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NOTES OF RECENT CASES.

Horwill and Kuppuswami Ayyar, JJ. Alagappa Chettiar *v.* Muthukaruppan Chettiar.
22*nd November*, 1946. A. A. O. No. 311 of 1945.

Res judicata—*Execution—Petition to transmit decree for execution—Failure of judgment-debtor to raise objection to executability of decree*—Res judicata.

In an application to transmit a decree for execution to another Court, the judgment-debtor must raise any objections he has to the general executability of the decree. He must, for example, plead discharge, or, if the decree is not executable on the ground that the Official Receiver has not been brought on record on the insolvency of the decree-holder that objection too must be taken.

But in an application for transmission it is not necessary for the judgment-debtor to object to the executability of the decree against a particular item of property, because that would not be a valid objection to the transmission of the decree. Where objections that could and should have been raised have not been raised in the transmission petition they cannot be raised in a subsequent execution application.

B. C. Sesbachala Aiyar and *T. S. Nagaswami Aiyar* for Appellant.
R. Kesava Aiyangar and *S. R. Krishnamacharya* for Respondent.
K.S.

Horwill and Kuppuswami Ayyar, JJ. Padarty Balayya *v.* Parvateswara Rao.
29*th November*, 1946. A.A.O. No. 620 of 1945.

Hindu Law—Decree on promissory-note against father and sons and joint family property in their hands—Execution against shares of sons—Limitation—Period between adjudication of father as insolvent and annulment—If can be excluded as against the sons.

When sons are joined with the Hindu father in a suit on a promissory note and a decree is obtained against the father and the sons as well as the joint family property in their hands, the claim against the sons must be deemed to have been put in suit and merged in the decree and the only mode of enforcing such claim is by executing the decree against the sons. Such a decree is executable against the sons even during the period that the father was an adjudged insolvent. The period during which insolvency proceedings against the father was pending (date of adjudication to the date of annulment) cannot be excluded in computing the period of limitation for execution of the decree against the sons.

Decision in C.M.A. No. 634 of 1941, 56 L.W. 182, I.L.R. 1940 Mad. 815, considered and distinguished ; (1941) 1 M.L.J. 270, relied on.

V. Suryanarayana for Appellant.
K. Bhimasankaram for Respondent.
K.S.

Wadsworth and Govindarajachari, JJ. Chinna Venkata Reddi *v.* Sidda Reddi.
29*th November*, 1946. Appeal No. 147 of 1945.

Hindu Law—Partition—After-born sons—Right to challenge—Limits.

A partition once completed cannot be challenged by an after-born son except in a case where no share is allotted to the father. A partition is completed when the title in the different shares has passed to the persons who have divided. So far as immoveable properties are concerned, the title passes either by the execution of a registered instrument or by an agreement to divide coupled with a trans

of possession. If there is an agreement to divide in certain shares and th without any division by metes and bounds come into the separate enjc the various sharers, there is, such a transfer of possession as would mak the sharers completely entitled to the undivided share which is in his ei An after-born son cannot challenge such a partition arrangement.

The Advocate-General (*K. Rajah Aiyar*) and *D. Narasaraju* for Appellan

Sir A. Krishnaswami Aiyar, N. C. Vijayaraghavachari and *N. C. Srin* Respondents.

K.S.

Govindarajachari, J. Gangayya *v.*
29th November, 1946. S.A. No. 2214

Practice—Suit framed as for account instead of for mesne profits by person restitution to his property wrongly sold in execution—Dismissal—If justified—Limit

Where the plaint contains all the allegations which would be neces suit for recovery of mesne profits but the suit is described as a suit for ar partly to avoid payment of a large court-fee in the first instance and partly the plea of limitation, a dismissal of the suit is not justified.

Article 109 and not Article 120 of the Limitation Act applies to suits f profits by a person who had been dispossessed of immoveable property in of a decree but restored to possession by way of restitution on the rever decree on appeal.

(Case-law discussed.)

K. Kameswara Rao for Appellant.

T. Satyanarayana for Respondent.

K.S.

Chandrasekhara Aiyar, J. Venkatarama Aiyar *v.* Varagunaram
6th December, 1946. S.A. No. 1726

Limitation Act (IX of 1908), Article 84—Advocate—Suit for recovery of fe work done—Limitation—Starting point—Engagement of advocate—Duration.

Article 84 of the Limitation Act is clearly applicable to a suit filed by cate for the recovery of fees due for work done. The three years period co from the termination of the suit for which the advocate was engaged. Th ment of an advocate cannot be held to cover execution proceedings also an as a compromise had been put through, even if it be without reference advocate, the engagement must be deemed to be at an end and limitat mences from that date.

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

A. Swaminatha Aiyar for Respondent.

K.S.

Rajamannar, J. Kamurunnissa Begum *v.* Azizuddi
12th December, 1946. C.R.P. No. 583

Civil Procedure Code (V of 1908), Order 47 and sections 151 and 152—A for amendment of errors in decree—When to be by review application.

Where once the preliminary decree has fixed the shares of the parties i tion suit, it is not open to the Court in the final decree proceedings to al in any way. Where a mistake has been committed in respect of the of properties, if it was an inadvertent mistake and not the result of a d finding, it is not necessary for the party to come by way of a review ap The Court has got power to make the necessary amendments to correct suc errors. It may be that as a result of correcting the errors, consequential have to be made in the arithmetical calculation of amounts that may be but even those alterations would partake of a clerical nature and would n amount to a substantive adjudication. It is only when such a substantiv cation is prayed for, that the appropriate remedy would be by way of a revi cation.

R. Desikan for Petitioner.

F. Muhammad Hibbathullah for Respondent.

K.S.

Rajamannar, J. Shanmugha Raja *v.* Suppiah Serva
th December, 1946. S. A. No. 1133 of 1945, et

Madras Forest Act (*V of* 1882), *sections* 32 *and* 26—*Extension of provisions of section* 2 *Forest Act to forests in a zamindary—If affects ownership of the forests—Suit by zamind for declaration of title to such forests and that they were in his enjoyment—Maintainabili -Madras Act XVIII of* 1946—*Applicability.*

Where the zamindar requested the Government to extend the provisio f section 26 of the Forest Act to the forests and waste lands in his estate, such fores nd waste lands do not become the property of the Government on the issue of otification under section 32 of the Madras Forest Act. The zamindar can mainta suit for declaration that the forest and waste lands belong to him and is in h njoyment. Neither the Government nor the forest officer as such could mainta suit for a declaration of title and ownership as regards forest lands in the estat

Madras Act XVIII of 1946 does not apply to reserved forests situated in estat s defined in the Madras Estates Land Act.

K. Kuttikrishna Menon for Appellant.

M. S. Vaidyanatha Ayyar for Respondents.

K.S.

Rajamannar, J. Sanka Rama Rao Naidu *v.* Kistna Co-operative Urban
th December, 1946. Bank, Lt
S. A. No. 849 of 194

Transfer of Property Act (*IV of* 1882), *sections* 3 *and* 130—*Fixed deposit—How f debt—If actionable claim—Endorsement of fixed deposit receipt—When amounts to vali ssignment of the debt.*

A fixed deposit is a debt though under the terms of the contract the amou ue is not payable *eo instanti*. Even if payable in the future it is nonetheless a xistent debt. The fixed deposit receipt is evidence of such debt. The mon overed by the fixed deposit receipt is an actionable claim. An endorsement c ich receipt :—"Please pay the principal and interest to *C* after the deposit matures perates as a valid assignment of the debt covered by the fixed deposit recei nd the endorsee is entitled to recover the same.

(Case-law discussed).

P. Satyanarayana Rao for Appellants.

K. Bhimasankaram for Respondents.

K.S.

Rajamannar, J. Venkappa Bhatta *v.* Ramayya Bhatt
o*th December*, 1946. C. R. P. No. 10 of 194

Civil Procedure Code (*V of* 1908), *Order* 33, *rule* 5, *clause* (*d*-1)—*Question if ba arred by* res judicata—*Power of Court to take evidence.*

Under Order 33, rule 5, clause (*d*-1), the Court is justified in taking eviden n the question whether the suit was barred by *res judicata.*

Ramaswami Vadyar v. *Karuppan Chettiar*, (C. R. P. No. 1055 of 1945, n eported), relied on.

Perumal Aiyar v. *Srinivasa Aiyangar*, (1941) 1, M.L.J. 31 not followed as it dea ith rule 5 of Order 33 before clause (*d*-1) was added.

K. Srinivasa Rao for Petitioner.

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

K.S.

Kuppuswami Ayyar, J. Sabapathy Mudaliar *v.* Ponnambala Gounda
2*th December*, 1946. Cr.R.C. No. 371 of 194
(Cr.R.P. No. 359 of 1946

Criminal trial—Charge of offence punishable under section 406, *Penal Code—Discha -Finding in revision that accused should be charged for offence punishable under section* 47

Penal Code—Accused if can be committed to sessions without any enquiry into the charge under that section.

The accused was originally discharged by the Magistrate in respect of an offence punishable under section 406, Penal Code, of which alone he was charged. On a revision petition it was found that he should be charged for a different offence punishable under section 477, Penal Code and he was directed to be committed to sessions for that offence. In a petition to revise the order directing the accused to be committed to sessions it was contended that the lower Court was not justified in directing the accused to be committed straightaway without any enquiry while the original charge was under section 406, Penal Code, of which he was discharged.

