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LALA PUNNALAL *v.* KASTURICHAND RAMAJI, (1945) 2 M.L.J. 461.

This case contains the interesting dictum that there is nothing like an exhaustive classification of torts beyond which Courts should not proceed and that new invasion of rights devised by brain of man might give rise to new classes of torts. *Apropos* of this observation reference may be made to certain well known principles both of natural justice and of law. The institutes of Justinian state[1]: *Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.* "The precepts of law are these: to live honestly, to injure no one, and to give every man his due." The principles are no doubt ethical but indicate pithily the categories of duties which a man has to discharge. The second of the precepts is to forbear from inflicting unlawful harm in general. Judicial dicta to a similar effect are also not wanting. Pratt, C.J., afterwards Lord Camden, repelling counsel's objection to a novel cause of action, observed in *Chapman* v. *Pickersgill*[2]: "torts are infinitely various, not limited or confined." About a century and a quarter later, in *Skinner & Co.* v. *Shew & Co.*[3], Bowen, L.J., expressed the sentiment: "At common law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." Later decisions have however made it clear that there is no such general test, see *Mayor of Bradford* v. *Pickles*[4], *Sorrel* v. *Smith*[5]. According to these decisions, it is not sufficient to prove *damnum*, whether wilful or not, to constitute a *prima facie* cause of action; the plaintiff must bring the facts which he alleges within a recognised head of tort. The mere infliction of harm upon a person does not give him either a right of action or a right to call upon the defendant to justify his conduct. The position therefore is that "the categories of tort (not of course the categories of particular torts) are closed," see *Donoghue* v. *Stevenson*[6]. This does not however mean that the law of torts does not or should not develop, within its categories, in accordance with the ever changing needs of society. If the dictum in the case under notice is to be understood literally it will be opposed to the trend of English authority which regards the classification of torts as exhaustive beyond which the Courts cannot go but within which there can be developments.

The particular question which came up for decision in the case was whether such a tort as malicious house search is recognised and damages are awardable. In *Bajo Sahu* v. *Chedi Barhi*[7], where as a result of information given to police about a person's character that person's house was searched by the police, and that person sued those that furnished the information for recovery of damages for having maliciously brought about a house search, Wort, J., observed that an action for malicious

1. Title 1, 3.
2. (1762) 2 Wils. 145.
3. (1893) 1 Ch. 419.
4. (1895) A.C. 587.
5. (1925) A.C. 700.
6. (1932) A.C. 562 at p. 619.
7. A.I.R. 1939 Pat. 89.

house search is *eo nomines* unknown, though an action for searching a house illegally is known to law. The learned Judge did not notice however an earlier ruling of the same High Court in *Jai Pande* v. *Jaldhari Raut*[1], which had proceeded on the basis that there could be an action for procuring maliciously a house search. The only English precedent is *Wyatt* v. *White*[2], which was an action for maliciously procuring the issue of a search warrant, wherein Willes, J., allowed damages for the invasion of the plaintiff's premises. In the case under notice the learned Judge held that it cannot be said that there is no tort known as malicious house search. This is in accordance with the view indicated in Clark and Lindsell's Torts, 9th edition, at p. 666.

BRIJ BHUSHAN SINGH *v.* KING EMPEROR, (1946) 1 M.L.J. 147 (P.C.).

A valuable pronouncement on the probative value of statements recorded under section 164, Criminal Procedure Code is to be found in this decision of the Judicial Committee. Section 164 provides that any magistrate specially empowered in that behalf may record any statement made to him in the course of an investigation or at any time thereafter before the commencement of the trial, that such statement shall be recorded in the prescribed manners and shall then be forwarded to the magistrate by whom the case is to be tried. It has been repeatedly recognised that a statement under section 164 is not inadmissible in evidence and may be used to corroborate or contradict a statement made in Court, see *Nitai Chandra Jana* v. *Emperor*[3], *Emperor* v. *Sekender Ali Shah*[4], *Emperor* v. *Manik Gazi*[5], *Nur Muhammad* v. *Emperor*[6]. It has, however, been in some cases suggested that though the Court has to receive a statement made under section 164 with caution it can act upon it provided it is supported by other evidence, see *Parmanand* v. *Emperor*[7]. This would mean that a statement under section 164 may even be substantive evidence though it may not be entitled to much weight. The ambiguous position of being evidence but not in the full sense would thus result. That such a picture would not be correct is forcibly brought out by the case under review. Mr. Pritt—the appellant's counsel—argued that a statement under section 164 can be used to check, corroborate or destroy evidence but it can never prove the facts stated. He gave the illustration : " If a man goes into the witness box and says ' I carried that girl alive ' and is asked ' did you make a statement under section 164 that you carried her 'corpse ' and he replies ' yes, but it was not true ', then there is no evidence that he carried the corpse". The Privy Council in accepting the contention observed that a statement under section 164 can be used to cross-examine the person who made it and the result may be to show that the evidence of the witness is false but that does not establish that what he stated out of Court under section 164 is true. The position has been reiterated by the Privy Council in *Mamand* v. *King Emperor*[8] where it is pointed out that it is an error not uncommon in criminal courts in India, to treat the statement made under section 164 as substantive evidence of the facts stated and that such a statement can be used only to discredit the evidence of the witness given in court, but not for any other purpose.

RAM RATTAN *v.* PARMANAND, (1946) 1 M.L.J. 295 (P.C.).

Three statutory provisions bear on the admissibility in evidence of documents which are not stamped or registered, namely, section 35 Stamp Act, sections 17 and 49, Registration Act and section 91, Evidence Act. The first of these lays down : " No instrument chargeable with duty shall be admitted in evidence for

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1. A.I.R. 1917 Pat. 48.
2. (1860) 5 H. & N. 371 : 27 L.J. Ex 193.
3. A.I.R. 1937 Cal. 433.
4. A.I.R. 1941 Cal. 406.
5. (1941) 74 C.L.J. 208.
6. I.L.R. (1944) Kar. 86.
7. A.I.R. 1940 Nag. 340.
8. (1946) 1 M.L.J. 211 (P.C.).

any purpose by any person having by law or consent of parties authority to receive evidence or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped". Section 49 of the Registration Act provides that no document required to be registered under section 17 should unless it has been registered affect any immoveable property comprised therein or be received in evidence of any transaction affecting such property. Section 91 of the Evidence Act prescribes that where the terms of a contract, or of a grant or of any other disposition of property have been reduced to the form of a document and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or disposition of property except the document itself. These provisions have given rise to the questions (*i*) whether the document can be looked into for any *collateral purpose*, (*ii*) whether it could be used as *corroborative testimony* and (*iii*) whether *other evidence* can be received in regard to the transaction embodied in such a document. In the case under notice, two memoranda partition lists—which under the law had to be stamped and registered had not satisfied these requirements. It was contended that the lists can be looked into for the purpose of determining the factum of partition as distinct from its terms. The language of section 35 is wholly clear that a document not properly stamped shall not be admissible in evidence for *any purpose*. *Prima facie* "any purpose" would subsume not merely the reception of the document as substantive evidence, that is, as proof of its terms, but also as ancillary evidence, that is, to prove a collateral matter such as the factum of partition. It suggests that the document should be completely expunged from consideration. The words "for any purpose" first appeared in India in the Stamp Act of 1879 and in England in the Act of 1891 and under the earlier Acts there were decisions both in England and in India that an unstamped document might be admitted in evidence for a collateral purpose, that is, to prove some matter other than the transaction recorded in the instrument. This feature was relied upon in the present case as a pointer that the earlier cases still continued to be good law. In negativing the contention, the Privy Council observed : "A document admitted in proof of some collateral matter is admitted in evidence for that purpose, and the statute enacts that it shall not be admitted in evidence for any purpose. Their Lordships see no reason why the words for any purpose in the Indian Act of 1879 should not be given their natural meaning and effect. Such words may well have been inserted by the Legislature to get rid of the difficulties surrounding the question what amounted to a collateral purpose". In view of the reasoning so set out, it would appear that the document cannot be regarded as corroborative testimony either of the transaction it recorded. In regard to the last question whether the terms of the transaction embodied in the document could at least be proved by other evidence, in *Ramayya* v. *Achamma*[1], it was laid down that where a deed of partition was inadmissible in evidence for want of registration, the parties are not entitled to prove by other evidence the details of the partition in so far as items of immoveable property fell to particular sharers. The prohibition contained in the Stamp Act is wider and therefore in the case under notice the Privy Council felt it unnecessary to consider the effect of section 49 of the Indian Registration Act. Such wider prohibition was not, however, considered by their Lordships as precluding other proof of the transaction set out in and concluded by the document. The Privy Council observed : "Their Lordships therefore pay no regard to the documents marked 'C' and 'D' but they are in agreement with the High Court in thinking that the oral evidence proved partition in February 1939." In making that observation the Privy Council did not advert to the difficulty concerning the reception of such evidence in view of the provisions of sections 17 and 49 of the Registration Act or section 91 of the Evidence Act. In *Koyatti* v. *Imbichi Koya*[2], it was contended that, in so far as the Full Bench decision in *Ramayya* v. *Achamma*[1], held that other evidence is not admissible

1. (1944) 2 M.L.J. 164 : I.L.R. (1945) Mad. 160 (F.B.).
2. (1946) 1 M.L.J. 454.

to prove which items fell to the individual sharers, the matter will require reconsideration in the light of the observations of the Privy Council in the case under review. *Apropos* of that Somayya, J., remarked : " The Judicial Committee did not refer to the difficulty of admitting other evidence when the transaction was admittedly reduced to writing and that writing was inadmissible either under section 35 of the Stamp Act or under sections 17 and 49 of the Registration Act. But there is no doubt that the Judicial Committee had no difficulty in finding a partition on other evidence. But whether other evidence is admissible to prove the terms of the partition is still open to doubt. It is not clear whether oral evidence was accepted only in proof of the division in status or to prove the details of the partition." Apart from the factors thus adverted to, it also falls to be noted that the Madras Full Bench decision was cited at their Lordships' Board by Counsel for the appellant (see notes of arguments in L.R. 73 I.A. 28, at p. 31) and no dissent from the conclusion reached there was expressed.

CHHABA LAL *v.* KALLU LAL, (1946) 1 M.L.J. 339 (P.C.).

This is an important pronouncement concerning the construction of Order 32, rule 7 of the Code of Civil Procedure. The latter provides that " no next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian " and that " any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor". In the Indian Courts opinion has not been uniform whether the provisions of Order 32, rule 7 apply to an agreement to refer matters in dispute to arbitration. *Mariam Bibi* v. *Amna Bibi*[1] gave an affirmative answer. In *Debir-ud-din* v. *Amina Bibi*[2] a contrary view was taken, and it had been held that an agreement to refer to arbitration is not an agreement which is contemplated by Order 32, rule 7. This conflict is now resolved and the Privy Council has, in the case under notice, expressed its approval of the former view. In the language of the Judicial Committee : " Such an agreement which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party is clearly an agreement with reference to the suit, and not only falls within the terms of the rule but comes within the mischief at which the rule appears to be aimed. The interests of minors might well be sacrificed by an improper reference to arbitration and it is necessary that their interest be protected by the Court." Another point laid down by the Privy Council in the present case is that the provisions of Order 32, rule 7 are imperative and that all its requirements should be strictly complied with. There must be a formal application by the guardian *ad litem* for the leave of the Court to his entering into the agreement for reference to arbitration and leave should be formally given or expressly recorded in the proceedings. It must appear from the record that the Judge realised that he was dealing with the guardian *ad litem* of minors.

SRINIVASAN *v.* SRINIVASAN, (1945) 2 All. E.R. 21 ; BAINDAIL *v.* BAINDAIL, (1946) 1 All.E.R. 342 (C.A.) *sub-nom.* (1945) 2 All.E.R. 374.

These constitute two interesting decisions of the British Courts of Judicature on a point of far reaching importance concerning Hindu marriages. The degree of recognition to be accorded by the English Courts to Hindu marriages had directly

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1. I.L.R. (1937) All. 317.

2. A.I.R. 1925 Cal. 475.

to be considered in connection with the question whether a Hindu who had married a Hindu wife according to the Hindu rites and ceremonies can during the subsistence of such marriage marry again in England an Englishwoman professing Christianity according to English forms. In the first of the cases the respondent, by birth a native of Madras Presidency and Hindu by religion, while temporarily resident in England for medical studies, married the petitioner, an Englishwoman, Christian by religion, at a register office in Blackburn on the 26th December, 1936, he being described in the marriage certificate as a bachelor. In June, 1937, he left England to visit his ailing mother in India. The parties were in correspondence till January, 1938. Inquiry by the wife revealed and it was found in the case by Barnard, J., that the respondent had already on March 17, 1933, married a Hindu wife at Trivandrum according to Hindu rites and that that wife was alive at the time of the second marriage. The petitioner thereupon sued for dissolution of her marriage on ground of nullity. The facts of the second case were on all fours with those of the first except for the fact that a child had also been born of the second marriage. In that case the petitioner an Englishwoman married the respondent on 5th May 1939, at a register office in London. She was a Christian and the respondent a Hindu. Her domicile was English. The respondent had left India in 1935 with the view of settling in England. At the time of his second marriage he had already a Hindu wife whom he had married at Muthra (U.P.). Here also the marriage certificate described the respondent as a bachelor. When knowledge of the first marriage reached the petitioner, she sued for a declaration of nullity of her marriage. The matter came up in the first instance before Barnard, J., and on appeal before Lord Greene M.R. and Morton and Bucknill, L.JJ. In both cases the main argument was that the earlier Hindu marriage should be disregarded by the Courts as it would not be a marriage of which the Courts exercising matrimonial jurisdiction in England could or would take any note it being polygamous in character. Some of the English text books had expressed the view against recognition of such marriages and there were also certain judicial dicta to that effect. That view was repudiated in both the cases as wrong. Lord Greene M.R. felt : " The problem as it seems to me, requires to be approached *de novo* and from quite a different angle". The approach was to be no longer puritanical but should have regard to policy as well. The Master of the Rolls observed that the question has to be decided " with due regard to common sense and some attention to reasonable policy". For in the words of Barnard, J., " It would be strange if English law were to afford no recognition of polygamous marriages when one realises that England is the centre of a great Empire whose Mohamedan and Hindu subjects number many millions". The early English law proceeded on the assumption that marriage is the voluntary union of one man and one woman for life to the exclusion of all others, *Hyde* v. *Hyde and Woodmansee*[1]. The conception of marriage as a union for life could hardly be compatible with the provision in the English system of law for divorce. It was therefore recognised that the description of marriage given by Lord Penzance required to be explained. Commenting on Lord Penzance's description, in *Nachimson* v. *Nachimson*[2] Romer, L.J., observed : "The only words in this definition which create any difficulty are the words ' for life '. Lord Penzance's judgment was given in the year 1866, at a time therefore, when the Matrimonial Causes Act of 1857 had been in operation for several years, and at a time when in most Christian countries a marriage could be dissolved for various causes. It seems clear, therefore, that in deciding whether any particular union of one man and one woman is for life, the fact that the union is made dissoluble in certain events by the laws of the country where it is entered upon must be disregarded." In other words, it is the inception of the contract of marriage that is to be regarded and not subequent possibilities. The English matrimonial courts being ecclesiastical in origin necessarily regarded marriage from the Christain standpoint. The

1. (1866) L.R. 1 P. & D. 190. 2. L.R. (1930) P. 217, 238.

