the grant to rebut the presumption. The Zamindar can rely on the presumption of resumability in the absence of evidence to indicate the contrary.

I.L.R. 28 Bom. 305, 59 M.L.J. 183 (F.B.), I.L.R. 7 Mad. 268, I.L.R. 14 Mad. 365, I.L.R. 26 Mad. 403, (1911) 2 M.W.N. 406, (1910) M.W.N. 436 and (1914) M.W.N. 179, referred to.

The entry referred to indicates that the inam is resumable.

59 M.L.J. 183 (F.B.), followed.

Leave to appeal granted.

P. Somasundaram for Appellant.

S. Venkatesa Aiyangar for Respondent.

G. S. V.

Varadachariar, J. C. R. P. Nos. 87 of 1937
19th August, 1938. and 386-388 of 1937.

Civil Procedure Code (V of 1908), O. 2, r. 2, cl. (3)—Leave to omit certain reliefs—If application for leave should be filed before or at least with the plaint—Power of Court to entertain such an application at later stages of the suit.

The plaintiff was entitled to recover a sum of Rs. 20,000 from the defendant in ten annual instalments of Rs. 2,000 each, the first instalment becoming payable on 31st March, 1929. As the first instalment was not paid on the due date, the plaintiff filed a suit for its recovery in April, 1929. Several defences were raised in that suit. In 1933 he filed a second suit O. S. No. 19 of 1933 By that time not only the second instalment but some later instalments had also fallen due. But O. S. No. 19 of 1933 sought for the recovery of the second instalment only. O. S. No. 17 of 1934 was filed next year for the third instalment and two other suits in 1935 and 1936 for the later instalments. All the four suits beginning from O. S. No. 19 of 1933 remained pending on 1st October, 1936. At some stage the defendant raised the plea under O. 2, r. 2, Civil Procedure Code, that the claim for the later instalments had accrued due by the date of O. S. No. 19 of 193 and therefore they were barred by O. 2, r. 2. At this stage on 1st October, 1936, the plaintiff applied for leave under O. 2, r. 2 (3) to omit the claim for certain reliefs. The question was whether assuming that the bar under O. 2, r. 2 (3) would have applied to each of the later suits, the Court had power to grant leave under that clause at a late stage of the pendency of the earlier suit or the leave should have been asked for before O. S. No. 19 of 1933 was filed or at least at the time the suit was instituted.

Held, that where leave is not a condition precedent to the jurisdiction of the Court to entertain the particular action, there is no inherent necessity that the application should be made before the institution of the suit itself or at least along with the plaint. Where the objection under O. 2, r. 2 arises, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked for. It only entails a disability as regards subsequent proceedings. Therefore in this class of cases there is no reason for insisting that the application for leave to omit must precede or at least be contemporaneous with the plaint in the first instance. But by applying later a plaintiff will be running a risk of the application being refused when it will be too late for him to set matters

right. It is therefore only as a matter of prudence that the plaintiff will do well to apply before or with the plaint.

B. Somayya for Petitioner.

P. Satyanarayana Rao for Respondent.

S. V. V.

Wadsworth, J. S. A. No. 559 of 1938.
23rd August, 1938.

S. 5 of the Provident Fund Act—S. 180 of the Succession Act—Scope of.

A testator during his lifetime nominated his wife to recover the amounts standing to his credit in a Provident Fund and in a Mutual Benefit Fund and in a Telegraphic Co-operative Society by declarations duly made.

The testator subsequently devised these amounts besides other properties by a will in specific shares to his wife and daughters. It was contended that by virtue of S. 5 of the Provident Fund Act the wife as sole nominee is protected and is not put to election under S. 180 of the Succession Act either to take the fund amounts and reprobate the will or approbate the will.

Held, that though under S. 5 of the Provident Fund Act the wife is entitled to the Provident Fund amount absolutely she can't act in derogation of S. 180 of the Succession Act. She must either elect to take the Provident Fund amount and reprobate the will or approbate the will in its entirety.

Held, further, that nominee the wife having died her representative in interest can make the election.

Held, further, that the Provident Fund Act applies only to funds established by an authority or substitution for the benefit of its employee and has no application to Mutual Benefit Fund and to Co-operative Society.

I.L.R. 59 Mad. 855 and (1908) A.C. 224, referred.

A. C. Sampath Aiyangar for Appellant.

A. Gopalacharlu, B. Somayya and *K. R. Gupta* for Respondents.

S. V. V.

Pandrang Row, J. C. M. A. No. 202 of 1936.
12th August, 1938.

Promissory note—Suit by indorsee—Defence that the payee is a benamidar—Sustainability—Negotiable Instruments Act, S. 46—Delivery—Nature of—Delivery to the beneficiary—If sufficient.

A suit was brought by the indorsee of the payee of a promissory note against the executant. The defendant contended that the payee was only a benamidar and there was no proper delivery of the note. The note was handed over to the beneficiary who actually advanced the money under the note.

Held, (1) that the claim by the payee or his indorsee cannot be questioned by the maker of the note on the ground that the payee was only a benamidar;

(2) that the delivery contemplated by S. 46 of the Negotiable Instruments Act must be a delivery by the maker or by some one authorised on his behalf. It need not necessarily be to the person whose name is given in the promissory note as the payee or to any agent authorised by him in that behalf. The delivery in this case is sufficient to complete the transaction evidenced by the note.

K. Rajah Aiyar for Appellant.

B. Sitarama Rao for Respondent.

G. S. V.

Madhavan Nair, Offg. C. J. and Stodart, J. L. P. A. No. 61 of 1938.
16th August, 1938.

Civil Procedure Code (V of 1908), O. 32, r. 15—Power of attorney granted by plaintiff—Suit by next friend for the revocation of—Maintainability—Plaintiff incapable of protecting his interests.

Where the next friend files a suit alleging that the power of attorney was granted by the plaintiff to the defendant on unsubstantial grounds and that it should be revoked, in the interests of the plaintiff himself, and it is found that the plaintiff is mentally deficient and incapable of protecting his interests,

Held, that the next friend is entitled to institute the suit.

R. Gopalaswami Aiyangar and *S. Sankara Aiyar* for Appellant.

G. S. V.

Wadsworth, J. S. A. Nos. 177, 178 and 179 of 1936.
16th August, 1938.

Madras Estates Land Act (I of 1908), Ss. 3 (11) and 4—Land used for agricultural purposes in 1900—Subsequent use of land for residential purposes—No payment of rent for 20 years—Suit for rent—Nature of presumption to be drawn.

The suit lands were cultivable in 1900, some eight years prior to the passing of the Madras Estates Land Act. At some date subsequent to 1900, houses were built upon the lands. For 20 years the suit lands were occupied by houses and no rent was paid for them nor had any patta been tendered. There was no proof of the consent of the landholder to this arrangement. The landholder brought a suit for rent.

Held, that no presumption could be drawn that the purposes for which the lands were held in 1900 continued in 1908 and the persons who occupied the lands on 1st July, 1908, probably for purposes of residence acquired the statutory position of occupancy ryots liable to pay rent. To gain the benefit of the rule in 25 M.L.J. 50, the plaintiff should show that lands have been ryoti lands some period while the Act has been in force in order to justify the inference that the occupant has the right to use these lands for agricultural purposes and is liable to pay rent for them within the definition in S. 3 (11).

T. Kumaraswamiah for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondents.

G. S. V.

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Wadsworth, J. S. A. No. 594 of 1933.

16th August, 1938.

Possession—Suit for—Presumption that possession follows title—When drawn.

In a suit for possession, the land was in fact under cultivation at the time of suit and for some years prior to that and there was no finding that the plaintiff was in possession, physical or constructive, at any particular time,

Held, that the plaintiff can be given the benefit of the presumption that possession follows title, only if he proves that the land was unoccupied within twelve years of the suit in such circumstances as to raise that presumption. If the plaintiff proves that fact, the defendants will be required to prove that they had acquired title by adverse possession.

(1937) M.W.N. 533, explained and distinguished.

V. Govindarajachari and *G. Satyanarayana Raju* for Appellants.

S. Venkatesa Aiyangar for Respondents.

G. S. V.

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Wadsworth, J. S. A. No. 183 of 1936.

19th August, 1938.

Land Acquisition Act (1 of 1894), S. 31—Reference under—Rival claimants—Duty of Court—Appellate Court confirming the

decision of trial Court and referring one party to a separate suit —Legality.

While rival claimants come before the Court on a reference under S. 31 of the Land Acquisition Act, the Court has a duty to decide which of the two claimants is entitled to the money deposited in Court.

The appellate Court cannot confirm the trial Court's decision, and recognise the title of one of the claimants, while at the same time referring the other claimant to a separate suit, to canvass the correctness of that decision.

4 C.L.J. 256, relied on.

B. Sitarama Rao for Appellants.

P. J. Kuppanna Rao and *K. S. Sundaram* for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 762 of 1935.

19th August, 1938.

Civil Procedure Code (V of 1908), S. 11—Land-holder and ryot—Suit by land-holder against ryot to recover water charge collected from him by Government—Claim of land-holder to enforce such a clause in patta rejected—Plea of res judicata.

The land-holder claimed to recover from his ryot an amount which he himself had paid to the Government by way of charge for Government water used to irrigate second or third crop. In an earlier suit to enforce a patta, the plaintiff claimed to include a clause in the patta imposing upon the ryot liability to pay water cess corresponding to the amount recovered from the land-holder by the Government. Objection was taken to that clause and the plaintiff's claim was rejected.

Heid, that the present suit was barred by *res judicata.* When the basis of the relations of the parties was judicially decided the matter cannot be re-opened, though the present suit related to a different fasli.

58 M.L.J. 260, referred to.

M. S. Venkatarama Aiyar for Appellants.

A. Sundaravaradachariar for Respondents.

G. S. V.

Pandrang Row, J. C. R. P. No. 301 of 1938.

19th August 1938.

Court-Fees Act (VII of 1870), S. 12—Judicial determination of court-fee—Subsequent reversal of.

When a Court has passed a judicial order fixing the correct Court-fee payable on a memorandum of appeal, it is not open to that Court to reverse it afterwards either at the instance of a party or of its own motion.

(1937) 1 M.L.J. 89 and 69 M.L.J. 479, followed.

K. Kameswara Rao for Petitioner.

The Government Pleader (B. Sitarama Rao) for Respondent.

G. S. V.

Varadachariar and Pandrang Row, JJ. A. S. No. 127 of 1936.

19th August, 1938.

Hindu Law—Maintenance—Widow—Defendant's offer of a house in his village for her residence—Refusal by the widow—Proper order to be made—Order compelling the defendant to build a house for her in another village—Legality of.

In a suit for maintenance by a widow against her husband's brother, the latter offered to place one of the houses in his own village at her disposal and the lower Court compelled him to build a house for the plaintiff in her father's village.

Held, that the defendant cannot be compelled either to pay her a lump sum to enable her to build a house or to build a house for her in another village. If the plaintiff is unable to accept the plaintiff's offer, the only reasonable alternative is to direct the defendant to pay the widow a certain sum of money annually to provide a residence for her.

A. C. Sampath Aiyangar and *T. K. Subramania Pillai* for Appellant.

S. S. Bharadwaj for Respondents.

G. S. V.

Burn and Lakshmana Rao, JJ. C.M.S.A. No. 165 of 1934.

22nd August, 1938.

Limitation Act (IX of 1908), Art. 182 (5)—Execution petition returned for rectification not re-presented—Effect of.

It is not permissible for a decree-holder to extend the period of limitation by simply failing to re-present the execution petition returned for rectification. The proper way to deal with such a petition as that is to treat it as not having come into existence at all.

K. P. Ramakrishna Aiyar for Appellants.

Sundaresan for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 245 of 1936.

23rd August, 1938.

Succession Act (XXXIX of 1925), S. 214—Effect of admission of genuineness of will—Suit for account—Necessity of production of probate or succession certificate.

Two daughters of a deceased person *R* and another relation claimed from the defendants 3 and 4, an account of an alleged partnership between *R* and the defendants. The genuineness of the will of *R* was admitted.

Held, that the admission of the genuineness of will would not put an end to the operation of S. 214 of the Succession Act and obviate the necessity for obtaining some form of authentication of the plaintiffs' claim to succeed to *R's* right as against his debtors. Until the account has been taken, it cannot be said whether there is any debt in respect of which a succession certificate is necessary. So no final decree can issue until the plaintiffs produced the necessary succession certificate or probate entitling them to receive the debts of the deceased, if any.

M. Appa Rao for Appellants.

Ch. Raghava Rao for Respondents.

G. S. V.

Varadachariar and Pandrang Row, JJ.
24th August, 1938.

A. S. No. 44 of 1933.

Hindu Law—Partnership with strangers—Manager alone partner—Junior members if can sue for dissolution—Dissolution of partnership—Agreement by manager prejudicial to family—If junior members can sue the partners for amounts due by firm—Rule in I.L.R. 41 Mad. 454 if applicable after dissolution—Certified copy of a statement before Income-tax Officer—How far admissible—S. 54, Income-tax Act—If a bar—Separate partnership of a partner with knowledge of partners—Loan to such partner—Profits from other business—If original partnership entitled to.

Plaintiff was a member of a joint Hindu family with defendants 24 and 25 and as between them the interests of defendants 24 and 25 in a partnership business was held as joint family property. According to I.L.R. 41 Mad. 454, a person in the position of the plaintiff cannot maintain a suit for the dissolution of a partnership in which the managing member of his family was a partner. But when the partnership has been dissolved and on the dissolution the managing member partner has entered into an arrangement prejudicial to the interests of his family, the junior members of the family are not without a remedy and it is open to them to take steps to protect the interests of their family and for the realisation of what represents the share of their managing member in the assets of the dissolved partnership. When the managing member has placed himself in an embarrassing position in respect of the assertion or protection of the rights of his family, the junior members are not without a remedy. On the analogy of the right of beneficiaries in similar circumstances, they can maintain a suit not merely against their manager but also against persons who are in possession of their share of the assets.

47 M.L.J. 854 and (1938) 1 M.L.J. 106, relied on.

Where an assessment to income-tax was made upon all the members of the firm, and one of the assessees alone made a statement before the Income-tax Officer and one of the assessees has obtained a certified copy of that statement. the grant of copy to one of the assessee partners is not illegal. Such a certified copy is admissible in evidence if it is otherwise relevant and S. 54 of the Income-tax Act does not preclude its being looked at by the Court.

I.L.R. 2 Rang. 391 and 1938 Rang. L.R. 243, distinguished.

Where a partner was carrying on another business with the knowledge or consent of his co-partners and with such knowledge the partners agree to one partner drawing monies from the partnership for the benefit of such separate business and the moneys so drawn are shown in the partnership books as moneys lent to the business, there is no justification for claiming the profits of that business for the benefit of the partnership. The case is not one in which a partner has made profits by the use of partnership money as in 8 Ch. D. 345 and 15 C.L.J. 204. On the basis of the relationship being one of creditor and debtor, the claim for interest can be substantiated only if it could be based either on contract or in the course of business.

B. Sitarama Rao, M. Appalachari and *N. Vasudeva Rao* for Appellants.

G. Lakshmanna, G. Chandrasekhara Sastri, K. Kameswara Rao, G. Krishnachandra Mouleswar, V. R. Venugopalan and *R. Rangachari* for Respondents.

S. V. V.

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Burn, J. C. M. A. No. 408 of 1937.
29th August, 1938.

Civil Procedure Code (V of 1908), O. 39, r. 2 (1)—Suit to reduce the rate of maintenance awarded in an earlier suit—If comes under—Defendant if can be restrained from executing the earlier decree.

A suit for reduction of the rate of maintenance awarded in an earlier suit is not a suit which can be brought under O. 39, r. 2, Civil Procedure Code. It cannot be said that the defendant in executing the decree lawfully made by a competent Court in the earlier suit *inter partes* is committing an injury. There is no question of restraining the defendant from executing it.

K. P. Ramakrishna Aiyar and *P. R. Narayana Aiyar* for Appellants.

C. S. Swaminadhan for Respondents.

G. S. V.

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Wadsworth, J. S. A. No. 864 of 1932 and
1st August, 1938. C. M. S. A. No. 8 of 1934.

Ejectment—Landlord and tenant—Decree for eviction of tenant—Dependants of tenants—Position of—C. P. Code, O. 20, r.12 (1) (c) (ii)—Decree for possession—Letter by defendant stating that he had left the house—His family left behind in the house—Effect.

When a landlord gets a decree for the eviction of his tenant on the termination of his tenancy, the dependants of that tenant in possession as such dependants have no option but to obey the decree more especially if they have been made parties to the suit. They should be evicted by the same process.

Where after the passing of a decree for possession of a house, the judgment-debtor left the house leaving behind him his wife and family and wrote a letter to the plaintiff stating that he had left the same and that the plaintiff could take possession of the house,

Held, that there was no compliance with the decree by the defendant as contemplated by O. 20, r. 12 of the C.P. Code.

V. Govindarajachari for Appellants.

N. Jaganmohana Rao and *G. Krishna Arya* for Respondents.

G. S. V.

Varadachariar and Abdur Rahman, JJ. A.S. Nos. 375 of 1932 and 13 of 1933.
5th August, 1938.

Mahomedan Law — Guardianship — Agreement by minor's mother granting exclusive claim in a family house to his brother—Settlement of claim in favour of minor in a suit forming part of consideration—Minor if bound by the arrangement.

Where in settling the claim of a minor son *A* in a suit, it was agreed between his major brother *B* and his mother that *B* should retain the family house exclusively and this concession to him was part of the consideration which induced him to agree to the claim of *A*,

Held, that the mother of the minor *A* was not competent to enter into any such arrangement in respect of the property which was joint property and in which the minor was entitled to a share and the arrangement was not binding on him.

T. R. Ramachandran for Appellant.

K. Rajah Aiyar, K. V. Sesha Aiyangar, V. Seshadri and *P. S. Srinivasa Aiyangar* for Respondents.

Wadsworth, J. S. A. No. 577 of 1934 and
9th August, 1938. C. M. P. No. 5173 of 1937.

Transfer of Property Act (IV of 1882), S. 81—Right of marshalling—Some properties not common to the earlier and subsequent mortgages—Declaratory suit—Order to sell properties in a particular order—If can be made.

The existence of alienees who have for valuable consideration acquired some of the properties bound by the earlier mortgage puts an end to the right of marshalling which may be claimed under S. 81 of the Transfer of Property Act.

The Court is not in equity entitled to protect the properties of a subsequent mortgagee by prescribing that they should be sold last, in execution of a decree on an earlier mortgage, when both the earlier and the subsequent mortgages cover other properties which are not common.

In a suit for a declaration that the rights claimed by the defendant under a prior mortgage had no existence whatever, the Court cannot direct, while dismissing the suit, that the properties should be sold in a particular order, as it is not a mortgage suit to which all the parties interested in the properties are not impleaded.

V. Ramaswami Aiyar for Appellant.

K. V. Sesha Aiyangar and *K. Aravamuda Aiyangar* for Respondents.

G. S. V.

Burn, J. C. M. S. A. No. 48 of 1937.
17th August, 1938.

Execution—Objection by decree-holder to sale by Official Receiver—Subsequent withdrawal of protest—His share of the proceeds of sale taken by him—Property again brought to sale by him—Validity of prior sale if can be challenged.

A decree-holder first objected to the sale of the three-fourths share belonging to the sons by the Official Receiver and then allowed it to proceed. He took part in the sale by bidding, protested against it after the sale was held, and then withdrew his protest and subsequently took from the Official Receiver his share of the proceeds of the sale. He then presented an execution petition and brought to sale the sons' shares and in that petition he gave credit to the judgment-debtors for the amount he had taken from the Official Receiver as his share of the sale proceeds.

Held, that the decree-holder approved of the sale and having done so, cannot be permitted afterwards to say that the sale was void and his execution petition should be dismissed.

(1921) 2 K.B. 608, relied on.

58 M.L.J. 137 and 26 L.W. 527, referred to.
69 M.L.J. 673, commented on.
Ch. Raghava Rao for Appellant.
M. Appa Rao for Respondent.
G. S. V.

Varadachariar and Abdur Rahman, JJ.
17th August, 1938.

A.S. No. 135 of 1934.

Adverse possession—Owner's title asserted in documents—Joint living in a house along with his brothers—Effect—Inference of gift—If can be drawn.

Where *A* and his natural brothers were living in the same house and in some of the documents the exclusive title of *A* was asserted in the earlier portion but there was also a statement by *A* that 'they were holding and enjoying the house' and the brothers claimed title to the house,

Held, that unless the joint living was the result of any assertion of adverse right, that fact by itself would not justify the recognition of a title by prescription.

I.L.R. 18 Cal. 341 at 348 (P.C.), relied on.

Further, an inference of a gift by *A* in favour of his brother cannot be drawn.

C. S. Venkatachariar, D. Ramaswami Aiyangar and *K. S. Sundaram* for Appellants.

B. Sitarama Rao and *E. R. Balakrishnan* for Respondents.

G. S. V.

Varadachariar and Abdur Rahman, JJ.
17th August, 1938.

A.S. No. 377 of 1933.

Trust—Right of plaintiffs to become trustees after death of their father—Breach of trust and failure to perform trust by the father—If plaintiffs become trustees—Madras Hindu Religious Endowments Act, Ss. 9 (11), 57 and 73 (1) (a)—Scope.

According to a will of the grandfather of the plaintiffs, their father would be the trustee of certain charities during his lifetime and they would become trustees after their father's death. They brought a suit for recovery of certain lands which were dedicated to the charities under the will. They alleged that they had become entitled to manage and perform the trust as their father ceased to perform the trust, had alienated the suit properties, as if they were his private properties and had in fact gone away to French territories and he was accordingly not entitled to be in management of the trust.

Held, that the plaintiffs' father did not *ipso facto* cease to be a trustee merely on the grounds alleged by them, though such grounds might justify his removal from office under appropriate proceedings and the plaintiffs did not become trustees nor could they be said to be in *de facto* management of the trust.

22 L.W. 701, followed.

Though the same language as in the definition of 'religious endowment' is not adopted in the amendments to Ss. 57 and 73 (1) (*a*) the intention is to make these two provisions co-extensive with the definition of 'religious endowment' in S. 9 (11).

[S. 9 (11) refers to property endowed for the performance of any service or charity connected with a temple. Ss. 57 (1), Expl. and 73 (1) (*a*) refers to a specific endowment attached to a temple.]

K. Rajah Aiyar and *R. Sundaralingam* for Appellants.

R. Somasundaram, P. N. Marthandam Pillai, C. Rangaswami Aiyangar and *E. S. Chidambaram Pillai* for Respondents.

G. S. V.

Wadsworth, J.
18th August, 1938.

S. A. No. 629 of 1934 and
C. R. P. No. 1536 of 1934.

Limitation Act (IX of 1908), S. 12—Application for a copy of order—If amounts to an application for a copy of decree—Civil Procedure Code (V of 1908), O. 47, r. 1 (1) (c)—Overlooking of statutory provision—Wrongful assumption of jurisdiction—Error apparent on the face of record—Correction of.

An application for 'a copy of the order' cannot be regarded as an application not only for a copy of the judgment but also for a copy of the decree, so as to excuse the delay caused in making a later application for a copy of decree.

In a case there was an error of law which obviously and without research into the rulings involved a lack of jurisdiction to pass the order of which review was sought. The error consisted in overlooking a statutory provision.

Held, that it is a case, in which the error, though technically an error of law, is apparent on the face of the record and should be corrected.