Held, such an order is passed only where the accused would not have been tried and discharged in respect of a charge under a different section. It was not on the enquiry into an offence punishable under section 477, Penal Code, that there has been an order of discharge. In the circumstances there should be a fresh enquiry and then a committal if the offence under section 477, Penal Code, is made out.

V. T. Rangaswami Iyengar and *R. Santhanam* for Petitioner.

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

A. V. Narayanaswami Aiyar for Respondent.

K.S.

Rajamannar, J. Municipal Council, Anakapalli *v.* Srinivasa Rao.
16*th December*, 1946. C. R. P. No. 672 of 1945.

Contract Act (*IX of* 1872), *section* 70—*Printer printing examination papers for Municipal High School—Absence of requisite contract in writing by commissioner—Effect—Right of printer to recover printing charges under section* 70, *Contract Act.*

Where in respect of printing examination papers for a Municipal High School (which actually uses the papers) there is no contract by the commissioner in writing, as required by the Madras District Municipalities Act, the doctrine of implied agency of the headmaster who actually entered into the contract cannot be relied on. As the printer however did the work not gratuitously for the municipality and the municipality accepted the benefit of the work he would be entitled to recover the charges under the provision contained in section 70 of the Contract Act which would apply.

K. Kuttikrishna Menon for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Rajamannar, J. Soundararaja Perumal Devasthanam *v.* Ganapathy Thevar.
16*th December*, 1946. C. R. P. No. 370 of 1946.

Court-Fees Act (*VII of* 1870), *section* 7, *clause* (*iv*) (*f*)—*Suit against trustee for accounts—Proper court-fee.*

Where the prayer in a suit against a trustee is for passing of a decree, directing the defendant to render a true and proper account with reference to the transactions, collections, expenses, remissions, amounts allowed to become time barred, non-collections, etc., set forth in several paragraphs of the plaint and for the appointment of a commissioner to examine the accounts and vouchers produced by the trustee, *ad valorem* court-fee is not payable. 70 M.L.J. 292 and A.I.R. 1936 Mad. 525, relied on. (1945) 2 M.L.J. 460, distinguished.

S. Thiagaraja Ayyar for Petitioner.

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

K.S.

Horwill and Bell, JJ.
6th December, 1946.

Muyyarikkandi Kalandar and others *v.* Muyyani Kandi Kunhipakki.
A. A. O. No. 338 of 1945.

Suits Valuation Act (VII of 1887), section 4—Suit for partition of the plaintiffs' half share in suit properties comprising parambas, garden, etc.—Question of jurisdiction—If to be determined by valuing the whole of the plaint schedule properties or only the half share which the plaintiffs claim.

It is clear from the provisions of section 4 of the Suits Valuation Act that for purposes of jurisdiction it is the plaintiffs' interest in the property that must be valued. Where the plaintiffs' claim is for an undivided half share in the suit properties comprising parambas, garden, etc., which they seek to have divided, it is clear that the suit relates only to a half share of the plaint schedule property.

P. Govinda Menon for Appellant.

K. Kuttikrishna Menon for Respondent.

V.S.

Rajamannar, J.
10*th December*, 1946.

Chengalraya Chetty *v.* Official Receiver, North Arcot.
C. R. P. No. 1040 of 1945.

Provincial Insolvency Act (V of 1920), section 34 (1)—Claim in respect of decree debt payable by insolvent but paid by claimant—Claim, if a debt provable in insolvency.

The claim of a creditor tendering proof of his debt was made in respect of an amount which the creditor paid to discharge a decree which was passed against the claimant, the insolvent, and another. The petitioner claimed that though the decree ran against three persons it was only the insolvent that was really liable and that he having paid the entire decree amount was entitled to recover the same from the insolvent. On a contention that the debt was not a provable debt,

Held, that assuming that the petitioner's claim was by way of contribution it did not fall within either category mentioned in sub-section (1) of section 34 of the Provincial Insolvency Act. It cannot be said that the value of the debt is in capable of being fairly estimated. It certainly is not a demand in the nature of unliquidated damages. The claim in contribution is not a claim in damages. It cannot be said that the claim of the petitioner is not a debt which is not provable under the Act.

S. V. Venugopalachari for Petitioner.

M. Natesan for Respondent.

V. S.

Rajamannar, J.
10*th December*, 1946.

Perumal and others *v.* Perumal Reddiar and another.
C. R. P. No. 282 of 1946.

Provincial Small Cause Courts Act (IX of 1887), schedule II, Article 35 (ii)—Applicability—Suit to recover sum representing value of tamarind belonging to plaintiff alleged to have been taken away by the defendants—Not excepted from the cognizance of Small Cause Courts—Likelihood of question of title to immoveable property being gone into—If affects jurisdiction of the Small Cause Court.

Where a suit is for the recovery of a sum of Rs. 65 being the value of tamarind belonging to the plaintiff alleged to have been taken away by the defendants, it does not fall within Article 35 (ii) of Schedule II of the Provincial Small Cause Courts Act for it cannot be said that the averment in the plaint discloses the commission of a criminal offence by the defendants. Nor does the suit relate to a right to immoveable property because after the tamarind is brought down from the

trees, it is certainly moveable property. The fact that incidentally the q title to immoveable property may have to be gone into does not take jurisdiction of the Small Cause Court.

K. V. Rangachari for Petitioner.

A. Seshachari for Respondent.

V.S.

Rajamannar, J. Krishnamurthy Ayyer *v.* R. Kailasam Ayyer and
12th December, 1946. C. R. P. No. 86

Hindu Law—Joint family—Suit by endorsee of promissory note executed b Decree against undivided sons of executant—Judgment-debtors directed to pay amount "as the legal representatives of their late father"—Executability again family property in the hands of the judgment-debtors—Civil Procedure Code (V section 115—Executing Court going behind the decree under a mistake of law— in revision.

In a suit by the endorsee of promissory note executed by the father Hindu family, a decree was passed against the undivided sons of the and the judgment-debtors were directed to pay the decree amount "as representatives of their late father." The decree-holder proceeded to s joint family properties in the hands of the judgment-debtors. On an that such properties cannot be proceeded against in execution of the de

Held, that the joint family properties in the hands of the judgmen would be liable to be proceeded against in respect of a decree passed for the of the debt by the maker of the note, their father. The fact that the su an endorsee of the note did not affect the question as the decree was or of the father.

Held further, that where the executing Court refuses execution ag joint family properties in such circumstances, it acts without jurisdict though it was by a wrong understanding of the law that it had gone b decree and is therefore clearly a ground of interference contemplated b 115, Civil Procedure Code.

D. Ramaswami Aiyangar for Petitioner.

K. S. Narayana Aiyangar for Respondent.

V.S.

Rajamannar, J. Gopalakrishna Chetty *v.* Sreeramul
17th December, 1946. C. R. P. No. 81

Court-Fee—Appeal—Court passing order for payment of additional fee— order.

When an appeal was originally filed an objection was taken that t court-fee had not been fixed. The appellant's counsel was heard and passed an order directing the appellant to pay *ad valorem* court-fee calc the value of the appeal. That was done. Later on the court-fee examine out that a larger court-fee was payable and the valuation of the appea correct. The Judge agreed with the court-fee examiner and ordered of additional correct court-fee. On revision,

Held, the earlier order of the Judge fixing the court-fee is final for all till the matter is carried to a higher court and the question of court-fe be re-opened. The fact that the particular aspect pressed by the court-fee was not before the Judge on the earlier occasion does not preclude the the order already made.

A. Sundaram Ayyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for the Governme

K.S.

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uswami Ayyar, J.
December, 1946.

Ramanathan Chettiar, *In re.*
Cr. R. C. Nos. 1097 and 1098 of 1945 and 411 of 1946
(Cr. R. P. Nos. 1016 and 1017 of 1945 and 396 of 1946)

Madras District Municipalities Act (*V of* 1920), *section* 347—*Notification extending in provisions to a Panchayat Board area—Failure to include section* 347 *in the notification rosecutions for offences punishable under the District Municipalities Act—Maintainability.*

The Local Government at the request of a Panchayat Board extended certain isions of the Madras District Municipalities Act to the area under the control iat Panchayat Board. But in the notification order issued under section 206 e Madras Local Boards Act the provisions of section 347 of the Madras District icipalities Act was not included, with the result that the provision as regards person who is to prosecute for offences under the provisions of the Madras ict Municipalities Act was not included and there was no machinery for ing such prosecutions. In prosecutions for certain offences, under the Municiies Act,

Held, such prosecutions cannot be maintained until the provisions of section 347 ipplied to the Local Board area with the necessary amendments as regards the ons who are to start the prosecutions. It will be open to the local Government ke the necessary steps to remedy the defect in future.

C. S. Swaminathan for Petitioners.

P. Govinda Menon for Respondent.

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

K.S.

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uswami Ayyar, J.
December, 1946.

Manikya Mudaliar and another, *In re.*
Crl. R. C. No. 545 of 1946.
(Crl. R. P. No. 523 of 1946).