Divorce Court naturally would not entertain a matrimonial cause for the purpose of granting relief or enforcing rights in respect of a marriage which at its inception lacks the characteristics of monogamy, *Hyde's case*[1]. That does not however prevent recognition of polygamous marriages between persons domiciled out of England, *Brook* v. *Brook*[2]. There is really nothing in the decision in *Hyde* v. *Hyde*[1] to the contrary. There the parties were Mormons and had married at a time when polygamy had been recognised by the Mormon state. The question arose whether the husband could obtain a decree of divorce of such a marriage in the British Courts. Lord Penzance observed : "In conformity with these views, the Court must reject the prayer of this petition, but I may take the occasion of here observing that this decision is confined to that object. This Court does not profess to decide upon the rights of succession or legitimacy which, it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people being under the sanction of such unions may have created for themselves. All that is here intended to be decided, is that as between each other they are not entitled to the remedies, the adjudication or the relief of the matrimonial law of Engalnd". In the second of the cases under notice, Lord Greene M.R. points out that in general the status of a person depends upon his personal law, which is the law of his domicil, that by his first marriage the respondent had acquired the status of a married man which would not be lost but would cling so long as there was no dissolution of the marriage. Propounding the question : "Will that status be recognised in this country ?" he goes on to remark : "English law certainly does not refuse all recognition of that status. For many purposes, quite obviously, the status would have to be recognised. If a Hindu domiciled in India died intestate in England leaving personal property in this country, the succession to the personal property would be governed by the law of his domicil, and in applying the law of his domicil effect would have to be given to the rights of any children of the Hindu marriage, to the rights of the Hindu widow, and for that purpose the courts of this country would be bound to recognise the validity of the Hindu marriage so far as it bears on the title to personal property left by an intestate here". In the *Sinha (Peerage) Case*[3], the facts found were :—Sir Satyendra Prasanna Sinha had married on 15th May, 1880, in India, according to Hindu rites, Gobinda Mohini. The marriage *in fact* remained a union between the husband and wife to the exclusion of any other spouses. Six years after the marriage, in 1886, the Sinhas joined the Brahmo Samaj one of whose tenets was strict monogamy. A son was born in August, 1887. Sinha was made a Peer in February, 1919 and according to the Patent the title was to pass to the heirs male of his body lawfully begotten and their heirs. Lord Sinha died in 1928 and in considering the question whether his son was entitled to sit and take part in the proceedings of the House of Lords, Lord Maugham L.C., observed : "It cannot, I think, be doubted now (notwithstanding some earlier dicta by eminent Judges) that a Hindu marriage between persons domiciled in India is recognised in our Court, that the issue are regarded as legitimate, and that such issue can succeed to property in this country with a possible exception which will be referred to later .. .. .. Having regard to the domicil of the parties at the date when it was solemnised, the marriage would properly be treated as valid in this country for all purposes except it may be the inheritance of real estate before the Law of Property Act, 1925, or the devolution of entailed interests as equitable interests before or since that date and some other exceptional cases." It would thus appear that except for the purpose of remedies as between the parties such as enforcing the rights of marriage or dissolution of marriage, a marriage validly solemnised between Hindus in India would be recognised by the British Courts for all other purposes, such as the status of the parties, the legitimacy of children born of the marriage, their rights of succession to property etc. Does recognition of the married status bar the husband from marrying in the English forms an Englishwoman ? The

1. (1866) L.R. 1 P. & D. 130.
2. (1861) 9 H.L.Cas. 193.
3. (1939) 171 Lords Journals 350 : (1946) 1 All.E.R. note p. 348, et *seq.*

cases under notice answer in the affirmative and apart from the reasons already set out, they refer to the inconveniences that would result if a contrary view is entertained. According to Barnard J., in the first of the cases, " To refuse recognition would mean that the respondent would be lawfully married to his Hindu wife in India, and to his English wife in England, but if he brought his Hindu wife to this country and lived with her here he would be living in adultery here. It would mean that if the respondent were to live with his Hindu wife in India for a part of the year and for the remainder of the year live with his English wife in England he would be living with his lawful wife in each country. It would therefore mean that English law would be encouraging polygamy and not frowning upon it. .. .. If the respondent deserted both his Hindu wife and his English wife, he could be sued for restitution of conjugal rights by both wives, in the Courts of their respective countries, and he might be ordered by those Courts to return to two different wives in two different parts of the world." The Master of the Rolls, in the second of the cases under notice, considered the following reason as clinching. He said : " The consideration which weighs with me very heavily is this. If the marriage with the respondent was a valid marriage it would have this consequence, that she is entitled to the consortium of her husband to the exclusion of any other woman, that he is entitled to the consortium of his wife, and that she is bound according to our notions of law to live with him provided he gives her a suitable home. If he decided to go back to India it would be her duty as a wife to follow him to the home that he would provide. Directly they land in India, by the law of India he is a man married to the Indian lady and assuming that Hindu law would be the same in this respect as English law, that Hindu lady is his lawful wife in India and as such entitled to his consortium and he would be entitled to insist that she should live with him and she would be entitled to insist that he should provide a home for her. The position therefore, would be this, that this English lady would find herself compelled in India either to leave her husband or to share him with his Indian wife. .. .. .. Whether or not she could divorce him in India, because in India he was associating with a woman who under Indian law was his lawful wife, I do not know and I do not stop to inquire". While Barnard, J., draws a colourful picture of what would happen if the Hindu wife visited England and stayed with her husband, the learned Master of the Rolls conjures up the vision of the English wife accompanying her husband to India and her having to " share " him with his Hindu wife. In regard to the query contained in the last part of the observations of the Master of the Rolls, one case at least in India, *Sainapatti* v. *Sainapatti*[1], seems to suggest that the English wife can in those circumstances obtain a divorce if the husband lives with his Hindu wife. Incidentally, it is of interest to note that according to Barnard, J., in the second of the cases under notice, it is not " of the slightest materiality whether the respondent (the husband) is domiciled in British India or in England."

R.N. KAPUR *v.* TRAVANCORE NATIONAL AND QUILON BANK LTD., (1945) 2 M.L.J. 120.

This case deals with the interesting question as to when an account can be said to be "mutual" within the meaning of section 85 of the Limitation Act. The decisions on the point are many and not always helpful. In *Phillips* v. *Phillips*[2] it was remarked that a mutual account is not merely one where one of two parties has received money and paid it on account of the other but where each of the two parties has received and paid on the other's account. But this is by no means the only type of cases where the account is mutual. An altogether simple case will be that of two merchants supplying goods each to the other. The amount or extent of mutuality is immaterial. In *Raja Syud Ahmed Raza* v. *Syud Enayat Hussain*[3], a case under the Limitation Regulation of 1793, Trevor J., held that a mutual account

1. A.I.R. 1932 Lah. 116.
2. (1852) 9 Hare 471 : 68 E.R. 596.
3. (1864) W.R. 235.

is one where there was a reciprocity of dealings, transactions in which there was a mutual credit founded on a subsisting debt on the other side. There is a suggestion in *Madhav* v. *Jairam*[1], that dealings are mutual if they are posted in an account consisting of mutual items of credit and debit irrespective of whether they give rise to independent obligations on both sides. If this is correct, then every account in that sense can be cast in the form of a mutual account. The view has however received scanty support. According to *Bholat* v. *Motala*[2], a Rangoon case, it would seem that where there is only an isolated transaction on one side creating an obligation on the other side and many transactions on the other side giving rise to obligations on the former side there is no mutuality. Thus stated, it may be said that the conclusion is rather wide. How the account is to be regarded in those circumstances will depend on the intention of the parties. It is submitted that the arithmetical number of the transactions on any one side cannot be very material. The decision in *Firm Mansa Ram and Sons* v. *Hira Lal*[3], lays down that the test of mutuality is to see if there are two sets of transactions. In *Appa* v. *Ramakrishna*[4] it is pointed out that the transaction on each side should create independent obligations on the other, and the balance should shift. So if there is no likelihhood of the balance shifting the account is not mutual. Shifting of balance by itself is not however conclusive. It must be coupled with reciprocity in demand, see *Rulda Ram Daulat Ram Firm* v. *Basant Ram*[5]. The real emphasis lies in the fact that there exist transactions on each side creating independent obligations on the other side. In *Hirda Basappa* v. *Gadigi Muddappa*[6], it was stated by Holloway A.C.J. that in order that an account might be mutual there should not merely be transactions which create obligations on one side, those on the other being merely complete or partial discharges of such obligations. According to Sargent, J., in *Narrandas Hemraj* v. *Vissandas Hemraj*[7], in regard to the latter part of Article 85 of the Limitation Act " the more reasonable and more probable intention of the framers of the clause appears to have been that it should apply to cases where the course of business has been of such a nature as to give rise to reciprocal demands between the parties—in other words, where the dealings between the parties are such that sometimes the balance may be in favour of one party and sometimes of the other". The view of Pontifex, J., in *Hajee Syud Mahomed* v. *Mst. Ashrufunissa*[8], that an account cannot be described as a mutual account where the customer could not at any time have said " I have an account against you, the banker " expresses the general result and need not be taken as embodying an exclusive test. In *Ghaseeram* v. *Manohar Doss*[9], explaining the case before him, Norman, J., observed : " The plaintiff remits moneys to the defendants. He thus advances money and has a right to sue as for money lent or received for his use. On the other hand the defendants are shown to make advances by paying hundis drawn on them without waiting to see whether they are in funds or not. The defendants, therefore, in like manner, are from time to time in a position to sue for moneys lent by them in the course of their business to the plaintiff. There is thus a course of mutual lending and dealings apparently as between the bankers". The cases thus suggest that there should be transactions on each side giving rise to independent obligations on the other side, that the balance may be liable to shift and that the reciprocal dealings are not accidental but the result of an arrangement between the parties On the statement of facts in the case under notice that the customer was permitted to overdraw a current account and the account was sometimes in credit and sometimes in debit, over a number of years the conclusion that the account was a mutual account would be justified.

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1. (1921) 63 I.C. 950.
2. (1937) 177 I.C. 265.
3. I.L.R. (1940) All. 147.
4. (1930) I.L.R. 53 Bom. 652.
5. A.I.R. 1939 Lah. 356.
6. (1871) 6 M.H.C.R. 142.
7. (1881) I.L.R. 6 Bom. 134.
8. (1880) I.L.R. 5 Cal. 759.
9. 2 I.J. N.S. 241.

MEHTA *v.* MEHTA, (1945) 2 All.E.R. 690.

In this case two questions arose for consideration, namely, whether a marriage celebrated in British India according to the Arya Samaj rites between a Hindu with an Indian domicile and an Englishwoman with an English domicile who before the marriage had been converted to Hinduism is a marriage in the Christian sense in respect of which the English Courts will have jurisdiction to give relief at the instance of the wife, and whether if the marriage was not a marriage in the Christian sense, the Court could yet give relief. The petitioner who at all material times had been domiciled in England went through a ceremony of marriage on 15th February, 1940 at Bombay with the respondent according to vedic rites under the auspices of the Bombay Arya Samaj. The petitioner was a teacher in London and in September, 1938 had met the respondent who was then in England for purposes of study. Some time after the respondent's return to India, she also came to this country. The evidence showed that there had been some talk between the parties about marriage, that the parents of Mehta had exhibited antipathy to the proposal and that to placate the parental opposition the respondent had suggested her becoming a Hindu. She had expressed willingness to be converted. For five days after her arrival she and the respondent were staying in a hotel and on 15th February, 1940 not only was she converted to the Hindu faith but she was at one and the same time married to the respondent according to the Arya Samaj rites. The petitioner's case was that she was under the impression that she was only being converted, that the proceedings were in Hindusthani which she did not understand and that she had no consciousness that she was being married. On these grounds she petitioned for a declaration of the nullity of the marriage. Barnard, J., held that "as the law now stands .. .. .. the fact that the petitioner was at all material times domociled in England gives this Court jurisdiction to deal, so far as nullity is concerned, with the marriage she went through with the respondent." In regard to the question whether the marriage could be regarded as a marriage in the Christian sense, it was argued that inasmuch as it would have been possible for the respondent at any time to become an orthodox Hindu and have a plurality of wives under that law the marriage in question could not be regarded as a marriage in the Christian sense—the union of one man with one woman for life to the exclusion of all others. A similar argument had been considered by Romer L.J., in *Nachimson* v. *Nachimson*[1], where he had held that the possibility of a marriage being dissolved under the Matrimonial Causes Act will not detract from the Christian conception of marriage as a union for life and that the material point of time was the inception of the marriage contract and subsequent possibilities should be disregarded. Monogamy being a tenet of the Arya Samajists, the possibility of the husband taking a second wife after reverting to orthodox Hinduism would be no more relevant than the possibility of a marriage among Christians being dissolved by reason of marital infidelity *etc.* In that view, it was held in the present case that the English Court could adjudicate upon the marriage, enforce rights thereunder and grant relief notwithstanding the possibility of the conversion of the monogamous union into a polygamous one. The learned Judge also held on the evidence that the petitioner was not aware of the fact that she was being married but was under the impression that she was only being converted to the Hindu faith, that there was thus a fraud on the policy of marriage law and the marriage should therefore be set aside.

RAJAMAYYER *v.* VENKATASUBBA IYER, (1945) 2 M.L.J. 122.

This case deals with a question of mortgage law of great practical importance. It holds that, where in a suit by a mortgagee for sale, a sub-mortgagee is impleaded as a defendant and the preliminary decree has ascertained the amount due to the latter, it would be open to him to make an application for sale, on default of payment by the mortgagor into Court as directed by the decree, of the mortgage amount, even if the original plaintiff mortgagee fails to make an application for

1. L.R. (1930) P. 217.

a final decree for sale, and the decree has not provided for any order passed making any such application. In *Mackintosh* v. *Watkins*,[1] it was decided that in a suit by a first mortgagee impleading the mortgagor and the puisne mortgagee, the mortgagor cannot be compelled to redeem the puisne mortgagee and the latter will not be entitled to have the property sold for non-payment of the sum found due to him. This was on the ground that the object of making the puisne mortgagee a party is really to enable the property to be sold free of encumbrances and not to enable in effect the puisne mortgagee to obtain a decree against the mortgagor without bringing a properly framed suit for the purpose. The position was more fully explained in *Vedavyasa Aiyar* v. *The Madura Hindu Labha Nidhi Co., Ltd.*[2]. It was there observed : " The right of the subsequent mortgagee under the decrees drawn up according to Form F of appendix D (of the Civil Procedure Code) is contingent on the property being sold for non-payment of the sum found due to the plaintiff mortgagee and the decree cannot be read as a decree directing the mortgagor to redeem each of the puisne mortgagees within the time limited for redeeming the first mortgagee and to entitle the puisne mortgagee on default to bring the property to sale for non-payment not of the sum decreed due to the first mortgagee but to each of them. The utmost that can be said is that if the first mortgagee for some reason or other does not apply for sale in spite of the fact that he has not been paid, the (other) mortgagees can apply for sale in order to work out the rights to share in the surplus if any. This is quite different from their applying to sell the property to discharge the amount declared due to each of them. If the mortgagor pays off the amount for which a sale in default of payment was directed it is difficult to see how under the express terms of the decree each puisne incumbrancer can come forward and ask for sale." A like conclusion was reached in *Sarat Chandra Roy Chowdhury* v. *Nahapiet*[3] where it was held that a puisne mortgagee cannot take any independent action in such a case and treat the decree as if it was one in his favour. In *Vedavyasa Aiyar's case*[2] a suit for sale had been brought impleading the puisne mortgagee and a decree was passed according to Form F of Appendix-D. The decree declared the amounts due to the plaintiffs and the puisne mortgagees respectively and ordered the sale of the mortgaged properties only in the event of the amount of the plaintiff's mortgage not being paid. The puisne mortgagees had been given only the right to share in the surplus, if any, arising out of the sale. The mortgagor however, sold the property by a private sale and paid off the decree-holder. The amount found due to the puisne mortgagees was not paid. One of them brought a suit for recovery thereof against the mortgagor and the private purchaser from him. It was argued that such a suit was incompetent and that the pusine mortgagee should have proceeded by way of execution of the decree in the prior suit. In repelling the contention, Phillips and Kumaraswami Sastri, JJ., observed : " The decree did not direct redemption of the subsequent mortgagees and expressly authorised sale only in case the amount due to the first mortgagee was not paid within the time limited. The only right given to the puisne incumbrancers was the right to redeem the first mortgage and on sale to share in the surplus sale proceeds in the order of priority". The view of the Court in *Sarur Jigar Begum* v. *Baradakant Mitter*[4] also seems to be the same, namely, that if the amount due to the first mortgagee was paid there can be no sale of the mortgaged properties and the puisne mortgagee would obtain no relief in the suit. All the above were cases concerning the extent of the puisne mortgagee's right in regard to decrees which had ascertained the amount due to him. In the case under review, it was the rights of a sub-mortgagee that were in question. A sub-mortgagee is an assignee of the original mortgagee. His position is therefore superior to that of a puisne mortgagee. It stands to reason that what his own mortgagor could have done he himself should have the power to do. The objection would, however, remain, that it should not be open to him to get indirectly a relief which would have been available to him ordinarily only through a properly framed suit brought by him. The relief which he seeks to achieve is not incidental merely

1. (1904) 1 Cal.L.J. 31.
2. (1918) 35 M.L.J. 639 : I.L.R. 42 Mad. 90.
3. (1910) I.L.R. 37 Cal. 907.
4. (1910) I.L.R. 37 Cal. 526.

to the suit by the original mortgagee (the sub-mortgagee's mortgagor). Nor is it analogous to the declaration of the puisne mortgagee's right to share in the surplus. In *Lachmi Narain Marwari* v. *Balmukund Marwari*,[1] a suit for partition had been brought and resulted in a consent decree while the matter was on appeal to the High Court. The suit was remitted by the High Court to the Sub-Court to take the necessary steps for effecting the partition and taking the valuation of the share of the elder brother (the plaintiff). On the day fixed by the Subordinate Judge neither the plaintiff nor his brother was present and the Subordinate Judge thereupon dismissed the suit purporting to act under order 17, rule 2 of the Civil Procedure Code. The High Court set aside the order in revision. On appeal therefrom to the Privy Council, Lord Phillimore observed in the course of his judgment : " After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have on the making of the decree acquired rights or incurred liabilities which are fixed unless and until the decree is varied or set aside. After decree any party can apply to have it enforced." The last sentence lays down the broad principle that after the passing of a decree any person who would be benefited by its enforcement would be competent to initiate further proceedings. In *Hajee Abdulla Sahib* v. *Shaffee Muhammad Sahib*[2], the plaintiff had sued for the dissolution of an alleged partnership and the taking of accounts. The defendant contended that the plaintiff was only a commission agent, counterclaimed in respect of such agency and claimed an account on that basis. The Court found the defence to be true and passed a preliminary decree for accounts to be taken on the basis of principal and agent. In considering the question whether thereafter the defendant could withdraw the counter-claim it was held that no such withdrawal could be made after the passing of the preliminary decree, inasmuch as it was quite possible that the taking of accounts might result in a benefit to the party other than the one at whose instance the accounting had been ordered and that if the latter did not wish to proceed with the matter there was nothing to prevent the other party from doing so. It falls to be noted, however, that in both these cases the party desiring to initiate further proceedings was a *necessary* party to the suit which resulted in the decree declaring a benefit in his favour. Whether the position will be unaffected where the party was not a necessary party is debatable. In holding that the sub-mortgagee whose amount stood ascertained by the preliminary decree passed in the suit of the original mortgagee could apply for a final decree though the original mortgagee had been satisfied, the case under notice has purported to apply the principle in *Lachmi Narain Marwari's case*[1].