A.I.R. 1935 Cal. 153 and I.L.R. 46 Mad. 955, relied on.

65 M.L.J. 173, referred to.

P. Somasundaram for Appellants.

K. S. Desikan for Respondents.

G.S.V.

Wadsworth, J. S.A. No. 913 of 1936.
26th August, 1938.

Hindu Widows' Remarriage Act (XV of 1856), S. 2—Property of husband—Settlement of widow's right to maintenance—Execution of pro-note by coparceners to her uncle as guardian—Ratification by widow—Suit on promissory note—Remarriage of widow—Remarriage if provides a defence to the suit—Widow, if necessary party to suit.

The coparceners of the deceased husband of a widow settled her claim to maintenance for all her life and compounded it by a fixed sum which was treated as having been paid by the substitution for the actual payment, of a promissory note executed by them to the uncle of the widow as her guardian. A release deed was executed on behalf of the widow, which put an end to any interest which she might have in the property of her deceased husband. Subsequently the widow ratified the action of her guardian. A suit was filed for the balance due under the promissory note. After the filing of the suit, the widow remarried.

Held, (1) that though the widow was a beneficiary under the arrangement, she need not be made a party to the suit.

(2) That the debt due by the coparceners could not be treated as an interest in the property of the deceased husband which the widow could claim within the meaning of S. 2 of the Hindu Widows' Remarriage Act. So the defendants could not repudiate the debt, though the possibility of the remarriage was not actually visualized by them at the time of the arrangement.

C. Vasudevan and *Bhagawat* for Appellant.

M. S. Ramachandra Rao for Respondents.

G.S.V.

Pandrang Row, J. C.R.P. No. 273 of 1933.
26th August, 1938.

Civil Procedure Code (V of 1908), O. 11, r. 14—Suit against Secretary of State for India in Council represented by Collector—Petition directing Collector to produce paimash *registers in his custody—Maintainability.*

The plaintiff in a suit filed against the Secretary of State for India in Council applied under O. 11, r. 14 of the Civil Procedure Code directing the defendant to produce *paimash* registers, etc., in the custody of the Collector.

Held, that the Collector cannot be required by the terms of O. 11, r. 14 to produce the registers in original on the ground that he was an agent of the Secretary of State for India in Council as every document in his possession cannot be deemed to

be in his possession in his capacity as agent of the Secretary of State in Council.

The Government Pleader (B. Sitarama Rao) for Petitioner.

K. Kameswara Rao amicus curiæ.

G.S.V.

Wadsworth, J. S.A. No. 121 of 1934.

29th August, 1938.

Evidence Act (I of 1872), S. 63 (3)—Printed record of a case in High Court—Admissibility in evidence.

The question arose about the admissibility of a copy of a deposition forming part of the printed record of a case in the High Court.

Held, that under the present practice which is obtaining from a few months after 4th January, 1923, typed copies of the record are sent to the Government Press and the correcting of proofs is done there by comparison with the typed copies and not with the original. So unless there is evidence of some comparison with the original, which is not the usual practice, the printed record is, in the absence of consent, not secondary evidence of the original as it is not a copy made from or compared with the original but it is a copy of a copy.

A.I.R. 1929 Mad. 187, distinguished.

V. Govindarajachari for Appellant,

B. Somayya for *K. Krishnamurthi* for Respondent.

G.S.V.

Burn, J. C. M. A. No. 444 of 1937.

1st September, 1938.

Civil Procedure Code (V of 1908), O. 41, r. 21—Notice of appeal given to respondent—Omission to give notice of the transfer of appeal from the District Court—Absence at the time of hearing of appeal—If prevented by sufficient cause.

Where the respondent in an appeal was served with a notice in the appeal but he omitted to put in an appearance, and the Subordinate Judge omitted to give notice to him of the transfer of the appeal from the District Court to his Court and he was absent when the appeal was heard,

Held, that it cannot be said that he was "prevented by a sufficient cause" from appearing.

R. Krishnaswami Aiyangar for Appellant.

S. Kuppuswami and *P. S. Ramaswami Aiyangar* for Respondents.

G.S.V.

Varadachariar and Abdur Rahman, JJ., A.S. No. 189 of 1937.
29th July, 1938.

Hindu Law—Joint family business—Separation of members—Family business—Continuance of by manager—Other members not objecting to it—Effect of—Manager if entitled to remuneration for doing business after separation—Proof of purchase of jewels with family funds—Plea of stridhan—Onus—Managership put an end to on separation.

Where after separation, a family business is carried on by the managing member and the junior members do not interfere with him or take objection to his doing the business, it will not, in the absence of evidence to show an express or implied agreement between the former joint owners to continue as partners after the separation, justify the conclusion that they adopt the new business as one carried on on their behalf as well or that they become partners with the erstwhile manager. Even if the business transactions entered into after the separation are of the same kind or on the same lines as the previous transactions, the business is in law a new business.

Where there is *prima facie* proof that certain jewels were made or purchased with family funds or there is other proof that they are family jewels, the onus will be shifted on to those who deny their divisibility on the ground of their being stridhan to prove that by reason of a gift as a stridhan they have ceased to be part of the family property.

Where a member of a joint Hindu family continued the business even after separation, he will not ordinarily be entitled to remuneration at all. If it is to be regarded as a family business he was equally a member of the family and the mere fact that somebody else may be entitled to claim a share in the profits made by that business on the ground that his assets had been utilised in the business, will not give the person carrying on the business a right to remuneration.

Even in cases where a manager has been conducting a family business his power to continue the business on behalf of all the members ceases with the disruption of the joint status and therefore all that he is entitled to do is to take such steps as may be necessary for preserving it but he has no right to enter into new transactions unless he is prepared to do so on his own responsibility or the new transactions may be necessary merely to fulfil obligations already contracted or to prevent loss to the estate.

Where the family had a joint family business the division in status puts an end to the managership and the manager has not,

independently of any contract or arrangement, the same rights as before to continue the family business till he is actually displaced by the appointment of somebody else or by a division by metes and bounds.

Dayabhaga analogy misleading.

B. Somayya and *Kasturi Seshagiri Rao* for Appellant.

V. S. Narasimhachar and *M. Guruswami Aiyar* for Respondents.

S. V. V.

Burn J. C.M.S.A. No. 104 of 1936.
23rd August, 1938.

Civil Procedure Code (V of 1908), S. 47—Execution petition Expression of opinion as regards executability of decree—No order for execution made—Appeal against expression of opinion —Competency.

Where a District Munsif expressed an opinion that the decree could be executed but made no order for its execution and adjourned the matter for evidence to enable him to decide whether an order for execution should or should not be made,

Held, that no appeal lies against the expression of the opinion not followed by a decretal order.

K. Rajah Aiyar for Appellants.

K. V. Krishnaswami Aiyar and *T.P. Gopalakrishna Aiyar* for Respondents.

G. S. V.

King and Krishnaswami Aiyangar, JJ. C.M.A. No. 75 of 1936.
23rd August, 1938.

Civil Procedure Code (V of 1908), O. 21, rr. 22 and 90—Execution—Issue of notice to a person as a minor, though he was actually a major—Effect.

Where notice of an execution petition was taken to a judgment-debtor in his capacity as a minor represented by his father as a guardian, though he was actually a major but that fact was not known to the Court nor to the decree-holder,

Held, that the issue of such a notice is a sufficient compliance with the requirements of O. 21, r. 22 of the Civil Procedure Code but may amount to an irregularity.

20 M.L.T. 479, Expl. and I.L.R. 47 Mad. 288 (F.B.), dist.

Srinivasaraghavan and *Thiyagarajan* for Appellant.

E. R. Krishnan for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 548 of 1936.
24th August, 1938.

Madras Estates Land Act (I of 1908), Ss. 3 (11) and 26—Suit for rent—Grant of both warams to defendants' predecessors by plaintiff's ancestors—Land held free of rent—Applicability of S. 26.

The suit land was held free of rent by defendants by virtue of a maintenance gift of both warams made before 1858 by one of the plaintiff's predecessors. The plaintiff-landholder brought a suit under Sl 77 of the Estates Land Act for rent relying upon Ss. 25 and 26 and claimed the right to demand rent at the faisal rate though in fact no rent was paid on the suit land in the past. There was an exchange of pattas and muchilikas between the parties with reference to the cesses payable on the land.

Held, that no relationship of land-holder and ryot was established between the plaintiff and the defendants. So S. 26 of the Estates Land Act has no application to the case and the plaintiff is not entitled to a decree.

42 L.W. 626, referred to.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellants.

B. Sitarama Rao for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 361 of 1934.
30th August, 1938.

Civil Procedure Code (V of 1908), O. 41, r. 27—Additional evidence—Admission by the Court with the consent of parties—Record of reasons by Court not adequate—Effect of order—Duty of Court—Estoppel of party consenting to admission of evidence.

Where by consent of parties the appellate Court admitted additional evidence, and the reasons given by it did not strictly comply with the terms of O. 41, r. 27 of the Civil Procedure Code.

Held, that the consent of the parties may be treated as an admission by both parties that the grounds for admitting additional evidence existed. Still the Judge is not absolved from the requirement of satisfying himself as to the necessity for this evidence but the consent may to a large extent cover the defects in the record of the reasons for the order.

I.L.R. 31 Bom. 381 (P.C.), distinguished.

I.L.R. 36 Cal. 833 (P.C.), relied on.

Even if the reasons recorded by the Court are deemed inadequate, the consent of the party to the admission of further evid-

ence precludes him from questioning the admissibility of that evidence in subsequent proceedings.

55 I.C. 226, not followed.

S. Ramachandra Aiyar for Appellant.

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

G. S. V.

Burn, J. C.M.S.A. No. 119 of 1936.
1st September, 1938.

Contract Act, S. 135—Grant of time by Court to the judgment-debtor—Surety if discharged from obligation.

Where a surety bound himself to pay the debt at once, if the petition to set aside the ex parte decree should be unsuccessful, the granting by the Court of time to the judgment-debtor does not affect the surety's liability.

I.L.R. 56 Mad. 625 referred to.

K. S. Rajagopala Ayyangar, K. Rajah Aiyar and *C. A. Muhammad Ibrahim* for Appellant.

P. Govinda Menon for Respondent.

G.S.V.

Wadsworth, J. S. A. No. 365 of 1934.
1st September, 1938.

Evidence Act (I of 1872), S. 90—Scope—Anonymous documents—Proof of—Second appeal—New point—Objection to the mode of proof of document.

The presumption under S. 90 of the Evidence Act would not be sufficient to provide proof of a document. S. 90 does not lay down that there is any presumption regarding anonymous documents the writer of which is not known.

An objection to the mode of proof of a document though based on valid grounds, not raised at the time when it should have been raised, cannot be sustained in second appeal.

P. Govinda Menon for Appellant.

O. T. G. Nambiar and *C. K. Kerala Varma* for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ. C.M.A. Nos. 420 and 421 of 1935.
2nd September, 1938.

C. P. Code, O. 21, R. 52—Decree to A *against assets of* B—*Attachment of fund in court to credit of* C *in execution of another decree—Plea of* A *that the decree of* C *was really for benefit of* B

—If such a plea open in execution proceedings—Order under O. 21, R. 52—C also a party to A's decree—Appealable.

A obtained a money decree for Rs. 16,000 and odd in O. S. No. 32 of 1925, Ramnad Sub-Court against the assests of one *B* (deceased) in the hands of defendants 1 to 4, and for a portion of the said amount against *C* personally (the 5th defendant). The 5th defendant paid the amount decreed against him and satisfaction was entered *pro tanto*.

In execution of the decree in O.S. No. 32 of 1925 which was transferred to Kumbakonam Sub-Court for execution, *A* attached a fund in the latter court standing to the credit of O.S. No. 33 of 1924 on its file in which *C* was the decree-holder and which amounts *C* was entitled to draw as decree-holder. *A*'s contention was that the decree amount and the fund in Court were really assets of *B* (deceased) belonging to defendants 1 to 4 but of which *C* was a benamidar for them, as the claim in respect of the decree amount arose out of a benami conveyance by *B*'s heirs to *C* for the benefit of the former. *C* contended that he was not a benamidar but was really entitled to the fund in his own right and prayed for release of attachment. The lower Court held that it was not legally open to *A* in these procedings to raise the question as to the benami character of the transfers and to prove that *C* was only a benamidar for *B*'s heirs and it also held that whatever be the nature of the transfers to *C*, they were real and supported by consideration.

Held on appeal (overruling a preliminary objection) that an appeal lay under S. 47, Civil Procedure Code notwithstanding that the order may be passed under O. 21, r. 52, Civil Procedure Code, if the question arose between parties to the suit and related to execution of the decree and that in the particular case the 5th defendant being a party to the decree under execution, and the order being passed by the Kumbakonam Sub-Court (which was both the executing Court and the custody Court also) in the execution proceedings in O.S. No. 32 of 1925 the matter came under S. 47, Civil Procedure Code.

Held, further, that the decision in I.L.R. 48 Mad. 553 at 558 and 559 had no application to the facts of the case and that the Courts were not only competent but bound to investigate whether the fund attached was really the property of the judgment-debtors 1 to 4 as assets of *B* in their hands and hence available for satisfaction of *A's* decree, even though *C* was ostensibly put forward as the owner thereof.

Held, further, that *C* was only a benamidar for *B's* heirs and that the fund in Court was available for *A's* decree and should be attached.

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

A. Viswanatha Aiyar, S. Sundaresan and *S. Hanumantha Rao* for Respondents.

S.V.V.

Krishnaswami Aiyangar, J. C. R. P. No. 1211 of 1937.
2nd September, 1938.

Civil Procedure Code, (V of 1908), O. 6, r. 17—Late stage—Amendment of plaint—No prejudice to defendants—Application for amendment not to be rejected.

A plaintiff sued for an injunction on the footing that he was in possession. The defendants took the point that the plaintiff was not in possession of the property in dispute and the suit as framed was incompetent. The plaintiff after some interval of time applied to add a further relief asking for possession in addition and by way of an alternative to the original relief prayed for.

Held, that the amendment prayed for did not raise any question that might be said to be inconsistent with the suit as originally framed. No prejudice of any sort whatever to the defendant was suggested if the amendment was allowed. The delay by itself, without any suggestion of prejudice to the defendants, is not a sufficient ground for dismissing the application.

K. Umamaheswaran for Petitioner.

K. Kuppuswami for Respondent.

G. S. V.

Burn, J. C. M. A. No. 22 of 1936.
2nd September, 1938.

Sale—Balance of purchase money due under—Vendor assigning his rights to plaintiff—Suit for unpaid purchase money—If one for account.

A vendor of immovable properties assigned to the plaintiff his rights to the balance of purchase money under a sale. The assignee brought a suit against the vendee to recover the balance of the purchase money. The plaint was framed as one for a suit for account and prayed that an account should be taken of the amount owing by the defendant.

Held that, in the circumstances, there cannot be any suit for an account. The plaintiff suing for unpaid purchase money cannot pretend that the defendant was liable to account to him for the use

to which the unpaid purchase money might have been put; his claim was only for the unpaid purchase money.

N. Sivaramakrishna Aiyar and *C. K. Viswanatha Aiyar* for Appellant.

S. V. Narayana Aiyar for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 1105 of 1933.
5th September, 1938.

Hindu Law—Partition—Partial partition—If can be inferred from separate enjoyment of houses alone.

Among the family properties, two houses alone were separately enjoyed by the two brothers of the family. The houses came into the ownership of the family by their joint acquisition. The taxes on the houses were separately paid in the name of each brother.

Held, that the separate enjoyment of the two houses is not sufficient to form the basis for an inference of partial partition as such separate enjoyment may be consistent with joint ownership.

B. Somayya for Appellant.

T. R. Arunachalam for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ. C. M. A. No. 179 of 1937.
5th September, 1938.

Guardian and Wards Act (VIII of 1890), S. 25—Application by father for custody of child—Failure to visit the child for 9 months—No decision to leave the child in the hands of maternal relatives—Order to be passed in favour of the father.

Where a father failed to visit his infant son in the house of his maternal relatives where he was brought up and make enquires of him for a period of 9 months, and it was not proved that he had decided to have nothing more to do with his son and to leave him and his welfare entirely in the hands of the maternal relatives,

Held, that the father should not be refused custody of the child.

V. Rangachari for Appellant.

P. Satyanarayana Raju for Respondent.

G. S. V.

Burn and Lakshmana Rao, JJ. R. T. No. 60 of 1938 and
5th September 1938. Cr. App. No. 278 of 1938.

Criminal Procedure Code (V of 1898), S. 235—Joint trial of offences under Ss. 211 and 302 of the Penal Code—Validity of.

Where an accused killed a person in order to foist a false case of murder upon his enemies and immediately after committing murder went to prefer a false complaint and he was tried at one trial for offences under Ss. 211 and 302, I.P.C.,

Held that though strictly speaking a joint trial held for the two offences is not illegal, they ought not to be tried together as such joint trial is very embarrassing to the accused and to the prosecution and may lead to failure of justice.

A. K. Pavitram for the Accused.

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

G.S.V.

Varadachariar and *Pandrang Row, JJ.* C.M.P. No. 2812 of 1938.
8th September, 1938.

Civil Procedure Code (V of 1908), S. 109, cls. (a) and (b)—Dismissal of suit on a preliminary point by first Court—Appeal to High Court—Reversal of judgment—Remand order—If a final order—Scope of cl. (c).

Where in a suit the objection was taken that the Court had no jurisdiction to entertain the suit on the ground that the suit was barred by the provisions of the Sea Customs Act and the trial Court upheld the objection and dismissed the suit on that ground, and an appeal was filed to the High Court against that judgment and the High Court held that the Civil Court was not deprived of jurisdiction in the matter by the provisions of the Sea Customs Act and remanded the suit for trial on the merits,

Held, an order of the above kind is not a 'final order' within the meaning of S. 109, cls. (*a*) and (*b*), and leave cannot be granted under them. But leave was granted here under cl. (*c*) as a fit case for appeal as the question was pending decision in several other suits and the question of law was a substantial question of law and one of general importance. The circumstance that the respondent will be inconvenienced is no ground for refusing leave nor can the High Court make any provisions therefor.

The Advocate-General (Sir A. Krishnaswami Aiyar) for Petitioner.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

S. V. V.

Madhavan Nair, O.C.J. and Krishnaswami Aiyangar, J. — A.S. No. 150 of 1934.

25th July, 1938.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 18, 57 and 62—Excepted temple—Framing of scheme—Board proceeding on the assumption that a person was not hereditary trustee—His hereditary trusteeship established in a suit under S. 57—Case against the trustee not stated clearly—Procedure causing prejudice to trustee.

The Commissioners of the Endowments Board proceeded under Ss. 18 and 57 of the Hindu Religious Endowments Act on the assumption that *A* was not the hereditary trustee of the temple, examined a few witnesses and then framed a scheme without making clear the case against him. In a suit contemplated by S. 57 it was established subsequently that *A* was the hereditary trustee of an excepted temple.

Held, that the procedure adopted by the Commissioners was wrong, and the trustee, *A*, was prejudiced by such procedure. What is contemplated in S. 62 of the Act is that opportunity should be given to the trustee to hear what the case against him is and then the Board may proceed to consider whether a case for the settlement of a scheme has been made out. The inquiry under S. 62 should be more detailed and thorough than what is required under S. 57.

I.L.R. 57 Mad. 532 and I.L.R. 58 Mad. 862, referred to.

B. Sitarama Rao and *K. Srinivasa Rao* for Appellant.

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

G. S. V.

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Wadsworth, J. — S. A. No. 4 of 1935.

19th August, 1938.

Hindu Law—Maintenance—Suit for enhancement of—Points to be considered—Cessation of payment under the original decree —Decree for enhancement—When to commence—Provision for pilgrimage not made in the prior suit—If can be made in the suit for enhancement—Charge for maintenance—Extent of properties to be provided for.

In a suit for enhancement of maintenance, the maximum which can be awarded to a widow will be the amount of the income of the share to which her deceased husband would have been entitled, had he been alive and a coparcener at the date of the suit for maintenance. 27 M.L.J. 221, relied on.

The only grounds upon which the decision of the Court which already fixed maintenance amount can be said to lose its

force are such changes in the circumstances governing the widow and the family as were not foreseen and allowed for at the time when the original decree was passed. The Court is entitled to look into the changes not only in the needs of the widow but also any changes of those other circumstances, to which the Court had regard in fixing the original rate of maintenance. The Court must have regard to the rise of prices; it must have regard to additional expenses necessitated by the deterioration of the health of the maintenance holder; it must also have regard to any reasonable change in the standard of comfort and in the conventional necessities of the widow due to the improvement in the circumstances of the family to which she belongs. The Court must have regard to the growth of the income of the family in order to ascertain the maximum which must govern the maintenance allowance.

I.L.R. 8 Pat. 840 (P.C.), referred to.

Where no formal demand was made for enhancement prior to the filing of the suit for such purpose, the arrears should be calculated from the date of the institution of the present suit and not from the date from which former payment under the old decree ceased or the date of decree in the present suit.

9 W.R. 152 and I.L.R. 8 Pat. 840 (P.C.), followed.

It is unreasonable to give a charge over the whole of the family properties. It should be limited to the properties necessary to secure the payment of the maintenance.

Where payment for pilgrimage for the benefit of the soul of the deceased husband was refused in the earlier suit, not due to lack of funds, she should not be granted a lump sum for such purpose in the latter suit.

Ch. Raghava Rao and *M. Sriramamoorthi* for Appellants.

P. Somasundaram for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ.

C.M.A. Nos. 354 and 425 of 1936.

6th September, 1938.

Civil Procedure Code (V of 1908), O. 21, r. 2—Discharge between the date of the preliminary and final decrees not certified —If can be pleaded.

A discharge between the date of the preliminary and final decrees if not certified to the Court under the provisions of O. 21, r. 2 of the Civil Procedure Code cannot afterwards be pleaded in bar of execution.

37 M.L.J. 356, followed.

Ch. Raghava Rao for Appellant in C.M.A. No. 354 of 1936.

M. S. Ramachandra Rao for Appellant in C.M.A. No. 425 of 1936.

V. Govindarajachari and *N. Vasudeva Rao* for Respondents in both.

G.S.V.

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Wadsworth, J. S. A. No. 509 of 1934.
6th September, 1938.

Limitation Act, Ss. 19 and 22—Acknowledgment by guardian —Insolvency petition by mother to protect the estate of minors— Petition to annul her adjudication—Statement by her about the binding character of debts—If sufficient to save limitation.

A mother acting as guardian of her minor sons renewed a promissory note debt of her husband, on behalf of them. In order to protect their estate, from the attack of their creditors, she filed an insolvency petition, purporting to be a personal petition, in which she included as her own debts all the debts of her husband and as her own assets all the assets of the minors in her hands and was adjudicated an insolvent. In reply to an application to annul her adjudication, she filed a counter affidavit in which she stated that the debts disclosed by her in the schedule were all debts due by her late husband and therefore binding on the estate of the minors in her hands. She had no debts of her own and no assets of her own.

Held, that though she filed the petition illegally for the benefit of the minors, the counter affidavit was intended as an acknowledgment on behalf of the minors and was sufficient to save limitation.

N. Rama Rao for Appellant.

P. Satyanarayana Rao for Respondent.

G. S. V.

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Burn, J. C. M. S. A. No. 16 of 1937.
7th September, 1938.

Provincial Insolvency Act, Ss. 28 (2) and 39—Composition scheme filed by an insolvent—Approval by Court—Terms of the scheme not embodied in an order of Court—Application for execution by a decree-holder—Maintainability.