Indian Penal Code (*XLV of* 1860), *sections* 380 *and* 395 —*Complaint of entry into and stealing of property—Admission of case under section* 380—*During pendency of direction by Additional District Magistrate to treat the case as a preliminary register under section* 395 *without notice to accused and without hearing him—Legality of direc-*

On a complaint alleging entry into the house of the complainant and stealing me articles, the Magistrate admitted the case under section 380, Indian Penal e. When the case was pending, the Additional District Magistrate was ed and he directed that the case should be treated as a preliminary register and proceeded with under section 395, Indian Penal Code.

On a contention that the order was without jurisdiction,

Held, that when a complaint is made, the trying Magistrate need not admit ase in respect of all the offences mentioned in the complaint. If after enquiry nds that a more serious offence has also been committed, he can frame a charge proceed with the trial. Therefore it cannot be said that the order of the g Magistrate amounted to a dismissal of the complaint under section 395, an Penal Code, to justify the order by the Additional District Magistrate ; nor t be said that in a case like this a prosecution for a more serious offence can be red by an appellate Court without notice to the accused and without hearing

V. T. Rangaswami Aiyangar and *G. Natarajan* for Petitioners.

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

V.S.

N R C

Rajamannar, J. — Venkitalakshmi *v.* Chakrapani Aiyangar.
19*th December*, 1946. — C. R. P. No. 774 of 1946.

Provident Funds Act (*XIX of* 1925), *section* 3 (2)—*Right to exemption under—If available to wife of depositor who is a dependant within the meaning of section* 2 (*c*) *and is also a nominee under section* 5 (1) *of the Act.*

The question was whether a compulsory deposit in a railway provident fund standing to the credit of a depositor was payable to his wife under a nomination duly made by the depositor, was free from liability to be attached by a creditor, in execution of a decree obtained by him against the wife for a debt incurred by her along with her husband prior to this death.

Held, that a person nominated under section 5 (1) of the Act could also be a dependant as defined in section 2 (*c*) of the Act and a dependant does not cease to be dependant by being also a nominee. The words "payable under the rules of the Fund to any dependant of the subscriber or depositor" in section 3 (2) should be construed to mean "payable under the rules to a person who falls within the class of persons defined in section 2 (*c*) of the Act." The benefit of the exemption will be available when the sum is paid to any person who would be a dependant within the meaning of section 2 (*c*) of the Act whether such person becomes entitled to that sum by virtue of a nomination or by virtue of the general law or special rule.

Lakshmanna v. *Subramanyam*, (1939) 1 M.L.J. 620 ; *Sitaramaswami* v. *Venkatarama Rao*, (1944) 1 M.L.J. 198, explained. (1919) I.L.R. 46 Cal. 962, referred to.

T. L. Venkatarama Aiyar for Petitioner.

R. Gopalaswami Aiyangar for Respondent.

V.S.

Wadsworth, J. — Sankarappa Naidu *v.* Nallayya Pillai.
20*th December*, 1946. — C. R. P. No. 1381 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938), *section* 20—*Period fixed under—If can be extended with reference to section* 5 *of the Limitation Act—Power of Court under section* 151, *Civil Procedure Code, to treat as within time a proceeding barred by limitation under the law.*

The period of 60 days fixed in section 20 of Madras Act (IV of 1938) is a period of limitation and there cannot be an extension of that time with reference to section 5 of the Limitation Act, for this section has not been made applicable by law to the period of limitation fixed in the special Act. When a certain period of limitation has been prescribed by law, the Court has no power under section 151, Civil Procedure Code, to treat as within time a proceeding which is barred by limitation under the existing law.

D. Ramaswami Aiyangar and *O. K. Ramalingam* for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

V.S.

Yahya Ali, J. — S. K. V. Krishnavataram, *In re.*
9*th January*, 1947. — Cr. R. C. No. 9 of 1947.
(Cr. R. P. No. 9 of 1947).

Criminal Procedure Code (*V of* 1898), *section* 144 (4)—*Application under—Offer of evidence to show cause against continuance of* ex parte *order—Duty of Court—Refusal to hold enquiry and confirming of* ex parte *order—Legality.*

When an application under section 144 (4), Criminal Procedure Code, is made and when the applicant offers evidence to show cause against the continuance of the ex *parte* order against him, it is the obvious duty of the Magistrate to hold an enquiry and he cannot without holding that enquiry anticipate what the nature of the evidence would be and confirm his *ex parte* order.

V. V. Srinivasa Aiyangar, K. Krishnamoorthy and *Dwarkanath* for Petitioner.

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

V.S.

Kuppuswami Ayyar, J. Vadalamani Yagneswara Sarma *v.* Vedulla Subbamma.
7*th January*, 1947. C. R. P. No. 1391 of 1945.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 89—*Deposit under—Unconditional nature—Test.*

No kind of condition or dispute should be left in doubt to be decided later on when a deposit is made under rule 89 of Order 21, Civil Procedure Code. Where it is definitely stated that the petitioners under rule 89 of Order 21, Civil Procedure Code, had deposited the money being the total of proclamation amount, poundage, commission, etc., without prejudice to the proceedings contemplated to be taken in respect of the decree under execution, such a deposit cannot be said to be an unconditional deposit.

C. Rama Rao for Petitioner.

G. Balaparameswari Rao for Respondents.

V. S.

Yahya Ali, J. Perumal Naicken, *In re.*
10*th January*, 1947. Crl. Appeal No. 608 of 1946.

Penal Code (*XLV of* 1860), *section* 75—*Sentence under—If should always be higher than the last sentence awarded.*

It is not an inexorable rule that the sentence under section 75, Indian Penal Code, should always be higher than the last sentence awarded without regard to the merits of the case.

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

Accused not represented.

V.S.

Horwill and Bell, JJ. Gadiraju Bangarayya *v.* Gottemukkula Ramabhadriraju.
10*th January*, 1947. A. A. O. No. 378 of 1945.

Arbitration Act (*X of* 1940), *section* 33—*Filing of objections to award by one party—Prayer for award being set aside—Objections if could be heard in the absence of application to have the award set aside—Irregularity due to being misled by order of Court—Does not entitle Court to overlook objections and to pass a decree in terms of award.*

The matter in a suit was referred to arbitrators and an award was filed on 21st November, 1944, and on the same day the Court posted the suit for objections to 2nd December, 1944. On the adjourned date, the defendants filed objections, but the plaintiff was satisfied with the award and filed none. It was then posted for enquiry to 11th January, 1945. On that date a preliminary objection was taken that the defendants' objections could not be heard as according to section 33 of the Arbitration Act, the Court was bound to pass a decree in terms of the award, unless a party applied to the Court to have the award set aside. The preliminary objection was upheld and a decree was passed in terms of the award. On appeal,

Held, that in substance the objections of the defendants amounted to an application to the Court to set aside the award and the mistake in filing objections was to a large extent due to the order passed by the lower Court when the award was filed and the lower Court should have overlooked this irregularity; for, it was nothing more than an irregularity. It was not such as to entitle the Court to overlook their objections and to pass a decree in terms of the award.

C. A. Md. Ibrahim and *T. S. Santanam* for Appellants.

P. Satyanarayana Raju for Respondent.

V.S.

Horwill and Bell, JJ. Nagi Reddi Seetharami Reddi *v.* Thikkavarapu Kotamma.
10*th January*, 1947. A. A. O. No. 706 of 1945.

Limitation Act (*IX of* 1908), *Article* 182 (5)—*Application to Court which passed decree which has been transferred for an order for re-transfer of it—Step-in-aid of execution—Court which passed decree cannot execute the decree when it has been transferred and is in the custody of another Court.*

An application may always be made to the Court which passed the decree for an order re-transferring it if it has been transferred elsewhere and such an application would be a step-in-aid-of-execution and would prevent limitation

running against the decree-holder. But the Court which passed the decree cannot execute it when it has been transferred to another Court and is in fact in the custody of that Court for execution and the copy of the decree with the non-satisfaction certificate has not been returned by that Court.

K. Krishnamurti for Appellants.

P. Chandra Reddi for Respondents.

V.S.

Yahya Ali, J. — S. M. Ar. N. Arunachalam Chettiar *v.* M. S. T. Thameermalayan Chettiar.
16*th January*, 1947. — Cr. R. C. No. 532 of 1946. (Cr. R. P. No. 511 of 1946).

Madras District Municipalities Act (*V of* 1920), *section* 353 (A)—*Sanction under—Necessity for—Test to decide—Abuse of one member of a Municipal Council by another member during the course of a meeting of the Council and threatening to assault him—Continuing the threatening after the dissolution of the meeting—Sanction, if necessary.*

The correct test applicable to decide whether sanction under section 353 (A) of the Madras District Municipalities Act is necessary is to see whether the act complained of was done while acting or purporting to act in the discharge of official duty and whether the said act can reasonably be related to the official character of the person who did the act or in other words there was anything in the nature of the act complained of that attaches it to the official character of the person doing it.

In the circumstances, the abuse and the throwing out of the challenge and its acceptance, was done while acting or purporting to act in the discharge of official duty and sanction under section 353 (A) would be required for the cognizance of any offence in respect of that. The further acts amounting to offences committed thereafter, cannot be said to be done while acting or purporting to act in the discharge of official duty as they did not in any manner whatsoever relate to the official character of the person at that time and hence would not require sanction under section 353 (A) of the Act.

L. S. Veeraraghava Aiyar for Petitioner.

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

V.S.