PROVINCE OF MADRAS *v.* A. P. N. MUHAMMAD, (1945) 2 M.L.J. 127.

An interesting question, which albeit occurs only occasionally, relating to the construction of the expression " customary rent " in section 3 (1) of the Malabar Compensation for Tenants Improvements Act (Act I of 1900) was elucidated in the above case with reference to waste lands belonging to Government in Malabar. It was held that in respect of such lands occupied for purposes of cultivation unauthorisedly, the customary rent will be the land price of Rs. 15 per acre *plus* the annual assessment. In the case under notice the land in question was formed by recession of the sea. The plaintiff had entered upon it, planted trees and thereafter applied to Government for permission to pay the value therefor to be fixed by the Government. Section 3 (1) of the Act defines a tenant as including a person who with the *bona fide* intention of attorning and paying the customary rent to the person entitled to cultivate or let waste land, but without the permission of such person brings such land under cultivation and is in occupation thereof as cultivator. It looks somewhat doubtful whether the provision is applicable to unauthorised occupation of waste lands belonging to Government. Unauthorised occupation is dealt with in the Land Encroachment Act (Act III of 1905). It applies to the whole of the Presidency and there is no reservation. Under section 8 of that Act

1. (1924) 47 M.L.J. 441 : I.L.R. 4 Pat. 61 : L.R. 51 I.A. 321 (P.C.).
2. (1945) 1 M.L.J. 196.

it is open to Government to declare that any particular land shall not be open to occupation. If no such declaration has been made and the land has been occupied without the Government's permission the occupant shall be liable to pay assessment in the manner prescribed by section 3 (*ii*) for the period of the unauthorised occupation. It is no doubt open to Government to allot the land to the occupier and grant patta. That however will depend on the rules framed in that behalf. The judgment in the case under notice states : " So far as one can judge from the record the Government usually collects only assessment and before issuing a patta the Government also levies what is known as the land price or customary price." There is nothing in the procedure inconsistent with the prescriptions of the Land Encroachment Act. It is also stated in the judgment that " there is no evidence that in such cases on the west coast the Government used to collect what is called the customary rent on waste lands when those lands are occupied by a person who would otherwise fulfil the terms of section 3 of the Malabar Compensation for Tenants Improvements Act." This is presumably because the latter Act is not intended to cover cases of occupation of Government waste lands. An examination of the different sections of the Act leaves the impression that its provisions are to be applied where suits for ejectment are brought. In regard to Government lands the Land Encroachment Act provides for summary eviction of the trespasser and no question of a suit for ejectment brought by Government will therefore arise. The observation in the present case that " the land price *plus* the assessment every year is tantamount to the customary rent within the definition of section 3 " seems in the circumstances rather difficult to follow in the absence of anything by way of special rules framed by Government by which, the payment to be made for the issue of a patta regarding lands unauthorisedly occupied is to be calculated in the manner of customary rent which would become payable, if the person entitled to let or use the land happened to be a private person.

RAJAYYA NANDIAR *v.* LAXMANA AYYAR, (1945) 2 M.L.J. 148.

The Madras Estates Land Act distinguishes sharply between two categories of land in an " estate," namely, ryoti land and private land. The differences between them are fundamental. Private land may be said to be the freehold of the landholder, see *Kondayya Rao* v. *Naganna*.[1] Its incidents are not subject to the provisions of the Act. Section 19 states : " Except as otherwise specially provided in this Act the relations between a landholder and a tenant of his private land are not regulated by the provisions of this Act." Conversion of private land into ryoti land is expressly contemplated by the Act; and, according to its policy it is to be encouraged. Section 181 lays down that a landholder shall be at liberty to convert his private land into ryoti land and confer occupancy right in the land so converted. The Act however nowhere prescribes how the conversion is to be effected or by what mode or process the result could be achieved. In *Kondayya Rao* v. *Naganna*[1] the Full Bench by a majority decided that the separation or detachment of the kudivaram from the melvaram and its conveyance to a person were tantamount to a conversion of private land into ryoti land and that section 181 could not be construed as contemplating two distinct stages for that result to ensue, namely, firstly the doing of certain other acts as constituting conversion followed up by the conferment of occupancy right. It is clear that such dis-annexation of the kudivaram interest apart and its bestowal on a person, conversion of ryoti land into private land may be by way of express declaration or through acts of treatment in regard to the land in question. One thing is clear, namely, whether or not there has been conversion is a question of fact. One test which has been generally applied to see whether there has been conversion is to ascertain whether the landholder has by his acts and conduct manifested an intention to retain the land as resumable for cultivation by himself even when from time to time he has demised it for a season. This test was propounded in *Budley* v. *Bukhtoo*[2] and was adopted by the Madras High Court in *Zemindar of Chellapalli* v. *Somayya*[3], by Wallis, C.J. Apropos of this

1. (1941) 1 M.L.J. 336: I.L.R. (1941) Mad. 367 (F.B.).
2. (1871) 3 N.W.P. 203.
3. (1914) 27 M.L.J. 718.

test in *Raja Yarlagadda Mallikarjuna Prasad* v. *Rajulapati Somayya*[1], Sir John Edge remarked : "The test is obviously suggested by section 185 of the Act and was rightly applied by the Chief Justice." The test was also accepted by Venkatasubba Rao J., in *Veerabhadrayya* v. *Sree Raja Bommadevara Naganna Nayudu*[2]. The case under review recognises that apart from grant, the conversion of private land into ryoti land may be brought about by the lease of such land along with admitted ryoti lands under a single patta with terms which are inconsistent with the continuance of the landholder's absolute rights in them ; but that the mere fact that a cultivator has been allowed to be in possession for a long period of time will not by itself amount to such conversion or negative the retention by the landholder of the kudivaram interest.

SOUTH INDIAN RAILWAY COMPANY, LTD. *v.* MUNICIPAL COUNCIL, MADURA., (1945) 2 M.L.J. 155.

Decisions have been prolific in regard to section 70 of the Indian Contract Act, whose precise scope is somewhat baffling. The decision under notice holds that this section can apply only where there is a *direct* benefit for the person for whom the work is done. In the present case a railway company had constructed a culvert in accordance with the orders passed by Government under section 11 (3) (*b*) of the Indian Railways Act. The object of the work was to prevent the flooding of houses and buildings in that locality which was part of a municipal area. A claim was laid against the municipality for contribution. It has been recognised that the terms of section 70 are unquestionably wide but applied with discretion they enable Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract, see *Suchand* v. *Balaram*[3]. Three conditions are required by the section to be satisfied to establish a right of action in favour of a person who does anything for another : (1) the thing should be done lawfully ; (2) it must be done without any intention to act gratuitously ; and (3) the person for whom it is done should enjoy the benefit of it. The last prescription would require, that in the present case, before the municipality could be held liable it should be shown that the Act was done for it and it enjoyed the benefit thereof. The municipality was admittedly not the owner of the houses and buildings that would or might have been affected by floods if the culvert had not been constructed. Outside its obligations as a civic body in regard to the people resident there under the provisions of the District Municipalities Act the municipality had no other interest. Decisions have proceeded so far as to suggest that the act in respect of which recompense is sought need not be one done exclusively for the benefit of the person sought to be charged. In *Ram Das* v. *Ram Babu*[4] it was held that the application of section 70 is not excluded merely because the thing done enured both for the plaintiff's benefit as well as that of the defendant, in other words, merely because the benefit was shared. In *Ram Tuhul Singh* v. *Bisseswar Lal*[5], it was recognised that where a payment is made against the will of a person sought to be charged and in the course of a transaction which in one event might have proved detrimental to his interest, section 70 cannot apply merely because in the actual event it in fact did benefit the plaintiff. It follows therefore that the benefit contemplated by the section should not have been fortuitous or accidental merely. Neither of these pronouncements touches the question whether the section would be attracted to a case where the benefit was not direct. The ruling in *Binda Kuer* v. *Bhonda Das*[6], that revenue paid by the plaintiff, while in wrongful possession of the defendant's land on his own account and for his own benefit, cannot be recovered from the defendant, on the latter being restored to possession. The policy underlying section 70 would seem to indicate that liability

1. (1919) 36 M.L.J. 257 : I.L.R. 42 Mad. 400 : L.R 46 I.A. 44 (P.C.).
2. (1927) 52 M.L.J. 38.
3. (1910) I.L.R. 38 Cal. 1.
4. A.I.R. 1936 Pat. 194.
5. (1875) 23 W.R. 305.
6. (1885) I.L.R. 7 All. 660.

thereunder can attach only where the benefit derived was directly contemplated as for the party sought to be charged without being a result merely of something done. The finding in the Full Bench case of *Sree Rama Raja* v. *Secretary of State for India in Council*[1], lends support to this view. The learned Chief Justice there remarked : "It is not denied that the repairs were necessary and it is obvious that if they had not been carried out the appellant's lands would suffer," thereby suggesting that the benefit there was both direct and proximate.

THEKKAIKAT MADATHIL RAMAN *v.* VALLIKAT AMMALUKUTTY AMMA, (1945) 2 M.L.J. 191.

Section 20 of the Malabar Tenancy Act provides that a kanomdar may be evicted *inter alia* on the ground that he has intentionally and wilfully committed such acts of waste as are calculated to impair materially and permanently the value or utility of the holding for agricultural purposes. Two things have to be proved : (1) that the acts are intentional and wilful ; (2) they are calculated to impair the value of the holding for agricultural purposes not merely materially but also permanently. It may be instructive to compare this provision with section 151 of the Madras Estates Land Act, which enacts that a ryot can be ejected only on the ground that he has materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. While under section 20 (2) of the Malabar Tenancy Act, the impairment should be *material* and *permanent*, under the Estates Land Act it should be *material* and *substantial*. "Permanent" signifies irreparable character. The word "substantial" would seem to advert to the extent or degree of waste rather than to its irreparable character or otherwise. Though seemingly different the two provisions really convey the same principle. Section 152 of the Estates Land Act states that if the damage to the holding is susceptible of repair ejectment shall not be ordered but the ryot should in the first instance be directed to repair the damage. It would follow therefore that it is only where the damage or waste is of an irreparable character that the eviction of the ryot or cultivator is contemplated. This practically means that under the Estates Land Act also it is only if the waste is permanent that ejectment will be justified. The only difference between the Malabar Act and the Estates Land Act will be that under the latter even where the waste is of a reparable character, still if it is not carried out, the ryot will be liable to ejectment. In this view, it is difficult to accept the opinion expressed in the case under review that the wording of section 20 (2) of the Malabar Tenancy Act is different from that of section 151 of the Estates Land Act in the sense that the term "permanently" carries a different connotation from the word "substantially" in the context. The view expressed in *Narayana Rao* v. *Zemindar of Muktyala Estate*[2], that a diversion of lands by a ryot from agricultural to building purposes would attract section 151 and entail forfeiture of the tenancy should be understood in the light of section 152 of the Act and so understood would imply that diversion from agricultural purposes justifying ejectment should be one that has caused irreparable damage, that is, damage of a permanent character.

KRISHNASWAMI IYER *v.* RAMAKRISHNA IYER, (1945) 2 M.L.J. 202.

The question has frequently arisen whether payment by cheque made by a debtor to his creditor is a payment which satisfies section 20 of the Limitation Act as an acknowledgment in writing of or by the person making the payment. In *Maillard* v. *Duke of Argyle*,[3] Maule, J., observed : "'Payment' is not a technical word. It has been imported into law proceedings from the exchange and not from the law treatises." It is therefore the popular sense that is to rule. There it signifies the discharge of a debt by money or its equivalent in value. In *Sukhmani Chowdhurani* v. *Ishan Chandra Roy*[4], it was pointed out that the Limitation Act specifies no particular

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1. (1942) 2 M.L.J. 800 (F.B.).
2. (1928) 54 M.L.J. 621 : I.L.R. 51 Mad. 478.
3. (1843) 6 Man. & Gr. 40.
4. (1898) L.R. 25 I.A. 95, 101.

mode or form of payment. In order to constitute a payment, it is not essential that it should be in cash or currency, see *Prafulla Chandra* v. *Jatindra Nath*[1], *Parthasarathi Ayyangar* v. *Ekambara*[2]. It may, for instance, be by the execution of a promissory note, *Kandaswami Mudaliar* v. *Thevammal*[3]. Setting off decrees by mutual consent may also be tantamount to payment, *Bhagela Koer* v. *Abdul Rahman*[4]. Even the settlement of an account might amount to payment, *Kariyappa* v. *Rachappa*[5]. There is, at any rate, nothing in section 20 to suggest that payment cannot be by a cheque. But a cheque is only an order for payment. It will not therefore necessarily constitute a payment though it may in particular circumstances amount to payment, as where it is *accepted* as such. It will thus be essentially a question of fact in each case whether payment by a cheque is a payment within the meaning of section 20. In *Mackenzie* v. *Thiruvengadathan*,[6] the debtor had not issued but only endorsed over a cheque to his creditor. In holding that it does not satisfy the requirements of section 20, Muttuswami Ayyar, and Brandt, JJ., observed : " The cheque is only an order for payment and it does not evidence any payment at all. Nor does it show for what purpose the payment was made." In *Mandardhar Aitch* v. *Secretary of State*,[7] Banerji, J., observed that he was prepared to go so far as the Madras case. *Ram Chandar* v. *Chandi Prasad*[8] was also a case of an endorsed cheque and the learned Judges followed the Madras ruling. There are however a number of decisions which have taken the view that if a cheque is delivered to a person in payment of a debt due to him and accepted as such it operates as a payment subject only to the condition that if on presentation it is not honoured the original debt revives, *Kedar Nath Mitra* v. *Dinabandhu Saha*,[9] *Dial Singh* v. *Davindar Singh*[10]. This view is in accord with the English rulings which hold that payment by a cheque which is honoured becomes a payment when it is honoured, *Turney* v. *Dodwell*[11] In the case under examination it is remarked that a payment by cheque is a conditional payment subject only to realisation. It has to be added that the cheque should have also been accepted as a payment.

VENKATANARAYANA *v.* HINDU RELIGIOUS ENDOWMENTS BOARD, (1945) 2 M.L.J. 220.

This decision holds that a grant of land for the *vedaparayanam* or *swastivachakam* service in a temple is in the nature of a personal grant subject to the performance of the specified service and hence the grantee is not liable to pay contribution under section 69 of the Madras Hindu Religious Endowments Act. Section 69 states that every temple and every specific endowment attached to a temple shall pay annually for meeting the expenses of the Board such contribution not exceeding one and a half per centum of its income as the Board may determine. An " endowment" is defined in section 9 (11) as meaning all property belonging to or endowed for the support of temples or for the performance of any service or charity connected therewith and includes the premises of temples but does not include gifts of property made as personal gifts or offerings to the archaka or other employee of a temple. Read together, these provisions suggest that where the grant is personal, notwithstanding that it is made in favour of an employee in the temple and contemplates the rendering of some service by him, no liability to contribute under section 69 will arise. A personal grant is one made usually for the support or subsistence of the grantee. It stands distinguished from a service grant in that the service liable to be performed under the former is only a secondary consideration and is also more or less nominal in character. The grant in such a case is a grant of property out and out though the grantee is also directed to perform some specified service. It is not as if the lands stand annexed to an office which is bestowed upon a person. It will be a question of fact in each case whether the grant answers

1. I.L.R. (1938) 2 Cal. 320.
2. A.I.R. 1938 Mad. 579.
3. I.L.R. (1938) Mad. 1090.
4. (1916) 36 I.C. 77.
5. (1900) I.L.R. 24 Bom. 493.
6. (1886) I.L.R. 9 Mad 271.
7. (1901) 6 Cal. W.N. 218.
8. (1897) I.L.R. 19 All. 307.
9. (1915) I.L.R. 42 Cal. 1043.
10. A.I.R. 1933 Lah. 741.
11. (1854) 8 E & B. 136.

to the one description or to the other. As observed by Jackson, J., in *Babu Kooldeep Narain Singh* v. *Mahadeo Singh*[1], there is a clear distinction between the grant of land burdened with a certain service and the gift of an office the performance of whose duties is remunerated by the use of certain lands. No doubt even in the former case the grant might be so expressed as to make the continued performance of the services a condition to the continuance of the tenure. In such a case it is the continuance of the service that is the sole and whole motive for the grant, or, the instrument of grant would have expressly provided for the cessation of the tenure the moment the services ceased to be performed, see *Forbes* v. *Meer Mahomed Tuquee*.[2] Such a provision is altogether different from one which merely directs the grantee to perform certain services. In *Sriranga Chariar* v. *Pranatharthihara Chariar*,[3] it was held than an inam granted to the family of the defendant for service as *acharyapurusha* in a temple and made tenable only so long as the service was rendered was not a personal gift to the grantee but one made for the support of the temple officer performing the duties of *acharyapurusha*. In the case under notice there does not seem to have been attached to the grant any condition making its tenability dependent on the continued performance of the services or suggesting that the grant is really that of an office to which certain lands are annexed to serve as a source of remuneration to the person holding the office. It would therefore follow that the grant was one by way of a personal gift though it was burdened with the performance of the *vedaparayanam* or *swastivachakam* service. It is true that in *Kotayya* v. *Yellamanda*[4], Curgenven, J., seemed to be of the opinion that the term "endowment" as defined in section 9 (11) is wide enough to include properties given to the employee of a temple burdened with service. The learned Judge observed: "Ordinarily speaking the word 'endowment,' I think, is restricted to property the title to which vests in the institution endowed. But this definition is very wide and I am not prepared to say that a service inam held by a temple servant would not fall within it." This view is not however consistent with the latter part of section 9 (11) which expressly exempts personal gifts made to the employee of a temple from the scope of the definition of the term "endowments." Nor could it be contended that the expression "personal gifts" in the context relates to gifts of movable property only and not to gifts of lands. In *Hindu Religious Endowments Board, Madras* v. *Jagannathacharyulu*[5], the suggestion was made that if the grant was merely one burdened with service there would be no liability to contribute under section 69. Somayya, J., remarked: "The plaintiff's claim that the properperties were their own archaka service inams, if upheld, would have precluded the appellant Board from levying a contribution." Likewise in the *Board of Commissioners of Hindu Religious Endowments, Madras* v. *Seshacharyulu*[6], Horwill, J., observed: "So that if this may be regarded as an endowment within the meaning of section 9 (11). then it is liable for contribution even though the property vests in the archakas. The definition does not say that to constitute an "endowment," the gift must be to the temple; but it is only by presuming that this was what the legislature intended that the definition of an "endowment" can be brought into consonance with what is ordinarily understood by the word." The learned Judge went on to add: "I am reluctant to interpret section 9 (11) as giving a definition of 'endowment' contrary to its accepted meaning or section 69 of the Act as making liable to the contribution *persons* where a general reading of the Act seems to make liable only *institutions* (italics ours). I am therefore of the opinion that the land is not liable to the contribution claimed by the Board." The conclusion reached in the case under examination that the land granted to a person for *vedaparayanam* or *swastivachakam* service in a temple is a personal grant and hence not liable to make any contribution under section 69 of the Hindu Religious Endowments Act is entirely consistent with the authorities cited and the considerations mentioned *supra*.