The Insolvency Court passed an order approving of a composition scheme filed by an insolvent. The terms of the composition scheme were not embodied in an order of the Court, no schedule was framed and the order of adjudication was not annulled—A person who had obtained a decree against the insolvent took out

execution under a certain clause of the composition scheme without obtaining leave of the Insolvency Court.

Held, that the annulment of the adjudication does not automatically follow upon the approval of a composition and the adjudication is still in force and it follows from S. 28 (2) of the Provincial Insolvency Act that the decree-holder has no remedy against the properties of the insolvent in respect of her decree debt. Hence the application for execution is incompetent. S. 39 of the Provincial Insolvency Act is peremptory.

V. Viyyanna for Appellant.

K. Venkatarama Raju for Respondent.

G. S. V.

Venkataramana Rao, J.
21st September, 1938.

Application No. 1196 of 1938
and
C. S. No. 48 of 1938.

Practice—Madras High Court Original Side Rules of Practice, O. 5-A, Rr. 1 and 5—Third party procedure—Vendor and purchaser —Vendor covenanting for good title and agreeing to indemnify the purchaser for any loss—Suit against purchaser claiming the property as trust property—Whether vendor can be brought in as third party in the suit.

Where in a suit for possession claiming that certain properties were trust properties, the defendant sought to bring in as third party his vendor who had covenanted in the sale deed his title to the property and further agreed to indemnify the purchaser for all loss caused by any defect in the title, the vendor can be brought in as third party to the suit by reason of the covenant for title and the indemnity contained in the sale deed. Even without an express covenant for indemnity the vendor is liable to be brought in as a third party on his covenant for title alone.

(1894) 1 Ch. 11, followed.

(1917) 1 K.B. 544, not followed.

(1895) 1 Q. B. 591, explained.

Case-law reviewed.

C. A. Seshagiri Sastri for *K. Narasimha Aiyar, R. Sankaranarayana Aiyar* and *R. Natesa Aiyar* for Petitioner.

Aravamuthu Aiyangar for *N. T. Shamanna, K. S. Sankara Aiyar* and *A. Suryanarayana* for Respondents.

K. C.

King and Krishnaswami Aiyangar, JJ. C. M. A. No. 486 of 1935.
30th August, 1938.

Civil Procedure Code (V of 1908), Ss. 38 and 63—Scope—S. 63 if controlled by S. 38—Realization of property in S. 63—Meaning of.

S. 63, Civil Procedure Code, overrides S. 38 of the Code in the matter of claim petitions and realization of property. Where the facts come within the definition of the situations given by S. 63, this section must be applied. It cannot be controlled or governed by S. 38.

The expression "realise such property" in S. 63 refers to bringing such property to sale.

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

P. Satyanarayana Rao for Respondent.

G. S. V.

Wadsworth, J. S. A. Nos. 230 and 231 of 1934.
2nd September, 1938.

Adverse possession—Land usufructuarily mortgaged—Points to be proved by person setting up hostile title.

If a person wishes to make out adverse possession in land usufructuarily mortgaged as against the mortgagor, he must show not merely possession for the statutory period but also possession which was in denial of the rights of the mortgagor to the knowledge of the mortgagor. He must also show that the possession was his own possession or that of somebody under whom he claims. He cannot defeat the mortgagor's rights by asserting the possession of a third party, however hostile that third party's possession may be.

R. Krishnaswami Aiyangar for Appellant.

A. Swaminatha Aiyar for Respondents.

G. S. V.

Wadsworth, J. S. A. No. 510 of 1934.
6th September, 1938.

Madras Electoral Rules, rr. 12 (3) and (4) and 48—Rule for forfeiture of deposit—If ultra vires*—Meaning of 'total number of ballot papers' and 'spoiled ballot papers' in r. 12 (3) and (4)—Jurisdiction of Civil Court—Suit for a declaration that the interpretation of Election Rules by the Collector is wrong.*

A candidate for election to a seat in the Legislative Council got less than one-eighth of the total number of votes polled but more than one-eighth of the total number of valid votes. The

Collector declared his deposit to be forfeited under R. 12, sub-rr. 3 and 4 of the Madras Electoral Rules framed under the Government of India Act, S. 72 (A) (4). The unsuccessful candidate brought a suit for return of the deposit.

Held, (1) that the rules enabling the forfeiture of a deposit made by the unsuccessful candidate is not *ultra vires* of the Local Government. The candidate consents to the terms and there is nothing in the nature of the seizure of the candidate's property against his will, such as is implied in the term 'forfeiture' strictly used.

Kirk v. *Nowill and Butler*, 1 T. R. 119, distinguished.

(2) That 'the total number of ballot papers' for the purposes of r. 12 (4) must be taken to be the total number in the box at the time when the return officer makes his initial count. The term 'spoiled papers' cannot be taken to include all invalid votes. It refers to those papers which have been spoiled by inadvertance and handed in to the officer in charge to be exchanged in the manner laid down in r. 28 of the rules for the conduct of elections.

(3) Civil Courts have no jurisdiction to entertain a suit which seeks in substance a declaration that the interpretation of the Electoral Rules by the Collector is wrong and the proper way of rectifying such an error is to take the course indicated by r. 48 of the Electoral Rules.

I.L.R. 47 Mad. 585, referred to.

M. S. Venkatarama Aiyar for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ.
7th September, 1938.

C. M. A. No. 230 of 1936.

Civil Procedure Code (V of 1908), O. 21, rr. 66, 67 and 90—Sale proclamation—Value of properties not correctly described in sale proclamation—Court directing judgment-debtor to inform intending bidders about their value—Propriety—Omission to mention existence of trees and well in the properties—Material irregularity.

The Court cannot cast on the judgment-debtor the burden of making known as wide as possible the true facts as regards the value of the properties to be sold and informing intending bidders that the properties were more valuable than their mere description in the sale proclamation would make them appear to be.

The omission to mention the existence of 'trees and well' on certain items of properties, in the proclamation is a material irregularity.

K. Periaswami Gounder for Appellant.

S. T. Srinivasagopalachari for Respondent.

G. S. V.

Lakshmana Rao, J.

8th September, 1938. Crl. Appeal No. 158 of 1938.

Penal Code (XLV of 1860), S. 402—Trial for offence under —Previous conviction for dacoity—Relevancy of.

The previous conviction of an accused for dacoity would be relevant under S. 14 of the Evidence Act when he is tried for an offence under S. 402 of the Penal Code.

K. V. L. Narasimham and *N. Subramanian* for Appellant.

The Public Prosecutor on behalf of the Crown.

G.S.V.

Lakshmana Rao, J.

9th September, 1938. Crl. R.C. No. 677 of 1932.

Criminal Procedure Code (V of 1898), S. 106—Breach of peace—If offence under S. 426 of Penal Code involves.

The offence under S. 426 of the Penal Code does not involve a breach of the peace and an order under S. 106 of the Criminal Procedure Code cannot be sustained.

P. Satyanarayana Rao for Petitioner.

The Public Prosecutor on behalf of the Crown.

G. S. V.

Wadsworth, J.

9th September, 1938. S. A. Nos. 537 and 538 of 1934.

Madras Survey and Boundaries Act (VIII of 1923), S. 14— Suit under—Supplemental notification—If gives extension of time to file suit—Survey officer's decision based on title—No definite finding as regards factum of possession—Unsuccessful party pleading adverse possession—Subsequent proceedings—Permissibility of the plea—Conditions—Appellate Courts making an enquiry—Finding based on opinion formed as a result of enquiry— Value in second appeal.

1. A supplemental notification terminating a supplemental survey cannot extend the time for filing a suit to contest the correctness of the boundaries laid down in the main survey which had been terminated by an earlier notification.

2. The survey officer's decision can only be final to the extent to which it purports to decide the rights of the parties. Where the survey officer's order is based on documentary evidence of title and does not give a definite finding regarding the factum of possession at the time of his order, the unsuccessful party is not barred from contending that he was at that time in actual enjoyment of the land in a manner hostile to the successful party. In a suit by the latter, he can establish title by adverse possession if he can prove continuous possession both before and after the survey officer's order, for the statutory period.

I.L.R. 42 Mad. 425 and 62 M.L.J. 399, followed.

3. A judge is not warranted in converting himself into an unofficial investigator. He cannot enquire amongst the people for the purpose of obtaining guidance in deciding the rights of the parties and treat the result of those enquiries as evidence in the case.

Where the admissible evidence was considered by the Appellate Judge in the light of the opinion he had formed as a result of what he heard in the enquiry, the finding based on such an opinion cannot be supported in second appeal.

Ch. Raghava Rao for Appellant.

K. Kameswara Rao for Respondent.

G.S.V.

King and Krishnaswami Aiyangar, JJ.
9th September, 1938.

C.M.A. Nos. 302, 303, 423 and 424 of 1937.

Practice—Receiver—Duty of—Leave to apply for delivery of possession of property in the hands of.

Where leave is applied for delivery of possession of the property in the hands of a receiver, it is undesirable for him to assume the role of a party and object to the grant of leave, and it should be granted as a matter of course.

K. Krishnaswami Aiyangar for Appellants in all.

I. K. Deva Rao, K. V. Sesha Aiyangar, K. P. Mahadeva Aiyar and *V. Thyagarajan* for Respondents.

G.S.V.

Wadsworth, J.
12th September, 1938.

S.A. Nos. 540 and 541 of 1934.

Malabar Tenancy Act (XIV of 1930), S. 51—Collector's notification of prices for 5 years prior to the Act—Validity.

Though S. 51 of the Malabar Tenancy Act lays down that in calculating the value of the commodities the Courts should find

out the average price for the 5 years prior to the fixing of the price, the publication of the prices for 5 years prior to the Act by the Collector is not in accordance with the Act.

But the Court should accept the prices contained in the list published by the Collector as correct in the absence of any evidence to the contrary.

T. M. Krishnaswami Iyer and *C. K. Visvanatha Iyer* for Appellant.

P. Govinda Menon for Respondent.

K. C.

Varadachariar and Pandrang Row, JJ.

Appeal No. 73 of 1934.

13th September, 1938.

Mortgage—Mahomedan family—Trade of father—Settlement by father in favour of his three sons—Senior sons constituted trustees of son's share—Business continued by elder brothers—Debts incurred therefor—Last son just attaining majority—Pressed to execute a mortgage for business debts at insistence of mortgagee—Undue influence—If last son liable for the mortgage—Absence of independent advice.

Defendants 1 to 3 were brothers, sons of one D. K. who died in November, 1912. The brothers executed a mortgage in favour of plaintiffs on 14th May, 1923. Defendants 1 and 2 became indebted to the plaintiffs in the course of their business at Rangoon. The bond purported to be for nearly Rs. 288,000 of which about Rs. 26,000 was advanced at the time in 1923. The pre-existing debts were due to various creditors recited in the deed on account of loans borrowed from them by defendants 1 and 2, in connection with the business carried on by them. The contemporaneous advance of Rs. 26,000 was also borrowed for the business. The third defendant pleaded that he was not interested in the business, that he was not liable for the debts and that he was prevailed upon by the brother and an agent of the mortgagees to execute the mortgage saying that he will not be held liable for it and that at that time he was a young student.

D. K. was a Mahomedan who was for many years carrying on a business in Rangoon. About two months before his death, he executed settlement deeds, under one of which he settled certain properties on defendants 1 to 3 to be enjoyed by them in equal shares. As the third defendant was then aged only seven, he appointed defendants 1 and 2 as trustees and guardians to look after his interest in the properties. The third defendant attained majority only about the beginning of 1923. It was found that for

the debts of the business whose repayment was intended to be secured by the execution of the mortgage, the third defendant was not in any degree legally liable. It was also found that since the mortgagees insisted on the third defendant joining, the brothers had to yield. The mortgagees had notice of the settlement deed. The defendants 1 and 2 were anxious to stave off disaster to their business and it was at their insistence that the third defendant must have been induced to join in the deed and thereby make himself liable for a debt which was not in any degree binding upon him. The third defendant never had the management of the affairs nor had he at any time been away from the control of defendants 1 and 2. He had no independent advice from any quarter and he had no opportunity to consult any one other than the second defendant.

Held, on those facts, the mortgage cannot be held to be binding on the third defendant or his interest in the properties. Undue influence may in the circumstances be presumed in view of the relationship of the parties and the nature of the transaction. When there is evidence of over-powering influence and the transaction is immoderate and irrational, proof of undue influence is complete.

(1911) A.C. 137, referred to.

If it is shown that two parties stood in such a situation as to give rise to confidence between them and the third party who derives the benefit was aware of the existence of this relationship, the third party is not entitled to retain the benefit unless he shows that the party conferring the benefit was a free agent and had independent and disinterested advice. It is not necessary to make out that the mortgagee connived at the actual fraud.

(1934) 1 K.B. 417 and 53 M.L.J. 852, followed.

12 Beav. 539, distinguished on facts.

Whether the business run by defendants 1 and 2 was the same as their father's or not can make no difference in the determination of the question of third defendant's liability for debts incurred for the business. The cases *re* Hindu joint family businesses have no application to Mahomedans. Whether under Mahomedan Law or on general principles, a guardian as such has no power to carry on business on behalf of his ward, especially if the business is one which may involve the minor's estate in speculation or loss. It is an option to a minor to claim a share in the profits made by his guardian but that does not mean that the ward will be bound by the transactions of the guardian or the liabilities sought to be imposed upon the estate.

B. Sitarama Rao, B. Pocker, K. T. M. Ahmed Ibrahim for Appellant.

T. R. Venkatarama Sastri and *K. S. Sankara Aiyar* for Respondents.

S. V. V.

Burn, J.

14th September, 1938. C.M.A. No. 324 of 1937.

Civil Procedure Code (V of 1908), O. 41, r. 32—Reversal of decree by appellate Court—Trial Court directed to pass a decree in favour of plaintiffs for the amounts due to them—Proper procedure.

Where a Subordinate Judge reversed a decree of a District Munsiff and directed the latter to take accounts, find out how much if anything, was due to the plaintiffs and to pass a decree in their favour for such amounts,

Held, that the procedure adopted by the appellate Court is wrong. The decree for any specific amount that is to be passed in the future must be that of the Subordinate Judge. He may call on the District Munsiff to submit a finding with regard to the amounts to which the plaintiffs would become entitled in accordance with the declaration given by him (the Subordinate Judge).

A. Srirangachariar for Appellant.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

G. S. V.

Varadachariar and *Pandrang Row, JJ.* A. S. No. 26 of 1934

15th September, 1938.

Evidence—Estoppel—Attestation to deed—Recital that sale free of incumbrances—Estops attestor who knew of it—Absence of a recital—Effect of.

A purchased certain properties under Ex. II (items 9-12). He purchased also another item (item 8) under Ex. I about 9 months later than Ex. II. In Ex. I there was a specific recital that the sale was free of incumbrances in favour of the plaintiff and that the plaintiff's attestation has been taken to the deed in token of the relinquishment of his mortgage rights over the item. It was also admitted that the plaintiff read this recital in Ex. I.

Held, that the conduct of the plaintiff was such that it must have led *A* to take the sale and pay money therefor and it was therefore not open to him now to turn round and dispute it.

With regard to items 9-12 under Ex. II, there was no specific recital to that effect and there was nothing to show that the plaintiff attested this deed at that time with knowledge of the recitals.

Held, the plaintiff was not estopped. It is not open to look into subsequent transactions for this purpose as the question of estoppel depends on the question whether at the time anything happened which could give rise to an estoppel.

P. Somasundaram for Appellant.

Ch. Raghava Rao for Respondent.

S. V. V.

Lakshmana Rao, J. Crl. App. No. 237 of 1938.
15th September, 1938.

Penal Code (XLV of 1860), S. 201 (2)—Conviction under—If sustainable—Statement of accused found insufficient for a conviction under S. 302 and S. 326.

Where the confessional statement of an accused was not acted upon and he was acquitted of the offence of murder, and the information given by him was considered insufficient even for a conviction under S. 326, Indian Penal Code, he cannot be convicted under S. 201 (2), Indian Penal Code on the footing that his statement was 'a reconstruction by himself of what must have happened.'

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

G.S.V.

The Chief Justice and Abdur Rahman, J. O.S. App. No. 60 of
15th September, 1938. 1938.

Companies Act (VII of 1913), S. 153—Petition under—Winding up petition filed—Hearing of—If barred—Scheme not placed before share-holders and creditors.

A petition was filed by directors of a bank under S. 153 of the Companies Act asking the Court to refer a scheme which they had prepared to the shareholders and creditors for their consideration. A winding up petition was filed subsequently.

Held, there was no bar to the hearing of the winding up petition, though the scheme was not placed before the shareholders and the creditors by the Court.

Ch. Raghava Rao and *M. Chinnappan Nair* for Appellant.

King and Partridge, K. R. Shenai, A. B. Nambiar, A. Sundaram Aiyar, S. Kuppuswami Naidu, S. Kothandarama Nainar and *S. Venkatachala Sastri* for Respondents.

G.S.V.

Abdur Rahman J. C.R.P. No. 682 of 1936.
16th September 1938.

Civil Procedure Code, Ss. 73 and 115 and O. 22 Rr. 8 and 12 and Provincial Insolvency Act, S. 28—Application for rateable distribution of assets—Maintainability—Interference in revision when other remedies open—Jurisdiction.

Where an insolvent after adjudication and before discharge presented an application for rateable distribution in execution of a decree obtained by him prior to the insolvency, on the question as to the maintainability of the application by him,

Held that the application was competent.

8 I.R. 516 followed.

13 L.W. 616; I.L.R. 57 M, 89 (F.B.); 1930 Lah. 205 and 60 C.L.J. 581 Referred to.

I.L.R. 23 C. 813 and I.L.R. 49 M. 461 Distinguished.

Held also that a revision lay to the High Court.

I.L.R. 4 Mad. 383, 22 L.W. 744, and I.L.R. 32 Mad. 334 Referred to.

K. P. Ramakrishna Aiyar for Petitioner.

K. Venkateswaran for Respondents.

K. C.

Lakshmana Rao, J.
20th September, 1938. Crl. App. No. 261 of 1938.

Madras Prohibition Act, S. 4 (1) (a)—Undivided son offering liquor to customers of his father—If amounts to possession of liquor.

Where the case against the second accused aged about 19 years, the undivided son of the first accused, a toddy renter, was that he offered a bottle of liquor to his father's customers along with his father, he cannot be said to have possessed the liquor within the meaning of S. 4 (1) (*a*) of the Madras Prohibition Act.

K.S. Jayarama Aiyar and *C.M.J. Earnest* for the Accused

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

G.S.V.

Varadachariar and *Pandrang Row, JJ.* A.S. No. 154 of 1934.
20th September, 1938.

Civil Procedure Code (V of 1908), S. 92—Public charitable trust—Family in management—Disputes between members of family—Reference to arbitration—Arbitrator framing a scheme therefor—Application to pass a decree in terms thereof—Court, if competent to pass such a decree.

A family called *N* family had founded various public charities in the circars. The parties are descendants of different branches of that family. During the period of first defendant's management disputes arose between them and as a result the matter was referred to arbitration. The reference to arbitration itself stated what the arbitrator had to decide and two of the points for his decision were "(*a*) How is the management of the choultry at *R* by the 1st defendant from 1919 up to date. How is the management of the dharmakarthas of the other charitable institutions for the past 12 years and (*b*) what is the nature of the scheme to be framed regarding the future administration of the said institutions." The arbitrator passed an award stating that 1st defendant's management had not been blameworthy and as regards future management he drew up an elaborate scheme. In a suit to enforce the award,

Held, that the award was illegal and cannot be made a decree of Court as it related to matters which should be made the subject-matter of a suit under S. 92, Civil Procedure Code. The points decided are not matters arising out of the private right of any particular individual. It may be open to the parties entitled to the management of a public, religious or charitable institution to settle a scheme of management among themselves. But when the parties refer the question to arbitration and ask the Court to pass a decree in terms, thereof, the Court cannot do it as it falls under S. 92, Civil Procedure Code. The question whether and under what conditions questions relating to a public trust can be referred to arbitration left open.

Though it may be open to parties entitled to the management of a public, charitable or religious institution to settle a scheme of management among themselves, and a suit for carrying out the scheme may lie as in I.L.R. 27 M. 192 and I.L.R. 29 M. 283, it is not open to the Court to pass a decree in terms of a scheme passed by an arbitrator on a reference by the parties, as by embodying the award in a decree of Court, the Court will be practically framing a scheme for the management of the institutions in question and it will be an evasion of the provisions of S. 92 to allow it to be done under the guise of an award when the procedure prescribed by S. 92 has not been complied with.

Question whether and under what conditions questions relating to a public trust can be referred to arbitration left open.

I.L.R. 29 M. 288, distinguished.

V. Govindarajachari and *Y. Venkatasubramaniam* for Appellants.

M. S. Ramachandra Rao for Respondents.

S. V. V.

Varadachariar and *Pandrang Row, JJ.* A. S. No. 180 of 1934.
21st September, 1938.

Mortgage—Rice mill engine—Clause that if engine shifted to another building, then also the engine should be subject to mortgage—Later addition of a sheller to the engine—Sheller attached by a detachable belt to the engine—Site on which engine was, not mortgaged—If sheller also an accession to the security.

Defendants 1 and 2 executed a mortgage in favour of the plaintiff over certain properties. Schedule *C* comprised an engine which was said to be known by the name of S. K. Rice Mill and the various parts of the machinery pertaining to the engine or to the huller which was then intended to be set up to work with the help of the engine. The concluding words of the *C* schedule referred to all samans connected with the rice mill and other samans necessary to fit up the mill and the huller and all accessories. There was also a clause to the effect that if the mill should be fitted up in some other place, the property should nevertheless continue to be under the mortgage. For some time the concern was working only as a huller. Afterwards the mortgagors decided to work a sheller also with the power derived from the engine. For purchasing the sheller, etc., expenses, they borrowed from another person. In due course the sheller was also set up in the shed that had already been constructed. The sheller system was fixed in the earth and connected by a belt with the huller system and power from the same engine was used for working both the systems. But the sheller system can be separated from the huller system merely by removing the belt and for account purposes, the two systems were kept distinct. On these facts the question was raised if the plaintiff can claim that the machinery pertaining to the sheller system is also comprised in the security to the plaintiff.

Held, that it may be that in certain circumstances machinery existing in the mortgaged premises on the date of the mortgage and even machinery subsequently installed there may pass under a mortgage of the premises. But the question has to be determined in each case in the light of various facts. In the present case there is no scope for the application of the rule relating to fixtures or of the principle enunciated in S. 70 of the Transfer of Property Act because the site to which the sheller system of machinery is said to be attached is not comprised in the mortgages to the plaintiff. Also on the construction of the mortgage deed the machinery was mortgaged not as part of or passing with the immovable property but independently and as movable property. Since the leasehold of the site is not comprised in the plaintiff's security, it would follow that the sheller system machinery would not become part of the

security merely by its having been subsequently fixed upon the site.

G. Lakshmanna and *G. Chandrasekara Sastri* for Appellant.

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

S.V.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 182 of 1934.
22nd September, 1938.

Civil Procedure Code, O. 34, r. 6—Omission to reserve liberty to apply under—No decision on personal liability in preliminary judgment—If precludes plaintiff from later applying under O. 34, r. 6.