Yahya Ali, J. — Satyanarayanamurthy *v.* Gopalarao Naidu.
16*th January*, 1947. — C. R. P. No. 1278 of 1946 and C. M. P. No. 5638 of 1946.

Madras Act (*XVII of* 1946)—"*Tenants*"—*Class covered by—Applicability of Act—Contest between persons each of whom claims to be the occupancy ryot in respect of the suit lands.*

There is no provision or even expression in Madras Act XVII of 1946, from which it can be gathered that the expression "tenants" used in the Act would cover persons other than the two classes of tenants mentioned, namely, tenants under the Malabar Tenancy Act and tenants of private lands situated in estates. The Act does not cover a case where the contest is between persons each of whom claims to be the occupancy ryot in respect of the suit lands.

P. Somasundaram and *S. Ramamoorthy* for Petitioner.

K. Kameswara Rao, V. Sethumadhava Rao, K. Subba Rao and *T. Venkatadri* for Respondents.

V.S.

Yahya Ali, J. — Public Prosecutor *v.* V. S. Viswanathan
17*th January*, 1947. — Crl. Appeal Nos. 35 and 36 of 1947.

Indian Penal Code (*XLV of* 1860), *sections* 160 *and* 116—*Offering of a bribe—If an offence.*

Offering a bribe is *per se* no offence under section 160, Indian Penal Code. When a person offering a bribe is sought to be implicated with the aid of section 116 as abettor, it is difficult to conceive how such an act can under the present law, amount to abetment of taking the bribe.

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

V.S.

Kuppuswami Ayyar, J.
8th *January*, 1947.

Ramasubbier *v.* Saraswathi Ammal.
C. R. P. No. 1154 of 1945.

Arbitration Act (*X of* 1940), *sections* 17 *and* 39—*Scope—Orders refusing to set aside awards and passing decree in terms of award—Appealability.*

It must be understood from sections 17 and 39 of the Arbitration Act (1940) that the Legislature contemplated appeals being filed against orders refusing to set aside the award by allowing the objections and it also provided for a decree being passed in terms of the award, which will shut out further appeals. Where the order on the petition to set aside the award and the order giving a decree in terms thereof after rejecting the petition were passed on the same day, it is not open to any one to take away the right given under the Arbitration Act to file an appeal against the order refusing to set aside the award.

V. Ramaswami Aiyar for Petitioner.

V. Minakshisundaram and *P. K. Narayanaswami* for Respondents.

K.S.

Rajamannar, J.
10th *January*, 1947.

Munuswami Chetty *v.* Adikesavalu Naidu.
S. A. No. 1871 of 1945.

Limitation Act (*IX of* 1908), *section* 19—*Acknowledgment by mortgagor in favour of first mortgagee after the execution of a second mortgage—If operative against second mortgagee.*

Mortgage—Sale in satisfaction annulled—Fresh cause of action arises to the mortgagee.

An acknowledgment by the mortgagor in favour of the first mortgagee after the execution of a second mortgage would not be operative against the second mortgagee.

(1941) 1 M.L.J. 388, distinguished ; 1 C.L.J. 337, relied on ; (1940) 1 M.L.J. 766 : I.L.R. 1940 Mad. 872 (F.B.), referred to.

Where a sale in satisfaction of a mortgage is annulled, a fresh cause of action arises to the mortgagee.

(Leave granted.)

R. Thirumalaithathachariar for Appellant.

M. S. Venkatarama Aiyar and *V. Natesan* for Respondent.

K.S.

Happell, J.
20th *January*, 1947.

Manuval Nadar *v.* Naina Mohamed Rowther.
A. A. O. Nos. 562 to 564 of 1945.

Madras House Rent Control Order (1941), *section 7-A—Suits for eviction instituted before section 7-A of the order came into force—Decree for ejectment—If can be passed.*

Decrees could be passed in suits for eviction filed before section 7-A of the Madras House Rent Control Order, 1941, came into force. Section 7-A of the order is no bar to the suits.

(1945) 1 M.L.J. 44, dissented from ; (1945) 1 M.L.J. 441, (1946) 1 M.L.J. 134 and (1946) 1 M.L.J. 135, followed.

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

K. S. Ramamurthi, *T.M. Ramaswami Aiyar* and *C.A. Seshagiri Sastri* for Respondents.

K.S.

Chandrasekhara Aiyar, J.
20th *January*, 1947.

Appa Rao *v.* Ramaswami Mudaliar.
C. C. C. A. Nos. 80 to 86 of 1945.

Practice—Agreement between parties to accept judge's valuation of properties—Finality of judge's valuation.

Where in a suit for ejectment, the tenants, who had put up buildings on the sites, set up the protection conferred by the Madras City Tenants Protection Act and claimed the right to purchase the sites at the value to be ascertained and fixed by the Court, a consent order is made that the plaintiff should sell to the defendants their respective sites and the defendants were to purchase the same at the market value to be fixed by the Court on such evidence, oral and documentary, and other materials placed before it by the parties, there is an agreement that the parties would abide by the decision to be arrived at by the Court and the valuation by the Court is binding on the plaintiff and he cannot resile from his agreement. It is not because that the Judge is to be regarded as an arbitrator, but because of the general

principle that parties who enter into solemn agreements before the Court should not be allowed to go behind them.

37 M.L.J. 100 and I.L.R. 47 Mad. 39 : 44 M.L.J. 258, distinguished.

T. R. Srinivasa Aiyangar and *G. Gopalaswami* for Appellants.

K. Narasimha Aiyar and *V. N. Srinivasa Rao* for Respondents.

K.S.

Horwill and Bell, JJ. Subba Reddi, *In re.*
22nd January, 1947. R. T. No. 161 of 1946.

Criminal Procedure Code (V of 1898), section 161 (3) (new)—Investigating officer—Duties—Recording of statements—Proper procedure.

Per *Horwill, J.*—It does not seem that the new sub-section (3) of section 161 of the Criminal Procedure Code was intended to make it incumbent upon the investigating officer to record a statement in greater detail than was the practice prior to the amendment. This new sub-section seems to hit at the practice of writing against the names of certain witnesses that they corroborate the statements of the earlier witness. Statements should be recorded where reasons of urgency do not preclude this course.

Per *Bell, J.*—It is not the law that the police-officer must record individual statements under section 161 of the Criminal Procedure Code which specifically says that he 'may' and not that he 'must' reduce the statement of a witness into writing. Nothing is more natural than that he should make rough notes of information which later he would set out in proper form in the case diary for the information of his superior officers in whose hands after all, lies the subsequent control of the matter.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* and *V. V. Radhakrishnan* for Accused.

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

K.S.

Wadsworth and Govindarajachari, JJ. Ranganathan *v.* Venkitaswami Naidu.
30th January, 1947. Appeal No. 158 of 1945.

Limitation Act (IX of 1908), section 7—Suit by two Hindu brothers for declaration that a sale executed by their mother was not valid—Elder brother found to have attained majority more than three years before suit was filed—Suit barred as regards younger brother also.

When two Hindu brothers sue for a declaration that a sale executed by their mother was not valid and it was found that the elder brother had attained majority more than three years before the suit was filed, the suit is barred as regards both the brothers.

53 M.L.J. 677, I.L.R. 58 Mad. 155 : 67 M.L.J. 27 and I.L.R. 38 Mad. 118 : 25 M.L.J. 405 (F.B.), relied on; I.L.R. 48 All. 152, considered.

G. N. Chari for Appellants.

R. Venkataraman, S. Viswanathan and *M. R. Narayanaswami* for Respondents.

K.S.

Horwill and Bell, JJ. Chenchiah and others, *In re.*
5th February, 1947. Crl. M. P. Nos. 99, etc., of 1947.

Madras Ordinance (I of 1947)—Arrest before promulgation of Ordinance but earlier on the day of promulgation of Ordinance in Fort St. George Gazette—Legality of arrests.

No doubt publication in the Fort St. George Gazette was necessary to give Ordinance I of 1947, the force of law. It is however a well-known maxim of the law regarding the interpretation of statutes that the law takes no account of fractions of a day. An Act which comes into force on a particular day is deemed to have effect from the first moment of that day. Ordinance I of 1947 must be deemed therefore to have had effect from midnight of the 22nd-23rd January, 1947, which means that it was in operation at 4-30 or 5 A.M. on 23rd January, 1947, when arrests were made though the Ordinance was published in the Gazette later on the same day.

Certificate under section 205, Government of India Act, refused.

A. Ramachandran for *Row and Reddy* for Petitioners.

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

K.S.

Horwill, J. Kandaswami Pillai *v.* Kandaswami Pillai.
10*th January*, 1947. C. R. P. No. 784 of 1945.

Provincial Insolvency Act (*V of* 1920), *section* 28 (7)—*Relation back of order of adjudication—Scope and effect—Annulment of adjudication of Hindu father—Rights of sons born after petition for adjudication and before annulment—Order directing the properties to continue to vest in the Official Receiver—Effect.*

On 18th April, 1933, a petition was filed to adjudicate *X* (a Hindu debtor) an insolvent and he was adjudged insolvent on 1st November, 1934. On 8th March, 1940, the adjudication was annulled, because the insolvent had not applied for a discharge within the time allowed; but at the same time the Court passed an order directing that the property should continue to vest in the Official Receiver; *Y* and *Z* the sons of *X* born in April, 1934, and May 1939, respectively, filed a petition in 1944 for permission to sue *in forma pauperis* to have the sale of their shares in the properties sold by the Official Receiver in 1939 and 1942 set aside.

