THE
MADRAS LAW JOURNAL.

II] JULY [1938.

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.

———

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.]