Omission to reserve liberty to apply for personal liability in the preliminary decree in a mortgage suit does not preclude the plaintiff from claiming relief under O. 34, r. 6, Civil Procedure Code, unless there has been a prior decision on the point. Though it is the practice to consider this question even at the preliminary stage, the proper stage for dealing with the question of personal liability arises only after the mortgaged property has been sold and the proceeds are found insufficient to satisfy the plaintiff's claim.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

S.V.V.

Varadachariar and Abdur Rahman, JJ. A. S. No. 121 of 1934.
15th August, 1938.

Survey and Boundaries Act, S. 13—Suit under—Burden of proof—Practice—Objection to production of documents—Rejection of documents—Adverse inference from non-production—If can be drawn—Copy from register of copies kept in Collector's Office—Admissibility—Evidence Act, S. 11—Scope—Description of plot as situate in a village—Admissibility—Evidence Act, Ss. 11, 13, 32, 35, 74, and 90.

(1) Where a suit is filed to set aside the decision of a Survey Officer, the burden of proof is on the plaintiff to show that the demarcation by the Officer is clearly wrong. 13 M.I.A. 57, 60 M. L.J. 341, 27 C.L.J. 599 referred to.

(2) Where the plaintiff opposed the production of certain documents by defendants on the ground they were produced too late and they were rejected by the Court, it does not lie in the mouth of the plaintiff to contend that an adverse inference ought to be drawn against the defendants from the non-production of the documents.

(3) Where a certified copy was given from out of a book maintained in the Collector's Office containing the copies of the communications sent by the Collector to various subordinate officers, and the copy purporting to be a copy declares itself to be a true copy and contains the signature of the Collector,

Held, that the book of copies is itself an official register within the meaning of S. 35 and a public document within the meaning of S. 74 of the Evidence Act and a certified copy of it is clearly admissible. A. S. 261 of 1925 relied on.

The genuineness of the signature on the copy can be presumed under S. 90 of the Evidence Act. I.L.R. 57 All. 494 (P.C.), I.L. R. 52 Mad. 453 at 459 (P.C.) relied on.

4. Ancient enjoyment is good evidence of title, even when there is a grant to construe, if the terms of the grant are not clear, still more in the case of a boundary description which is not clear and definite.

5. The description that a plot dealt is situate in a particular village cannot be admissible under S. 13 or S. 32 (4) of the Evidence Act as the description cannot be taken to be part of the right asserted. S. 11 of the Evidence Act must be read subject to the other provisions of the Act—and a statement not satisfying the conditions laid down in S. 32 cannot be admitted merely on the ground that, if admitted, it may probablise or improbablise a fact in issue or a relevant fact.

(1905) C.L.J. 55 Dist. I.L.R. 16 Pat. 258 (P.C.), relied on.

K. Rajah Aiyar and *V. Ramaswami Iyer* for Appellants.

K. Kuttikrishna Menon for Respondents.

G. S. V.

Varadachariar and Pandrang Row, JJ. A. S. No. 167 of 1934.
6th September, 1938.

Hindu Law—Joint family—Family business—Participation by junior co-parcener—Effect—If liability for pre-existing debts and debts incurred by manager arises—Affairs of family business referred to arbitration—Award directing two members to wind up business—If makes them partners.

Where a junior adult co-parcener of a Hindu joint family having a family business takes an active part in the conduct of the business he does not become personally liable for pre-existing debts of the business or debts incurred by the manager, except by reason of the applicability of the doctrine of "holding out". By such conduct he does not make himself a partner in the family business.

The view of Spencer, J. in I.L.R. 41 Mad. 824 relied on.

I.L.R. 22 Mad. 166 followed.

9 Bom. L.R. 1289 and the view of Sadasiva Aiyar, J. in I.L.R. 41, Mad. 824 dissented from.

A.I.R. 1932 Pat. 206 referred to.

Where, in a joint family business, after the death of the father, the liabilities exceeded the outstandings and the members of the family referred the question of partition to certain arbitrators and they passed an award directing that two of the sons should take over its assets and liabilities, and wind up the whole business within three years and that one of them should collect the assets of the business and they were given the option to do *new* business under a different vilasam, but no new business was carried on by them.

Held, that the award does not make them partners.

B. Sitarama Rao, S. Parthasarathy, V. K. Thiruvenkadachari and *C.R. Pattabhiram* for Appellants.

The Advocate-General and *K. Umamaheswaran* for Respondents.

G. S. V.

King and Krishnaswami Aiyangar, JJ. C.M.A. Nos. 127 and 357
8th September, 1938. of 1936.

Provincial Insolvency Act, S. 28—Hindu manager's insolvency—Attachment of shares of his brothers by creditors—Official Receiver's rights—Limitation Act, S. 15 and Art. 182—Execution

—Injunction restraining sale of portion of attached properties— Application to revive earlier application after removal of injunction.

Where the manager of a joint Hindu family became insolvent, and the shares of his brothers were attached by their creditors in execution of a decree against them, the power of the Official Receiver as representing the insolvent to sell their shares disappears.

A decree-holder filed an execution application in 1925 and effected attachment of properties of the judgment-debtors. As a result of claim petitions filed with regard to a portion of the attached properties, there was an injunction which prevented the Court from proceeding further with the execution application which was therefore recorded in 1925. The injunction did not relate to the whole of the properties which had been attached. The decree-holder quite fairly believed that the Court would not proceed with his execution application until the question of injunction was finally settled. The decision of the Court granting injunction was set aside in appeal in 1934 and the decree-holder filed an application in 1935 to revive his earlier application. It was contended that there was nothing to prevent the decree-holder from proceeding with the execution against those items of properties which were not the subject-matter of injunction and as he failed to do so, the application in 1935 must be held to be barred by limitation.

Held, that the execution application of 1925 should not be split up, when the Court itself which was dealing with the application had not in definite terms divided it in that way and the application was not barred. I.L.R. 17 Cal. 268, dist.

A. C. Sampath Ayyangar and *T.V. Ramanatha Iyer* for Appellants.

T. R. Venkatarama Sastri, and *M. S. Vaidyanatha Aiyar* for Respondents.

G.S.V.

Burn, J. C. M. A. No. 210 of 1936.
9th September, 1938.

T. P. Act, S. 52—Transfer of right—Determination of lessee's right under kanom—Jenmi creating a fresh demise pending suit— If affected by lis pendens.

Where the rights of the lessee under a kanom had been determined by a decree and the Jenmi purported to confer a fresh right of a similar nature upon another person *A*, by a fresh demise during the pendency of a suit,

Held, that the transaction is not affected by the rule of lis pendens, as the Jenmi did not convey to *A* the same right which

had been created long before in favour of a third party by the old demise.

K. Kuttikrishna Menon for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

G.S.V. ———

Wadsworth, J. S. A. No. 484 of 1934.
12th September, 1938.

Hindu Law—Joint family — Presumption of jointness—Rebuttal—Registration of family property in the name of widow of a member.

The widow of *A*, a member of a joint family, was the registered pattadar of certain disputed lands for some twenty years, after the death of *A*, without any challenge from the members of the other branch who would have succeeded to the property, had there been no partition. The question arose whether *A* was or was not divided from his cousins.

Held, that the inference to be drawn from the registration of the property in the widow's name rebuts the presumption of jointness. The strength of the presumption of jointness declines with the passage of time and with the enlargement of the limits of the family.

49 M.L.J. 55 (64) (P.C.) and I.L.R. 45 All. 729 distinguished.

R. Gopalaswami Aiyangar for Appellant.

K.S. Sankara Aiyar for Respondents.

G. S. V. ———

King and Krishnaswami Ayyangar, JJ. C.M.A. No. 265 of 1936.
15th September, 1938.

Execution—Application for — Amendment of—Power of Court to allow—Expiry of 12 years' period laid down in S. 48, C.P. Code.

Where an execution petition was pending for 6 years and no further action in execution was possible on account of the pendency of an appeal in the High Court and the decree-holder made an application to amend the petition and the 12 years' period laid down in S. 48, C. P. Code had already expired.

Held, that the Court has got power to grant such amendment in a proper case.

C.S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

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

G.S.V. ———

Wadsworth, J. S. A. No. 515 of 1934.
13th September, 1938.

C. P. Code, S. 9—Jurisdiction of Civil Court—Exclusion from a particular row of congregation—If interference with right to worship—Civil Court—No power to prescribe elaborate manual of ritual connected with service in temple.

Where the plaintiffs are under no obligation to perform worship in a temple, and have only the right to join in the service as members of the general body of worshippers frequenting the temple and are excluded from the first two rows of the congregation,

Held, that there has been no interference with their civil rights to worship in the temple and the Civil Courts cannot be required to declare their rights to stand in any particular row of the congregation.

The Civil Courts in India have no ecclesiastical jurisdiction and they cannot decide questions of ritual except in so far as the decision of such questions is a necessary incident to the decision of civil rights.

The Civil Courts have neither the power nor the duty to attempt to draft a prayer book for a temple, prescribe a complete set of rubrics which shall establish precisely the prayers to be used, the positions to be occupied by the various classes of worshippers, the time when the service is to begin and cease and the precise manner in which it is to be conducted.

K, Srinivasa Aiyangar for Appellants,

C. Narasimhachariar and *K.E. Rajagopalachariar* for Respondents.

G. S. V.

Burn, J. C.M.S.A. Nos. 118 and 119 of 1937.
14th September, 1938.

C. P. Code, O. 21, R. 2—Certification by decree-holder—Validity—Person authorised to file suits under power of attorney—Intention to defraud the rights of—Contract Act, S. 202.

A borrowed a sum of money from *B* and executed a registered power of attorney in favour of the latter authorising him to file suits on certain mortgages on his behalf and to pay himself the amounts due by him out of the amounts realised by him. *B* obtained decrees on the mortgages. *A* certified satisfaction of the decrees falsely to defraud the rights of *B*. *B* got a declaration from Court that he had a charge and a lien on the proceeds of the decrees in mortgage suits.

Held, that *A*, though he was a holder of the decrees, was not entitled to enter up satisfaction of them, as *B* had an interest in them.

58 I.A. 50 applied; 5 M.L.T. 72, 41 L.W. 295, 45 L.W. 562 and 29 M.L.J. 693 referred to.

K.V. Sesha Aiyangar for Appellant.

N.R. Sesha Aiyar for Respondent.

G. S. V.

Wadsworth. J. S. A. No. 585 of 1934.

16th September, 1938.

Evidence Act, S. 13—Transaction—Sale or mortgage—Existence of an easement claimed or recognised in.

A transaction by way of sale or mortgage in which the existence of an easement as part of the property transferred has been claimed or recognised, is a transaction admissible in evidence under S. 13 of the Evidence Act to prove the existence of the right of easement.

Y. Suryanarayana for Appellants.

P. Somasundaram for Respondents.

G.S.V.

King, J. C.M. S. A. No. 30 of 1935.

6th October, 1938.

Madras Co-operative Societies Act (VI of 1932), S. 47 (3) (b) and (6)—Power of liquidator to decide as regards membership—Application to Court under S. 47 (6)—Jurisdiction of Court to decide the question of membership.

The liquidator of a Co-operative Society passed an order determining what contribution should be made by the members under S. 47 (3) (*b*) of the Madras Co-operative Soiceties Act and applied to the Court under S. 47 (6). It was contended by the respondent that he was not a member of the Society and therefore was not bound by the liquidator's order.

Held, that the liquidator has jurisdiction to decide who are members and who are not. There is no bar to the executing Court deciding whether the respondent is or is not a member bound by the order of the liquidator.

I.L.R. 59 Mad. 895, relied on.

B. Sitarama Rao for Appellant.

K. Y. Adiga for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ. C. M. A. No. 482 of 1937.

6th October, 1938.

Provincial Insolvency Act (V of 1920), S. 78 (2)—Civil Procedure Code, S. 48—Limitation Act, Art. 182—Relative scope

—Execution—Enlargement of time due to pendency of insolvency proceeding—Computation of period in respect of execution petition—Method of.

Where the adjudication of the judgment-debtor was subsequently annulled and an execution petition was filed after such annulment, the question arose about the bar of limitation.

Held, S. 78 (2) of the Provincial Insolvency Act controls the computation of the period of time limited whether by S. 48 of the Civil Procedure Code, the Limitation Act or any other statute. S. 78 (2) is applicable to the periods limited by both S. 48, Civil Procedure Code and Art. 182 of the Limitation Act and each of these two periods runs independently of the other. In the former case, the period of 12 years is extended by the addition of a further period equivalent to that during which the insolvency was pending. Within the enlarged time so obtained, it is open to the decree-holder to make any number of applications, each one of which has to be tested by reference to Art. 182.

I.L.R. 42 All. 118, followed.

I.L.R. 45 Mad. 785, explained.

K. Rajah Aiyar for Appellant.

R. Sundaralingam for Respondent.

G.S.V.

Krishnaswamy Aiyangar, J. C.R.P. No. 1337 of 1937.
7th October, 1938.

Civil Procedure Code (V of 1908), O. 33, r. 1—Suit for recovery of compensation under Fatal Accidents Act—Sons of deceased as plaintiffs—Other representatives joined as defendants—Plaintiffs whether entitled to sue as paupers.

The plaintiffs sued for damages under the Fatal Accidents Act on account of the death of their mother due to contact with a live electric wire under the control and management of the first defendant company. The husband and parents of the deceased were also made party defendants as representatives within the meaning of the Act. The plaintiffs obtained the leave of the court to sue as paupers, but it was objected to on the ground that the action was a representative one and that the persons impleaded as party defendants were not paupers.

Held, that though the decree that might be passed might enure for the benefit of the other representatives also, the plaintiffs had a distinct and individual right and that they were entitled to sue as paupers under O. 33, R. 1, Civil Procedure Code.

I.L.R. 28 Mad. 479 applied.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Petitioner.

V. Suryanarayana for Respondent.

B.V.V.

King, J. C. M. A. No. 309 of 1937.

7th October, 1938.

Provincial Insolvency Act (IV of 1920), S. 72 (1)—'Obtaining credit'—Money borrowed in connection with a sale—Prosecution for such offence—Principle to be followed.

Where an advance of money is given to an undischarged insolvent in order that he may procure property which he will then sell to the person who has advanced him the money he has 'obtained credit' within the meaning of S. 72 (1) of the Provincial Insolvency Act.

It is not desirable to occupy the time of the Criminal Courts by ordering prosecution in every case in which an infringement of the provisions of the Act has been disclosed. It is to glaring and striking cases in which the moral turpitude of the insolvent stands out conspicuously that directions to prosecute should be confined. Prosecution of the insolvent is not required in the public interests where he is guilty of no act of commercial dishonesty other than that of infringing the provisions of S. 72 (1).

V. Viyyanna for Appellant.

M. S. Ramachandra Rao for Respondent.

G. S. V.

Varadachariar, J. C.R.P. No. 1299 of 1936.

12th October, 1938.

Civil Procedure Code (V of 1908), O. 6, r. 17—Amendment—Legal basis for relief changed—If amounts to changing cause of action.

A plaint was filed setting out various payments to or on behalf of the defendant and it also mentioned that these payments were made under an arrangement that a mortgage securing repayment of the amount advanced was to be executed in due course and added that this was not done. The plaint therefore prayed for a decree for the suit amount. The court-fee was not calculated under S. 17 as distinct subject-matters treating each advance as a separate loan but it was paid on the aggregate treating the whole amount as a single claim. When the Court returned the plaint for proper valuation, the plaintiff re-presented it with an endorsement that the claim was in the nature of one for damages for breach of contract to execute the mortgage and then filed an application to amend the plaint on those lines.

Held, that the amendment only brings out clearly or even puts in a different form the legal basis on which the plaintiff would be entitled to relief on the facts set forth in the plaint. An attempt of this kind is not to be put on the same footing as an attempt to introduce a new cause of action.

A.V. Narayanaswami Aiyar for Petitioner.

K. Rajah Aiyar for Respondent.

S. V. V.

King, J. C.R.P. No. 53 of 1938.

14th October, 1938.

Civil Procedure Code (V of 1908), O. 1, R. 8—Representative suit—Varying claims of plaintiffs forming basis of—Conditions to continue as representative suit.

Six plaintiffs, claiming to be representatives of a large body of people, on being evicted by the Corporation sued to establish their right to continue in possession of their properties. Some of them claimed to be owners, some claimed rights as permanent tenants, some as trespassers, etc. Permission was granted to them for the filing of the plaint under O. 1, r. 8, Civil Procedure Code. At a later stage in the suit, two of them withdrew from their association with the others. The remaining four applied for permission to continue the suit as representatives of the same body.

Held, that their representative character would depend entirely upon their reducing themselves to the level of those among the occupants who had the weakest case to put forward. Only if the plaintiffs who sought to represent the others described themselves as trespassers and nothing else, the Court would be justified in granting permission to them under O. 1, r. 8, Civil Procedure Code.

S. G. Rangaramanujam for Petitioner.

E. Vinayaka Rao and *A. Suryanarayanayya* for Respondent.

G.S.V.

Wadsworth, J. S. A. No. 567 of 1934.

17th October, 1938.

Limitation Act (IX of 1908), S. 19—Notice of demand by a Proprietor to Ijardar—Reply mentioning claims, set off and settlement of accounts—Amounts due admitted—Acknowledgment within the meaning of section—Suit not barred.

In a suit by the proprietor of an estate against his Ijaradar for recovery of certain sum due by way of arrears of rent on a statement of account appended to the plaint the defendant raised the plea of limitation. In answer to a notice issued by the plaintiff to the defendant claiming a certain sum as due, the defendant sent a

reply repudiating his liability for the amount mentioned in the plaintiff's notice mentioning certain items to be deducted by way of set off and remission and also stated that as arranged by the mediators the accounts between the parties had to be settled in person, to ascertain whether the plaintiff was to pay to the defendant or the defendant was to pay to the plaintiff, and the plaintiff relied upon that statement as sufficient acknowledgment under S. 19 of the Limitation Act.

Held, the statement did not amount to a total repudiation of liability for any portion of the amount claimed and the admission that there were unsettled accounts outstanding between the parties clearly implied an admission that there might be a balance due from the defendant and a promise to pay any such balance on settlement of accounts. The statement therefore was a sufficient acknowledgment of liability.

I.L.R. 33 Cal. 1047 P.C. followed.

6 Ch. Appeals 822 explained and distinguished.

I.L.R. 36 Mad. 68 referred to.

Held further, the acknowledgement operated not merely in a suit for accounts but also in a suit for balance due on account.

D. Narasa Raju for *B. Somayya* for Appellant.

A. Bhujanga Rao for *E. Venkataramana Rao* for Respondent.

K.C.

Burn and Stodart, JJ. C.M.A. No. 297 of 1937.
19th October, 1938.

Provincial Insolvency Act, (V of 1920), S. 9 and Partnership Act, (IX of 1932), S. 69—Petition in insolvency against debtor by an unregistered firm—If barred by S. 69 of the Partnership Act.

Creditors who constituted a firm and had not registered themselves presented a petition in insolvency under S. 9 of the Provincial Insolvency Act against the debtor. The District Judge dismissed the petition as not maintainable, relying on S. 69 of the Partnership Act.

Held, that a petition for the adjudication of a debtor as an insolvent is not a proceeding to enforce a right arising from a contract between him and his creditors. The disability of the partners to enforce the debt due to them does not deprive them of their right to file a petition in insolvency.

V. Rangachari for Appellant.

M. S. Ramachandra Rao for Respondent.

G.S.V.

Varadachariar and Pandrang Row, JJ. A. S. No. 98 of 1934.
7th September, 1938.

Partnership—Inference from conduct—Continuous association in business—Date of commencement of relationship not known.

Partnership can be implied from a long course of conduct. The mere fact that it is not possible to fix a specific date as to the commencement of that relationship does not preclude the inference of a partnership, when for many years the parties have carried on business on a basis which is only attributable to some such relationship, for example, long connection with the business, active participation in the business and its income.

Nerot v. *Burnand*, (1827) 4 Russ. 247: 38 E.R. 798, relied on.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *C. A. Seshagiri Sastri* for Appellant.

S. Srinivasa Aiyangar, T. R. Venkatarama Sastri, K. R. Rangaswami Aiyangar and *K. Narasimha Aiyangar* for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ. C. M. A. No. 277 of 1937
13th September, 1938.

Lunacy Act (IV of 1912), S. 62—Inquisition under—Grounds for.

No person should be made the subject of an inquisition under S. 62 of the Indian Lunacy Act, unless there are good and substantial reasons which will generally include some medical opinion for ordering it.

P. Chandra Reddy and *R. Ramalinga Reddy* for Appellant.

J. R. Gundappa Rao for Respondent.

G. S. V.

Wadsworth, J. S.A. No. 587 of 1934.
16th September, 1938.

Civil Procedure Code—O. 26, r. 9—Issue of commission to prepare a plan—Plan found to be defective—Second Commissioner appointed to prepare a further plan—Both plans considered by Court—Procedure, if wrong.

The Court issued a commission to a person learned in law to prepare a plan, and the plan prepared by him was found to be not very satisfactory. Then another person trained in survey was appointed to prepare a further plan to supplement the first com-

mission. The Court considered both the plans and adjudicated on the rights of the parties.

Held, that the procedure was not wrong.

A.I.R. 1922 Mad. 219 distinguished.

T. E. Ramabhadrachariar and *S. Thyagarajan* for Appellant.

R. Somasundaram Aiyar for Respondent.

G.S.V.

Burn and Lakshmana Rao. JJ. R.T. 69 of 1938.
19th September, 1938.

Evidence Act, S. 24—Person in authority—President of Village Vigilance Committee—Statement made to—Relevancy of.

The President of the Village Vigilance Committee is a person in authority within the meaning of S. 24 of the Evidence Act. A statement made to him by an accused is irrelevant under that section.

K. Krishnamurthi for Accused.

Public Prosecutor (V.L. Ethiraj) for Crown.

G. S. V.

Varadachariar and Pandrang Row, JJ. A. S. No. 148 of 1935.
20th September, 1938.

Land Acquisition Act (I of 1894), S. 23—Market value—Computation of—Land purchased by claimant 4 years back—Fall in price alleged—Burden of proof.

Where a piece of land was acquired by Government four years after it was purchased by the claimant, the claimant is entitled to receive compensation at the rate of what he actually paid for a good portion of the land acquired in the absence of evidence to prove any real fall in value of that land or similar land in the vicinity. The burden lies on the party who asserts that there was a fall in the price of land to prove it.

A. Lakshmayya for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

G.S.V.

Venkataramana Rao, J. S. A. No. 761 of 1934.
20th September, 1938.

Sale of Goods Act (III of 1930) S. 20—Passing of ownership—Vendor restricting the power of vendee to alienate goods.

Where the vendor intended to restrict the power of the vendee to alienate the goods until the sale price was paid,

Held, that the above circumstance does not connote that the vendor has retained the power of disposal in him. The ownership must be deemed to have passed to the vendee.

Srinivasaraghavan and *Thyagarajan* for Appellant.

K. Rajah Aiyar for Respondent.

G.S.V.

Leach, C.J. and Madhavan Nair, J. O.S.A. No. 64 of 1937.
21st September, 1938.

Administration—Suit for—Creditor—Right to be made a party.

A person who is admittedly not an heir, and if anything, is merely a creditor of the estate is not entitled to be made a party in an administrative suit.

B. Somayya, R. Venkatasubba Rao and *D.C. Raghaviah* for Appellants.

A. Kuppuswami and *M. Natesan* for Respondents.

G. S. V.

Wadsworth, J. S.A. No. 557 of 1934.
21st September, 1938.

Decree—Suit to set aside on ground of fraud—Decree obtained by perjury—Maintainability of suit.