Held, the effect of section 28 (7) of the Provincial Insolvency Act is that the adjudication must be deemed to have taken place on 18th April, 1933, and that from that date the property vested in the Official Receiver and the property passed out of the hands of the insolvent before either of his sons *Y* or *Z* were born, and they were in no better position with regard to the property than they would have been with regard to alienations made before they were born.

As simultaneously with the order of annulment of the adjudication there was an order continuing the vesting of the property in the Official Receiver, the property continued to vest throughout in the Official Receiver and there was no reverter to the insolvent to confer any rights on *Y* or *Z* at any time.

Accordingly the petition for permission to sue *in forma pauperis* must be dismissed on the ground that the draft plaint disclosed no cause of action.

S. V. Venugopalachari for Petitioner.

A. Swaminatha Aiyar, T. R. Srinivasan, A. K. Annaswami Aiyar, K. Venkateswara Aiyar and *R. Sundaralingam* for Respondents.

K.S.

Kuppuswami Ayyar, J. Nagoji Rao *v.* Lakshmibayamma.
21*st January*, 1947. A. A. A. O. No. 132 of 1945.

Civil Procedure Code (*V of* 1908), *section* 39—*Court other than the one which passed a decree—If can transfer it to another Court for execution.*

No other Court except a Court which passed a decree has the right to transfer it to another Court for execution.

I.L.R. 47 Bom. 56, considered. Leave granted.

P. Somasundaram for Appellant.

V. Vijyanna for Respondent.

K.S.

Kuppuswami Ayyar, J. Nallammal *v.* Appavu Udayan.
21*st January*, 1947. S. A. No. 102 of 1946.

Hindu Law—Widow of divided son in indigent circumstances—Right to maintenance as against other divided sons of father-in-law inheriting father-in-law's share of property.

X's husband and his two brothers *Y* and *Z* and their father became divided under a partition in 1924. After the death of her husband in 1929, such property which *X* had inherited from her husband had to be sold for the discharge of her husband's debts, and in her indigent circumstances her father-in-law maintained her and she cooked for him. The father-in-law died in 1943 and his two remaining sons inherited his share of the property. *X* then filed a suit against her husband's brothers for recovery of maintenance.

Held, there was a moral obligation on the father-in-law to maintain *X* when she was in indigent circumstances and this moral obligation ripened into a legal obligation when the property got into the hands of his sons. The moral obligation arises independently of the joint family properties and therefore a partition of the properties can have no effect on the moral obligation which ripens as against his heirs into a legal obligation.

I.L.R. 11 All. 194 (F.B.), (1940) 2 M.L.J. 298 : I.L.R. 1941 Mad. 13 (F.B.), 50 C.W.N. 559, A.I.R. 1932 Nag. 11 and 66 M.L.J. 148 : L.R. 61 I.A. 29 : I.L.R. 61 Cal. 221 (P.C.), discussed.

I.L.R. 2 Bom. 573 and (1939) 2 M.L.J. 340 : I.L.R. 1939 Mad. 877 (F.B.), considered.

Leave granted.

A. Srirangachari for Appellant.

T. V. Ramanatha Aiyar for Respondent.

K.S.

Chandrasekhara Aiyar, J. Sri Vidyarathna Thirtha Swamiar *v.* Poovappa Shetty.
30*th January*, 1947. S. A. No. 1844 of 1945.

Land tenures—South Kanara—Mulgeni grant—Trees of spontaneous growth—Right to —Tenants if entitled to claim value of as compensation for improvements—Invalid lease—Liability of tenant to mesne profits.

A tenant under a *mulgeni* grant in South Kanara, where the Malabar Compensation for Tenants Improvements Act does not apply, is not entitled to the value of trees of spontaneous growth as compensation for improvement.

Where a permanent lease (*mulgeni* grant) of trust property is set aside as invalid after the death of the head of the mutt, the tenant is liable for mesne profits during the period he has been in possession after the succeeding madathipathi has chosen to challenge the alienation as not binding against him.

K. K. Bhat and *T. Krishna Rao* for Appellant.

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

K.S.

Yahya Ali, J. Public Prosecutor, Madras *v.* Achamma.
5*th February*, 1947. Cr. R. C. Nos. 647 to 654 of 1946.
(Cr. R. P. Nos. 620 to 627 of 1946).

Indian Penal Code (XLV of 1860), section 476 and Criminal Procedure Code (V of 1898), section 236—Scope—Prosecution of witnesses for giving contradictory statements at different stages—Proof as to which of them was false—If essential.

Even if it cannot be proved which of the contradictory statements is false a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another.

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

B. Jagannadha Das for Respondents.

K.S.

Gentle, C.J. and Rajamannar, J. Nellimarla Jute Mills Co., Ltd. *v.*
5*th February*, 1947. The Province of Madras.
Appeals Nos. 418 and 419 of 1945.

Madras General Sales Tax Act (IX of 1939)—Power of Commercial Tax Officer to challenge correctness of returns and claim additional tax—If must be exercised within any period of time.

The year of account 1942-43 ended on March 31, 1943. In February 1944, the Deputy Commercial Tax Officer wrote to the assessee company, challenging the correctness of the monthly returns which had been made and, shortly thereafter, required payment of additional tax in respect of transactions which had not been included in the company's monthly returns during the year of account. Negativing the argument that the Tax Officer could not reopen the matter of taxation during the second year following the year of account when the returns had been made and the amount of tax shown therein had been paid by the company,

Held, there is nothing either in the Madras Sales Tax Act itself or in the rules thereunder which specifies a period of time during which a Tax Officer must complete his examination of the returns and any enquiry he may make upon the matters arising out of the returns. There was nothing which prevented the tax officer raising the question of unpaid tax on unreturned transactions at the time in which in fact he did.

Sir Alladi Krishnaswami Aiyar instructed by *Messrs. King and Partridge* for Appellant

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

K.S.

Kuppuswami Ayyar, J. Subramania Iyer *v.* Annasami Iyer.
3rd February, 1947. A. A. A. O. No. 301 of 1945.

Conflict of Laws—Foreign Court—Submission to jurisdiction—Test—Taking part as witness in commission enquiry in British Indian Court—When amounts to submission to jurisdiction.

The question as to whether there was submission or not to jurisdiction of Foreign Court is a question of fact. (1934) 67 M.L.J. 187 : I.L.R. 57 Mad. 824, relied on.

In a suit filed in the Trivandram District Court the defendant (a resident of Srivaikuntam in the Madras Presidency) did not appear in Court, and the plaintiff got a commission issued to the Srivaikuntam District Munsiff's Court (a British Indian Court) to have the defendant examined as a witness. The defendant appeared when summoned as witness and protested against the enquiry. The Munsiff held that the question as to whether the Trivandram Court had jurisdiction or not was not going to be decided by him and that he had jurisdiction as a Court to which papers were sent to call upon the defendant who was within his jurisdiction to give evidence. The defendant then engaged a counsel, objected to questions put to him and got orders passed thereon and finally got himself cross-examined and gave statements which were likely to affect the merits of the case. In the circumstances,

Held, there was submission to jurisdiction of the Foreign Court. If the defendant had merely answered questions put to him by Court he would not have done anything "voluntarily" to charge him with having submitted to the jurisdiction of the Court. The defendant's act was a voluntary one so as to render it a submission to jurisdiction. Dicey's Conflict of Laws (Fifth edition), page 407, referred to. Even though a man protests against the jurisdiction of a particular Court and pleads that the Court had no jurisdiction and does not submit expressly, still if he does any act and if he is likely to be benefited by a decision in his favour, it must be presumed that he voluntarily did an act which would amount to submission to the jurisdiction of the Court. There was no obligation on the part of the defendant to engage a counsel or to take part in the proceedings. He could be prosecuted only if he refused to answer questions put to him.

Ch. Raghava Rao for Appellant.

T. M. Ramaswami Aiyar for Respondent.

K.S.

Wadsworth and Govindarajachari, JJ. Gopalaswami Iyer *v.* Nataraja Chettiar.
7th February, 1947. A. S. No. 349 of 1945.

Civil Procedure Code (V of 1908), section 11—Suit to enforce mortgage by two of the sons of mortgagee impleading third son as defendant—Decree for plaintiffs' 2/3rd share reserving third son's remedy—Subsequent suit by third son as regards his share—Not barred by res judicata.

For part of the consideration for the sale of immoveable properties the vendee executed a mortgage over some properties in favour of the vendor and his two sons. Later the vendor had another son. After his death two of the sons filed a suit on the mortgage for the whole amount due impleading the third son and the mortgagor as defendants. The Court however passed a decree only for the 2/3rd share due to the plaintiffs and the third son was left with his remedy to recover his 1/3rd share by separate suit. The mortgagor sold the properties and the vendee paid off the decree amount. The third son filed a suit to recover his share under the mortgage and it was contended by the purchaser from the mortgagor that the suit was not maintainable.