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1. 6 W.R. 209.
2. (1870) 13 Moo.I.A. 438 (P.C.).
3. (1915) Mad. W.N. 531.
4. (1933) 65 M.L.J. 54 : I.L.R. 56 Mad. 731.
5. (1944) 2 M.L.J. 260.
6. S.As. Nos 802 and 803 of 1942.

VEERAPPA CHETTIAR *v.* THANGACHAMI NAICKER, (1945) 2 M.L.J. 264.

While recognising that impartibility of property may arise out of family custom or as an incident of military or other service tenure or under a Crown grant, this decision also points out that impartibility can hardly arise out of a local custom since it will be difficult to postulate that all estates in a particular area, at any rate, in this country, are impartible. It further suggests that where a stranger becomes by purchase or otherwise the owner of an impartible estate, the estate will cease to be impartible in his hands. There is little light afforded by the texts of Hindu law on this matter, except indirectly from analogy afforded by the rules prescribed regarding a raj. In *Naragunty Luchmedevamma* v. *Vengama Naidu*[1], it is recognised that " a palayam is in the nature of a raj ; it may belong to an undivided family, but it is not the subject of partition ; it can be held only by one member of the family at a time." See also *Pratap Chandra* v. *Jagadish Chandra*[2]. That the Crown has the power in making a grant of land to limit its descent or enjoyment in any manner though it will not be competent to prescribe in regard to the devolution of the property any limitation at variance with the ordinary law is well settled, see *Achal Ram* v. *Udai Pertab*[3], *Narindar Bahadur* v. *Achal Ram*[4], *Kachi Kalyana Rangappa* v. *Kachi Yuva Rangappa*[5]. The descent of an estate as impartible may be by intention of the legislature, *Debi Baksh* v. *Chandrabhan Singh*[6]. In *Baij Nath* v. *Tej Bali*[7], the Privy Council refers to impartibility as " being a creature of custom". The reason why impartibility does not normally attach to property is that it does not arise by nature. Many of the impartible zemindaris were originally principalities and the rules appurtenant to the latter have in course of time come to be regarded as applicable to the former. And in the case of holders of tenures on military service or of offices, the estates attached thereto were treated as not partible since the tenure or office could be held by only one at a time. Where an impartible estate has been *forfeited* to Government or *lapses* by escheat or has been *seized* or acquired by it by *sale* and then regranted either immediately or after an interval, either in its integrity or of a portion of it only, either to the heir of the dispossessed holder or a member in a junior branch of the family or even in favour of a remote kinsman, in the absence of indication of a contrary intention, it would pass to the grantee with the incident of impartibility unaffected. In such circumstances, it is held that the intention is not to create a new tenure but only a new tenant. And the act of the Government is an act of state. In *Katama Nachiar* v. *The Rajah of Sivaganga*[8], an impartible zemindari created in 1730 by the Nabob of Carnatic in favour of one S was treated, on the extinction of the whole lineal line, as escheated to the East India Company who had then become possessed of the sovereign rights of the Nabob and regranted by the Madras Government in favour of a remote kinsman. It was held that the incident of impartibility stood unaffected; see also *Muttu Vaduganadha Tevar* v. *Dorasingha Tevar*[9]. In the *Hunsapore case, Baboo Beer Pertab Sahee* v. *Maharaj Rajendar Pertab Sahee*[10], an impartible estate had been confiscated and regranted after 23 years to a member of the junior branch ; the East India Company was in the meanwhile enjoying the revenues and it was held that the regrant did not affect the incidents that originally had attached to the property. In *Sri Raja Venkata Narasimha Appa Rao* v. *Sri Rajah Rangayya Appa Rao*[11], it was recognised that an estate acquired by sale or forfeiture by Government and regranted to the heirs of the former owner without the expression of any intention to interfere with the quality of the estate, would pass to the new grantee with all its old incidents. The character of impartibility if possessed previously would not be destroyed. See also *Sardar Muhammad Afzul Khan* v. *Nawab Ghulam Kasim Khan*[12]. In the *Bettia case, Ram Nundun Singh* v. *Maharani Janki Koer*[13] the East India

1. (1863) 9 M.I.A. 66 (P.C.).
2. (1927) L.R. 54 I.A. 289, 293 (P.C.).
3. (1883) L.R. 11 I.A. 51 (P.C.).
4. (1893) L.R. 20 I.A. 77 (P.C.).
5. (1905) L.R. 32 I.A. 261 : I.L.R. 28 Mad. 508 (P.C.).
6. (1910) L.R. 37 I.A. 168, 174.
7. (1921) L.R. 48 I.A. 195 : I.L.R. 43 All. 228.
8. (1863) 9 M.I.A. 543 (P.C.).
9. (1881) L.R. 8 I.A. 104 : I.L.R. 3 Mad. 290 (P.C.).
10. (1867) L.R. 12 M.I.A. 1 (P.C.).
11. (1906) I.L.R. 29 Mad. 437.
12. (1903) L.R. 30 I.A. 190 (P.C.).
13. (1902) L.R. 29 I.A. 178 (P.C.).

Company had seized the raj, assumed dominion over it, then effected a division and reinstated the heir of the last holder in a portion of the raj. It was held by the Privy Council that the reinstatement and grant must be treated as an exercise of sovereign authority and that the new grantee took the property with all the incidents of the family tenure of the old estate as an impartible raj, despite the breaking up of its integrity. All these were cases of transfers by the Crown by way of regrant in favour of a new incumbent. Where, however, the transfer is by the holder in favour of a private party, totally different considerations arise. Impartibility arising out of family custom of the holder's family cannot continue in the absence of such custom and cannot follow the property when it passes out of the holder's family. This is also in accord with the policy underlying section 7 of the Madras Impartible Estates Act which lays down that the provisions of the Act will not apply where the estate is transferred to a stranger. Referring to section 7, in *Ramarayaningar* v. *Venkata Lingama Nayanim Bahadur*[1], Venkatasubba Rao., J., remarked : " The section means that when once a lawful sale has been effected the estate so sold or the part so severed ceases to be governed by the Act; that is to say, after it passes into the hands of a stranger purchaser it is no longer to be treated as being subject to the restrictions under the Act."

PALANI VANNAN *v.* KRISHNASWAMI KONAR, (1945) 2 M.L.J. 303.

Section 202 of the Indian Contract Act provides that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot in the absence of an express contract be terminated to the prejudice of such interest. In other words, where the agency is one coupled with interest it is not terminable arbitrarily. Whether the agency is one coupled with interest or not will naturally be a question of fact in each case. The language of the section suggests the inference that the agent's interest in the subject-matter of the agency should be anterior to and independent of the creation of the agency. In *Smart* v. *Sandars*[2] it is made clear that a rule like the one contained in the above section " applies only to cases where the authority is given for the purpose of being a security or as a part of the security, not to cases where the authority is given independently and the interest of the donee of the authority arises afterwards and incidentally only". See also *Frith* v. *Frith*[3]. In England the rule is " that where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority such an authority is irrevocable," see *Smart* v. *Sandars*[2], *Taplin* v. *Florence*[4], *Clark* v. *Laurie*[5]. In other words where the authority of an agent is given . . . . for the purpose of effectuating any security or securing any interest of the agent it is irrevocable[6]. The Indian decisions also have laid down practically the same test. In *Hurst* v. *Watson*[7], the defendant had requested the plaintiff to sell for him a plot of ground in the Esplanade area of Bombay city at any rate exceeding the price at which the defendant had himself purchased it and agreed to give him as remuneration half the net profit realised on the sale. The defendant subsequently revoked the authority and later on refused to accept an offer which the plaintiff had found. Adopting the view found in Story[8], Couch C.J. observed : " Where an authority or power is coupled with interest, it is irrevocable unless there is an express stipulation to the contrary ; but the right of the agent to remuneration although stipulated for in the form of part of the property to be produced by the exercise of the power is not an interest in this sense". In *Vishnucharya* v. *Ramchandra*[9], the agreement was in the nature of a letter of attorney constituting the plaintiff agent of the defendant for collection of rents of his share of an inam village and it had been stipulated by the defendant that the plaintiff shall be paid an annual salary out of the rents. In these circumstances it was held by Melville and Birdwood, JJ.,

1. A.I.R. 1932 Mad. 709.
2. (1848) 5 C.B.895, 918.
3. (1904) A.C. 204.
4. (1851) 10 C.B. 744, 758.
5. (1857) 2 H. & N. 199, 200.
6. Bowstead on Agency, 8th ed., Art. 138.
7. (1866) 2 Bom. H.C.R. 400.
8. Agency, sec. 477, note.
9. (1881) I.L.R. 5 Bom. 253.

that the mere arrangement that the plaintiff's salary should be paid out of the rents could not be regarded as giving to the plaintiff an interest in the property, the subject-matter of the agency, within the meaning of section 202. The same conclusion is stated by Jenkins, C.J., in *Lakshmichand* v. *Chotooram*[1], where he remarked : " The interest which the agent has in effecting a sale and the prospect of remuneration to arise therefrom are not such an interest as would prevent the termination of the agency". The illustration (a) to section 202 does not afford much support to the view that unless the agent had an anterior interest in the property forming the subject-matter of the agency there will be no agency coupled with interest. The illustration states : " A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority." It is difficult to see how in this case B can be regarded as having an anterior interest in the subject-matter of the agency. It is true that A owes money to B but the illustration does not suggest that the debt is a mortgage debt or that the lands are charged with its payment. It is only when B is appointed A's agent that he is given the right to pay himself. Nevertheless it has been held in *Ramachandra Lalbhai* v. *Chinubhai Lalbhai*[2], that though section 202 is wide in its terms it makes no departure from the English law ; that under the section as in English law, some specific connection must be shown between the authority and the interest and there must also be an agreement express or implied whereby the authority is given to secure some benefit which the donee is to obtain by reason of such authority. In the case under notice the defendant had executed in favour of the plaintiff a power of attorney empowering the latter to execute a mortgage decree that had been obtained by the defendant, and agreeing that accounts shall be taken at the end, that the costs of the execution shall be taken by the plaintiff out of the amount realised and that the balance shall be shared equally between them. The defendant had also stipulated that he would not for any reason whatever cancel without the plaintiff's permission the authority given to him, without paying him the amount expended by him and without giving him the relief mentioned above as remuneration for his trouble. The learned Judges held that the authority was not one coupled with interest and hence could be revoked. This conclusion is inescapable in view of the last part of the language of the power.

BAHORI LAL *v.* SRI RAM, I.L.R. (1946) All. 49.

This is an interesting decision relating to the law of torts. The learned Judges have claimed (see p. 53) : " No case similar to the present one appears to have been decided by the High Courts in India ". The decision holds that an action for damages will lie for procuring adjudication of another as insolvent maliciously and without reasonable and probable cause. It is true that in England it has been held that an action for damages will lie for maliciously procuring an adjudication of bankruptcy against another, see *Johnson* v. *Emerson*[3]. It has there been likewise held that a suit for damages will lie for a malicious attempt to have a company wound up, *Quartz Hill Gold Mining Co.* v. *Eyre*[4]. It is now settled law that it is an actionable wrong to institute certain kinds of legal proceedings against another maliciously and without reasonable and probable cause. Malicious prosecution is a familiar example. In *Savills* v. *Roberts*[5] it was pointed out by Holt, C.J., that damage which is the gist of the action may be either (*i*) damage to a man's fame as if the matter whereof he is accused be scandalous; or (*ii*) damage to the person as where a man is put in danger to lose his life or limb or liberty ; or (*iii*) damage to his property as where he is forced to expend his money in necessary charges to acquit himself of the crime of which he is accused. It is not however ordinarily an actionable wrong to institute civil proceedings maliciously and without reasonable and probable cause. The mulcting in costs of the unsuccessful party is considered to be sufficient penalty in such cases. But in certain types

1. (1900) I.L.R. 24 Bom. 403.
2. 45 Bom.L.R. 1075 : A.I.R. 1944 Bom. 76.
3. (1871) L.R. 6 Ex. 329.
4. (1883) L.R. 11 Q.B.D. 674, 691.
5. (1698) 1 Ld. Raym. 374 : 91 E.R. 1147.

of cases even the institution of a civil action maliciously and without reasonable cause may expose a party to an action in torts. In *Quartz Hill Gold Mining Co.* v. *Eyre*[1], Bowen L.J., remarked : " But although an action does not give rise to an action for malicious prosecution inasmuch as it does not necessarily and naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage, and when proceedings of that kind have been taken falsely and maliciously and without reasonable or probable cause then, inasmuch as an injury has been done the law gives a remedy. Such proceedings are indictments . . . . . but there are other proceedings which necessarily involve damage such as the presentation of a bankruptcy petition against a trader . . . . but a trader's credit seems to be as valuable as his property and the present proceedings in bankruptcy although they are dissimilar to proceedings in bankruptcy under the former Act, they resemble them in this that they strike home at a man's credit." Thus an action analogous to the one for recovery of damages for malicious prosecution will lie for instituting maliciously and without reasonable or probable cause certain forms of civil processes as well. Such proceedings are not however ordinary actions. They fall within the reason of the law which allows an action for malicious prosecution of a criminal charge. Broadly speaking, they are proceedings which tend to cause an injury, at any rate, to the credit, fair fame and reputation, immediately that they are instituted. On this principle, in *Muhammad Niaz Khan* v. *Jai Ram*[2], an action for damages in respect of malicious proceedings taken under section 107 of the Criminal Procedure Code was allowed. In *Palani Kumaraswamia Pillai* v. *Udayar Nadan*[3], damages were awarded for procuring a malicious attachment of property. It was observed by White C.J., and Abdur Rahim, J., that " an order under section 483 of the Civil Procedure Code, where the application has been made on insufficient grounds, must necessarily cause damage to the credit, and reputation of the party against whom the order is made " and hence " general damages are recoverable". See also *Nanjappa Chettiar* v. *Ganapathi Gounden*[4], *Nicholas* v. *Sivarama Ayyar*[5], *Bishambar Nath* v. *Gaddar*[6]. In *Nanjappa Chettiar's case*[4], the Madras High Court remarked : " We cannot doubt that the attachment of a respectable man's property before judgment on the ground that he is attempting to alienate his properties with a view to defeat his judgment creditors must in this country damage his reputation and credit." In *Velji Bhimsey and Co.* v. *Bachoo Baidas*[7], it was held that malicious procurement of arrest or attachment in execution of a decree will lay the decree-holder open to an action for damages. The decision in *Bishan Singh* v. *Wyatt*[8], sets out clearly the principle followed in such cases. It was there observed : " The broad proposition that the institution of an ordinary civil action however unfounded, vexatious and malicious it may be, is not a good cause of action must be qualified when there has been arrest of person or seizure of property." See also *Arjun Singh* v. *Mt. Parbati*[9]. In the last mentioned case the suit was for recovery of damages consequent on injury to property occasioned by a former suit by the defendant who claiming as an adopted son had sued to enforce an award giving him one half of the debts due to the deceased husband of the plaintiff which was decreed in the Court of first instance but was refused by the High Court, the debts to which the claim had been laid having in the meanwhile become time-barred. It was held that where the bringing of an action does as a necessary consequence involve an injury to property which cannot be compensated by the grant of costs in the action a suit for recovery of general damages will lie. In *Har Kumar De* v. *Jagat Bandhu De*[10] a temporary injunction had been obtained on utterly insufficient grounds and it was held that the aggrieved party can maintain an action for recovery of damages. See also *Miazji Lal* v. *Babu Ram*[11], *Bhupendranath Chatterji* v. *Trinayani Debi*[12]. In *Lala Punnalal* v. *Kasturichand Ramji*[13], the Madras

1. (1883) L.R. 11 Q.B.D. 674, 691.
2. (1919) I.L.R. 41 All. 503.
3. (1909) I.L.R. 32 Mad. 170.
4. (1912) I.L.R. 35 Mad. 598.
5. (1922) I.L.R. 45 Mad. 527.
6. (1911) I.L.R. 33 All. 306.
7. (1924) I.L.R. 48 Bom. 691.
8. (1911) 16 C.W.N. 540.
9. (1922) I.L.R. 44 All. 687.
10. (1926) I.L.R. 53 Cal. 1008.
11. I.L.R. (1943) All. 885.
12. A.I.R. 1941 Cal. 289.
13. (1945) 2 M.L.J. 461.