A suit was brought to set aside an *ex parte* decree on the ground of fraud. The only allegation of fraud was that the defendant's case was based on perjured evidence and he prevented due service of notice. These allegations were put forward and negatived in the application to set aside the *ex parte* decree.

Held, that suit is not maintainable. The fraud alleged should be something extrinsic or collateral to the subject-matter of the suit in which the decree was obtained.

I.L.R. 29 Cal. 395 (P.C.) explained.

3 L.W. 572, I.L.R. 29 All. 212, and I.L.R. 1 Rang. 500 followed.

T. M. Krishnaswamt Aiyar and *M. Murugappa Chettiar* for Appellant.

K. S. Champakesa Aiyangar and *M. Guruswami* for Respondents.

G.S.V.

Burn, J. C. M. S. A. No. 125 of 1937.
22nd September, 1938.

Will—Construction—Alternative bequest—If to be treated as contingent.

Where the bequest was to the daughter for life, after her to her sons or the male heirs of her sons, but there were no male heirs of her daughter's son in existence at the time but there were her daughter's sons,

Held, the bequest is of course alternative but it does not thereby become contingent. The grandsons get a vested interest.

Ch. Raghava Rao for Appellant.

V. Govindarajachari for Respondent.

G. S. V.

King and Krishnaswami Aiyangar, JJ.
22nd September, 1938.

C.M.A. Nos. 253 and 322 of 1936.

Hindu Law—Joint family—Sons' liability—Trespass by father—Acquisition of property—Dismissal of suit as against sons—Decree against father—Execution petition to sell shares of sons—If maintainable—Father becoming insolvent—Provincial Insolvency Act, S. 28 (2).

A suit was brought for damages against a father and his sons on the ground that he had unlawfully trespassed upon the property of the plaintiff and prevented him from enjoying its fruits. The father had enjoyed the benefit of his trespass and acquired property on behalf of himself and his sons. The suit was decreed as against the father but dismissed as against the sons. The father became an insolvent and the plaintiff filed an execution petition for the sale of the shares of the sons in the family properties.

Held, that the sons were liable to refund the money actually received by their father.

21 L.W. 606, relied on.

The sons could not contend that as the suit was dismissed against them they were no longer liable.

The execution petition is not barred by the terms of S. 28 (2) of the Provincial Insolvency Act.

S. T. Srinivasagopalachari for Appellant in both.

K. G. Srinivasa Aiyar for Respondent in both.

G.S.V.

Varadachariar and Abdur Rahman, JJ.
27th September, 1938.

Appeals Nos. 119 of 1933 and 12 of 1934.

Presumptions—Lunacy—Once lunatic—If continuance of lunacy can be presumed—Senile dementia of an old man—Presumption of continuance.

Whether the rule laid down in I.L.R. 40 Mad. 660 that the effect of an adjudication that a person is a lunatic is to raise a presumption that he continued to be of unsound mind until the contrary is shown is confined to cases where he is so found by inquisition or not; in a case where the mental incapacity proved is *senile dementia* in the case of an old man, it is reasonable to presume its continuance than its discontinuance and the onus will be upon persons who wish the court to uphold transactions entered into by the patient subsequent to this date to prove that the transactions were not vitiated on the ground of his incapacity.

K. K. Sreedharan for Appellant.

G. N. Tirumalachariar and *B. Narasimhahariar* for Respondents.

S.V.V.

King and Krishnaswami Aiyangar, JJ. C.M.A. No. 129 of 1937.
28th September, 1938.

Provincial Insolvency Act (III of 1907)—Adjudication under—Final declaration of dividend—Subsequent acquisition of property by insolvent—Sale of that property by him—Right of Official Receiver to claim title to it.

An adjudication was made under the provisions of Act III of 1907 under which the insolvent was under no obligation to apply for a discharge and he in fact did not apply for a discharge. After the adjudication the Official Receiver realised the estate, made a distribution of the final dividend in 1915 and transmitted the papers to the Court. The insolvent subsequently became an earning member and with such acquisitions made in 1928 purchased certain property which he sold to his wife. The Official Receiver claimed in 1936 that the property should be applied and administered according to the Insolvency Act, as it became vested in him.

Held, that the insolvent, the Official Receiver and the creditors had acted on the footing that the insolvency had closed. The creditors as well as the Official Receiver were estopped from claiming that he as representing the creditors, had a title to the property which he could assert as against a purchaser from the insolvent.

9 Ch. D. 312, (321), relied on.

Kasturi Seshagiri Rao for Appellant.

Respondent not represented.

G. S. V.

Lakshmana Rao, J. Crl. R.C. 354 of 1938.
29th September, 1938.

Cr. P. Code, S. 145—Applicability—Dispute relating to shares in fish in tank and channel.

S. 145 of the Cr. P. Code is not applicable where the dispute between the parties relates to their respective shares in the fish in a tank and channel.

J.S. Vedamanickam for Petitioner.

S. Rajappa for Respondents.

The Public Prosecutor on behalf of the Crown.

G. S. V.

Wadsworth, J. S. A. No. 735 of 1934.
29th September, 1938.

Legal Practitioner—Admission made in notice—Explanation from the bar—If admissible—Proper procedure to be followed.

Where an admission was made by a lawyer acting under instructions, in a reply notice on an important point affecting his client's case, if it is desired to explain away that admission as due to a mistake of the lawyer, then the explanation should be given in the form of evidence on oath subject to cross-examination. A statement made by him from the bar to explain away the admission should not be taken into consideration.

T. R. Srinivasa Aiyar for Appellant.

M. Krishna Bharathi for Respondents.

G.S.V.

Pandrang Row, J. C. R. P. Nos. 1153 and 1631 of 1935.
30th September, 1938.

Contract Act, Ss. 148 and 149—Goods sent by A without order to B—Repudiation by B—Relationship between parties—Sale of goods Act, Ss. 42 and 43.

A sent goods to *B* without any order in the hope that *B* would retain them and try to sell them but *B* repudiated the goods and wrote to *A* that he did not require them. *A* then wrote to *B* to keep them as his (*A's*) goods.

Held, that *A* constituted *B* as his bailee. The relationship between the two was not that of seller and buyer in respect of the goods. Ss. 42 and 43 of the Sale of Goods Act do not apply to a case of goods sent on the chance that they may be accepted.

K. V. Ramachandra Aiyar for Appellant in C.R.P. No. 1153 of 1935 and Respondent in C.R.P. No. 1631 of 1935.

P. Satyanarayana Rao and *K.K. Gangadhara Aiyar* for Respondent in C.R.P. No. 1153 of 1935 and Appellant in C.R.P. No. 1631 of 1935.

G.S.V.

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Abdur Rahman, J. C. R. P. Nos. 499 and 500 of 1936.
30th September, 1938.

Civil Procedure Code (V of 1908), O. 22, r. 3—Application under—Sufficiency of—Real heir not made legal representative —Application by a person claiming interest in the suit to be made a legal representative.

Where a person claiming an interest in the suit as the purchaser of the whole of the outstandings of the business belonging to the deceased plaintiff applied to be made a legal representative of the plaintiff who had left a son,

Held, the application came under O. 22, r. 3 of the C. P. Code, though it was not made with the object of bringing the deceased plaintiff's son on the record as his legal representative and the suit cannot be held to have abated.

5 I.C. 514, and A.I.R. 1926 All. 156, relied on.

I.L.R. 15 Pat. 82, distinguished.

K. S. Champakesa Aiyangar for Appellants.

N. Srinivasa Aiyangar and *C. R. Balangamayya* for Respondents.

G. S. V.

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Varadachariar and Abdur Rahman, JJ.

5th October, 1938. C. M. S. A. No. 134 of 1934.

Execution—Decree against a member of an undivided Hindu family—Decree holding his ⅓rd share liable—Sale of the ⅓rd share —Application to set aside by another member of the family—If maintainable—Attachment before judgment against father—Son added as legal representative—If attachment became inoperative on father's death.

A suit had been instituted against the 1st defendant, the 2nd defendant his father and the 3rd defendant a brother of the 1st defendant. As the 1st defendant died, 4th defendant was added as his legal representative. The case went to arbitration and a decree in terms of the award held that the 1/3rd share, which the 4th defendant as son of the 1st defendant had in the joint family property, was liable for the suit debt. Defendants 2 and 3 were exonerated. The plaintiff attempted to bring the 4th defendant's 1/3rd share to sale. The 3rd defendant filed an application objecting to the execution sale.

Held, he had no *locus standi* to present the application. No proceedings are sought to be taken against him or his interest in the family property. The mere fact that he is an undivided member of the coparcenary of which 4th defendant is also a member will not suffice to give him a *locus standi* to maintain the application.

I.L.R. 57 All. 201, followed.

Where there was an attachment before judgment against a father and the son was brought on as legal representative, the attachment before judgment made during the life time of the father does not become inoperative because the decree was not passed during his life time. Cases dealing with the effect of attachment before judgment in personal actions against individual coparceners have no application, because here the son will be liable for the father's debts notwithstanding that the father's property might have survived to the son and even in the absence of any attachment obtained during the father's lifetime.

P. Satyanarayana Rao for Appellant.

T. M. Krishnaswami Aiyar and *A. Lakshmayya* for Respondents.

S.V.V.

Abdur Rahman, J. C. M. A. No. 465 of 1936.

1st November, 1938.

Provincial Insolvency Act (V of 1920), S. 51—Right of Official Receiver to obtain refund of "Benefits of Execution".

A decree-holder who has obtained rateable distribution under S. 73, Civil Procedure Code, and is liable to refund the benefit of the execution under S. 51 of the Provincial Insolvency Act, is not entitled to retain the costs of the suit in which he obtained the decree and of the execution proceedings.

I.L.R. 57 Mad. 330: 63 M.L.J. 402, doubted.

42 M.L.J. 361, referred to and distinguished.

K. Sankaranarayanan for *U. Ramachandran* for Appellant.

K. Kuppuswami for Respondent.

G.S.V.

The Chief Justice O. S. A. No. 49 of 1936.
Madhavan Nair, J.
29th September, 1938.

Contract Act (IX of 1872), S. 233—Agents personally liable on certain contracts—Plaintiff proving against them in insolvency —If precluded from suing their principals.

Where a person who claimed damages against agents in respect of certain contracts on which they were personally liable proved in insolvency against them he is not precluded from subsequently maintaining a suit against their principals, on the ground that the agents acted for undisclosed principals.

The view of Coutts-Trotter, C.J., in I.L.R. 49 Mad. 900, dissented from.

T. L. Venkatarama Aiyar for Appellants.

V. V. Srinivasa Aiyangar and *R. Sundararajan* for Respondents.

G. S. V.

Varadachariar and Appeal No. 151 of 1934.
Pandrang Row, JJ.
5th October, 1938.

Tort—Accident by collision of two buses—Injury to and death of a passenger—Claim by representatives under Fatal Accidents Act—Both drivers found guilty of negligence—Joint decree against owners of buses—If proper—Liability if joint—Drivers, if joint tort-feasors.

While driving in a road 26 feet wide two buses coming in opposite directions collided in the middle of the road and it was found that it was a result of the drivers of the two buses persisting in driving on the metalled portion of the road each declining to make room for the other to pass by. One *V*, a passenger in one of the buses, died as a result of the collision. The representatives of *V* filed a suit under the Fatal Accidents Act for damages for loss of the life of *V* impleading the owners of both the buses as defendants and the trial Court gave a joint decree against both the defendants.

Held, that as both the drivers persisted in driving without making room for the other to pass by, both the defendants must be held liable.

L.R. 13 A.C. 1, relied on.

Even assuming that the present case is not a case of a joint tort, yet it will not necessarily follow therefrom that the damages should or could be assessed separately as against each of the defendants. The case will fall in the category of cases of injury

arising from "composite negligence". In such a case, the plaintiff is not bound to a strict analysis of the proximate or immediate cause of the event to find out whom he can sue. Subject to the rules as to remoteness of damage, the plaintiff is entitled to sue all or any of the negligent persons and it is no concern of his whether there is any duty of contribution or indemnity as between those persons though in any case he cannot recover on the whole more than his whole damage.

(1923) 2 K.B. 112, applied.

(1938) 1 K.B. 540 and 34 T.L.R. 108, distinguished.

K. Rajah Aiyar and *R. Rangachari* for Appellant.

K. V. Ramaseshan for Respondent.

S.V.V.

Wadsworth, J. S. A. No. 266 of 1934.

7th October, 1938.

Transfer of Property Act (IV of 1882), S. 122—Deed of gift registered—Non-acceptance by donee—Subsequent revocation by donor—Validity of.

Where a deed of gift was registered but there were no change of possession and no delivery of the deed to the donees, nor was there any acceptance by them and the donor subsequently revoked it,

Held, that the gift is incomplete and the donor is not barred from revoking it. Registration will not convert that which is not a complete transfer into a complete transfer.

7 L.W. 339, explained.

I.L.R. 50 Mad. 193 (P.C.) and I.L.R. 54 All. 534, relied on.

P. Muthukumaraswami Mudaliar for Appellant.

K. S. Champakesa Aiyangar for Respondent.

G. S. V.

Burn, J. C. M. S. A. No. 31 of 1935.

7th October, 1938.

Civil Procedure Code (V of 1908), O. 21, r. 57—Default of decree-holder—Proper order to be made—Order of rejection—Real effect of.

If the Court is unable to proceed with the application for execution by reason of the decree-holder's default, it is obliged to "dismiss" the application unless for some sufficient reason it decides to adjourn the proceedings to a future date. Where in the above circumstances the Court called the order, an order of rejection and not an order of dismissal, the order is clearly an order of dismissal.

P. Satyanarayana Rao and *S. Venugopala Rao* for Appellant.

K. Kotayya for Respondent.

G. S. V.

King, J. C. M. S. A. No. 91 of 1 37,
11th October, 1938.

Civil Procedure Code (V of 1908), O. 21, rr. 99 and 103—Application for recovery of possession—Dismissal on the ground of non-existence of well-defined boundaries—Proper remedy for decree-holder.

The executing Court rejected an application for recovery of possession after removal of obstruction on the ground that there were no specific well-defined boundaries separating the lands of the decree-holder and the judgment-debtor as per the decree. The decree-holder applied for the appointment of a commissioner to demarcate the boundaries and for the delivery of possession.

Held, that the decree-holder was not bound to file a suit under O. 21, r. 103 and no order was passed under O. 21, r. 99.

K. Kuttikrishna Menon and *K. Narayana Marar* for Appellant.

A. V. Viswanatha Sastri for Respondent.

G.S.V.

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Wadsworth, J. S. A. No. 786 of 1934.
11th October, 1938.

Evidence Act (I of 1872), S. 32—Statement made in will—Admissibility of—Subsequent cancellation of will—Effect.

A statement made in a will by a testator acknowledging an obligation to her daughter is admissible under S. 32 of the Evidence Act. The fact that the will was subsequently cancelled does not make the statement less admissible, though it may be treated as a warning against relying too strongly upon the recitals.

N. S. Mani for Appellant.

B. Somayya for Respondent.

G.S.V.

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Wadsworth, J. S. A. No. 851 of 1934.
13th October, 1938.

Madras Estates Land Act (I of 1908), S. 151—Small portion of holding used as a cattle-shed and for storing manure—Holding if rendered unfit for agricultural purposes—Diversion of land from agriculture—When becomes ground for eviction.

The occupation of a small portion of a holding as a cattle-shed and for storing manure cannot legitimately be treated as an occupation rendering the holding as a whole unfit for agriculture. Mere diversion of land from agriculture is not a ground for eviction, provided that diversion does not by its nature impair the value of the land for future agriculture.

A. Swaminatha Aiyar and *S. Thiagaraja Aiyar* for Appellant.

K. S. Champakesa Aiyangar for Respondent.

G. S. V.

King, J. C. M. A. No. 22 of 1937.
17th October, 1938.

Land Acquisition Act (I of 1894), Ss. 3 (d), 30 and 32—Decision of a Subordinate Judge under S. 32—If a decree—Competency of appeal.

The decision of a Subordinate Judge (who is a special judicial officer appointed to perform the function of the Court under the Land Acquisition Act) under S. 32 of the Act on a reference under S. 30 is a decree and an appeal from that decision lies to the District Court.

I.L.R. 45 Mad. 320 (P.C.) and I.L.R. 52 Mad. 142, relied on.

I.L.R. 54 Mad. 722, distinguished.

I.L.R. 59 Mad. 554, not followed.

C. Narasimhachari and *M. E. Rajagopalachariar* for Appellant.

R. Kesava Aiyangar for Respondent.

G. S. V.

Lakshmana Rao, J. Cr. R. C. No. 801 of 1938.
18th October, 1938.

Evidence Act (I of 1872), S. 123—Accidents Register—If to be treated as a privileged document.

The Accidents Register is not a privileged document and a Magistrate cannot refuse to send for it.

V. Viyyanna for Petitioner.

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

S.V.

The Chief Justice and Madhavan Nair, J. O.S.A. No. 3 of 1938.
18th October, 1938.

Transfer of Property Act (IV of 1882), Ss. 4, 59 and 100—'So far as may be' in S. 100—Meaning of—Debentures of Rs. 50 each, issued by a company—If to be registered under the Registration Act.

Where a company issued debentures of Rs. 50 each, and the debentures were registered pursuant to S. 108 of the Indian Companies Act, but not registered under the Indian Registration Act,

Held, that they were invalid for want of registration by reason of S. 100, Transfer of Property Act, read with S. 59, even if only a charge was created by them. The words 'so far as may be' in S. 100 of the Transfer of Property Act do not have the effect of taking S. 59 out of the purview of S. 100. By virtue of S. 4 of the Transfer of Property Act, S. 59 has now to be read as being supplemental to S. 17 of the Registration Act.

44 L.W. 438, distinguished.

D. Suryaprakasa Rao for Appellant.

K. S. Narayana Aiyangar, S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondents.

G.S.V.

Varadachariar and Abdur Rahman, JJ. — C. M. P. No. 4192 of 1938 in Appeal No. 152 of 1934.

20th October, 1938.

The Madras Agriculturists Relief Act (IV of 1938)—Suit on mortgage—Mortgaged properties sold in execution of money decree—Purchaser defendant to mortgage suit—If can claim benefit of the Act as an agriculturist—Purchase in 1933—If liability existing in 1932—Limit of relief if to be confined to the proportion of properties in his hands.

A suit was filed for recovery of money due under a mortgage deed dated 27th July, 1929, executed by first defendant in favour of the plaintiff. In execution of a money decree obtained against the mortgagor, the eighth defendant purchased the equity of redemption in a portion of the hypotheca in 1930 and sold the same to ninth defendant in 1933. The plaintiff claimed to bring to sale the properties purchased by ninth defendant as part of his mortgage security. It was found that the mortgage was true and supported by consideration and a decree was passed for full amount due thereunder. Ninth defendant is an agriculturist within the meaning of Madras Act IV of 1938. The question was if this liability is a debt within the meaning of S. 3 (3) of the Act.

Held, the definition cannot be restricted to cases where a person is personally liable. The word 'due' does not necessarily imply that it must be recoverable by imprisonment of the debtor.

Clause (3) is wide enough to cover every person who is in any manner liable, either because he is personally liable or because he is liable on account of the possession of property and takes in his heirs, legal representatives or assigns.

As for the contention that liability of petitioner was not one falling within S. 8 as he purchased only in 1933 and his liability was not one subsisting prior to 1st October, 1932,

Held, his liability is traceable to the original mortgage and his purchase was not the basis of any new liability.

Also the liability cannot be limited to the extent of the properties attributable to the property in the possession of the petitioner.

K. V. Ramachandran for Petitioner.

N. Somasundaram for Respondent.

S.V.V.

King, J. — C. M. S. A. No. 135 of 1935.

20th October, 1938.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Amount got under—How to be adjusted—Decree consisting

of two debts due by two sets of defendants—Money realised by sale of the properties of one set of defendants.

Under a decree, a certain sum was payable by 1st and 2nd defendants and also a further sum by way of costs not only by them but by the 3rd defendant also. The decree was executed and money was realised by the sale of the properties belonging to the first and second defendants alone. The decree-holder received a certain amount by way of rateable distribution.

Held, that the decree-holder could not claim that the money received by him must all go towards the satisfaction of the debts due by defendants 1 and 2. He must give proportionate credit even in respect of the debt due by the third defendant, as he (the decree-holder) got the particular amount because of the total of the two debts.

Bardswell and others v. *Lydall*, 131 E.R. 189, Rel. on.

B. V. Ramanarasu for Appellant.

K. R. Lakshminarasamma for Respondents.

G. S. V.

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Varadachariar; J. C. R. P. Nos. 1317 and 1561 of 1936.

21st October, 1938.

Civil Procedure Code (V of 1908), O. 9, rr. 6 and 7—One of the defendants declared ex parte*—Suit adjourned—Issues framed and evidence not recorded—Application to file written statement and adduce evidence—Maintainability of.*

One of the defendants in a suit did not appear on the first hearing date and he was declared *ex parte*. His application to have that order set aside was dismissed. On the next hearing date, he applied for permission to file a written statement and to take further part in the conduct of the case. The other defendants had filed written statements, certain issues were framed and no evidence was yet recorded. The lower Court held that he could be permitted only to cross-examine the witnesses on the other side, without letting in any evidence on his side and that he was not entitled to file a written statement at that stage.

Held, that applying the principle in 49 M.L.J. 273, so far as future proceedings are concerned, no distinction can be drawn between the liberty to cross-examine the plaintiff's witnesses and the liberty to adduce evidence. The defendant should not be deprived of an opportunity to file a written statement, the case having not made much progress.

I.L.R. 51 Mad. 597 and A.I.R. 1931 Nag. 122, referred to.

L. V. Krishnaswami Aiyar for Appellant.

P. J. Kuppanna Rao for Respondent.

G. S. V.

King, J. C.M.A. No. 416 of 1936.
24th October, 1938.

Civil Procedure Code (V of 1908), S. 149 and O. 33, r. 15—Relative scope—Application to sue in forma pauperis*—Dismissal of—Grant of time to pay court-fee—Plaintiffs directed to pay the defendant's costs—Petition registered as plaint on payment of court-fee—Costs paid subsequently—Maintainability of suit.*

The plaintiffs applied for permission to sue the defendant *in forma pauperis* on 30th July, 1930. That permission was refused on 21st August, 1931, by an order which also directed the plaintiffs to pay the defendant's costs. The plaintiffs asked for time to pay court-fee. The matter was adjourned to 30th September, 1931. On that day the court-fee was paid and the petition was registered as a plaint. The defendant raised a ground of defence, namely, that as the plaintiffs had not paid his costs, they were debarred by the provisions of O. 33, r. 15 of the Civil Procedure Code from maintaining the suit. On 30th August, 1933, the plaintiffs paid the costs into Court.

Held, that S. 149, Civil Procedure Code, does not apply to the case. When court-fee was paid by the plaintiffs on 30th September, 1931, the suit was not properly instituted under O. 33, r. 15.

A.I.R. 1936 All. 584 (F.B.) and A.I.R. 1937 Rang. 185, followed.

16 C.W.N. 641, 46 M.L.J. 254 and A.I.R. 1937 All. 781, referred to.

As the costs were in fact paid, the suit must be treated as one validly instituted on the day on which the costs ware paid, namely, 30th August, 1933.

69 M.L.J. 791, followed.

K. R. Rangaswami Aiyangar for Appellant.

K. Venkateswaran for Respondent.

G. S. V.

[F.B.]