Held, that the suit was maintainable. Far from the plaintiff being barred by *res judicata*, it was the mortgagor and his representative who were bound by the former judgment. That the former decree was not correct in form was no ground for not decreeing the present suit.

Case-law discussed.

T. V. Muthukrishna Aiyar and *R. Vaidyanatha Aiyar* for Appellant.

A. V. Viswanatha Sastriar, R. Viswanathan and *T. R. Srinivasan* for Respondents.

K.S.

Kuppuswami Ayyar, J. — Sivaramiah *v.* Andi Reddi.

14th February, 1947. — A. A. A. O. No. 277 of 1945.

Civil Procedure Code (V of 1908), section 53—Property obtained by survivorship by Hindu undivided son—Liability in execution of decree against father's assets in his hands.

Under section 53 of the Code of Civil Procedure a person holding a decree against the assets of a Hindu father in the hands of his sons is entitled to proceed against the joint family properties of the father obtained by his sons by right of survivorship.

Decision of Rajamannar, J., in *Krishnamurthy Ayyar* v. *Kailasam Aiyar*, (1947) 1 M.L.J. (N.R.C.) 6, followed.

P. S. Raghavarama Sastri for Appellant.

Kasturi Seshagiri Rao and *T. V. R. Tatachari* (Court guardian) for Respondents.

K.S.

Happell and Shahabuddin, JJ. — Mehdi and others, *In re.*

14th February, 1947. — Crl. M. P. No. 1689 of 1946.

Military Stores (Unlawful Possession) Ordinance (XXXIII of 1943)—Proceedings under—If can be continued after expiration of Ordinance—Government of India Act (1935), *Schedule* 9, *section* 72.

The India and Burma (Emergency Provisions) Act, 1940, conferred the power on the Governor-General to make Ordinances unrestricted in duration for a period that ended on 1st April, 1946. After that date any Ordinance made by the Governor-General under section 72 of the 9th Schedule of the Government of India Act again has effect for a space of six months only. But that will not affect retrospectively an Ordinance made during the period when the India and Burma (Emergency Provisions) Act, 1940, was in force. Accordingly, Ordinances promulgated by the Governor-General before the 1st of April, 1946, is by virtue of the provisions of the India and Burma (Emergency Provisions) Act, 1940, not restricted to six months, but will continue to have effect for the period provided in the Ordinance, or if no period is provided, until the emergencies declared by the Governor-General have ceased to have effect.

Ordinance XXXIII of 1943 is therefore still in force and a charge under section 3 of that Ordinance can be framed and proceedings commenced under it continued.

Leave granted to appeal to the Federal Court.

B. Jagannadha Das and *C. V. Dikshitulu* for Accused.

The Advocate-General (*K. Rajah Aiyar*) and the Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown.

K.S.

Yahya Ali, J. — Subba Rao, *In re.*

21st February, 1947. — Cr. R. C. No. 1110 of 1946. (Cr. R. P. No. 1063 of 1946).

Madras District Municipalities Act (V of 1920), sections 199 and 317 (c)—Construction or re-construction of a building without express permission—When offence.

Under section 199 of the Madras District Municipalities Act, a construction or re-construction of a building should not be begun unless and until the executive authority has granted permission for the execution of the work. Section 201 requires that within 30 days after the receipt of an application for permission to construct or reconstruct a building the executive authority should either grant the same or refuse it on one or more of the grounds mentioned in section 203. Under section 202 the applicant is entitled if permission has not been granted within

the 30 days mentioned in section 201 to make a written request to the council and on receiving such a request the council is bound to determine by written order whether such approval or permission should be given or not. The applicant has after putting in the written request to the council to wait for one month longer to give time to the council to make the decision; but after the expiry of that one month, such approval or permission would be deemed to have been given if the council has not within one month determined whether such approval or permission should be given or not, and in such a case the applicant is entitled to proceed to execute the work. But even then he should do so without contravening the provisions of the Act or any by-laws made under the Act. Reading sections 197, 199, 201 and 202 together, it is clear that the applicant cannot carry out or complete any construction or re-construction of a building within at least a period of sixty days after the date of his application, and if he does so, he commits an offence under section 199 read with section 317 (*c*) of the Act.

Where the applicant did not make any written request at all to the council and he did not even choose to wait for the period of sixty days, he will be guilty of an offence under section 317 (*c*) of the Act if he carries out the work without the express permission of the executive authority.

Kasturi Sivaprasada Rao for Petitioner.

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

K.S.

Happell, J.
21*st February*, 1947.

Ghulam Ghouse Sahib *v.* Chowdri D. Raja Rao.
A. A. O. No. 635 of 1946.

Transfer of Property Act (*IV of* 1882), *section* 116—*Applicability—Tenant directed by House Rent Controller to give possession to his landlord by a named date failing to do so —Execution by landlord for eviction—Receipt of rent from tenant during pendency of execution proceedings—If creates new tenancy.*

A tenant was directed by the House Rent Controller to give possession of the house to his landlord on 8th August, 1946. He did not obey the order and the landlord filed an execution petition praying for eviction. The tenant meantime paid two months' rent and obtained a receipt and claimed that a new tenancy had thereby been created and therefore he was not liable to be evicted.

Held, the tenant in this case is not a lessee who remains in possession of the property after the determination of the lease. He is wrongfully remaining in possession beyond the date on which he had been directed by the controller to give possession and no new tenancy was therefore created by the payment and receipt of rent. Accordingly there was no bar to the eviction.

M. M. A. Kirmani for Appellant.

H. Neelakantan instructed by *Messrs. Short Reeves & Co.* for Respondent.

K.S.

Yahya Ali, J.
21*st February*, 1947.

Tirumal Raju, *In re.*
Cr. R. C. No. 642 of 1946.
(Cr. R. P. No. 619 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 545—*Power of appellate Court imposing fine for first time to order compensation to be paid out of the fine.*

It cannot be said that only the trial Court or an appellate Court which dealt with the sentence of fine imposed by the trial Court could make an order for payment of compensation out of the fine under section 545 of the Criminal Procedure Code. Section 545 empowers any Criminal Court which imposes a fine or any Criminal Court which confirms in appeal the sentence of fine to make the order contemplated in that section. Accordingly, even an appellate Court which for the first time imposed a sentence of fine could make an order under section 545, Criminal Procedure Code.

V. T. Rangaswami Aiyangar for Petitioner.

V. Rajagopalachari for Respondent.

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

K.S.

Horwill, J. Keshavlal Joshi *v.* Sankara Aiyar.
21*st February*, 1947. C. R. P. No. 1001 of 1945.

Usurious Loans Act (*X of* 1918), *section* 3, *proviso* (*ii*)—*Applicability—Claim in a suit on promissory note settled out of Court by execution of another promissory note and suit dismissed—Suit on new promissory note—Provisions of section* 3 *of Usurious Loans Act—If attracted.*

A suit on a promissory note was dismissed as settled out of Court by execution of a fresh promissory note. In a suit on the fresh promissory note the provisions of section 3 of the Usurious Loans Act were invoked. It was contended that since the earlier transaction had been the subject of a suit it was not open to the Court to reconsider the same and apply the Usurious Loans Act.

Held, as the claim of the creditor had not been adjudicated upon or embodied in a " decree " in the previous suit, there was no bar to reconsideration of the matter and reopening of the transaction. Such reopening will not in any way affect the previous decree of the Court which was merely one dismissing the plaintiff's claim.

Accordingly the transaction was one which attracted the provisions of the Usurious Loans Act and the debtor can therefore be relieved of all liability on account of excessive interest already paid.

Distinction between the Indian Act and corresponding provisions of the English Act discussed and *Cohen* v. *Jones*, (1926) 1 K.B. 119, distinguished.

K. S. Rajagopala Aiyangar for Petitioner.

S. Amudachari for Respondent.

K.S.

Yahya Ali, J. Abdul Wahid Sahib *v.* Dewanjee Abdul Khader Sahib.
25*th February*, 1947. C. M. P. No. 18 of 1947.

Civil Procedure Code (*V of* 1908), *section* 24—*District Judge acting as appellate authority under Madras Buildings* (*Lease and Rent Control*) *Act* (*XV of* 1946)—*If* persona designata *or Court subordinate to the High Court for purposes of transfer.*

From the language of section 12 of the Madras Buildings (Lease and Rent Control) Act, 1946, it seems clear that a District Judge or a Subordinate Judge mentioned in the notification is to function as a *persona designata* and not as a Court subordinate to the High Court. No application under section 24 of the Civil Procedure Code for transfer of an appeal under the Rent Control Act before such District or Subordinate Judge can be maintained in the High Court.

Kasturi Sivaprasada Rao for Petitioner.

B. V. Ramanarasu for Respondent.

K.S.

Yahya Ali, J. Oomayan, *In re.*
28*th February*, 1947. Cr. R. C. No. 1080 of 1946.
(Case Referred No. 40 of 1946).

Criminal trial—Deaf and dumb person accused of offence under section 379 *of the Indian Penal Code—Admission by accused and pointing out of stolen property by mere gestures—Inference of guilt or admission of it—Propriety.*

When a deaf and dumb person is accused of an offence under section 379 of he Indian Penal Code and admits the offence by signs and also points out the stolen property to the police, it is not safe to act on mere gestures of the accused either to infer that he was the thief or to hold that he admitted the offence in Court.

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

Accused not represented.

K.S.