High Court took the view that an action for recovery of damages against the defendant for having procured a malicious house-search will be competent. The decision in *Sreeramulu Naidu* v. *Kolaindaivelu Mudaliar*[1], recognises that a suit for damages for attempting maliciously to get a person declared as a lunatic will be sustainable. In *Nityanand Mathur* v. *Babu Ram*[2], it was considered that an action for recovery of damages will lie for launching proceedings maliciously and without reasonable and probable cause against a legal practitioner under the Legal Practitioners Act for professional misconduct. The foregoing authorities as well as the English decisions do afford a pointer that it will not be incompetent to bring an action for recovery of damages for procuring adjudication of another as insolvent maliciously and without reasonable cause.

DIGBIJAI NATH *v.* TRIBENI NATH TEWARI, I.L.R. (1946) All. 56.

It is, with great respect to the learned Judges who decided this case, rather difficult to agree with their observation that though where payment of money is claimed on a contract interest cannot be allowed except under the provisions of the Interest Act, the position is different where interest is claimed as part of the damages for breach of the contract and it could be allowed. The learned Judges felt that there is no authority for the proposition that interest cannot be claimed by way of damages for breach of a contract under section 73 of the Contract Act. It is now settled that section 73 is merely declaratory of the common law as to damages, *Jamal* v. *Moolla Dawood and Co*[3]. At common law interest was not payable on ordinary debts unless by agreement or mercantile usage; nor could damages be recovered for non-payment of such debts, *London, Chatham and Dover Railway Co.* v. *S. E. R. Co*[4]. There are numerous decisions, often conflicting, as to whether interest could be awarded under *illustration* (*n*) to section 73 in cases where it is not recoverable under the Interest Act. Typical of decisions taking an affirmative view are, *Ganshiam Singh* v. *Daulat Singh*[5], *Anrudh Kumar* v. *Lachmi Chand*[6], *Khetra Mohan* v. *Nishi Kumar*[7], *Muthuswami* v. *Veeraswami*[8]. Among the decisions which take a contrary view are, *Madan Lal* v. *Radakishen*[9], *Kamalammal* v. *Peeru Meera Lowai Rowther*[10]. In *Bengal Nagpur Railway Company* v. *Ruttanji Ramji*[11], the suit was by the representatives of a contractor against the railway company for recovery of damages in respect of certain work done by the contractor for the railway company, the remuneration whereof had been withheld consequent on differences between the parties as to the rates at which it was to be calculated. In awarding a certain sum of money as damages in respect of the withholding of the payment, the High Court decreed interest on such amount up to the date of suit. On appeal the Privy Council took a different view as to the award of interest. The liability of the company was to pay the sum found due on 26th July, 1925. The suit was on 29th November, 1927. It was for the intervening period that the question arose whether interest could be awarded. Section 34 of the Civil Procedure Code provides for payment of interest from date of suit. Interest for period prior to the suit would therefore not come within the scope of that provision of law. In English law interest on damages can be awarded only if there was either a statutory provision or if there were circumstances which would induce a Court of equity to award interest. The general rule is stated by the House of Lords in *London, Chatham and Dover Railway Co.* v. *S.E.Railway Co.*[12], where as already pointed out it was held that interest cannot be allowed at common law by way of damages for wrongful detention of debt. It is true that in England the law has been amended by section 3, Law Reform (Miscellaneous Provisions) Act, 1934,

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1. (1919) 31 M.L.J. 479.
2. (1937) A.L.J. 528.
3. (1915) L.R. 43 I.A. 6 : I.L.R. 43 Cal. 493 (P.C.).
4. (1892) 1 Ch. 120, 140.
5. (1896) I.L.R. 18 All. 240.
6. (1928) I.L.R. 50 All. 818.
7. (1917) 22 C.W.N. 488.
8. (1936) 70 M.L.J. 433.
9. (1942) A.L.W. 659.
10. (1897) I.L.R. 20 Mad. 481.
11. (1937) L.R. 65 I.A. 66 : I.L.R. (1937) 2 Cal. 72 (P.C.).
12. (1893) A.C. 429.

empowering a Court of record to award interest on the whole or any part of any debt, or damages at such rate as it thinks fit, for the whole or any part of the period between the date when the cause of action arises and the date of the judgment. But there has been no such amendment of the law of India. In those circumstances, the Privy Council considered that interest was not awardable in the case of *Bengal Nagpur Railway Co.* v. *Ruttanji Ramji*[1]. Their Lordships remarked : " The learned Judges of the High Court have allowed interest by way of damages caused to the plaintiffs for the wrongful detention of their money by the railway, but the question is whether this view can be sustained. There is considerable divergence of judicial opinion in India on the question of whether interest can be recovered as damages under section 73, Contract Act, where it is not recoverable under the Interest Act. Now section 73, Contract Act gives statutory recognition to the general rule that, in the event of a breach of contract, the party who suffers by such a breach is entitled to recover from the party breaking the contract, compensation for any loss or damage thereby caused to him. On behalf of the plaintiffs reliance is placed upon *illustration* (*n*) to that section. The illustration does not deal with the right of a creditor to recover interest from his debtor on a loan advanced to the latter by the former. It only shows that if any person breaks his contract to pay to another person a sum of money on a specific date and in consequence of that breach the latter is unable to pay his debts and is ruined, the former is not liable to make good to the latter anything except the principal sum which he promised to pay together with interest up to the date of payment . . . . The illustration does not confer upon a creditor a right to recover interest upon a debt which is due to him, when he is not entitled to such interest under any provision of the law. Nor can an illustration have the effect of modifying the language of the section which alone forms the enactment." These last remarks are too emphatic to leave any doubt. They clearly recognise that no interest can be recovered on a debt under section 73, that is, by way of damages, if it is not recoverable under any other provision of the law. In other words section 73 does not independently provide for award of interest by way of damages. Interest would thus be claimable only, either under the Interest Act or in circumstances in which a Court of equity will award the same. Pollock and Mulla have taken the same view. They state : " At common law interest was not payable on ordinary debts unless by agreement or by mercantile usage ; nor could damages be given for non-payment on such debts. The view taken by the learned authors of this work was that there did not seem to be any sufficient ground for reading into *illustration* (*n*) to the present section an intention to abolish this rule and supersede the Interest Act, 1839"[2]. For the reasons indicated *supra* it is possible to take a different view to the one which commended itself to the learned Judges of the Allahabad High Court in the case under review.

LIAQAT HUSAIN *v.* VINAY PRAKASH, I. L. R. (1946) All. 62.

This decision enunciates a salutary practice in regard to the working of section 476 of the Code of Criminal Procedure. Clause (1) of that section states : " When any civil, revenue or criminal Court is, whether on application made to it in this behalf or otherwise, of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195 (1), clause (*b*) or clause (*c*) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing, signed by the presiding officer of the Court and shall forward the same to a Magistrate of the first class having jurisdiction etc." The offences mentioned in section 195 (1) (*b*) and (*c*) are offences against public justice and relating to documents. It will be recognised that the section does not provide that notice in proceedings under that section shall be given to a person who is immediately concerned thereby. The case under review points out that nevertheless it is desirable that such notice

1. (1937) L.R. 65 I.A. 66 : I.L.R. (1937) 2 Cal. 72 (P.C.).
2. The Indian Contract Act, 7th edn., p. 407.

should be given. Too much emphasis cannot be laid on the matter. Justice should not merely be done but should also seem to be done. It is a general principle that no one should be made to suffer unheard. In *Inayat Ali* v. *Mohan Singh*[1], an application had been made to the Court under section 195, Criminal Procedure Code for sanction to prosecute. It was held that though it is not legally necessary that notice of such application should be given to the opposite party before orders thereon are passed, nevertheless it is highly desirable that such notice should be given. In *Ram Piari Rai* v. *Emperor*[2], Knox, J. said much the same thing though he held that failure to give such notice will only be an irregularity and not an illegality. He said : "There is no doubt that this Court has always looked with disfavour upon an order made under section 476 without giving notice to persons immediately concerned. .. .. .. While I think, that it is always fairest and a course that should be followed, that a notice should be given, I cannot put the want of notice on a higher ground than irregularities in procedure". In *Imam Ali* v. *Emperor*[3], where a preliminary inquiry was actually held and additional evidence was recorded by the magistrate without giving notice to the other party, Sulaiman, J., observed : "It is true that in proceedings under section 476 notice is not absolutely necessary but it has been held by this Court in a number of cases that it looks with disfavour upon an order passed without such notice and it has also often been remarked that it is highly desirable though not essential, that such notice should be given." The decision in *Mohamed Kaka* v. *District Judge, Bassein*[4], expresses the position even more forcibly. There Dunkley, J., said : "It is a fundamental principle of justice that no order to the prejudice of a person shall be made without his being heard and therefore before an order directing the filing of a complaint against a person is made, that person must be heard and must be given a full opportunity of showing cause against the making of such an order." In the case under notice there had been reception of additional evidence and no notice had gone to the party affected. It was held conformably to the spirit of the decisions cited above that the failure to give notice in the present case vitiated the whole proceedings.

EMPEROR *v.* MANOHAR, I.L.R. (1946) All. 111 :

This decision is of great interest for the discussion it contains of certain points raised in regard to section 30 of the Evidence Act. Section 30 lays down that when more persons than one are tried jointly for the same offence and a confession by one of them affecting himself and others is proved, the Court may take into consideration the confession as against the others as well as the maker. In regard to the meaning of the expression "take into consideration", Woodroffe and Ameer Ali have remarked : "These words do not mean that they have the force of sworn testimony, but nevertheless it is evidence which the Court can consider in deciding guilt of parties". In other words a co-accused's confession is certainly evidence though it may have small probative value only. Section 3 states : "evidence" means and includes "all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry" and "all documents produced for the inspection of the Court". A co-accused is not a witness. So what he states may not fall within the scope of oral evidence. What he states may however be reduced to writing and then as document it may become evidence. Such being the case it is clear that judicial observations that the confession is not evidence must be understood as referring only to the weight to be attached thereto. In *In re Yerranna*[5], it has been stated that under section 30 the statement can only be taken into consideration and it is not evidence against the co-accused ; see also *In re Rami Reddi*[6], *Ramaswami Goundan* v. *Emperor*[7]. As to the weigh which such a statement should command it is generally held that as against a co-accused it cannot supply the place of substantive evidence, *Karuppan Chettiar* v. *Emperor*[8]; it does not stand on the same

1. (1906) I.L.R. 28 All. 142.
2. (1912) 10 A.L.J. 247.
3. A.I.R. 1924 All. 435.
4. A.I.R. 1937 Rang. 62.
5. A.I.R. 1941 Mad. 306.
6. A.I.R. 1941 Mad. 267.
7. A.I.R. 1938 Mad. 675.
8. (1940) M.W.N. 767.

level as substantive evidence and is hence of slight probative value only. It has been stated that it has less value than an approver's testimony. Though in the case of the latter there is the fear that he may be deposing to save his skin yet his testimony could be subjected to cross-examination. For the same reason a confession under section 30 has less value as against a co-accused than the evidence given by an accomplice under section 113. The latter section contemplates that the accomplice shall be examined as a witness. It may no doubt be urged that in the case of the confession of a co-accused, self-implication is guarantee of the truth of the accusation against the accused. Nevertheless since it could not be tested by cross-examination, little weight alone is attached to it and corroboration in material particulars will be required. In *Emperor* v. *Velu Naicken*[1], it was recognised that if a statement is made in the dock before the inquiring magistrate in the presence of the co-accused implicating himself and the co-accused, not only may that confession be taken into consideration but it has considerable probative value. In the case under notice, it was argued that while it is not illegal to convict a man upon his own confession and while in law the confession of one may be taken into consideration against a co-accused, a Court should not convict in either case upon such confession in the absence of corroboration in material particulars, that is, the confession should have as against the person making it the same value and no more than is attached to a confession as against other persons tried jointly with the person making it. In the case of co-accused it is generally agreed that to convict them corroboration is needed ; see *Emperor* v. *Laxman Jairam*[2], *Dikson Mali* v. *Emperor*[3]. This is because a co-accused's statement is considered to have even less value than the testimony of an approver or accomplice by reason of the confessing accused not being liable to cross-examination. As against the maker different considerations operate. Absence of cross-examination has in his case no significance and if conviction upon the uncorroborated testimony of an accomplice is not illegal it will be an *a fortiori* case to convict on the basis of the confession of the accused. The view in *Emperor* v. *Balmakund*[4], is to the same effect. The other question raised in the present case was whether a retracted confession could be acted upon in the absence of any evidence to corroborate what had been stated in the original confession. As observed by Straight, J., in *R* v. *Babu Lal*[5], a retracted confession is " an endless source of anxiety and difficulty to those who have to see that justice is properly administered". The better point of view is that a retracted confession must be regarded with suspicion and as a rule of practice and prudence it may not be safe to base a conviction solely upon such confession. As pointed out in *In re Abdul Gaffoor*[6], the retraction of a confession may throw doubt either on the truth of it or on the fact that it was voluntarily made, but it certainly does not follow because a confession is retracted that it was either untrue or involuntary. In *Bhimappa* v. *Emperor*[7], Lokur, J., observed : " There is no absolute rule of law that a retracted confession cannot be acted upon unless there is material corroborataion, if it is found to be voluntary. But as a rule of prudence it is regarded not safe to base a conviction solely on a retracted confession unless there are circumstances which leave no doubt that it is voluntary and true." The conclusion in the present case that, in the case of a retracted confession if there is room for any doubt as to its genuineness arising from the procedure followed or from its contents, the antecedent circumstances may be of material assistance in determining whether the confession should be believed is wholly in accord with the principles which are applied as a matter of prudence in such cases.

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1. (1939) 2 M.L.J. 202.
2. A.I.R. 1937 Bom. 31.
3. (1940) 196 I.C. 597.
4. (1930) I.L.R. 52 All. 1011 (F.B.).
5. (1884) I.L.R. 6 All. 509.
6. I.L.R. (1941) Nag. 169.
7. A.I.R. 1945 Bom. 484.

KAMANI DEVI *v.* KAMESHWAR SINGH, I.L.R. (1946) Pat. 58.

This case decides an interesting question of Hindu law. It holds that a gandharva marriage among Brahmins governed by the Mithila school is valid even at the present time. Various views are found in the decided cases as to the gandharva marriage and its validity. Manu describes it thus :

इच्छयाऽन्योन्यसंयोगः कन्यायाश्च वरस्य च ।
गान्धर्वः सतु विज्ञेयो मैथुन्यः कामसंभवः ॥

—" The voluntary union of a maiden and her lover is to be regarded as a gandharva marriage prompted by love and the desire for carnal union." Smriti writers like Devala have prescribed that the observance of rituals is necessary in the case of every marriage including the gandharva, though at its inception it is quite possible that the institution was a purely secular compact between a youth and a damsel. Devala states :

गान्धर्वादि विवाहेषु पुनर्वैवाहिको विधिः ।
कर्त्तव्यश्च त्रिभिर्वर्णैः समर्थेनाग्नि साक्षिकः ॥

—" In gandharva and other forms of marriage, in the case of the first three castes the marriage ritual should be performed in the presence of the sacred fire." A gandharva alliance which has complied with these requisites is nothing less than a marriage and is certainly not a concubinage. This is recognised by the Madras High Court in *Brindavana* v. *Radhamani*[1]. The observation of Spencer, O.C.J., in *Maharaja of Kolhapur* v. *Sundaram Ayyar*[2], that " in order to constitute a lawful marriage among Hindus, it is essential that certain nuptial rites should be performed ; otherwise the marriage is only a gandharva marriage or as it is described in *Brindavana* v. *Radhamani*[1], ' a marriage importing an amorous connection founded on reciprocal promise ' " misses the essential point that even in the gandharva marriage the performance of rituals is altogether necessary and unless accompanied by the performance of ceremonies the union will be a concubinage merely. Equally open to criticism is the dictum in *Bhaoni* v. *Maharaj Singh*[3] that marriage in the gandharva form is only concubinage. The remark of Daniels, J., in *Kishan Dei* v. *Sheo Paltan*[4], that the gandharva marriage is " really nothing more than the unregulated indulgence of lust " seems also to be the result of misapprehension. Nothing is to be found either in the texts or in the decisions to detract from the correctness of the conclusion in *Brindavana* v. *Radhamani*[1], that gandharva marriage is a valid marriage giving rise to the status of wifehood for the female party.