The Chief Justice, Madhavan Nair and Varadachariar, JJ. O.P. No. 118 of 1937.
26th October, 1938.

Income-tax Act (XI of 1922), S. 4, cl. (2)—Assessee carrying number of businesses—Loss in some and profit in others—All income to be looked at for deciding if assessee has earned profit taxable.

Where an assessee carries on two money-lending businesses outside British India in close proximity both being his sole businesses having current transactions and controlled by him and where one of the two businesses has suffered loss and the other has

profits and the assessee has received remittances from both, in determining whether the remittances so received are his income, profits and gains under S. 4 (2) of the Income-tax Act, the results of both the businesses should be considered together and the assessee is entitled to set off his loss in one business against the profits of the other business to arrive at the resultant profit available for remittance to be taxed.

R. Kesava Aiyangar for Petitioner.

M. Patanjali Sastri for the Commissioner of Income-tax.

S.V.V.

Lakshmana Rao, J. Crl. R. C. No. 490 of 1938.

26th October, 1938.

Motor Vehicles Act (VIII of 1914), S. 16 and r. 30 (a) (1)—Conviction under—Conditions.

For the conviction of a person under r. 30 (*a*) (1) read with S. 16 of the Motor Vehicles Act, it is not necessary that he should be the registered owner of the motor vehicles.

G. N. Chari for Petitioner.

The Public Prosecutor on behalf of the Crown.

G.S.V.

Venkataramana Rao, J. S. A. No. 1192 of 1934.

26th October, 1938.

Civil Procedure Code (V of 1908), O. 1, r. 8—Grant of permission under—Subsequent revocation of it—Proper procedure —Issue as regards the representative capacity—If can be raised— Community consisting of five families—Procedure under O. 1, r. 8 if can be adopted.

Once permission is given for the plaintiff to sue in a representative capacity under O. 1, r. 8, Civil Procedure Code, it is not competent to the Court to put his representative capacity in issue in the suit. If it is intended to revoke the permission, it must be done by an order on an independent application before the suit has proceeded to trial.

In a case where the suit was allowed to proceed to the stage of trial and the Court has come to the conclusion that permission ought not to have been granted under O. 1, r. 8, it ought not to dismiss the suit but should accord leave to the plaintiff to amend the plaint by adding the necessary persons as parties to the suit.

Where a community consists only of five families, it cannot be said that the parties are so numerous as to entitle the plaintiff to adopt the procedure prescribed by O. 1, r. 8, Civil Procedure Code.

D. Ramaswami Aiyangar for Appellant.

B. Somayya for Respondent.

G.S.V.

Burn and Stodart, JJ. C. M. A. No. 452 of 1936.
12th October, 1938.

Provident Funds Act (XIX of 1925), Ss. 2 and 4—Declaration nominating a stranger to receive Provident Fund amount—Validity of—Nomination if can be only in favour of dependant.

A depositor made a declaration under the Provident Fund Rules in favour of a lady whom he styled as his wife, nominating her as the person who should be paid the amount at his credit in the event of his death. The Court found that she was not his legally married wife. The son opposed her application to get a succession certificate to draw the amount.

Held, that the son had no right to the Provident Fund amount in preference to the lady. There is no provision in the Act that only a dependant may be lawfully nominated. The rules carried out the provisions of Ss. 3 and 4 of the Provident Funds Act.

1928 M.W.N. 402, distinguished.

I.L.R. 59 Mad. 855, relied on.

E. Venkataramana Rao for Appellant.

M. S. Krishnamurthi Sastri for Respondent.

G.S.V.

Wadsworth, J. S. A. No. 852 of 1934.
17th October, 1938.

Hindu Law—Daughters—Claim of properties as heiresses of their father—Father's brother claiming rights by survivorship—Compromise of conflicting claims—Properties given to daughters to be enjoyed as of right—Nature of estate taken.

A (brother of *B*) claimed properties which were alleged to belong to the joint family, by survivorship and *C* and *D* claimed those properties as daughters of *B* who was alleged to have died as a divided member.

As a result of compromise between them, the claims of *C* and *D* were in part recognised and they were given some properties to be enjoyed by them as of right (the terms used being *hakku* and *bhuktham*).

Held, that the compromise should not be treated as a document conveying a gift from *A*. The daughters got an estate similar to that which they claimed, that is, the limited estate of a female.

43 L.W. 464 (P.C.), distinguished.

T. R. Venkatarama Sastri and *V. Suryanarayana* for Appellant.

V. Govindarajachari and *K. Krishnamurthi* for Respondent.

G.S.V.

Burn and Stodart, JJ. C. M. A. No. 2 of 1938.
19th October, 1938.

Madras Debt Conciliation Act (XI of 1936), Ss. 4 and 25—Application to the Board—Attention of the executing Court drawn to it—Stay of sale not granted—Continuance of sale—Rejection of petition by Board—Confirmation of last bid—Validity of sale.

A Court was holding a sale in the course of executing a decree. Before the sale was due to begin, the judgment-debtor brought to the notice of the Court that he had made an application under S. 4 of the Debt Conciliation Act. The Court refused to stay the sale proceedings without seeing a certified copy of the application to the Debt Conciliation Board. The Court ordered the sale to go on and took bids. After the judgment-debtor's application to the Board was finally rejected by it, the Court took up the execution petition and confirmed the last bid.

Held, that the Court acted without jurisdiction when it allowed the sale to go on. The sale was entirely without jurisdiction and another sale should be held again after fresh proclamation.

V. S. Narasimhachariar and *N. Appu Rao* for Appellant.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

G. S. V.

King, J. C. M. A. No. 134 of 1937.
26th October, 1938.

Civil Procedure Code (V of 1908), O. 41, r. 23—Remand of whole suit with permission to both parties to adduce fresh evidence—Legality—Opportunity had to adduce entire evidence in trial Court—Interference by High Court.

In a suit raising the question of title of the plaintiff to recover Kattubadi and land cess from the defendants the trial Court raised the necessary issues and eventually dismissed the plaintiff's suit. On appeal by the plaintiff the lower appellate Court reversed the decree of the lower Court, framed additional issues, and remanded the whole suit for trial afresh giving permission to both parties to produce all further documentary and oral evidence they desired to produce. The defendants filed the appeal to the High Court against the order of remand.

Held, that all the necessary issues arising from the pleadings having already been framed by the trial Court and the suit having been dismissed for want of evidence on plaintiff's side the order

of remand giving a further opportunity to supply want of evidence on plaintiff's side was not justified.

Kasturi Seshagiri Rao for Appellants.

K. V. Gopalaswami for Respondent.

B.V.V.

Abdur Rahman, J. C. M. S. A. No. 54 of 1936.
27th October, 1938.

Execution—Application for—Prayer not justified—Dismissal of application if proper.

Where a decree-holder inserted a wrong prayer in an application for execution, the Court should not dismiss it *in limine*, but should have ordered him to amend his application and if it thought fit to do so, he can be ordered to pay costs.

P. S. Narayanaswami Aiyar for Appellant.

A. Bhujanga Rao and *E. Venkataramana Rao* for Respondent.

G. S. V.

Krishnaswami Aiyangar, J.
28th October, 1938. C. R. P. No. 42 of 1938.

Civil Procedure Code (V of 1908), S. 73—Construction—'Subject-matter of suit'—Compromise decree not registered—Charge given under—Decree-holder if entitled to priority in respect of proceeds of charged property.

The subject-matter of the suit in S. 73 of the Civil Procedure Code is determined by the extent of the claim made in the plaint and is not affected by what the defendant may plead in his written statement. A decree-holder who has got a charge over certain properties as a result of a compromise decree which is not registered can have no preferential claim in respect of the proceeds of that property in a case of rateable distribution.

K. Rajah Aiyar for Petitioner.

K. V. Ramachandra Aiyar for Respondent.

G.S.V.

King, J. C. M.A. No. 166 of 1937.
28th October, 1938.

Madras Co-operative Societies Act (VI of 1932), S. 51, sub-Ss. (5) and (6)—Mortgage by a member to society giving a survey number—Award by arbitrator—Subsequen attachment of another survey number in execution of a money decree against the member in a Civil Court—Letter by the President of the Co-operative Society to the Deputy Registrar that the latter is the correct number of the mortgaged property, for

amending the award by giving this number—Amendment by the Deputy Registrar after notice to the member but without notice to the execution creditor—Execution creditor buying the attached property in execution—Society buying the same property subsequently and obtaining possession—Amendment by the Deputy Registrar if can be questioned in the Civil Court under S. 51 (6) of the Act—Right of execution purchaser to redeem the property.

A Co-operative Society took a mortgage of a property described by a survey number from one of its members and obtained an award directing the sale of the same from an arbitrator. Then a simple creditor of the member obtained a money decree against him in the Civil Court and attached another survey number in execution. Then the President of the Co-operative Society wrote to the Deputy Registrar saying that the correct survey number of the mortgaged property was the latter and asking him to amend the award by inserting that survey number in the award. The Deputy Registrar amended the award after notice to the member but without notice to the attaching decree-holder. The attaching decree-holder purchased the property in execution and subsequently the Society bought the same in execution of the award and got possession of it. In a suit for possession by the money decree-holder purchaser against the society,

Held, that the order of amendment by the Deputy Registrar was one passed by him under the powers of revision vested in him under S. 51 (5) of the Madras Co-operative Societies Act and the same was not liable to be questioned in the Civil Court by reason of S. 51 (6) of the Act.

Held also, that the money decree-holder purchaser was entitled to redeem the property from the Co-operative Society.

M. Krishna Bharathi and *M. Chockalingam* for Appellant.

C. A. Seshagiri Sastri for Respondent.

G.S.V.

Venkataramana Rao, J. S. A. No. 616 of 1937.
17th October, 1938.

Hindu Law—Joint family—Use of family moneys by a member—Acquisition of property by him—Rights of the joint family in regard to such property—Relationship between parties—Malabar law—Tavazhi—Blending of income.

When members of a family allow a manager or an individual member to acquire property separately with full knowledge that he has joint family moneys in his hands, profits or property acquired therefrom for himself cannot be claimed as joint family property, though the member may be accountable to the family for the moneys so utilised. Such moneys would in fact be advances or loan made by the members of the family to the individual member or the manager.

A mixture of private income with *tavazhi* income would not effect a blending so long as accounts are kept.

P. Govinda Menon for Appellant.

Srinivasaraghavan and *Thiagarajan* for Respondent.

G. S. V.

Wadsworth, J. S. A. No. 968 of 1934.
24th October, 1938.

Hindu Law—Joint family—Suit for maintenance by minor coparcener and daughter against manager—Maintainability during their father's lifetime.

A minor coparcener, who has been denied maintenance and wishes to claim maintenance should, during his father's lifetime, bring his suit in the alternative of claiming partition or maintenance as the Court thinks fit, unless his guardian decides to adopt the usual form of a suit claiming partition.

The daughter of a coparcener cannot, during his lifetime, bring a suit for maintenance directly against the manager of the joint family. When she has been denied maintenance the proper course for her is to bring a suit against her father claiming maintenance out of his properties joint and separate. After she has got her decree, she may, if necessary, enforce it by the sale of her father's share in the joint family properties.

I.L.R. 47 Mad. 778 at 784 (P.C.), I.L.R. 8 Lah. 360 and A.I.R. 1936 Lah. 853, referred to.

K. P. Ramakrishna Aiyar for Appellant.

K. Subramanyam for Respondent.

G. S. V.

King and Lakshmana Rao, JJ. R. T. No. 96 of 1938.
31st October, 1938.

Evidence Act (I of 1872), S. 114, Ill. (b)—Evidence adduced by a witness—Corroboration if required—No attempt made by the witness to prevent the crime—Witness if to be regarded as an accomplice.

Where a prosecution witness who was in the company of the deceased when he was murdered, made no attempt to prevent the commission of the crime, and was described as a 'passive accomplice' but she did not share with the murderer an intention that the deceased should be killed and was liable to be suspected just as much as the accused was,

Held, that this was insufficient to render the witness an accomplice and her evidence did not require corroboration under the provisions of the Evidence Act.

S. Balaparameswari Rao for *R. Venkata Rao* for Accused.

The Public Prosecutor on behalf of the Crown.

G.S.V.

Wadsworth, J. S. A. No. 1147 of 1934.
1st November, 1938.

Practice—Non-joinder—Civil Procedure Code, O. 21, r. 63—Suit by a defeated claimant against the decree-holder and auction-purchaser—Plaintiff's suit decreed in the first court—Appeal by the auction-purchaser making only the claimant-plaintiff respondent and without impleading the decree-holder—Whether relief can be granted to the appellant.

Where a suit filed by the defeated claimant against the decree-holder and the execution-purchaser was decided in favour of the claimant and the execution-purchaser appealed against the decision making only the claimant-plaintiff respondent without impleading the decree-holder, the appeal is not incompetent by the non-joinder of the decree-holder and relief can be granted to the execution purchaser against the plaintiff in the appeal.

I.L.R. 6 Rang. 29 (P.C.), distinguished.

K. S. Desikan for Appellant.

C. A. Seshagiri Sastri for Respondent.

G. S. V.

[F.B.]

The Chief Justice, Madhavan Nair and Varadachariar, JJ. O. P. No. 176 of 1937.
1st November, 1938.

Income-tax Act (XI of 1922)—Firm—Taking over immovable property for debts due—If can be taken into account in computing profits.

Where a firm was compelled to take over in satisfaction of debts due to it immovable properties which had been mortgaged as security for debts, the Income-tax Officer in computing the profits available for assessment can take that into consideration. The assessee cannot be allowed to withdraw money from the firm and treat their interest in the immovable properties of the firm as representing their profits. The withdrawals from the firm must therefore be treated as withdrawals of profits. The effect was to turn the immovable properties representing such profits into capital assets.

4 T. C. 591, followed.

Assessee is an undivided Hindu family. The assessees are partners in various money-lending firms in F. M. S. and in Burma and carry on the same business at Karaikudi (headquarters). One of their foreign firms does business at Ipoh. Owing to depression there, the firm took over in satisfaction of debts due to it immovable properties which had been mortgaged as security for debts. The values of these properties were treated as representing in part the return of capital and in part profits. The assessees remitted from Ipoh to Rangoon (then British India) 99,000 odd. These remittances the Income-tax Officer treated as remittances of profits.

P. R. Srinivasan for Petitioners.

M. Patanjali Sastri for Respondent.

S. V. V.

[F.B.]

The Chief Justice, Madhavan Nair and Varadachariar, JJ.

O.F. No. 105 of 1938.

1st November, 1938.

Income-tax Act (XI of 1922), Ss. 3 and 4—Saw mill of assessee in Burma—Loss therefrom in 1936-37—If loss to be deemed to be sustained in British India—Burma part of British India when mill was worked.

An assessee, resident of Pallathur, owns a saw mill in Burma. In the account year April 1936-37, the mill resulted in a loss and her income consisted solely of interest received from investments. For purpose of assessment to income-tax she sought to set off the loss sustained in the saw mill against the profits from her investments. Burma ceased to be part of British India on 1st April, 1937 and the loss having been sustained outside British India, the Commissioner of Income-tax held it could not be set off.

Held, that when the assessee worked the mill, Burma was part of British India, S. 3 and S. 4 are to be read together and so

reading the loss must be deemed to have been sustained in British India.

M. Subbaroya Aiyar for Petitioner.

M. Patanjali Sastri for Respondent.

S.V.V.

Burn and Stodart, JJ. C. M. A. Nos. 458 and 459 of 1937.
2nd November, 1938.

Limitation Act (IX of 1908), Art. 182, cl. (5)—Application to Court which passed the decree for transmission to Court not in existence at the time—Whether in accordance with law and constitutes a step-in-aid of execution—Civil Procedure Code (V of 1908), S. 39.

The plaintiff obtained compromise decrees in two suits in the first class Sub-Judge's Court, Dharwar, whereby the defendants were directed to pay the decree amounts in instalments. Within three years from the last date of payment of the instalment, that is, in April, 1933, the decree-holder applied to the Dharwar Court (the Court which passed the decree) for transmission of the decree to the Sub-Judge's Court at Bellary on the ground that the immovable properties charged for payment of the decree amounts were situated within the jurisdiction of the Bellary Sub-Court. The decrees were for over 5,000 Rupees. There was no Sub-Court then in existence at Bellary. The Dharwar Court wrote to the District Judge, Bellary, to treat the application for transmission filed in that Court as an application praying for transfer to the District Judge's Court, Bellary. The execution petitions filed in the District Court, Bellary, were abandoned subsequently. In 1936 fresh execution petitions were filed in the District Court, Bellary and the previous applications filed in April, 1933, in Dharwar Sub-Court were relied on for saving limitation.

Held, that as the previous applications for transfer to a Court non-existing was made under a *bona fide* belief that that Court existed the error in the description of the Court could be corrected; and that if the Sub-Court had as a matter of fact existed the transfer prayed for was to a Court which would have jurisdiction to execute the decrees.

Held, further, that the applications for execution were made in accordance with law, and they constituted steps-in-aid of execution within the meaning of Art. 182, cl. (5) of the Limitation Act.

I.L.R. 11 Pat. 607, I.L.R. 1 Pat. 651, I.L.R. 39 Mad. 640 (P.C.) and I.L.R. 40 Mad. 1016, distinguished.

B. Somayya and *Kasturi Seshagiri Rao* for Appellants.

V. S. Narasimhachar for Respondent.

B. V. V.

Wadsworth, J. S. A. No. 875 of 1934.
24th October, 1938.

Transfer of Property Act (IV of 1882), S. 3—Attestation—Validity of—Attestors watching executant sign—Presumption—Evidence Act, S. 114.

Where it was proved that a mortgage was executed in the presence of the attestors and they signed as such having seen the executant sign and they were present together,

Held, that the presumption laid down in S. 114, Evidence Act, could be applied and the inference could be drawn that the signatures of the attestors were affixed in the presence of the executant, when there was no indication to the contrary.

10 C.L.J. 499, 39 M.L.J. 463 and A.I.R. 1930 Nag. 273, relied on.

K. Parasurama Aiyar for Appellant.

R. Sethurama Sastri for Respondent.

G. S. V.

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Pandrang Row, J. C. R. P. No. 1108 of 1936.
4th November, 1938.

Civil Procedure Code (V of 1908), S. 52—Pronote executed by father—Suit against son after father's death—Small Cause Court specifying the properties liable in respect of decree amount—Legality of direction—Proper decree to be passed.

A small cause suit was brought against a son to recover the amount due on a promissory note executed by his deceased father. The Court, while passing a decree, decided which immovable property was liable in respect of the decree amount.

Held, that the decree is not sustainable. The Court ought to pass a decree that the amount should be paid out of the properties of the deceased in the hands of his son, leaving it in the course of execution to be determined which are the properties that can be proceeded against to realise the decree amount.

T. P. Gopalakrishna Aiyar for Petitioner.

M. Krishna Bharathi for Respondent.

G. S. V.

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Pandrang Row, J. C.R.P. No. 355 of 1938.
4th November, 1938.

Civil Procedure Code (V of 1908), O. 33, r. 10—First charge given to Crown—Charge also given to a defendant—Decree directing delivery of properties to another defendant—Application for delivery—Right of Government to oppose—Determination of competing claims.

The decree passed in a pauper suit directed that certain properties should be handed over to *A* (the first defendant) and a charge was created in favour of *B* (the second defendant) for a certain sum. The decree also gave the Government a first charge in the properties involved in the suit for the court-fees payable on the plaint. *A* applied for delivery of the properties and the Government opposed the application.

Held, that the Government had really no *locus standi* to oppose the application of *A* but its remedy was to enforce in execution the order regarding costs and then bring to sale any of the suit properties. The competing claims of *B* and of the Crown as to whose charge was superior ought to have been determined at that stage.

The Government Pleader (B. Sitarama Rao) for Petitioner.

S. Panchapakesa Sastri and *V. Ramaswami Aiyar* for Respondent.

G.S.V.

Krishnaswami Aiyangar, J. C.R.P. No. 691 of 1936.

4th November, 1938.

Civil Procedure Code (V of 1908), O. 6, r. 17—Amendment of plaint.

Plaintiffs filed a suit for a sum of money due on dealings by the defendant. The plaintiffs agreed to receive a less sum of money if the defendant would pay the same within a certain time and a promissory note was executed by the defendant for the lesser amount. The defendant having failed to pay the lesser amount within the stipulated period, the plaintiffs filed a suit for the entire sum due on dealings alleging that the pronote was given by the defendant as a collateral security for the agreement. In the plaint this pronote itself was referred by the plaintiffs as having been taken as a collateral security. Objection was taken by the defendant that there was settlement of the accounts by the execution of the pronote and the liability on accounts having been extinguished by the execution of the pronote, no suit lies on accounts. The plaintiffs then sought to amend the plaint by stating that if the Court were to hold there was a settlement of the accounts they may be given a decree on the basis of the pronote. The defendant contended that the amendment introduces a fresh cause of action inconsistent with the original cause of action and hence the amendment cannot be allowed.

Held, it cannot be said that the amendment introduces a fresh cause of action inconsistent with the cause of action pleaded in the original plaint, the pronote itself which is now sought to be made

the foundation of the amendment itself having been already referred to in the original plaint as one executed by the petitioner for the amount which was then due on dealings.

V. S. Narasimhachar for Petitioner.

A. Gopalacharlu for Respondent.

S.V.V.

Krishnaswami Aiyangar, J. C.R.P. No. 690 of 1936.
4th November, 1938.

Civil Procedure Code (V of 1908), O. 14, r. 1—If subsequent issues can be raised after the framing of the issues at the first hearing.

It is open to a Court to raise issues on facts on which the parties are at variance for the purpose of finally and completely adjudicating all matters in difference between the parties and this the Court can do at any stage of the proceedings.

V.S. Narasimhachar for Petitioner.

A. Gopalacharlu for Respondent.

S.V.V.

Abdur Rahman, J. C. M. A. No. 498 of 1936.
4th November, 1938.

Registration Act (XVI of 1908), S. 49—Lessee agreeing to terms of lease—Subsequent execution of muchilika by him—Non-registration of the document—Suit to recover rent—Proof of the prior agreement.

Where a lessee agreed to the terms of a contract and then executed a muchilika which embodied the terms and the contract of lease was not registered, and the lessor filed a suit to recover the rent,

Held, that the lessor was entitled to rely on the agreement which could be proved without the necessity of spelling it out of the lease.

(1938) 2 M.L.J. 362, discussed.

P. Somasundaram for Appellant.

T. Satyanarayana for Respondent.

G.S.V.

The Chief Justice and Madhavan Nair, J. O.S.A. No. 74 of 1937.
7th November, 1938.

Civil Procedure Code (V of 1908), O. 40, rr. 1 and 3—Appointment of receiver by money decree-holder and mortgagee—Rent and profits of the mortgaged properties—Party entitled to preferential right to.

To realise the rents of certain mortgaged properties, a receiver was appointed at the instance of the holder of a money decree in execution proceedings and also appointed to act in a suit instituted by an equitable mortgagee to enforce his mortgage. There was a contest between the two as regards the rent and profits of the mortgaged properties.

Held, that the holder of the money decree in this case was not in the position of a secured creditor and the mortgagee was entitled to the preferential rights in the rents and profits, if it was clear that the mortgaged properties were not sufficient to pay the mortgage debt.

I.L.R. 54 Mad. 565, applied.

(1912) 2 Ch. 497, relied on.

T. K. Subramania Pillai for Appellant.

M. Appalacharya and *K. V. Rangachari* for 1st Respondent.

K. Narasimha Aiyar and *S. Muthiah Mudaliar* for 2nd and 3rd Respondents.

G.S.V.