Wadsworth and Govindarajachari, JJ. Somasundaramma *v.* Seshagiri Rao.
6th February, 1947. Appeal No. 487 of 1945.

Civil Procedure Code (V of 1908), Order 17, rules 2 and 3—Refusal of adjournment and reporting of no instructions by plaintiff's pleader—Decision purporting to be based on findings on merits dismissing the suit as not maintainable—Dismissal of application by plaintiff to restore suit under Order 9, rule 9—Appeals against dismissal of application under Order 9, rule 9, as well as against decree dismissing suit on merits—Failure of former appeal—If bars latter appeal.

Where on the refusal of an application for adjournment the plaintiff's pleader reports " no instructions " and the plaintiff though present during the defendant's arguments asks for time to engage another pleader which is refused, the trial Judge should, in such circumstances, pass an order dismissing the suit for default and not purport to pass a decree based on a finding on the merits against the plaintiff. Where in such circumstances a decree purports to be passed on the merits the plaintiff will not be deprived of the remedy of applying under Order 9, rule 9, for the restoration of the suit on the ground that it has really been dismissed for default. But the fact that this remedy has been recognised will not deprive the plaintiff of the remedy which the law allows to a plaintiff against whom a decree has been passed dismissing the suit on the merits. Merely because the decree on merits can for certain purposes be treated as the order which ought to have been passed (namely, dismissal for default) it does not follow that for the purpose of appeal the Court is not to have regard to the decree which was in fact passed. The failure of an appeal against the dismissal of an application for restoration of the suit dismissed for default is no bar to an appeal against the decree treating it as a decree on the merits.

P. Satyanarayana Rao and *C. V. Narasimha Rao* for Appellant.

The Advocate-General (*K. Rajah Aiyar*) and *D. Narasaraju* for Respondent.

K.S.

Gentle, C.J. and Rajamannar, J. Satyanarayana *v.* Venkataramayya.
7th February, 1947. L. P. A. No. 86 of 1946.

Madras Co-operative Societies Act (VI of 1932), section 57—Scope—Functions of Provincial Government—Nature of—Order setting aside a sale of property—Procedure—Notice of application to the purchaser—If essential—Absence of notice—Effect.

Section 57 of the Madras Co-operative Societies Act requires notice to be given to the party likely to be affected before an order can be made and if the powers given by the section are exercised without the potentially affected party being given an opportunity of being heard, the order is one which is *ultra vires* the powers of the authority exercising it. When the Provincial Government passes an order under section 57 setting aside a sale by the Registrar of Co-operative Societies, without giving notice of the proceedings to the purchaser, the order is a nullity and invalid.

Section 57 of the Madras Co-operative Societies Act requires an examination of the record by the Provincial Government which must be for the purpose of satisfying itself as to the legality or propriety of any decision or order and as to the regularity of the proceedings of the officer. It is only after the Government is satisfied with regard to the matter that it can pass an order contemplated by section 57. For the purpose of determining whether an order should be made for modification, annulment or reversal, the Provincial Government must first make a decision as to the legality or the propriety of the decision at the enquiry or as to the regularity of the proceeding under review. The Provincial Government exercises judicial and not administrative functions in reviewing a decision of an authorised officer of the department. Opportunity must be afforded to the parties interested or concerned to be heard before the decision is given. Action under section 57 of

the Act cannot be exercised differently to that under section 115 of the Code of Civil Procedure or section 435 of the Code of Criminal Procedure and persons who may be affected by the exercise of powers under section 57 must be given notice of proceedings.

Decision of *Somayya, J.*, in S. A. No. 1165 of 1945, reversed.

P. Satyanarayana Rao and *A. Sambasiva Rao* for Appellant.

Ch. Raghava Rao for Respondent.

K.S.

Gentle, C.J. and Rajamannar, J. — Arunachala Aiyar *v.* Lakshminarasimham.

12th February, 1947. — C. M. P. Nos. 5578 and 5579 of 1946.

Civil Procedure Code (V of 1908), Order 22, rule 9 (2)—Applicability—One respondent seeking relief in his cross-objections against the other respondent—If entitled to maintain application to bring on record the legal representatives of deceased appellant.

In an appeal by the first defendant, the plaintiff (in whose favour the suit was decreed) was the first respondent and the second defendant, the second respondent. The second respondent had filed cross-objections in the appeal seeking to obtain relief against the first respondent. On the death of the appellant during the pendency of his appeal, the second respondent filed an application before the appeal abated, to bring on record the legal representatives of the appellant. The first respondent opposed the application contending that only the legal representatives of the appellant could make the application.

Held, when there has been no abatement, the right to bring an application to bring the legal representative on record is not limited to the legal representatives of the appellant. There can be no objection to the legal representatives of the appellant being brought on record at the instance of a respondent when there has been no abatement.

Order 22, rule 9 (2) of the Code of Civil Procedure limits an application to set aside an abatement to the legal representatives of the deceased plaintiff. There is no similar limitation in respect of an application to bring on record the legal representatives of a deceased plaintiff or a deceased appellant, at the instance of a respondent in an appeal when there is no abatement.

P. S. Ramachandran for Petitioner.

N. Sivaramakrishna Aiyar for Respondent.

K.S.

Kuppuswami Ayyar, J. — Ramayya *v.* Lakshmanan.

17th February, 1947. — C. R. P. No. 696 of 1946.

Specific Relief Act (I of 1877), section 9—Owner who had leased out the property and not in physical possession—If can sue to recover possession from a trespasser.

The owner who had leased the property to another who was in possession, is not entitled to recover possession from a trespasser in a suit under section 9 of the Specific Relief Act during the pendency of the lease, even if such tenant is alleged to be colluding with the trespasser.

Mohideen Rawuthar v. *Jayarama Aiyar*, (1920) 40 M.L.J. 338 : I.L.R. 44 Mad. 937, relied on.

T. R. Ramachandra Rao for Petitioner.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondent.

K.S.

Wadsworth and Govindarajachari, JJ.
20th February, 1947.

Lakshmi Achi *v.* Subramania Pillai.
A. A. O. No. 434 of 1945 and
C.M.P. No. 2918 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 41, *rule* 10 (2)—*Scope—Appellant ordered to furnish security for costs at the instance of only some of the respondents—Failure to furnish such security—Effect—Appeal if to be dismissed* in toto *or only as against respondents who applied for security for costs.*

Just because numerous separate causes of action have been for convenience combined in a single suit, it would be anomalous to visit upon the appellant the penalty of losing the appeal *in toto* because of a failure to furnish security for the costs of certain out of the many respondents. The provisions of Order 41, rule 10 (2) of the Code of Civil Procedure are mandatory but in terms the rule only deals with the position where there is one appellant and one respondent. It may also apply where there are more than one appellant or respondent when the failure to furnish security for the costs of one respondent must necessarily result in the dismissal of the appeal as a whole, as for instance, when the cause of action is single and undivided and the respondent who had got an order for security for costs was the main contesting respondent. But where there are a number of separate causes of action against separate defendants joined together for reasons of convenience because in each case the questions in issue are similar and raise substantially the same points, the Court, on the appellant failing to furnish the security ordered, can under sub-rule (2) of rule 10 of Order 41, Civil Procedure Code, reject the appeal only so far as it is against those respondents in whose favour security for costs has been ordered, leaving it to be prosecuted against the other respondents.

N. Panchapakesa Aiyar for Appellant.

T. V. Muthukrishna Aiyar, S. Ramachandra Aiyar, K. L. Rajagopalachariar, C. R. Rajagopalachari, T. E. Ramabhadracharlar, V. K. Ramanatha Aiyar for *Messrs. King and Partridge, S. Panchapakesa Sastri* and *S. P. Subramaniam* for Respondents.

K.S.

Wadsworth, J.
21st February, 1947.

Viswanadham *v.* Sokalachand Chunilal.
A. A. A. O. No. 236 of 1945.

Madras Agriculturists' Relief Act (*IV of* 1938), *sections* 23 *and* 25-A—*Application under section* 23 *to set aside sale on the ground that applicant was an agriculturist entitled to the benefits of the Act—Dismissal for default on vakil reporting no instructions—If can be regarded as an order refusing to set aside the sale and appealed against under section* 25-A.

By virtue of section 141 of the Civil Procedure Code the procedure under Order 9 is attracted to the trial of petitions under the main provisions of Madras Act IV of 1938.

An order dismissing on the vakil reporting no instructions, an application under section 23 of Madras Act IV of 1938 to set aside a sale on the ground that the applicant was an agriculturist entitled to the benefits of the Act, cannot be regarded as one on the merits refusing to set aside the sale and appealed against under section 25-A of the Act. The order is one under Order 9, rule 8 of the Code of Civil Procedure giving rise to the remedy of an application for restoration and if such application is dismissed a special right of appeal is given under Order 43, rule 1 of the Code.

P. V. Vallabhacharyulu for Appellant.

G. Chandrasekhara Sastri, D. Narasaraju, P. Satyanarayana Rao and *V. Viyyanna* for Respondents.

K.S.

Bell, J.
25*th February*, 1947.

Venkataratnam *v.* Appa Rao.
C. R. P. No. 230 of 1946.