As to whether the gandharva as a form of marriage is extant or has become obsolete, on that matter also there is a divergence of judicial opinion. Where a form of marriage has been recognised by the sastras, it will naturally be for the party claiming that it has become obsolete to make out the fact. If that has been proved, it will be for the party who affirms the validity of such a form of marriage at the present time to show that it is valid as for instance, by custom. The decision in *Brindavana* v. *Radhamani*[1] does not suggest that the form should be deemed to have become obsolete. In *Viswanathaswami* v. *Kanu Ammal*[5], Abdur Rahim, J., observed, though *obiter* : " It may be that . . . . perhaps among the Kshatriyas the gandharva form of marriage has, even within recent times been recognised as prevalent in some parts of India . . . . Supposing . . . for argument's sake that the gandharva form of marriage would according to the ancient texts be permissible among the Sudras, I am of opinion that, so far as this caste (kambala) is concerned, it must, upon the evidence in the case, be held to be obsolete and no

1. (1889) I.L.R. 12 Mad. 72.
2. (1925) I.L.R. 48 Mad. 1.
3. (1881) I.L.R. 3 All. 738.
4. (1926) I.L.R. 48 All. 126.
5. (1919) 24 M.L.J. 271.

longer recognised as valid." A more forthright view is found in *Bhaoni* v. *Maharaj Singh*[1] where it is stated that the form has become obsolete as a form of marriage giving the status of wife and making the off-spring legitimate. Equally emphatic is the opinion of Daniels, J., in *Kishan Dei* v. *Sheo Paltan*[2] that six out of the eight forms (*i.e.*, forms other than Brahma and Asura) have "wholly disappeared". The other learned Judge, Sulaiman, J., considered that the gandharva marriage cannot be regarded as wholly non-existent and that it can be recognised if it is allowed by custom. It may be pointed out that the Allahabad view is to some extent coloured by the notion that the gandharva marriage did not involve the performance of ceremonies and as such was tantamount to concubinage only. The conclusion in the case under notice that this form of marriage has not become obsolete is not unwarranted. As pointed out in *Sambasivan* v. *Secretary of State*[3], in another connection, merely because cases of such marriage are rare it cannot be assumed that the institution has become obsolete. Either a statutory provision invalidating it or a custom forbidding it will have to be proved.

Another question that has arisen is whether the gandharva form of marriage is permissible only to the Kshatriyas and forbidden to the other castes. In *Kishan Dei* v. *Sheo Paltan*[2], it is suggested that the form is available to the soldier classes only. In *Viswanathaswamy* v. *Kanu Ammal*[4], the possibility of members of the Sudra caste marrying in that form was recognised. In the present case the form is held to be equally available to the members of the Brahmin caste as well.

There are however certain observations in the case under notice which, with due respect to the learned Judges, may be said to be somewhat open to criticism. It is observed that it should be "borne in mind that instances are not wanting in Hindu law when a particular jural relationship is created contrary to the sastraic injunctions, the relationship so created is not null and void for all purposes, however invalid they be for certain purposes." At another place it is remarked: "It may be assumed for the purposes of this case that this marriage may not be *as valid as* the four approved forms of marriage for all other purposes (*i.e.*, other than maintenance) including questions of inheritance, succession, etc.; but there is no authority for the proposition that a husband after taking a wife in this form of marriage and *after consummating the same and thereby* disabling the wife from taking another husband would be free to escape the consequences of his own act by denying her the right of maintenance." (Italics ours.) These statements would suggest: (*i*) that at the present time there are degrees of validity in marriage; (*ii*) that consummation is relevant in the matter of the wife's rights; and (*iii*) that a valid marriage may give rise to maintenance right only for the wife and nothing beyond. The first of the positions is inconsistent with modern trends in Hindu law. Marriage is a matter of status. It is either valid or void. There is no *tertium quid*. If valid, all the rights of a wife arise. Any restriction in this matter can only be by statute or by custom. The distinction drawn by the sastras between the approved and the unapproved forms of marriage regarding their effect on gotra, riktha and pinda has not been maintained by the judicial decisions. All marriages are treated alike in regard to their legal consequences. Nor is there any cutting down of the rights of the wife in the case of a gandharva marriage by statute. Nor has any custom derogating from her rights been established anywhere. The contention in the present case seems to have been merely a denial of the validity of the marriage as well as of its factum. The second of the considerations mentioned has also not much force. The rule that the bride should be (ananyapurvika) अनन्यपूर्विका has been treated as purely advisory. It is not consummation that would have disqualified the woman from marrying later but the subsistence of the previous valid marriage. If there is a valid marriage its consummation has hardly any bearing on the rights of the wife. If there is no valid marriage, then also consummation

1. (1881) I.L.R. 3 All. 738.
2. (1926) I.L.R. 48 All. 126.
3. (1921) 41 M.L.J. 109: I.L.R. 44 Mad. 704.
4. (1913) 24 M.L.J. 271.

is immaterial. If the woman becomes entitled to maintenance it is *qua* wife and not because of the sexual relationship. The last of the assumptions is also difficult to follow. Where the woman married is of the same caste she will get all the rights of a wife of that caste and not the right to maintenance merely. Even in regard to the off-spring it is only where the union is in the anuloma form that a distinction is drawn as to rights, see *Natha Nathuram* v. *Chota Lal*[1]. In support of the view that when a jural relationship is created contary to the sastras it may not be a total nullity but valid for some purposes, reference is made to an invalidly adopted son. There seems really to be no analogy. The maintenance given to him is not *qua* adopted son but on the finding that he is not; likewise in the case of the illegitimate son of a dwija, maintenance is given not on the basis that he is an inferior type of legitimate son but on the footing that he is not. If among Sudras he has heritable capacity it is by virtue of special texts. The case of the wife married from within the prohibited degrees is mentioned as the best illustration. Here again the fact is overlooked that maintenance is given to her not as one having the status of a wife but as one who has to be treated as a mother or as a sister.

AWAD SINGH *v.* EMPEROR, I.L.R. (1946) Pat. 298.

An interesting question under section 530, Criminal Procedure Code, fell to be decided in this case where it was held that where a person is properly charged with two separate offences in one trial his conviction upon each must constitute a separate conviction and there seems no reason in principle why the invalidity of one conviction upon grounds that affect that conviction alone should affect or invalidate the other conviction. Authority on the matter is meagre and what little that is available discloses a conflict of judicial opinion. Section 530 provides *inter alia* : " If any magistrate, not being empowered by law in this behalf, does any of the following things, namely :—(p) tries an offender, his proceedings shall be void". According to Bennett, J., in the present case the term " proceeding " when used in a statute relating to legal procedure signifies in its ordinary plain and grammatical meaning, a step in an action or trial and the words " his proceedings " in the context refer to those proceedings only which the magistrate was not competent to take. In Ex parte *Dalton*[2], there was a joint prosecution of a number of persons jointly on a charge of conspiracy to persuade tenants in a certain estate not to pay rent. During the course of the trial two of the accused who were on bail left the country but the trial proceeded in their absence with the rest and a number of the accused including the two absentees were convicted. On the question whether assuming that the conviction of the two absentees would be illegal the other convictions also were void, Pallas, C.B., observed : " Were the offence here one capable of being committed by a single individual the case would be clear. In such a case the conviction of two upon a charge against the two jointly should be treated as the separate conviction of each and the invalidity of the separate conviction of one, by reason of his not having been present at the time of his conviction could not invalidate the conviction of the other." The test propounded was whether the alleged offence was capable of being committed by a single individual. The trial in such a case could be regarded as severable with reference to each of the accused who were jointly tried. The illegal part being severed the legal part would remain valid. A contrary view has been taken in *Pokar Das Ganga Ram* v. *Emperor*[3]. There eight persons were jointly tried for an offence under sections 302 and 307 of the Penal Code. One of the accused had remained absent throughout the trial having been granted an illegal exemption without regard to the provisions of section 540-A of the Criminal Procedure Code. It was stated by Young, C.J. : " A joint trial is a single trial and cannot be considered as a separate trial of each person accused ; it is one and indivisible. It

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1. (1930) I.L.R. 55 Bom. 1.
2. (1890) L.R. 28 Ir. 36.
3. A.I.R. 1938 Lah. 216.

follows. . . . that an illegality which vitiates the trial so far as one of the accused is concerned prevents the trial from holding good in respect of the remaining accused." In *Emperor* v. *Fazal Rahman*[1] one of the accused in a joint trial was a public servant for whose prosecution sanction of the authorities was necessary. The Magistrate though not empowered to try him without such sanction held his trial along with that of the other accused. On the question whether the trial was thereby vitiated it was held that the proceedings were void not only as against the accused public servant but as against all the accused. It was observed that the word " proceedings " in section 530 though not defined anywhere in the Criminal Procedure Code must, having regard to its use at different places in the Code, be taken to signify the whole bundle of actions taken and recorded by the Court from the moment of taking cognisance till the final disposal of the matter. It is difficult to fully concur in this view. Where the legal part is susceptible of being severed from the illegal part there is no reason why the entire proceedings should *per se* be regarded as invalid. Anyway the matter is one where it is desirable that the doubt should be set at rest by legislation.

In re D. L. SINHA, I.L.R. (1946) Pat. 468 (S.B.).

This decision is of interest in so far as the Patna High Court has followed the ruling of the Madras High Court in *District Judge of Anantapur* v. *Vema Reddi*[2]. The question was whether a person who was a matriculate and had passed in 1941 the Advocates Examination held by the Bombay High Court and been enrolled in 1943 as an advocate of the Bombay High Court could practise regularly in the Courts subordinate to the Patna High Court. Section 4 of the Legal Practitioners Act provides that an advocate who wishes to appear in a Court subordinate to a High Court in which he was not enrolled should have been practising ordinarily in the Court in which he is enrolled. If this section applied the concerned advocate will be disentitled to practise in Behar, he not having ordinarily practised in the Bombay High Court. Section 38 of the Act however contains the provision that nothing in that Act except section 36 shall be applicable to advocates enrolled under the Bar Councils Act, 1926. The nature and extent of the rights of the advocate concerned therefore fall to be governed by the provisions of the latter Act. Section 14 (*b*) of the latter Act provides that an advocate enrolled under that Act shall be entitled to practise subject to the exceptions specified there in any other Court in British India or before any other tribunal or person legally authorised to take evidence. Such being the case, and there being no other law which prohibits persons like the advocate concerned from practising in the subordinate Courts of a province other than that in which he was enrolled, it is clear that he can practise in the Courts subordinate to the Patna High Court.

PRANLAL BHAGWANDAS *v.* CHAPSEY GHELLA, I.L.R. (1945) Bom. 649.

As to how far the right to maintenance and marriage expenses of the daughter of a coparcener can be enforced against or affect joint family properties alienated to a purchaser for value has frequently come up for consideration but has not always eliminated further problems in the matter. It is well settled that the right of a Hindu female to receive maintenance and a provision for marriage is not a purely personal right but arises by virtue of her membership of the joint family, *Subbiah* v. *Anantaramayya*[3]. It is also true that a Hindu female has no right in any specific property belonging to the joint family and the right she has to maintenance and marriage expenses is a right which is not crystallised into a charge and therefore does not attach to any specific property belonging to the family. It is also clear

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1. A.I.R. 1938 Peah. 52.
2. (1945) 1 M.L.J. 106 (F.B.).
3. (1928) 57 M.L.J. 826 : I.L.R. 53 Mad. 84.

that the debts of the family take precedence over the right to maintenance and marriage expenses of a female member. In the present case, the joint family had debts to the extent of Rs. 90,000 and property had been agreed to be sold for Rs. 1,45,000. There was an unmarried daughter of the head of the family among other female members. The question was whether the transferee would take the property unaffected by the daughter's right of which he was aware. Before the amendment of section 39 of the Transfer of Property Act, a transfer could be avoided only if it had been made with the intention of defeating the female member's right. Under the amended section, the female member's right will not be affected if (*i*) the transferee was a volunteer, or (*ii*) if he had notice of the right. In the case in question the transferee had notice. Chagla, J., held that the transferee will take the property free from the female member's right. He observed : "The fact that the sale proceeds realised are larger than the debts to be paid is entirely an irrelevant question ; once it is conceded that the property is sold for legal necessity and also it is conceded that the purchaser is not bound to look to the application of the sale proceeds, the fact that the karta realises more than what is necessary to pay the joint family debts does not give any rights to the Hindu female to look to the property which has been alienated for her maintenance or marriage expenses." It may, with respect, be observed that the reasoning is not convincing. True, there is legal necessity, but it is only up to Rs. 90,000. The rule that the purchaser is not bound to see to the application of the sale amount applies only where the legal necessity for the entire transaction as such or a *bona fide* enquiry into the existence of the necessity of the sale has been made out. It cannot apply where admittedly the transaction was for a far larger amount than the debts to be paid. In such a case it may even be that the entire alienation may be set aside, *Mahomed Shumsool* v. *Shewukram*[1], *Bhagwat Dayal* v. *Devi Dayal*[2], *Santi Kumar Pal* v. *Mukund Lal Mandal*[3]. Even if the entire alienation does not fall to be set aside it has been held that at least to the extent to which the transaction is not covered by legal necessity it is liable to be set aside. In *Radha Bai* v. *Gopal*[4], such a conclusion was reached. In that case a wife living apart from her husband brought a suit for maintenance and obtained a decree. Before it could be executed the husband sold all his properties to his natural father who also had notice of the passing of the maintenance decree. It was found that there were debts of a binding character to the extent of Rs. 9,518. In the circumstances, the Bombay High Court held the sale to be valid to the extent of 21/37 and declared the remaining 16/37 of the properties to be liable to the wife's maintenance. In principle there seems to be no difference between this decision and the present case. To distinguish that decision therefore as one turning on "the very exceptional facts of the case" does not seem to be warranted. In both cases there was legal necessity which covered the major part of the transaction. In both the cases before the sale the transferee had notice that there was no legal necessity for the balance of the amount. There is no finding in either case that the property could not be split up and sold. The principle that the purchaser is not bound to see to the application of the sale proceeds assumes that the purchaser was not aware of the absence of justification for the transaction in regard to any part of it. It therefore seems as if a different conclusion would be more consistent with the circumstances of the case.

LALA DUNI CHAND *v.* MOSAMMAT ANAR KALI, (1946) 2 M.L.J. 290 (P.C.).

It is gratifying that the Privy Council has in this decision affirmed the view taken by the various High Courts in India as to the applicability of the provisions of the Hindu Law of Inheritance (Amendment) Act, 1929, to cases where a male owner had died before the passing of the Act and had been succeeded by a limited

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1. (1874) L.R. 2 I.A. 7 (P.C.).
2. (1908) L.R. 35 I.A. 48 : I.L.R. 35 C. 420 (P.C.).
3. (1925) I.L.R. 62 Cal. 204.
4. (1942) 45 Bom.L.R. 980.

owner who however died after the passing of the Act. On this question there are a series of Full Bench and other decisions holding that the Act applies even in such cases, *Lakshmi* v. *Anantram*[1], *Pakhan Dushad* v. *Mt. Manova*[2], *Mt. Rajpali* v. *Surjes Raj*[3], *Shakuntala* v. *Khaushalya*[4], *Shankar* v. *Raghoba*[5], *Shankar Rao* v. *Santibai*[6]. The question in the present case was defined to be whether the Act II of 1929 applies only to the case of a Hindu male dying intestate on or after the 21st February, 1929, or whether it also applies to the case of such a male dying intestate before that date if he was succeeded by a female heir who died after that date. It was held by the Privy Council that the words "dying intestate" in the Act are a mere description of the status of the deceased and have no reference and are not intended to have any reference to the time of the death of the Hindu male; the expression merely means in the case of intestacy of a Hindu male, and to place this interpretation on the Act is not to give a retrospective effect to its provisions, the material point of time being the date when the succession opens, namely, the death of the widow. The succession does not open until the termination of the widow's estate and therefore it is only those that will be the nearest heirs of the husband at that moment of time that will take. Incidentally, it is remarked by the Privy Council: "the description and preamble of the Act make it clear that the object of the Act is to alter the order of succession of certain persons therein mentioned, namely, a son's daughter, daughter's daughter, sister and sister's son and to *rank them as heirs in the specified order of succession* next after a father's father and before the father's brother" (*italics ours*). In view of this statement it is arguable whether the opinion expressed by the Bombay High Court in *Sidramappa* v. *Neelava*[7] and *Bai Mahalaxmi* v. *The Deputy Nazir, District Court, Broach*[8], that the Act does not alter the order of succession to males governed by the law of the Bombay school where the sister's place is after the father's mother and before the father's father does not require reconsideration.

EMPEROR *v.* ABDUL AZEEZ, I.L.R. (1946) All. 238.