Varadachariar, J. C. R. P. No. 1189 of 1937.
8th November, 1938.

Civil Procedure Code (V of 1908), O. 21, r. 2—Adjustment not certified—Decree-holder executing the decree—Restriction if applicable.

The restriction imposed by O. 21, r. 2, Civil Procedure Code, applies not only when the judgment-debtor is a petitioner but also when the decree-holder seeks to execute the decree in contravention of the alleged adjustment.

P. B. Singarachari for Petitioner.

S. Rangachari for Respondent.

G. S. V.

Abdur Rahman, J. C. M. A. No. 465 of 1936.
1st November, 1938.

Provincial Insolvency Act (V of 1920), S. 51—Scope—Execution sale after admission of petition—Realisation of assets—Attaching decree-holder, if entitled to retain costs.

Where the assets are realised in the course of the execution by sale after the date of the admission of the petition for insolvency, even an attaching decree-holder is not entitled to retain the costs out of the money realised by him in such execution and derive the benefit of the execution as against the Official Receiver. No distinction can be made between an attaching creditor and other decree-holders, so far as S. 51 of the Provincial Insolvency Act is concerned.

I.L.R. 57 Mad. 330: 65 M.L.J. 402, not followed.

42 M.L.J. 361, referred to.

U. Ramachandran for Appellant.

K. Kuppuswami for Respondent.

G. S. V.

Abdur Rahman, J. C. M. A. No. 102 of 1937.
1st November, 1938.

Provincial Insolvency Act (V of 1920), S. 4—Applicability—Official Receiver applying for refund of sale proceeds of the insolvent's property.

Where the insolvent's property was sold in the execution of a decree and the Court came to a conclusion that the realisation of the sale proceeds was unjustified, and the Official Receiver made an application for refund of the sale proceeds,

Held, that the Court was entitled to order a refund on the application by the Receiver and he need not be directed to file a suit.

I.L.R. 14 Lah. 724, followed.

D. R. Krishna Rao for Appellant.

K. Kuppuswami for Respondent.

G. S. V.

King, J. C. M. S. A. No. 180 of 1938.
3rd November, 1938.

Civil Procedure Code (V of 1908), S. 11—Constructive res judicata—*Execution sale—Property included in sale proclamation though not in execution application or mortgage—Mortgagee purchasing the plot—Mortgagor and his successor if estopped from asserting title.*

A survey number, not included in a mortgage or in the execution application, was included in the sale proclamation without any objection by the mortgagor. The mortgagee became the auction-purchaser of the plot. The mortgagor was not aware of the fact that this survey number had been included in the sale proclamation and he sold it before the date of the execution sale. There was no formal adjudication on the question of inclusion of the plot at the stage of settlement of proclamation.

Held, that the doctrine of constructive *res judicata* did not apply and the mortgagor and his successor were not precluded from asserting that the title of the auction-purchaser was not good.

40 C.W.N. 428, distinguished.

T. V. Ramanatha Aiyar for Appellant.

A. V. Narayanaswami Aiyar for Respondent.

G. S. V.

———

Burn and Stodart, JJ. C. M. A. No. 27 of 1938.
3rd November, 1938.

Madras City Tenants' Protection Act (III of 1922) and Civil Procedure Code (V of 1908), S. 105—Order under S. 7 of the Madras City Tenants' Protection Act—Appeal against—Maintainability of.

The order passed by a City Civil Court Judge under S. 7 of the City Tenants' Protection Act fixing a reasonable rent is not appealable.

N. S. Rangaswami Aiyangar for Appellant.

A. Narasimhachariar for Respondent.

G. S. V.

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Krishnaswami Aiyangar, J. C. R. P. No. 793 of 1938.
4th November, 1938.

Madras Agriculturists Relief Act (IV of 1938), S. 20—Application under—Order appointing a Receiver in suit—If can be stayed.

Where an order appointing a Receiver is made in a suit and not in execution, it cannot be stayed in pursuance of an application under S. 20 of the Madras Agriculturists Relief Act.

M. Krishna Bharathi for Petitioner.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

G. S. V.

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Varadachariar and Abdur Rahman, JJ.
10th November, 1938.

A.S. No. 245 of 1934.

Civil Procedure Code (V of 1908), O. 21, r. 62—Mortgage of 1917—Attachment before judgment of some of mortgaged properties in 1918—Sale to mortgagee a few months later—Sale by attaching decree-holder in execution—Claim petition by mortgagee—Sale held invalid but mortgage recognised—No suit under O. 21, r. 63—Effect of sale to mortgagee—Effect of claim order—Court auction-purchaser if can plead extinguishment of mortgage.

A suit was filed to recover money due on a mortgage for Rs. 3,000 executed in plaintiff's favour by defendants 1 to 3 and their father on 13th March, 1917. In August 1918 a third party who had a money claim against the mortgagors attached some of the mortgaged items before judgment. On 2nd October, 1918, the mortgagors purported to sell the mortgaged items to the plaintiff under Ex. I partly for the mortgage amount and partly for a further consideration of Rs. 441. When the money decree-holder brought the properties to sale in execution, the plaintiff filed a claim petition on 29th September, 1920. He set up his sale and in the alternative his mortgage. The executing Court held that sale being subsequent to attachment was invalid against the attaching decree-holder but directed the sale to be held subject to the mortgage "referred to by the decree-holder." The property was so sold and purchased by decree-holder and later sold first to seventh defendant. As a result plaintiff lost possession of some items and retained possession of the others. So he filed this suit for recovery of the amount on foot of mortgage. The seventh defendant contended that the sale must be deemed to have extinguished the mortgage and that the later events could not revive the plaintiff's claim under the mortgage. The suit was dismissed on this ground following I.L.R. 57 Mad. 195.

Held, that I.L.R. 57 Mad. 195 was distinguishable as here the claim order was one under O. 21, r. 62. The decree-holder did not impeach the order nor the plaintiff. So the sale was gone and the Court only sold the equity of redemption. But in I.L.R. 57 Mad. 195 claim petition was dismissed as late and therefore it was not possible to say that the Court upheld the mortgage there.

I.L.R. 57 Mad. 195, doubted and distinguished.

I.L.R. 8 Cal. 530, followed.

20 A.L.J. 151 : 66 I.C. 203, not followed.

K. Bhimasankaran for Appellant.

P. Somasundaram for Respondent.

S.V.V.

The Chief Justice and Krishnaswami Aiyangar, J.
22nd November, 1938.

C. M. P. Nos. 2992, 450 and 3619 of 1938.

Provincial Insolvency Act, (V of 1920), Ss. 56 and 57—Appellant adjudicated an insolvent—Appointment of stranger to conduct the appeal in his place—Validity of order—Appeal if abates.

Where an appellant was adjudicated an insolvent after the appeal had been instituted, and a third party (other than the Official Receiver) was appointed as a special Receiver for the purpose of conducting the appeal in the place of the insolvent,

Held, that the appointment is within the power of the Court, and the appeal has not abated. S. 56 of the Provincial Insolvency Act does not operate to prohibit the Court appointing an additional Receiver for a special purpose.

N. Vasudeva Rao for Petitioner in C. M. P. Nos. 2992, 450 of 1938 and Respondent in C. M. P. No. 3619 of 1938.

K. Rajah Aiyar for Petitioner in C. M. P. No. 3619 and Respondent in C. M. P. Nos. 2992 and 450 of 1938.

K. V. Gopalaswami for Respondents in all C. M. Ps.

V. Parthasarathi for Respondent in C. M. P. No. 3619 of 1938.

G. S. V.

Lakshmana Rao, J.
1st December, 1938.

Crl. App. No. 421 of 1938.

Madras District Municipalities Act (V of 1920), S. 249—Keeping of cattle—Requirement of licence under notification—Keeping for industrial purpose—If an essential condition.

A licence is necessary for keeping cattle even when they are not kept for an industrial purpose, if it is required by the notification issued under S. 249 of the District Municipalities Act. The heading 'Industries and Factories' can in no way control the plain meaning of S. 249.

S. Rammohan Rao (amicus curiæ).

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

G. S. V.

[End of Vol. II.]

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NOTES OF INDIAN CASES.

NIRODE KALI RAY CHAUDHURI *v.* HARENDRA NATH RAY CHAUDHURI, I.L.R. (1938) 1 Cal. 280.

The questions in this case were whether an application under S. 47 of the Civil Procedure Code would lie in the case of an exonerated or a *pro forma* defendant seeking to set aside an execution sale of his property if his property had been sold as the property of the judgment-debtor and if it applied what would be the period of limitation applicable for such an application.

In this case, when the *pro forma* defendant's properties were attached as the properties of the judgment-debtor, the former put in a claim petition which was dismissed as unnecessarily delayed. It must be observed that when a party to the suit puts in a claim petition, it really falls under S. 47 of the Civil Procedure Code and not under O. 21, r. 58 of the Code. (*Sundaram Aiyangar* v. *Ramaswamy Aiyangar*[1].) Consequently no suit under O. 21, r. 63 is possible to set aside the order. The question therefore arose whether the suit which purported to be under O. 21, r. 63 after the execution sale and which prayed for a declaration that the property belonged to the plaintiffs and was therefore not liable to be sold in execution could be treated as an application under S. 47. Being a matter between the parties to the first suit and relating to the execution of the same, the suit could be treated as an application under S. 47 provided it was within the period of limitation for such an application. The suit was more than one month after the execution sale but within three years and it had therefore to be decided whether the article of the Limitation Act applicable in the case of such an application was Art. 166 or 181. The learned Judges have held that the proper article was Art. 181 and the suit could therefore properly be converted into an application under S. 47 of the Code. It is well settled that when an execution sale is without jurisdiction or

1. (1918) 35 M.L.J. 177 : I.L.R. 41 Mad. 955.

void, as distinct from being voidable, an application to set aside the sale is governed by Art. 181 and that Art. 166 has no application to the case. (See *Rajagopala Aiyar* v. *Ramanujachariar*[1], *Manmatha Nath Ghose* v. *Lachmi Debi*[2], *Ramanand Ganpat Rai* v. *Rakhal Mandal*[3] and *Ha We Gyan* v. *Maung Than Byu*[4].) If so, the question arises whether the sale of an exonerated defendant's property or of a *pro forma* defendant is void and the learned Judges have held that it is void and that consequently Art. 181 applies. This view of the learned Judges is supported by the decision of the Madras High Court in *Chengalraya Reddi* v. *Kollapuri Reddi*[5] where a similar view has been taken. In the latter case, the learned Judge held that time under Art. 181 would run from the date when the applicant was dispossessed from the property and not from the date of the execution sale itself.

It must however be noticed that when a third person's property has been sold as the property of the judgment-debtor, the execution sale has been held to be voidable and not void so far as the decree-holder is concerned and an application to set aside the sale has been held to be governed by Art. 166 of the Limitation Act and not Art. 181. (See *Muthukumarasamia Pillai* v. *Muthuswamy Thevan*[6], *Mundlapati Jagannadha Rao* v. *Rachapudi Basavayya*[7] and *Sripat Singh* v. *Naresh Chandra Bose*[8].) A distinction has however been made with regard to the effect of the sale on the third person whose property has been purported to be sold. So far as he is concerned the sale has been held to be a nullity (see *Sripat Singh* v. *Naresh Chandra Bose*[8]) with the result that an application by him to set aside the sale would be governed by Art. 181. Even on this distinction drawn by these decisions an application by a *pro forma* defendant or an exonerated defendant to set aside the execution sale of his property would be governed by Art. 181, as the sale so far as he is concerned would be a nullity. Consequently the decision of the learned Judges in this case and *Chengalroya Reddi* v. *Kollapuri Reddi*[5] would not be contrary to the decisions above referred to.

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1. (1923) 46 M.L.J. 104: I.L.R. 47 Mad. 288 (F.B.).
2. (1927) I.L.R. 55 Cal. 96.
3. A.I.R. 1936 Pat. 496.
4. A.I.R. 1937 Rang. 126.
5. A.I.R. 1930 Mad. 12.
6. (1926) 52 M.L.J. 148: I.L.R. 50 Mad. 639.
7. (1927) 53 M.L.J. 255.
8. (1936) I.L.R. 15 Pat. 308: A.I.R. 1936 Pat. 97 (F.B.).

BHAGABAN DAS SHAH *v.* FIRST LAND ACQUISITION COLLECTOR OF CALCUTTA, I.L.R. (1938) 1 Cal. 400.

In this case, the Calcutta High Court has departed from the view which previously prevailed in that Court and held that a Collector's order refusing to refer a matter to the Court under S. 18 of the Land Acquisition Act is not subject to be revised by the High Court.

The revisional jurisdiction of the High Court was invoked under S. 115 of the Civil Procedure Code or under S. 107 of the Government of India Act of 1915; but since the coming into force of the Government of India Act of 1935, the High Court can no longer call in aid any provision of law other than S. 115 of the Civil Procedure Code by reason of S. 224 of the former enactment.

Thus the question resolves into whether the Collector refusing to refer a matter under S. 18 of the Land Acquisition Act is a Court within the meaning of S. 115 of the Civil Procedure Code and whether if so, he is a Court Subordinate to the High Court. Both these questions were answered in the affirmative by the Calcutta High Court in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[1] which was followed in *Krishna Das Roy* v. *The Land Acquisition Collector of Pabna*[2] and *Leah Elies Joseph Solomon* v. *H. C. Stork*[3]. The decision in *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[1] and the reasoning underlying the same to the effect that a Collector was a judicial officer and a Court when acting under part III of the Land Acquisition Act as distinguished from part II of the Act was disapproved by the Bombay High Court in *Balakrishna Daji Gupte* v. *The Collector, Bombay Suburban*[4]. The Madras High Court originally held in *T.K. Parameswara Aiyar* v. *The Land Acquisition Collector, Palghat*[5] dissenting from an earlier decision in *Best & Co.* v. *The Deputy Collector of Madras*[6] that an order of the Collector was that of a Court and subject to the revisional powers of the High Court following *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[1]. But the decision of the Madras High Court in *T.K. Parameswara Aiyar* v. *The Land Acquisition Collector,*

1. (1905) 12 C.W.N. 241.
2. (1911) 16 C.W.N. 327.
3. (1934) I.L.R. 61 Cal. 1041.
4. (1923) I.L.R. 47 Bom. 699.
5. (1918) 36 M.L.J. 95 : I.L.R. 42 Mad. 231.
6. (1916) 20 M.L.T. 388.

Palghat[1] was overruled by the Full Bench of that Court in *Abdul Sattar Sahib* v. *The Special Deputy Collector, Vizagapatam Harbour Acquisition*[2]. The Allahabad High Court in Full Bench has also taken the view in *Bhajani Lal* v. *Secretary of State for India*[3] that such an order of the Collector is not open to revision by the High Court. A similar view has been taken by the Lahore High Court in *Mushtaq Ali* v. *Secretary of State and another*[4] and by the Rangoon High Court recently in *M.H. Mayet* v. *The Land Acquisition Collector, Myingyan*[5]. On the other hand, the Patna High Court in *Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran*[6] and the Lucknow Chief Court in *Saiyid Ahmad Ali Khan Alawi* v. *Secretary of State for India*[7] have followed *The Administrator-General of Bengal* v. *The Land Acquisition Collector*[8] and held that the order of the Collector refusing to make a reference is revisable by the High Court. In this state of authority, the Calcutta High Court in the case under notice has gone back on the older view prevailing in that Court and come into line with the High Courts of Bombay, Madras, Allahabad, Lahore and Rangoon. As the matter primarily depends on the meaning of the word 'Court', it may not be inappropriate to quote the words of Lord Sankey, Lord Chancellor in delivering the judgment of the Privy Council in *Shell Company of Australia* v. *Federal Commissioner of Taxation*[9] where his Lordship at page 297 laid down certain negative propositions on the point:—

"1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision. 2. Nor because it hears witnesses on oath. 3. Nor because two or more contending parties appear before it between whom it has to decide. 4. Nor because it gives decisions which affect the rights of subjects. 5. Nor because there is an appeal to a Court. 6. Nor because it is a body to which a matter is referred by another body."

In this connection, it must be noticed that the Madras High Court has held that the Collector under such circumstances is acting judicially though not as a Court while the High Courts of Bombay, Allahabad and Rangoon and the case of the Calcutta High Court under notice have held that he is only exercising administrative or executive functions in passing such an order. The difference is material because if it is a judicial order, the order may be brought up and quashed by the High Court under a *writ of certiorari* in a proper case, while if it is only an administrative order such a writ will not lie and even mandamus will not be available outside the Presidency Towns.

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1. (1918) 36 M.L.J. 95: I.L.R. 42 Mad. 231.
2. (1923) 46 M.L.J. 209: I.L.R. 47 Mad. 357 (F.B.).
3. (1932) I.L.R. 54 All. 1085 (F.B.).
4. A.I.R. 1930 Lah. 242.
5. (1934) I.L.R. 12 Rang. 275.
6. (1917) 2 P.L.J. 204.
7. (1931) I.L.R. 7 Luck. 578.
8. (1905) 12 C.W.N. 241.
9. (1931) A.C. 275.

COMMISSIONER OF INCOME-TAX, MADRAS *v.* FLETCHER, (1938) 1 M.L.J. 502: L.R. 64 I.A. 323: I.L.R. 1938 Mad. 1 (P.C.).

This judgment of the Board is important in that it once again emphasises that before a tax can be properly levied under the Indian Income-tax Act, it must first of all be established that what is being sought to be taxed is 'income' and not 'a capital receipt'. It is only thereafter that the assessee has to establish any specific exemption under the provisions of the Act. The gratuity and bonus given from the Officer's Retiring Fund to the employee on his retirement was in this case accordingly held to be exempt from tax on the ground that it was not 'income'. The judgment sets out several considerations as to the nature and constitution of the Fund and the rules governing it which make it clear that the allotments made to the employee from and out of the fund were not in the nature of deferred salary for current services taxable as such.

It is noteworthy that their Lordships do not agree with the contention that the payment may be regarded as a commutation of pension under the exemption clause but rest their judgment solely and entirely on the broader ground that what was sought to be taxed was only a capital receipt. It is the view not only of Cornish, J., in the High Court judgment but Pandrang Row, J., also has taken the same view (*see* the last paragraph of the judgment in *The Commissioner of Income-tax, Madras* v. *Fletcher*[1]) though the other portion of the reasoning of the learned Judge has not been accepted.

The definition of salaries under the Indian Act which was relied on by the Income-tax department has no force or application to the facts of the case. This judgment must therefore be taken to have overruled the prior decision of the Madras High Court in similar circumstances, reported in *Balaji Row* v. *The Commissioner of Income-tax*[2]. The rules and regulations of the gratuity fund in the latter case were if anything more favourable for the view that what was being allotted was not 'salary' at all.

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1. (1935) 69 M.L.J. 611: I.L.R. 59 Mad. 216 (F.B.).
2. (1934) 8 I. T. C. 80.

GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY, (1937) 1 M.L.J. 640: I.L.R. 1938 Mad. 63.

An order of a liquidator of a Co-operative Society under S. 45 (2) (*b*) of Act II of 1912 determining the amount of contribution passed against a past member was challenged by him in a civil suit on the ground that it was null and void as contravening S. 23 of the Act. This judgment decides that the court-fee payable is under Art. 17-A of the Madras Amendment and not under S. 7 (iv-A). The order though executable in the same manner as a decree is not by itself a "*decree* for the payment of money". So it was held that S. 7 (iv-A) could not apply. It is not however clear how the case came to be dealt with only under Act II of 1912. In Madras, Madras Act VI of 1932 had come into force in 1932 and the order in question was passed only in 1933. Under the new Act the governing section will be S. 47 (3) (*b*). The manner of execution of any order on a contributory is now by a requisition made by the Registrar to the Collector who will collect it in the same manner as arrears of land revenue. *See* S. 47 (3). There can be no doubt therefore that S. 7 (iv-A) can have no application at all.

Possibly in this particular case the liquidator had purported to pass the order under S. 42 of the Imperial Act as the winding up proceedings might originally have started before the new local Act came into force.

BHAGAT RAJ *v.* GARAI DULAIYA, I.L.R. (1938) All. 89.

Under Art. 23 of the Limitation Act (IX of 1908) the starting point in a suit for damages for malicious prosecution is "when the plaintiff is acquitted or the prosecution is otherwise terminated". In this judgment the Court holds that the date of the order of acquittal in proceedings started under S. 107 of the Criminal Procedure Code, which were however sought to be set aside by the prosecutor by a revision petition in a higher Court was not the starting point but it was only the date of the order dismissing the revision petition when the prosecution effectively terminated from which limitation commenced to run. A distinction is suggested as to the nature of the particular proceedings started in the Criminal Court under S. 107 of the Penal Code and other proceedings. A further distinction is thrown out between cases of orders of acquittal and orders of discharge which are sought to be appealed against or revised. (See *Madan Mohan Singh* v. *Ram Sundar Singh*[1].) Recently the Madras High Court, *Kulasekara Chetty* v. *Tholasingam Chetty*[2], has considered the matter elaborately and in a Full Bench judgment they have held that in all cases irrespective of the distinction suggested, the starting point is only when the prosecution can be said to be finally terminated and that is the date when the revision petition is thrown out by the superior Court. The earlier ruling to the contrary has been overruled.

RAM SARAN DAS *v.* BANWARI LAL, I.L.R. (1938) All. 148.

This decision holds that the Court cannot pass a personal decree under O. 34, r. 6, where there has been no actual sale of the hypotheca under O. 34, r. 5, even in a case where the mortgage had been found to be wholly void in a suit against the mortgagee, instituted by a son of the mortgagor. This view, we think, requires reconsideration. It was observed by the Madras High Court in *Periyasami Kone* v. *Muthia Chettiar*[3] that:

> If the mortgaged properties directed to be sold do not belong to the mortgagor, the mortgagee need not be compelled to resort to the farce of bringing them to sale and to undergo the useless delay involved in bringing

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1. (1930) I.L.R. 52 All. 553. 2. (1938) 1 M.L.J. 344.
3. (1913) I.L.R. 38 Mad. 677.

them to sale, because it is an elementary principle of law that the Court will not do a vain thing nor will it compel a man to do a fruitless thing."

The case where the mortgage security itself is found to be void and the mortgage decree-holder is restrained by injunction from selling the hypotheca under the mortgage decree obtained by him, would stand on a similar footing as a case of a total want of saleable interest of the mortgagor in the hypotheca. The other High Courts have taken a different view from the one under notice. (*See* for instance *Adhar Chandra* v. *Swarnamoyi Dasi*[1].) The observations of the Judicial Committee in *Mt. Jeuna Bahu* v. *Rai Parmeshvar Narayan Mahtha Rai Bahadur*[2] would seem to indicate that the language of O. 34, r. 5 should not be strained and that a liberal construction should be favoured. Attention may also be drawn to the observations of Rankin, C.J., as to the scope and effect of O. 34, r. 6 in *Rai Saheb Sundermull* v. *John Carapiet Galstaun*[3] which are completely adopted by the Judicial Committee as sound and unexceptionable (*Rai Saheb Sundermull* v. *John Carapiet Galstaun*[3]). The learned Judge said that:

" The power of the Court to give personal relief does not depend upon O. 34, r. 6 which is a provision giving direction as to the time and manner and in which the relief is to be given."