In regard to suretyship by way of bail two different views have emerged from the judicial decisions, in consequence whereof, in the working of section 499 of the Criminal Procedure Code, a certain amount of confusion has crept in. Suretyship under the section, according to one view, involves the idea of the accused being the principal, and so where no bond has been taken from the accused himself, the bond taken from the surety would be invalid and there can be no enforcement of the penalty, on breach of the conditions of the bond. In *Wadhawa Singh* v. *Emperor*[9], Zafar Ali, J., has inclined to this view. It also receives support from the opinion expressed by Mulla, J., in *Emperor* v. *Brahmanand Misra*[10]. According to this learned Judge, section 499 does not contemplate a person being released on bail without executing a bond himself, merely upon an undertaking or security given by a surety, the only exception to such a rule being found in section 514-B which provides: "When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept in lieu thereof a bond executed by a surety or sureties only." This, in the opinion of Mulla, J., makes it perfectly clear that it is incumbent under section 499 to get a bond executed by the person who is released on bail and until that is done there can be no valid bond by a surety alone. A different view as to suretyship by way of bail has been expounded in *Emperor* v. *Nisar Ahmed*[11]. Malik, J., there recognises that section 499 and the form prescribed in schedule V, No. 42, show that there have to be two bonds, one executed by the accused and another by the surety; but that the obligation undertaken by the

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1. (1937) 2 M.L.J. 209 : I.L.R. (1937) Mad. 948 (F.B.).
2. (1937) I.L.R. 16 Pat. 215 (F.B.).
3. (1936) I.L.R. 58 All. 1041.
4. (1936) I.L.R. 17 Lah. 356.
5. A.I.R. 1938 Nag. 97.
6. (1938) 40 Bom.L.R. 1201.
7. (1932) I.L.R. 57 Bom. 377.
8. (1943) 45 Bom.L.R. 434.
9. A.I.R. 1928 Lah. 318.
10. I.L.R. (1939) All. 924.
11. I.L.R. (1945) All. 639.

surety is an entirely independent one and that it is not as if the accused is a sort of principal. In *Indar* v. *Emperor*[1], it is remarked that the true view is to regard the person giving the bail as the principal and the person for whom the bail is given as the subject-matter of the contract. The etymology of the term " bail " lends some colour to this view. Wharton's definition states that bail is " derived from French *Bailler* and means to hand over, to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which, they have if they fear his escape, the legal power to deliver him." A fuller exposition of this view is found in the decision under review where it is pointed out that the surety is not in such cases guaranteeing the payment of any sum of money by the accused who is released on bail but guarantees only the attendance of such person and that his contract and that of the person released on bail are independent of each other. The same position has been accepted by Bajpai, J., in *Reoti* v. *Emperor*[2]. The result is that according to the first view the bond taken from the surety will be invalid where no bond has been taken at the same time from the accused also and that it is only then that the power to forfeit the surety's bond for breach of conditions can be exercised. The latest exposition of this view is contained in *Baidyanath Misra* v. *Emperor*[3]; see also *Emperor* v. *Brahmanand Misra*[4] and *Wadwa Singh* v. *Emperor*[5]. The decisions that have favoured the other view of suretyship hold that the failure to take a bond from the accused does not invalidate the bond taken from the surety. In *Emperor* v. *Nisar Ahmed*[6], it is remarked that such failure may at the most be an irregularity but cannot affect the surety's liability and the fact that till the amendment of section 514, where the accused was a minor, bonds were taken from the sureties only without any exception being taken to the practice constitutes a pointer to the correctness of the conclusion so reached. The case under notice takes the same view. Having regard however to the existence of differences of opinion between the Allahabad and the Patna High Courts on the one hand and the conflicting observations to be found even as among the Judges of the same High Court as in Allahabad and Lahore, it is to be hoped that the matter will receive early elucidation by the Privy Council.

THE GOVERNOR-GENERAL IN COUNCIL *v.* DEBI SAHAI, I.L.R. (1946) All. 250.

This is an interesting pronouncement on the scope of section 75 of the Railways Act (IX of 1890). It holds that where non-delivery of a consignment entrusted to a railway company is proved, the company cannot escape liability in the absence of evidence led by it to show that the parcel had been lost or destroyed. The liability of a railway company for the loss or destruction of the articles entrusted to it was at one time held to be that of an ordinary carrier and at another time as that of an insurer. Section 75 of the present Railways Act provides that the railway administration shall not be responsible for the loss, destruction, etc., of the parcel or package unless the person sending or delivering the package to the administration has caused its value and contents to be declared or declared at the time of the delivery of the parcel or package for carriage by railway and, if so required by the administration has paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk. The question is whether non-delivery of the article is equivalent to its loss for purposes of section 75. In *Hearn* v. *London and South-Western Railway Co.*,[7] in considering the analogous provisions of the Carriers Act of 1830, Baron Parke held that what the section contemplated was that the goods should " have been *lost by* the carrier as distinguished

1. (1941) I.L.R. 22 Lah. 519.
2. (1934) All.L.J. 871.
3. (1946) 12 Cut.L.T. 32.
4. I.L.R. (1939) All. 924.
5. A.I.R. 1928 Lah. 318.
6. I.L.R. (1945) All. 639.
7. (1855) 10 Exch. 793.

from *loss to* the owner." See also *Millen* v. *Brasch*[1]. In the course of the argument in the former case, Baron Martin put the question to counsel, "suppose a person delivered to a porter at a railway station a casket of jewels and in consequence of his refusal to forward it the casket remained for sometime at the station, would that be a loss within the Act?" Another Judge, Baron Alderson asked, "suppose the goods were known by the carrier to exist but were not delivered by him for a month, would that be a loss within the Act?" In *East Indian Railway Co.* v. *Jogpat Singh*[2], Page, J., remarked: "an affirmation that in such circumstances the goods have been lost surely involves a distortion of the meaning of the word so extravagant as to approach an abuse of the English language." The learned Judge held that loss occurs whenever the railway company to which the goods have been consigned for conveyance, involuntarily or through inadvertence loses possession of the goods and for the time being is unable to trace possession of them. In *Seetharama Ayyar* v. *South Indian Railway Co.*[3], Cornish, J., observed that the loss contemplated in section 75 will include a loss caused by the misfeasance or misconduct of the company's servants and that the section contains no qualification as regards the meaning of loss. The same view was taken in *Secretary of State* v. *Surjylal Haribaksh*[4], where it was held that it is not correct to assume that loss could occur only if the goods are lost involuntarily or through inadvertence but that loss by theft or fraud or by wilful neglect or connivance of railway officers is also loss within section 75. In *Narain Das* v. *East Indian Railway Co.*[5], it was contended that an article is not lost within the meaning of section 75 unless the actual manner in which the article was stolen in the course of the transit was proved by the railway company. It was held that the argument will have no force where it was clear from the admitted facts that the articles must have been stolen while in transit. From the decisions it is clear (*i*) that the loss contemplated by the section is one by the carrier as distinguished from loss to the owner; (*ii*) that the loss may be involuntary or through inadvertence, negligence or misfeasance of the employees of the company or through theft by outsiders or servants of the company or with their connivance; and (*iii*) that for the protection afforded by section 75 to be available the loss itself must be proved though not the manner of it. The burden of proving such loss is on the railway company, see *East Indian Railway Company* v. *Jogpat Singh*[2]. The case in *Chandrabhan Prakashnath* v. *East Indian Railway Company*[6] contains the statement that "there can be no doubt that if the articles are still in the possession of the railway administration and if they have failed to deliver the articles in their possession they cannot take advantage of section 75 of the Railways Act. It is only when the articles have been lost by them that the respondents can claim protection under section 75 of the Railways Act." At another place it was observed: "When a certain article delivered to the railway company is not forthcoming for delivery at the destination and its whereabouts are not known one would say that the article has been lost." The decision under notice is of value in so far as it lays down that where the railway company seeks to show that the articles are lost by pleading that their whereabouts are not known a mere assertion on its part to that effect is wholly unavailing but evidence should be let in to prove such fact. The fact being presumed to be one within its knowledge the burden of proof will lie on the railway company only.

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1. (1882) L.R. 10 Q.B.D. 142.
2. (1924) I.L.R. 51 Cal. 615.
3. A.I.R. 1936 Mad. 491.
4. (1934) I.L.R. 61 Cal. 599.
5. (1912) I.L.R. 34 All. 652.
6. (1926) 24 All.L.J. 305.

THE KING-EMPEROR *v.* VIMLABHAI DESHPANDE, (1946) 2 M.L.J. 10 : 1946 F.L.J. 95, (P.C.).

This decision deals with a matter of much legal and constitutional importance. It is a well-settled principle of English law that an order directing the discharge of a person under a writ of *habeas corpus* is final and is not subject to appeal, *Cox* v. *Hakes*[1]. In England, the writ is issued as a prerogative writ and it has been held that unless it was expressly so provided, the right of appeal generally given by section 19 of the Judicature Act, 1873, will not cover an appeal against an order of discharge in such cases. The principle presumably is that individual liberty is so precious that when a Judge of His Majesty's High Court has in his discretion directed an arrested person to be set at liberty on a writ of *habeas corpus* that discretion ought not ordinarily to be interfered with. There is no reason why the same considerations should not operate in the case of persons in other parts of the British Commonwealth. Liberty is no less precious to them. In India writs in the nature of *habeas corpus* are now issued under section 491 of the Criminal Procedure Code. In *Girindra Nath Banerjee* v. *Birendra Nath Pal*[2], it was pointed out by Sir George Rankin, C.J., that according to the law of India it will not be competent to a High Court to issue a writ of *habeas corpus* at common law independently of section 491 of the Criminal Procedure Code. This statement was approved and the matter was finally settled in *Matthen* v. *District Magistrate, Trivandrum*[3], where it was held that in cases covered by section 491, Criminal Procedure Code, the power to issue a common law writ of *habeas corpus* in British India had been taken away by legislation and the powers conferred by section 491 substituted therefor. Section 404 of the Code has provided that no appeal lies from any judgment or order of a Criminal Court except as provided for by the Code or any other law for the time being in force. In *Emperor* v. *Sibnath Banerjee*[4], it was recognised that there is no provision in the Code for an appeal from an order of discharge under section 491. Section 417 read with section 411-A will not avail either, for, they provide for an appeal from an acquittal and an order on a *habeas corpus* application is neither an order of conviction nor one of acquittal. The question therefore was whether there was any other law providing for such appeal. And the Privy Council held that an appeal may lie to the Federal Court in such a case under section 205 of the Government of India Act, 1935, if the case involved any substantial question of law as to the interpretation of the Government of India Act, and that a further appeal from the Federal Court to the Privy Council may lie under section 208 of the Constitution Act. It was also held by the Privy Council that in cases where an appeal could reach the Judicial Committee in that way, special leave may not be granted by the Privy Council for an appeal directly to His Majesty in Council, *Errol Mackay* v. *Oswald Forbes*[5]. cf.; also *Bhaya Mohammad Azim Khan* v. *Sadat Ali Khan*[6]. It would be a different question, however, whether outside the category of cases covered by sections 205 and 208 of the Constitution Act (as where an order of discharge on a *habeas corpus* application has been passed in a case not involving any substantial question of law as to the interpretation of the Constitution Act) an appeal by special leave could be entertained by the Judicial Committee. A negative answer will follow if the English analogy held. Two decisions of the Privy Council in *Attorney-General for the colony of Hong Kong* v. *Kwok-a-Singh*[7] and *Reg* v. *Mount*[8], have held that in such cases special considerations operated and that in the case of appeals from colonial courts the Privy Council was really tendering advice to His Majesty as to the exercise of his prerogative. In the present case the point is developed by the Privy Council, and it observed that " the broad principle which must determine the question is that appeals from decisions of Courts in the British Dominions and dependencies to the King in Council are heard under the Royal

1. (1890) 15 A.C. 506.
2. (1927) I.L.R. 54 Cal. 727.
3. (1939) 2 M.L.J. 406 : L.R. 66 I.A. 222 : I.L.R. (1939) Mad. 744 (P.C.).
4. (1945) 2 M.L.J. 325 : 1945 F.L.J. 222 (P.C.).
5. (1940) 1 M.L.J. 64 : L.R. 67 I.A. 64 : I.L.R. (1940) 1 Cal. 286 : 3 F.L.J. 1 (P.C.).
6. (1939) 2 M.L.J. 181 : L.R. 66 I.A. 160 : I.L.R. 14 Luck. 252 (P.C.).
7. (1873) L.R. 5 P.C. 179.
8. (1875) L.R. 6 P.C. 283.

prerogative and that the prerogative can only be curtailed by force of an Act of Parliament, that is, by the King in Parliament, and that there is no Act of Parliament which prohibits or authorises the prohibition of an appeal to His Majesty in Council by a party aggrieved against an order discharging from custody a person under section 491, Criminal Procedure Code. Strictly, this is so. But can there not be a conventional limitation of the exercise of the power to grant special leave? It is accepted that the Privy Council grants special leave only where it looks as if there has been a failure of natural justice. It has also often been stated that in criminal matters the High Court is the highest forum. It is equally well recognised that against orders of acquittal or discharge there shall not be interference ordinarily. Such being the principles, can it not with justice be contended that where a subject has been directed by the High Court to be set at liberty on a *habeas corpus* application a review of such order by a higher tribunal should not be encouraged and in practice therefore the Privy Council should decline to grant special leave to appeal? In the present case leave had been granted and the arguments against the entertainment of the appeal came to be urged on a plea to revoke the leave as having been irregularly granted.

THAKUR JAGANNATH BAKSH SINGH *v.* THE UNITED PROVINCES, (1946) 2 M.L.J. 29 (P.C.).

This decision of the Privy Council is of special interest in view of the proposal recently made for the abolition of the permanent settlement and the liquidation of the zemindari tenure. It has often been suggested that such a measure may not be within the competence of the Provincial Legislature. In the present case, the Privy Council had to consider whether the United Provinces Tenancy Act (XVII of 1939) which admittedly cut down the absolute rights claimed by the taluqdars in that province to be comprised in the grant of their estate as evidenced by sanads issued by the Crown was, to that extent, *ultra vires* the Provincial Legislature. The impugned Act purported to regulate and secure the rights of the tenants in various respects "on lines sufficiently familiar in modern agricultural legislation" and it was not contested that in doing so it impinged on the powers which, but for that measure, the taluqdars might have exercised within their estates. Apropos of the question it is instructive to note that before the Joint Parliamentary Committee whose deliberations led to the enactment of the Government of India Act, 1935, a demand had been made that the permanent settlement should be removed from interference by the Legislature and in that connection the Committee had observed: "We do not dispute the fact that the declarations as to the permanence of the settlement, contained in the regulations under which it was enacted, could not have been departed from by the British Government so long as that government was in effective control of land revenue. But we could not regard this fact as involving the conclusion that it must be placed beyond the legal competence of an Indian ministry responsible to the Legislature which is to be charged *inter alia* with the duty of regulating the land revenue system of the province, to alter the enactments embodying the permanent settlement, which enactments despite the promises of permanence which they contain, are legally subject to repeal or alteration."[1] It is with this background that the provisions of the Government of India Act in regard to legislation on land revenue and land tenures came to be framed. The Joint Parliamentary Committee has frankly conceded that the promises of permanence contained in the sanads issued by the Crown cannot curtail or limit the power of the Legislature to legislate so as to affect the permanent settlement. It is obvious that an Act of the Legislature could always be modified or repealed by a later Act of the Legislature and it is equally clear that the prerogatives of the Crown could be controlled by legislation. In the present case reliance was placed in support of the claim that the impugned Act was *ultra vires* on the provisions of (i) section 3 of the Crown Grants Act (XV of 1895) and (ii) sections 299 and 300 of the Government of India Act, 1935. Section 3 of the Crown Grants Act states:

1. Joint Parliamentary Committee Report, para. 372.

"All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid (*i.e.*, one made by the Crown) shall be valid and take effect according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding." It is clear that the reference in this section to any rule of law, statute or enactment can only be a reference to rules, statutes and enactments already in force and can hardly refer to rules, statutes or enactments that may be passed subsequent to the coming into force of the Crown Grants Act. To construe the provision differently will cut at the doctrine that a Legislature can always repeal or modify any prior legislation and control also the prerogative powers of the Crown. In the *North Charterland Exploration Co.* v. *The King*[1], the Crown had made a grant of lands lying within the territories of a Protectorate in favour of a company. The supreme legislative as well as the executive power was vested in the Crown in regard to that territory. It was held that the Governor by a legislative act could derogate from the grant that had been made in favour of the company. Luxmoore, J., observed : " the doctrine of derogation from grant cannot be applied in the case of a grant by the Crown so as to deprive it of its paramount right to legislate for the protectorate in which the subject of the grant is situate." The remarks will equally apply where the legislative powers are not vested in the executive authority but in a Legislature duly constituted. The question remains what precisely is the scope of the power conferred on the Provincial Legislature under the Government of India Act, 1935, and whether there are any statutory limits on such power imposed by that very Act, always remembering that "within their own sphere the powers of the Provincial Legislature are as large and ample as those of Parliament itself," see *Queen* v. *Burah*[2], and *United Provinces* v. *Atiqa Begam*[3]. Item 21 in List II of schedule VII to the Government of India Act gives power to the Provincial Legislature to legislate on "land, that is to say, land tenures including the relation of landlord and tenant and the collection of rents, transfer, alienation and devolution of agricultural land, land improvement and agricultural loans, etc." *Prima facie* the power to legislate in respect of land tenures and the collection of rents would cover legislation derogating from the terms of the permanent settlement sanad, in the absence of any safeguards contained in the Act itself. Section 299 provides that no person shall be deprived of his property in British India save by authority of law. This however, as the rest of the section shows, is intended to prevent expropriation. The only other section that may have a bearing is section 300 (1) which provides that " The executive authority of the Federation or of a Province shall not be exercised, save on an order of the Governor-General or Governor, as the case may be, in the exercise of his individual judgment, so as to derogate from any grant or confirmation of title of or to land." But it is self-evident that this provision deals only with executive action and does not affect legislative competence and authority and legislative action. On these considerations the conclusion arrived at by the Privy Council is inescapable that the impugned Act in the present case is not *ultra vires* the Provincial Legislature.

KADIR BIBI *v.* MAILAPPA PILLAI, (1946) 2 M.L.J. 82 (F.B.).