In a recent Full Bench case *Palaniappa Chettiar* v. *Narayanan Chettiar*[4], the Madras High Court points out that a mortgagee's suit for sale may comprise two reliefs, one by way of sale of hypotheca and the other for personal relief against the mortgagor and that ordinarily the latter portion of the plaint claim is taken up for adjudication at the stage contemplated by O. 34, r. 6 and in appropriate cases the Court passes a decree on that part of the claim. It may therefore well be held that where a sale could not effectively take place, the Court can still take up for adjudication, the portion of the plaint claim that has not been dealt with so far and which is awaiting disposal and pass a decree personally against the mortgagors (in proper cases) under S. 68 of the Transfer of Property Act, even if O. 34, r. 6 is not strictly applicable. (See *Roshan Din* v. *Thakar Das*[5].)

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1. A.I.R. 1929 Cal. 121.
2 (1918) 36 M.L.J. 215 : 29 C.L.J. 443 : I.L.R. 47 Cal. 370 at 374 (P.C.).
3. (1931) 62 M.L.J. 170 (P.C.).
4. (1935) 69 M.L.J. 765 : I.L.R. 59 Mad. 188 (F.B.).
5. A.I.R. 1935 Lah. 536.

CHHUTTAN LAL *v.* DWARKA PRASAD, I.L.R. (1938) All. 192.

Proceedings by way of revision petition to the High Court are included in the term 'civil proceeding' in S. 14 of the Indian Limitation Act. The revisional jurisdiction is really a part of the appellate jurisdiction. A Full Bench of the Madras High Court has recently held that even for purposes of Art. 182 (2) an application to 'revise' a decree or order of a Subordinate Court is "an appeal" *Chidambara Nadar* v. *Rama Nadar*[1]. There are earlier decisions of the same Court that the time taken for presenting a revision petition can be deducted under S. 14 itself. *See* for instance *Venkatrangayya Appa Row* v. *Murala Sriramulu*[2] and *Siddalingana Gowd* v. *Bhimana Gowd*[3].

SYED SABIR HUSAIN *v.* FARZAND HASAN, (1938) 1 M.L.J. 458: L.R. 65 I.A. 119: I.L.R. 1938 All. 314 (P.C.).

The question in this case was whether the British Indian Courts should enforce or not the rule of Mahomedan Law (Shiah School) to the effect that the father of an infant bridegroom who at the time of the marriage was indigent and had no means to pay, would be personally liable for the payment of the stipulated amount of the dower and that on his death his estate would be liable in the hands of his heirs. The Privy Council hold that the rule in question is a matter 'regarding marriage' within the meaning of the Bengal Civil Courts Act (XII of 1887). The Act for Madras also uses similar language. The specific enumeration of 'dower' in later enactments along with marriage is not an argument to the contrary. Quoting from their earlier judgment in *Hamira Bibi* v. *Zubaida Bibi*[4] their Lordships observe that the passage quoted shows how Mahomedan texts and the principles of the Mahomedan Law have been applied to determine every facet of the law of dower among Mahomedans and that it is impossible to contend successfully that dower is a mere matter of contract governed only by the general law of obligations.

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1. (1937) 1 M.L.J. 453: I.L.R. (1937) Mad. 616 (F.B.).
2. (1912) 17 I.C. 593.
3. (1934) 68 M.L.J. 487.
4. (1916) 31 M.L.J. 799: L.R. 43 I.A. 294: I.L.R. 38 All. 581 (P.C.).

Dower is an essential incident under the Mussalman Law to the status of marriage.

The more important question on which the Board differed from the High Court was whether the rule in question postulating personal liability of the father of the infant bridegroom was a rule of substantive Mahomedan Law or as the High Court held a mere canon of interpretation, or a rule of construction or a rule of evidence. In the latter case the British Indian Courts cannot give effect to the same. The Judicial Committee hold that it is undoubtedly a rule of substantive law and that a doctrine which enlarges the right of the wife or improves her security in respect of dower, cannot be ignored as otherwise it would be mutilating the substantive rights of parties as envisaged by the Mahomedan Law.

This liability of the father of the bridegroom and his estate, is nevertheless not a joint liability along with that of the husband but only an alternative one if at all. The wife could not claim a decree against both. Further their Lordships hold that the liability should be apportioned severally against the heirs (proportionate to their shares of inheritance) in cases where the claim is laid against the estate after the death of the father of the bridegroom.

The judgment is important as re-establishing the right to their respective personal laws of Hindus and Mahomedans which has been a fundamental feature of the judicial system as administered by the British rule.

MAHAMMAD HOSAIN *v.* JAMINI NATH BHATTACHARJYA, I.L.R. (1938) 1 Cal. 607.

The question considered in this case is one which has come up frequently before the Courts after the recent amendment of the Transfer of Property Act, namely, whether S. 53-A of the Transfer of Property Act is retrospective in its operation. The learned judges have held that the section applies even to transactions which took place prior to the 1st April, 1930, if they are sued on later than that date. In other words, they have held that the section is retrospective in its operation.

The correct answer to the question depends on the right construction of S. 63 of the Transfer of Property Amendment Act of 1929. This section provides that in respect of certain specified sections they are not retrospective and that in respect of the other sections they do not apply to proceedings pending on the 1st April, 1930. Broadly speaking the learned Judges have inferred from these two provisions, that as regards these other sections, they are retrospective in their operation and would consequently apply if the suits are brought later than the 1st April, 1930. This construction of S. 63, if correct, should apply to all the other sections of the Transfer of Property Amendment Act which have not been specifically referred to in it, as for example to the amendments introduced in Ss. 52, 92, 100 and 101 of the Transfer of Property Act. So far as these sections are concerned the weight of authority except in the Allahabad High Court is to the effect the amended sections are not retrospective in their operation. See *Lakshman Mahadev* v. *Ramachandra Kisan*[1], *Harlal* v. *Lala Prasad*[2], as regards S. 52. Vide *Srinivasa Naidu* v. *Damodaraswami Naidu*[3], *Lakshmi Amma* v. *Sankara Narayana Menon*[4], *Bank of Chettinad, Ltd.* v. *Maung Aye*[5], *Jagdeo Sahu* v. *Mahabir Prasad*[6] and *Lakmichand* v. *Janardhan*[7], as regards amended S. 92, vide also *Chhaganlal Sakharam* v. *Chunilal Jagmal*[8], as regards the amendment to S. 100. To the contrary effect is the decision of the Full Bench of the Allahabad High Court under Ss. 92 and 101 of the Act in *Tota Ram* v. *Lal Ram*[9].

1. A.I.R. 1932 Bom. 301. 2. A.I.R. 1931 Nag. 138.
3. A.I.R. 1938 Mad. 779.
4. (1935) 70 M.L.J. 1 : I.L.R. 59 Mad. 359 (F.B.).
5. 1938 Rang. L.R. 430 ; A.I.R. 1938 Rang. 306 (F.B.).
6. (1933) I.L.R. 13 Pat. 111.
7. A.I.R. 1932 Nag. 154. 8. A.I.R. 1934 Bom. 189.
9. (1932) I.L.R. 54 All. 897.

The reasoning of the Full Bench decision of the Allahabad High Court has been canvassed and not followed by the Madras High Court in *Lakshmi Amma* v. *Sankara Narayana Menon*[1], referred to above and *Srinivasa Naidu* v. *Damodaraswami Naidu*[2], and the Full Bench of the Rangoon High Court in *Bank of Chettinad, Ltd.* v. *Maung Aye*[3].

Coming to S. 53-A itself with which the decision under notice is concerned, it is not materially distinguishable from the other sections referred to above, though in some decisions a distinction has been sought to be made. See *Bank of Chettinad, Ltd.* v. *Maung Aye*[3]. Even with regard to this section the weight of authority seems to be against its retrospective operation. It is necessary in this connection to draw pointed attention to the decision of the Patna High Court in the latest case of *Jagdamba Prasad Lalla* v. *Anadi Nath Roy*[4], where the point has received the fullest discussion and where the learned judges have differed from the decision under notice. The Madras High Court has always taken the view that the section has no retrospective operation (*Kanji and Moolji Brothers* v. *Shanmugam Pillai*[5], *A. Muthuswami Aiyar* v. *P. B. Loganatha Mudali*[6] and *Kotireddi Kotareddi* v. *Koonam Sivaram Reddi*[7]). The Patna High Court has as shown above come to the same view differing from their prior expression of opinion in *Wakefield* v. *Kumar Rani Sayeeda Khatun*[8]. The Nagpur High Court has taken the same view in *Hari Prashad* v. *Hanumantrao*[9]. To the same effect is the view of the Bombay High Court in *Suleman Haji Ahmed Umar* v. *P. N. Patell*[10], *Cooverjee* v. *V. T. Co-operative Society*[11]. The Lahore and Allahabad High Courts have taken a contrary view in *Benarsi Das* v. *Ali Muhammad*[12] and *Shyam Sundar Lal* v. *Din Shah*[13], without a full consideration of the question and the authorities.

Turning to the rule of interpretation adopted by the learned Judges in the case under notice, we venture to submit that the

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1. (1935) 70 M.L.J. 1 : I.L.R. 53 Mad. 359 (F.B.).
2. A.I.R. 1938 Mad. 779.
3. 1938 Rang.L.R. 430 : A.I.R. 1938 Rang 306 (F.B.).
4. A.I.R. 1938 Pat. 337.
5. (1932) 63 M.L.J. 587 : I.L.R. 56 Mad. 169.
6. A.I.R. 1935 Mad. 404.
7. (1936) 71 M.L.J. 639.
8. (1936) I.L.R. 15 Pat 786 : A.I.R. 1937 Pat. 36.
9. A.I.R. 1937 Nag. 74.
10. A.I.R. 1933 Bom. 381.
11. A.I.R. 1935 Bom. 91.
12. A.I.R. 1936 Lah. 5.
13. A.I.R. 1937 All. 10.

correct rule is that unless by express mention or inevitable implication, we have to come to a conclusion that an enactment is retrospective in its operation, a statute is only prospective. Where as under S. 63 of the Transfer of Property Amendment Act of 1929, the section is silent as to the retrospective operation of the unenumerated sections, the true rule is that they are only prospective and not retrospective. The decision of the House of Lords in *James Gardner* v. *Edward A. Lucas*[1], bears a strong resemblance to the cases under S. 63 and they should be decided accordingly as having no retrospective operation. Reference may also be usefully made in this connection to the observations in *Bourke* v. *Nutt*[2] and In re *Athlumney*: Ex parte *Wilson*[3].

All this conflict would have been avoided if the legislature which was assisted in this piece of legislation by an expert committee of lawyers had used clearer language in S. 63 of the Amendment Act.

BENGAL NAGPUR RAILWAY COMPANY, LTD. *v.* RATANJI RAMJI, L.R. 65 I.A. 66: (1938) I.L.R. 2 Cal. 72: (1938) 1 M.L.J. 640 (P.C.).

There has been a great deal of conflict between the various High Courts in India and some times between different benches of the same High Court on the question whether interest is payable by way of damages for the wrongful detention of money due to the plaintiff, apart from the provisions of the Interest Act. The Madras High Court has generally taken the view that barring the special circumstances in which interest is payable under the rules of equity and the express provisions of the Interest Act, interest is not payable for unlawful detention of money in cases where there is no express or implied contract to that effect or no trade usage exists. (*Kamalammal* v. *Peeru Meera Levvai Rowthen*[4], *Kandappa Mudaliar* v. *S. R. Muthuswami Ayyar*[5], *Raja Ram Doss* v. *Krishna Chandra Deo*[6]). A single Judge of that Court recently took a different view in *Muthuswamy Pillai* v. *Veeraswamy Pillai*[7]. The Patna High Court has after a full discussion of the authorities

1. (1878) 3 A.C. 582.
2. (1894) 1 Q.B. 725 at 741.
3. (1898) 2 Q.B. 547 at 551 & 552.
4. (1897) 7 M.L.J. 263: I.L.R. 20 Mad. 481.
5. (1926) 51 M.L.J. 765: I.L.R. 50 Mad. 94 (F.B.)
6. (1933) 65 M.L.J. 620: I.L.R. 57 Mad. 205.
7. (1935) 70 M.L.J. 433.

taken the same view as the Madras High Court in *J.H. Pattinson* v. *Srimati Bindhya Debi*[1]. The Calcutta High Court has taken a contrary view in its recent decisions in *Bengal Nagpur Railway Company* v. *Ratanji*[2] and *Khetra Mohan Poddar* v. *Nishi Kumar Saha*[3]. The Lahore High Court has taken the view of the Madras and Patna High Courts in *Kirpal Singh* v. *Jiwan Mal*[4], though the proposition is broadly stated in *Piare Mohan* v. *Gopal Lal*[5] and *Gujranwala Municipality* v. *Charanji Lal*[6], that interest is allowable in cases of illegal detention of money. Conflicting views have been expressed on this question in the Allahabad High Court in *Lalman* v. *Chintamani*[7] and *Jwala Prasad* v. *Hoti Lal*[8], on the one hand and *Anrudh Kumar* v. *Lachhmi Chand*[9] and *Abdul Jalil* v. *Mohammad Abdul Salam*[10], on the other. In this state of uncertainty, this decision of their Lordships of the Privy Council has appeared none too soon. Having regard to the importance of the question, it is useful to state briefly the effect of their Lordships' decision. Their Lordships have held that the broad proposition that interest is allowable by way of damages for the wrongful detention of money is not correct. In the absence of an express or implied contract to pay interest or a usage of trade to that effect, interest can be claimed only under the Interest Act. The proviso to the section of the Act refers to cases where a rule of equity is invoked by establishing a state of circumstances which attracts the equitable jurisdiction of the Court as in the case of the non-performance of a contract of which equity can grant specific performance. S. 73 has been held merely to declare the common law rule as to damages for breach of contract and not as giving any right to interest not given by the common law. It is however necessary to observe that the divergence of judicial opinion on this question is largely based on the moral injustice of not allowing interest to a person who has been deprived of the use of his money. This state of things has been remedied in England by the legislature enacting S. 3 of the Law Reform (Miscellaneous Provisions) Act of 1934. It is time that a similar provision is enacted in this country to remedy the injustice.

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1. (1932) I.L.R. 12 Pat. 216
2. (1934) I.L.R. 62 Cal. 175.
3. (1917) 22 C.W.N. 488.
4. (1927) I.L.R. 8 Lah. 524.
5. A.I.R. 1935 Lah. 552.
6. A.I.R. 1935 Lah. 685.
7. (1918) I.L.R. 41 All. 254.
8. (1924) I.L.R. 46 All. 625.
9. (1928) I.L.R. 50 All. 818.
10. A.I.R. 1932 All. 505.

MAHOMED YUSUF *v.* ABDUL MAJID, I.L.R. (1938) 2 Cal. 162.

In this case, Mr. Justice Lort-Williams has expressed doubts on the view that the High Court has the power to revise the decisions of the Presidency Small Causes Courts under S. 115 of the Civil Procedure Code, though he ultimately followed the decision of the Bench of the Calcutta High Court in *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* and *Kalooram Sitaram* v. *Ram Chunder Haribux*[1] to the effect such decisions are revisable under S. 115. In the view of the learned Judge in this case, the High Court has power only to issue the prerogative writs such as *certiorari* or prohibition in respect of the proceedings and decisions of the Presidency Small Causes Courts under S. 223 of the Government of India Act, 1935 which has reproduced the provisions of S. 106 (1) of the Government of India Act of 1915 and S. 9 of the High Courts Act of 1861. We must observe that doubts have been expressed on the question of the applicability of S. 115 to the decisions of the Presidency Small Causes Courts by Beaman, J., in *Ismalji Ibrahimji Nagree* v. *N. C. Macleod*[2].

The answer to the question whether the decisions of the Presidency Small Causes Courts are revisable by the High Court depends on whether the Presidency Small Causes Court is subordinate to the High Court within the meaning of S. 115, Civil Procedure Code. There is no substance in the suggestion that the applicability of S. 115 has been excluded in the case of Presidency Small Causes Courts by reason of S. 8, because the latter section only enacts that the other provisions of the Code do not extend to any suit or proceeding in any Presidency Court of Small Causes and S. 115 does not relate to any suit or proceeding in that Court but in the High Court. There is also authority for this view in *P. Ramaswami Naidu* v. *Venkataramanjulu*[3] which was affirmed in *Venkataramanujulu Naidu* v. *Ramaswami Naidu*[4]. If therefore S. 115 has not been excluded in respect of the decisions of the Presidency Small Causes Courts, it has to be read with S. 3 of the Code which enacts that every Court of Small Causes is subordinate to the High Court; and a Presidency Small Causes Court is undoubtedly a Court of Small Causes though not

1. (1913) I.L.R. 41 Cal. 323.
2. (1906) I.L.R. 31 Bom. 138.
3. (1914) 26 M.L.J. 467.
4. (1915) 29 M.L.J. 353.

constituted under the Provincial Small Causes Court Act. For the same reason as the one stated above with regard to S. 115, the operation of S. 3 has not been excluded by S. 8 of the Civil Procedure Code. From the above, it seems to follow that a decision of the Presidency Small Causes Court is revisable by the High Court. Further, S. 6 of the Presidency Small Causes Court Act provides that a Presidency Small Causes Court is subject to the superintendence of the High Court under the Civil Procedure Code. It is difficult to see how a Court is subject to the superintendence of another without being subordinate to the latter. If full effect is given to the above provisions, it is unnecessary to go into the old enactments constituting the Supreme Courts and the High Courts and the despatch of Sir Charles Wood for holding that the High Court can issue only the prerogative writs to the Presidency Courts of Small Causes. Coming to the Indian authorities on the question of the applicability of S. 115, they are clear and unbroken in all the High Courts. In the Calcutta High Court itself we have *Haladhar Maiti* v. *Choytonna Maiti*[1], *Sarat Chandra Singh* v. *Brojo Lal Mukerji*[2], *Ramadhin Bania* v. *Sewbalak Singh*[3], *Shew Prosad Bungshidhur* v. *Ram Chunder Haribux* and *Kalooram Sitaram* v. *Ram Chandur Haribux*[4] and *Bhudhu Lal* v. *Chattu Gope*[5]. So far as Madras is concerned we have *P. Ramaswami Naidu* v. *Venkataramanjulu Naidu*[6], *Venkataramanujulu Naidu* v. *Ramaswami Naidu*[7], *Nagoor Meeran Sahib* v. *Sookulal Sowcar*[8] and *Rangiah Naidu* v. *Rungiah*[9]. The Bombay High Court has taken the same view in *Ismalji Ibrahimji Nagree* v. *N. C. Macleod*[10] and *S. A. Ralli* v. *Parmanand Jewraj*[11]. In the light of the above, it is doubtful whether even the Privy Council will take a different view on the question.

BAIDYA NATH BASAK *v.* ONKER MULL MANICK LAL, I.L.R. (1938) 2 Cal. 261.

In this case there was a monthly tenancy of a plot of land and it was provided that the lessees would give khas possession to the lessors within seven days. On the assumption that

1. (1903) I.L.R. 30 Cal. 588.
2. (1903) I.L.R. 30 Cal. 986.
3. (1910) I.L.R. 37 Cal. 714.
4. (1913) I.L.R. 41 Cal. 323.
5. (1917) 21 C.W.N. 654.
6. (1914) 26 M.L.J. 467.
7. (1915) 29 M.L.J. 353.
8. (1915) 18 M.L.T. 254.
9. (1908) I.L.R. 31 Mad. 490; 18 M. L. J. 480.
10. (1906) I.L.R. 31 Bom. 138.
11. (1889) I.L.R. 13 Bom. 642.

it provided for a seven days' notice to quit, the question was whether the notice should terminate with the end of a month of the tenancy or not. The learned Judge held the view that the notice should terminate with the end of a month of the tenancy differing from two decisions of the Lahore High Court in *Rure Khan* v. *Ghulam Muhammad*[1] and *Ram Nath* v. *Badri Nath*[2].

It may be observed that the present case was governed by S. 106 of the Transfer of Property Act while the Lahore cases were not decided under the Act, as the Transfer of Property Act was not extended to the Punjab. This circumstance however would not make any difference for the purpose of the decision of the question. If the Transfer of Property Act had no application to the case, the rules of English Common law would apply, as embodying the rules of justice, equity and good conscience. *Waghela Rajsanji* v. *Shekh Masludin*[3]. In this respect, however, the provisions of S. 106 do not in any way differ from the English law. It was held as early as *Doe* v. *Donovan*[4], by Lord Mansfield, C.J., that in the case of a yearly tenancy with a provision for a notice to quit at a quarter's notice, the quarter should expire with the year of the tenancy. This view was followed by the Divisional Court in *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society*[5]. This decision of the Divisional Court has been followed by Panckridge, J., in the present case for holding that the week's notice should expire with the end of the month. This rule of English law or the decisions were apparently not brought to the notice of the learned Judges in the Lahore High Court who held the contrary view in the cases referred to above. If however the provision in the lease deed was to the effect that it was subject to seven days' notice at any time to terminate the lease, under the English law or under the Transfer of Property Act, the seven days' notice need not expire with a month of the tenancy. See *Soames* v. *Nicholson*[6] following *Bridges* v. *Potts*[7]. The reason of the rule is that there should be no ambiguity about the provision for termination of the tenancy, and it would be inconvenient to one or both the parties

1. A.I.R. 1924 Lah. 643. 2. A.I.R. 1928 Lah. 348.
3. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 at 561 (P.C.).
4. (1809) 1 Taunton 555: 127 E. R. 949.
5. (1904) 1 K.B. 444. 6. (1902) 1 K.B. 157.
7. (1864) 17 C.B. 314: 144 E.R. 127 (N. S.).

if the lease is terminated at any time; but if however it is clearly and explicitly stated that it could be terminated at any time as in the last two cases, it would be given effect to. It would therefore seem that the view of the learned Judge in this case is to be preferred to that of the learned Judges in the Lahore cases.

KUNJA BEHARY CHAKRAVARTY *v.* KRISTO DHONE MAJUMDAR, I.L.R. (1938) 2 Cal. 361.

In England, varying tests have been applied as to the nature of the additional evidence which would justify the ordering of a new trial whether in the County Courts or the High Court. In the House of Lords in *Brown* v. *Dean*[1], Lord Loreburn L. C., with whom the other Law Lords except Lord Shaw concurred, laid down that the evidence should be of a conclusive nature. Lord Shaw on the other hand held that it would suffice if the evidence was material and so clearly relevant as to entitle the Court to say that that material and relevant fact should have been before the jury in giving its decision. These differing opinions have been considered in later English Cases and by the Privy Council on appeal from the Supreme Court of Shanghai, *The King* v. *Copestake*[2] and *Hip Foong Hong* v. *H. Neotia & Company*[3] and their general effect seems to approximate to the view of Lord Shaw in the above case. This is also the view of the learned Judges in the case under notice in granting a review in this country. It may however be mentioned that the terms of O. 47, r. 1 of the Civil Procedure Code are specific in this respect and are not in *pari materia* with S. 93 of the County Courts Act or O. 39 of the rules of the Supreme Court for granting a new trial. That is why the Madras High Court in *Srinivasa Iyengar* v. *The Official Assignee of Madras*[4] referring to *Brown* v. *Dean*[5] hold that in matters of granting review in this country on the ground of the discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant's knowledge or could not be produced by him at the time when the decree or order was passed, the decision of the House of Lords is not binding on us.

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1. (1910) A.C. 373.
2. (1927) 1 K.B. 468.
3. (1918) A.C. 888.
4. (1927) 52 M.L.J. 682: I.L.R. 50 Mad. 891.
5. (1910) A.C. 373.