Clauses providing for redemption on payment of the mortgage money on a particular date or month in any year, in default of redemption immediately on the expiry of the mortgage period, are a familiar feature of mortgages, any question as to the legality of such stipulations notwithstanding. The question has in fact often arisen as to how far such covenants are unobjectionable. *Prima facie* this will depend on the circumstances of each case, and no rigid test can be prescribed. Section 60 of the Transfer of Property Act gives the mortgagor the right to redeem at any time after the principal money has become due on payment or tender to the mortgagee at a proper time and place of the mortgage money. The section in terms recognises the validity of stipulations providing that if the time fixed for

1. (1931) 1 Ch. 169.
2. (1878) 3 A.C. 889.
3. (1941) 1 M.L.J. (Supp.) 65 : (1940) 3 F.L.J. 97 (F.C.).

the payment of the mortgage money has been allowed to pass or no time has been fixed for its payment, the mortgagee should be given reasonable notice before payment or tender of the mortgage money. In *Muhammad Sher Khan* v. *Raja Seth Swami Dayal*[1], it was remarked by Sir Lawrence Jenkins that the section is unqualified in its terms and contains no saving provision as other sections do in favour of a contract to the contrary. It has however been generally agreed that the section cannot be understood as precluding the parties for deciding for themselves what is reasonable notice. The Courts will interfere with any such arrangement only where it operates oppressively against the mortgagor or unconscionably so as to jeopardise his right to redeem. In *Chinnasami Reddiar* v. *Krishna Reddy*[2], a mortgage deed recited : " I shall pay back the said amount within three years from this day and redeem the usufructuary mortgage deed. If I fail to pay at the prescribed time you shall receive the money from me in any Ani month and restore the said properties to me." It was held by Subrahmanya Aiyar and Moore, JJ., that all that the later clause meant was that the mortgagor cannot recover in any year at a date earlier than June and July, as, if he did so, he would deprive the mortgagee of the crops grown on the land. The arrangement was thus considered not as one affecting redemption but as one regarding the appropriation of the crops by the mortgagee in consonance with principles of justice and equity. A case closely similar to the present case is that in *Kangaya Gurukkal* v. *Kalimuthu Annavi*[3]. There a usufructuary mortgage stated : " Thereafter on the 30th Panguni Bhava year, causing the aforesaid Rs. 200 to be paid (on paying the aforesaid Rs. 200) we shall redeem or recover back our land. If on the date so fixed the amount be not paid and the land recovered back, in whatever year we may pay the Rs. 200 in full on the 30th Panguni of any year then you shall deliver back our lands to us." The Court held that the second sentence only meant that in the event of the mortgagor not paying on the due date but subsequently, he may pay only on the corresponding day of a future year and there shall then be an obligation on the part of the mortgagee to give up the land. This construction receives support from the decision of Mears, C.J. and Lindsay, J., in *Gokul Kalwar* v. *Chandar Sekhar*[4], where a possessory mortgage contained a stipulation that the mortgagee should surrender possession only if everything was done by the mortgagor to discharge the mortgage debt by Jeth Sudi Purnamashi and the Court remarked : " In a mortgage of this kind the mortgagee can only be called upon to vacate possession in favour of the mortgagor if all steps necessary for redemption had been taken so as to enable the mortgagee to vacate possession in the fallow season of Jeth. It follows therefore that if in one particular year the mortgagor fails to take all the necessary steps to obtain redemption in the fallow season the mortgagee is entitled under the terms of the mortgage to remain in possession till the fallow season of the following year. The decision in *Kirpal Singh* v. *Sheoambar Singh*[5] is also to the same effect. There a mortgage deed contained the provision that the mortgage money should be tendered in the month of Jeth. It was held that " all that the mortgagee is entitled to insist upon is that there should be no redemption except in that month. Such a provision is not a clog on the equity of redemption inasmuch as the intention of the party obviously is to permit redemption at a time when the crops are not standing." A different view as to the validity of such stipulations was expressed in *Govinda Menon* v. *Chathu Menon*[6], where it was held that once the mortgage money had become payable, a suit for redemption cannot be met by the plea that the money was to be paid within certain dates only. Perhaps the most forceful exposition of this view is that of Venkatasubba Rao and Newsam, JJ., in *Suppan Chettiar* v. *Rangan Chetty*[7]. In that case a usufructuary mortgage had provided : " I shall pay the principal sum of Rs. 14,000 on the expiry of the due date and redeem the mortgage. . . . If in any year, after the stipulated period I pay the amount,

1. (1921) 42 M.L.J. 584 : L.R. 49 I.A. 60 : I.L.R. 44 All. 185 (P.C.).
2. (1906) 16 M.L.J. 146.
3. (1903) 14 M.L.J. 61 : I.L.R. 27 Mad. 526.
4. (1926) I.L.R. 48 All. 611.
5. A.I.R. 1930 All. 289.
6. A.I.R. 1914 Mad. 563.
7. A.I.R. 1938 Mad. 405.

I shall pay it on the 30th Ani (1st July) and redeem the mortgage and take back this othi deed." It was observed : "Redemption is by reason of the ten year term prevented till 1st July. On that date and not till then does the right for the first time accrue ; but the moment it accrues, the further clause seeks to impede and hamper that right. If the mortgagor is for some reason unable to redeem or prevented from redeeming on 1st July, the right vanishes for the time being, and although it accrues periodically again, it remains in force for a single day in each year, so that if the mortgagor forgets the due date he does so at his peril. His right is thus ever in jeopardy being liable to be defeated by his own fault or omission or by the mortgagee's cunning or evasion." These diverse views in sooth are attributable more to differences in approach rather than to any differences over the principles to be applied. The proper assessment will be to see whether the stipulation in the particular case has been conceived with a view to hamper or restrict the right of redemption or only for legitimately securing to the mortgagee the product of the crops he may have sown and nurtured. If the provision does not make redemption a farce or in the circumstances of the case is not oppressive it may be held to be a stipulation not running counter to the policy contained in section 60 of the Transfer of Property Act.

SINGARA MUDALI *v.* IBRAHIM BAIG SAHIB, (1946) 2 M.L.J. 103.

In this case where the defendant had purchased property from three minors and their natural guardian, the mother, subject to an agreement by the vendors to convey the property to the plaintiff, it was held that a suit for the specific performance of the agreement was not competent since there could be no specific performance against the minors and therefore against a transferee from them either. The leading case in India on this matter is *Mir Sarwarjan* v. *Fakhruddin*.[1] There a suit for specific performance was brought by a minor after attaining majority, of an agreement to convey property in his favour made during his minority with his guardian by the defendant. In refusing the relief, Lord Macnaghten observed : "It is not within the competence of the manager of a minor's estate or within the competence of the guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immovable property and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality and that the minor who has now reached majority cannot obtain specific performance of the contract." In *Venkatachalam Pillai* v. *Sethuram Rao*[2] a suit was brought for specific performance of an agreement to resell to a minor, property which had been conveyed to the defendant by the minor's guardian subject to the condition that if at any time the purchaser wanted to sell the property it should be offered to the minor in the first instance. The covenant was : "If it happens that you or your heirs have to sell the property to others then you must sell it to the plaintiff or his heirs for the above price and also for such price as may be determined by arbitrators in respect of any building that may be constructed upon the land." It was held that the agreement for resale being an executory contract without mutuality it was unenforceable by either party in a suit for specific performance. The validity or enforceability of such a contract does not depend on the question whether it was conducive to the benefit of the minor or not. In *Zeebunnissa Begum* v. *Mrs. Danagher*[3] as to the point of time when the question of mutuality falls to be ascertained, certain observations from Fry on Specific Performance were relied on by Varadachariar, J. According to Fry, a contract to be specifically enforced must be such that it might *at the time that it was entered into* have been enforced by either of the parties against the other of them, that the mutuality of

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1. (1911) 21 M.L.J. 1156 : L.R. 39 I.A. 1 : I.L.R. 39 Cal. 232 (P.C.).
2. (1933) 64 M.L.J. 354 : I.L.R. 56 Mad. 433 (F.B.).
3. (1935) I.L.R. 59 Mad. 942 : 70 M.L.J. 477.

the contract is to be judged of at the time it was entered into and that an infant cannot sue for specific performance because he could not be sued for specific performance. That it makes no difference whether the suit is for specific performance by the minor or against him is recognised in *Abdul Haq* v. *Muhammad Yahya Khan*[1]. In that case the Patna High Court held that no distinction can be drawn between an agreement to purchase and an agreement to sell and that the latter agreement also cannot be enforced against the minor. It was further held that if the minor is not bound by the agreement the transferee is also not bound by it. See also *Srinath Bhattacharya* v. *Jatindra Mohun Chatterjee*[2], *Swarath Ram Ram Sahan* v. *Ram Ballagh*[3]. In Madras, the matter has come up for consideration in *Ramakrishna Reddiar* v. *Chidambara Swamigal*[4]. One of the arguments in the case was that though the agreement to sell the minor's estate may not be specifically enforceable against the minors it can be enforced against the subsequent purchaser with notice of the suit agreement. In repelling the contention the learned Judge (Thiruvenkatachariar, J.) observed : " The short answer to this contention is that section 27 (*b*), Specific Relief Act presupposes a valid contract. But if the original agreement is void and unenforceable against the minors it follows that it cannot be enforced against the subsequent transferee from the guardian". The conclusion reached in the case under notice is thus in accord with the authorities mentioned *supra*.

KALIDAS CHETTY *v.* SIDDHA CHETTY, (1946) 2 M.L.J. 110.

This case deals with a point of great practical importance. It holds that where the amount deposited in Court as required by Order 21, rule 89, Civil Procedure Code fell short of the correct amount by a trifling sum, the deficiency being due to a mistake in calculation by the clerk who received the amount, and the deficiency was made good as soon as it was pointed out which, however, was after thirty days had expired from the date of the sale, the Court has no jurisdiction to excuse the delay and the maxim *de minimis non durat lex* cannot apply. A question of this character may fall to be considered under various enactments. Order 21, rule 89, Civil Procedure Code provides that the person applying to have the sale set aside should deposit *inter alia* for payment to the decree-holder " the *amount specified in the proclamation of sale* as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder." A similar provision is found in section 38 (2) of the Indian Contract Act which lays down that the offer of performance must be " of the *whole of what* he (the promisor) is bound by promise to do." Section 83 of the Transfer of Property Act which confers on the mortgagor the right to deposit in Court the money due on a mortgage requires that it should be of " *the amount remaining due* on the mortgage". Section 84 provides for the cessation of interest only on tender or deposit of " *the amount remaining due* on the mortgage". In all such cases the general rule is that the amount tendered should be the *precise amount* that is due[5]. In redemption cases it has been held that the mortgagee is not bound to accept anything less than the full amount owing to him, *Gauri Shankar* v. *Abu Jafar*[6]. The smallness of the deficiency is immaterial for this purpose, *Kameshwar Singh* v. *Ramjiwan Sahu*[7], *Jag Sah* v. *Ramachandra Prasad*[8], *Subbiah Goundan* v. *Palni Goundan*[9], see however *Subramania Aiyar* v. *Narayanaswami Vandaya*[10], *Narayanaswami Nayak* v. *Ramaswamy Nayak*[11]. The same question as that in the present case arose in *Kalinga Hebra* v. *Narasimha Hebra*[12]. In that case the amount deposited

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1. A.I.R. 1924 Pat. 81.
2. A.I.R. 1926 Cal. 445.
3. (1925) I.L.R. 47 All. 784.
4. (1927) 54 M.L.J. 412.
5. Halsbury's Laws of England, 2nd Edition, Vol. 7, p. 198.
6. (1915) 34 I.C. 690.
7. A.I.R. 1932 Pat. 237.
8. (1921) 63 I.C. 563.
9. (1916) 30 M.L.J. 607.
10. (1917) 34 M.L.J. 439.
11. (1939) 1 M.L.J. 324.
12. (1911) 21 M.L.J. 631.

by the assignee of the judgment-debtor was somewhat short of the amount which section 310-A of the Civil Procedure Code required to be deposited. There was a small deficiency and the Court appropriated certain amounts paid on other accounts by the party, to make up the deficit in the amount payable as mentioned in the sale proclamation. It was held by the High Court that section 310-A confers a special right on the judgment-debtor and before he can avail himself of the benefit of the section he must comply strictly with its terms. Since that had not been done in the case, the Court can have no jurisdiction either to extend the time for the payment or to overlook the deficiency in deposit as a matter of no moment. In *Rahim Baksh* v. *Nundo Lal Gossami*[1] it was held that a deposit under section 310-A should be such that the decree-holder could draw the money at once. It has likewise been recognised that it is not in the power of the Court to extend the time however small the deficit, see *Chandi Charan Mandal* v. *Banki Behari Lal Mandal*[2]. A contrary view has been taken in certain other cases. Following *Rangini Sundari* v. *Hiralal Biswas*,[3] it has been held in *Dildar Ali* v. *Kusum Kumari*[4] and *Gopinath Tewari* v. *Hiraman Bibi*[5] that where a deposit made for the purpose of setting aside a sale is short by a small amount, due to the applicant being misled by the officer whose duty it is to check the deposit, such an act is not a casual act of an officer of the Court and that if a party is misled by the act the Court should set the matter right. In *Nanhu Prasad Singh* v. *Nandan Missir*[6], applications had been made under Order 21, rule 89 and in one case the shortage was by Rs. 9 and in another case it was by Rs. 1-10-0. It was held following the previous Patna decisions that the principle of *de minimis non curat lex* will apply. It may also be noted that in proceedings for infringement of the revenue laws it has been held that if the deviation were a mere trifle which if continued in practice will weigh little or nothing in the public interest it might properly be overlooked, *The Reward*.[7] In cases however like the present there is no question of any public interest admitting a relaxation of the law, the violation being of an immaterial kind. The rights involved are private rights and obligations and it may therefore be plausibly argued that the strict letter of the law must rule in such cases. Anyway in view of the conflict of judicial opinion, having regard to the frequency with which the point is likely to occur, it is desirable that there should be an early elucidation of the correct position, whether strict execution or a benevolent construction is to be insisted upon.

RAHIMA BIBI *v.* SHERFUDDIN, (1946) 2 M.L.J. 305.

This case holds that in the case of a minor Muslim girl marriage is a "necessary" that would come within the purview of section 68 of the Contract Act. It also recognises that in English law the position would be different. An extended interpretation of the term, "necessary" was recognised by Wallis, C.J., in *Ramajogayya* v. *Jagannadham*[8] where he laid down that in deciding what are necessaries the position of the minor and the expenses which are properly chargeable to his estate under the personal law by which he is governed may have to be taken into account. He observed: "What are 'necessaries' must depend on the facts of each case and in the case of a Hindu, money advanced for the expenses of a marriage which the minor has to perform or to pay off a debt binding on him may be recoverable under this head from his estate". Similarly in *Ramakrishna Reddiar* v. *Chidambara Swamigal*[9], Thiruvenkatachariar, J., held that 'necessary purposes'

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1. (1887) I.L.R. 14 Cal. 321.
2. (1899) I.L.R. 26 Cal. 449 (F.B.).
3. A.I.R. 1930 Cal. 249.
4. A.I.R. 1924 Pat. 256.
5. A.I.R. 1933 Pat. 515.
6. A.I.R. 1934 Pat. 246.
7. 2 Dod. 265.
8. (1918) 36 M.L.J. 29 : I.L.R. 42 Mad. 185 (F.B.).
9. (1927) 54 M.L.J. 412.

should be understood as comprising " all that is necessary to meet the wants of the minor and of other members of his family who have claims either against him personally or against his estate". The decision in *Annamalai Chetty* v. *Muthuswami Maniagaran*[1] seems to approve these principles. A somewhat different note is sounded in *Tikki Lal* v. *Kamalchand*[2]. In that case, money had been advanced for the expenses of the marriage of a minor boy. Puranik, J., considered that " advancing of funds to a male Hindu minor for meeting his own marriage expenses is not supplying him with 'necessaries' suited to his condition in life within the meaning of section 68 of the Contract Act, and a person advancing such funds is not entitled to be reimbursed from the property of such a minor." The learned Judge, however, recognised that the supply of funds for the marriage of a female member like a sister may stand differently. Marriage in the case of a male has no doubt been recognised as " practically compulsory " and an alienation of family property or encumbering it so as to bind the other members of the family will be justified. At the same time the marriage of a minor male would seem to be not merely against the spirit of the sastras but contrary to the policy underlying the Child Marriage Restraint Act. In the words of Puranik, J., " though Courts have widened the definition of the term 'necessaries' within the meaning of section 68, Contract Act, it will be a travesty of justice to include in the term a marriage which is prohibited by law and thus not permitted by social usage". In *Pathak Kali Charan* v. *Ram Devi Ram*[3], funds had been advanced for the marriage of the brother of a minor owning ancestral property. The Patna High Court held that the money could be recovered from the estate under section 68 though the amount had really been advanced as earnest money for a contract of sale of property and had been applied for purposes of marriage. A similar view is found in *Makundi* v. *Sarabaksh*[4], where, Mahmood, J., considered that on an alienation being set aside, recoupment of any portion of the purchase money actually spent upon the maintenance or marriage of the minor should be permitted to the alienee. Whatever may be the position in regard to a minor Hindu male, the case of a girl whose maintenance and marriage expenses the minor is under an obligation to meet under his personal law would stand on a different footing. Marriage in the case of girls is the only samskara of a compulsory character according to the texts and the money advanced therefor might well be deemed to be advanced for " necessaries". The question would still remain whether the marriage of a Muslim minor girl is governed by the same considerations. It is no doubt stated in *Muhaidin Tharanagar* v. *Sainambu Ammal*[5], that, according to Muslim law, practice and tradition, a girl was expected to be married as soon after she attains puberty as possible. This cannot however mean either that marriage is obligatory in the case of every Muslim girl or that the marriage should be performed while the girl is still a minor. In so far as the present decision holds that the considerations operating as regards the marriage expenses of a Hindu girl will equally apply where the minor girl is a Muslim and the case will be within the purview of section 68, it may, with respect, be submitted that it marks new ground and constitutes an extension of the meaning of the term " necessaries " in section 68, Contract Act.

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1. (1939) 1 M.L.J. 798 : I.L.R. (1939) Mad. 891.
2. I.L.R. (1940) Nag. 632.
3. (1917) 2 Pat.L.J. 627.
4. (1884) I.L.R. 6 All. 417.
5. (1941) 1 M.L.J. 503 : I.L.R. (1941) Mad. 760.