Civil Procedure Code (*V of* 1908), *Order* 17, *rules* 2 *and* 3—*Scope—Plaintiff's application for adjournment refused and pleader reporting no instructions—Hearing of case on merits and decree for part of the claim and dismissal of rest of the suit—Remedy of plaintiff —Order* 9, *rule* 9—*Applicability.*

In a suit for arrears of maintenance due under a registered document and also enhancement of the same the defendant admitted that the arrears were due but alleged that he had made a tender of the amount and that the rate was fixed once for all and no further enhancement was possible or lawful. On the date of the trial the plaintiff was absent and her pleader filed an application for an adjournment but this was dismissed. The pleader then reported no instructions. The District Munsiff thereupon purported to proceed under Order 17, rule 3 of the Code. He passed a decree for the amount of arrears of maintenance at the old rate, together with costs, and then having examined the registered document itself and heard the arguments of the defendant and his counsel he held that the plaintiff had no just claim to enhancement and dismissed that part of her suit.

Held, that Order 17, rule 3 of the Civil Procedure Code applies only to cases where the parties are present. Here as only the defendant was present the Munsiff should have proceeded with regard to the claim for enhancement under the provisions of Order 17, rule 2, namely, by dismissing that part of the claim for default of her appearance. The plaintiff is entitled to apply under Order 9, rule 9, for an order setting aside the order of dismissal of that part of the claim relating to enhancement of rate of maintenance. Order 9, rule 9, was applicable even if the decision was under rule 3 of Order 17. In such circumstances the plaintiff has two remedies (1) to appeal against the decree passed dismissing the suit on the merits and/or (2) to proceed under Order 9, rule 9, which is obviously the more convenient and cheaper course.

Decision of Wadsworth and Govindarajachari, JJ., in *Somasundaramma* v. *Seshagiri Rao*, Appeal No. 487 of 1945. (1947) 1 M.L.J. (N.R.C.), page 19, relied on.

D. Narasaraju for Petitioner.

S. Venugopal Rao for Respondent.

K.S.

Yahya Ali, J.
28*th February*, 1947.

Verghese, *In re.*
Cr. R. C. Nos. 515 and 516 of 1946.
(Cr. R. P. Nos. 495 and 496 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 188 (*as amended by Act XVIII of* 1923) *—If governed or controlled by sections* 179 *to* 187 *or if governs and controls the same,— Pledge in British India—Sub-pledge by pledgee in Native State amounting to criminal breach of trust—Prosecution—Jurisdiction of British Indian Court.*

Where the accused a pledgee of jewels in British India sub-pledges them in a Native State thereby committing a criminal breach of trust, the British Indian Court has no jurisdiction to try the accused unless the Political Agent for that territory certifies that the charge should be inquired into in British India or where there is no Political Agent, the sanction of the Provincial Government is obtained. The fact that part of the consequences of the offence have ensued within jurisdiction is of no avail. Section 188 (as amended) of the Criminal Procedure Code is not governed or controlled by the preceding sections 179 to 187 but in turn itself governs and controls the same.

S. Govind Swaminathan and *Gopinath* for Petitioner.

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

K.S.

Gentle, C.J. and Rajamannar, J. Muhammad Rowthan *v.* Chami.
12th February, 1947. Appeal No. 464 of 1945.

Transfer of Property Act (IV of 1882), section 76 (e)—Mortgagee in possession—Acts of waste by—Liability to account and for damages—When accrues—Ascertainment of amounts—Procedure.

It cannot be said that a mortgagee in possession is liable in respect of any acts of waste committed by him at the time of their committal; but his liability is present when the amount of the damages occasioned by the waste are ascertained at the time accounts are taken, for instance in the course of the redemption suit. The amount of damages for such waste cannot be deemed to have accrued or have been received by the mortgagee in possession at the time of the committal of the acts of which complaint is made. Section 76 of the Transfer of Property Act only provides that when an account is taken in a redemption suit, moneys due to the mortgagee are ascertained and then any sums for which he is liable to the mortgagor are ascertained and debited against the amount which the mortgagee is entitled to receive. It is not until then that liability is cast upon the mortgagee with respect to acts of waste committed by him. The damages cannot be deemed to be amounts received by the mortgagee at the time of the acts of waste of which complaint is made, so that that sum should be debited against the mortgage debt and thus extinguish the amount due and entitle the mortgagor to claim mesne profits during the mortgagee's occupation of the property after such hypothetical extinguishment of the debt.

D. A. Krishna Variar and *T. V. Raman* for Appellants.

K. Kuttikrishna Menon and *V. Balakrishna Eradi* for Respondents.

K.S.

Horwill, J. Masenu *v.* Bavaraju.
25th February, 1947. S.A. Nos. 1951 and 1952 of 1945.

Madras Estates Land Act (I of 1908), section 3, clause (15), Explanation (added by 1934 amendment)—Scope and effect—Occupancy rights conferred by—If takes away existing occupancy rights of others.

The explanation added by the 1934 amendment to section 3, clause (15) of the Madras Estates Land Act will not have the effect of giving occupancy rights to whomsoever may be actually cultivating the land. The explanation of the clause must be read with the clause itself and it cannot be ignored that according to the definition of ryot in clause (15) of section 3 it is necessary that the person claiming to be a ryot should not only be cultivating the ryoti land, but should be doing so on condition of paying to the landholder the rent which is legally due upon it. To read the explanation as if it were an independent section would be to nullify an important ingredient of the definition of a ryot. Moreover one cannot construe the statute so as to take away the occupancy rights of a ryot without express words to that effect. It could not have been the intention of the Legislature by this amendment to deprive persons who were formerly ryots of their status as ryots by giving occupancy rights to some other person who was not until then a ryot at all. The purport of the amendment was to give occupancy rights to a person who was able to prove occupation for 12 years where there was no other ryot already having occupancy rights in the land. Section 19 of the Act also shows that this explanation was not meant to affect the relationship between the ryot and his lessee.

C. Rama Rao for Appellants.

P. Somasundaram and *P. Satyanarayana Raju* for Respondents.

K.S.

Chandrasekhara Aiyar, J. Motichand *v.* Sundaramma.
25th February, 1947. S.A. No. 1157 of 1945.

Civil Procedure Code (V of 1908), Order 41, rule 27 (2)—Mandatory nature of—Appeal—Additional evidence—Procedure and grounds for admitting during appeal.

The requirement of Order 41, rule 27 (2) of the Code of Civil Proc that reasons for admitting additional evidence in the appeal should be re in writing, is mandatory. There is an obligation thrown on the Court t not merely that the additional evidence will prove useful and throw light facts in issue but is required to fill up an obvious gap or lacuna so that the can pronounce a satisfactory judgment in the case. The Court must deci itself whether the documents are necessary from this standpoint and it has to s reasons for coming to this conclusion. The statutory provisions must be fi before the additional evidence could be considered.

P. Satyanarayana Rao and *M. S. Ramachandra Rao* for Appellant.

Ch. Raghava Rao and *B. Srinivasamurthi* for Respondents.

K.S.

Lakshmana Rao, J. — Ramaswamy Tevar *v.* Chinniah

4th March, 1947. — S.A. No. 1930 of

Hindu Law—Joint family—Alienation by father—Legal necessity as to part the amount of consideration—Duty of vendee to enquire as to existence of necessity——Alienation if can be set aside at instance of the sons to any extent.

In a sale by a Hindu father, where the vendee acted honestly and has due enquiry as to the existence of necessity he is not bound to see to the appli of the purchase money. The sale cannot be set aside at the instance of th merely because the vendee was not able to prove conclusively how the s was applied; where legal necessity existed only as to a portion of the consider The sale cannot be set aside as to the portion for which there was no legal ne as the sons will be liable for that portion under the rule of pious obligation.

I.L.R. 49 All. 149 : 52 M.L.J. 720 (P.C.) and I.L.R. 51 All. 430 : 57 M 7 (P.C.), relied on.

(Leave refused).

R. Viswanathan and *T. R. Srinivasan* for Appellant.

T. R. Srinivasa Aiyangar and *G. Jagadisa Aiyar* for Respondents.

K.S.

Yahya Ali, J. — Venkataratnam,

7th March, 1947. — Cr.R.C. No. 701 of

(Cr.R.P. No. 670 of

Penal Code (XLV of 1860), section 504—Gist of offence under—Absence of a tentional insult—Effect—Mere abuse—If offence.

A mere finding that the accused abused the complainant is not sufficie itself to warrant a conviction under section 504 of the Indian Penal Code. seection requires firstly that there should be an intentional insult, and sec that thereby the offender should have given provocation to any person intendi knowing it to be likely that such provocation will cause him to break the p peace or to commit any other offence. An act or conduct amounting to inten insult is essential to constitute an offence under section 504 of the Penal Whether the use of abusive words by the accused amounted to an intentional must depend on the actual words used.

Where it is found that the accused sold some goods to the complainant came to the accused next day and removed the goods without paying money this infuriated the accused and caused him to use abusive words which pro the complainant to beat him, a conviction under section 504 of the Penal cannot be maintained.

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

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

K. S.

Gentle, C.J. and Rajamannar, J. Devadas *v.* Sadasiva Reddiar.

21st February, 1947. C.R.P. No. 521 of 1945 and Appeal No. 434 of 1945.

Court-Fees Act (VII of 1870), section 7 (ix)—Suit for redemption by usufructuary mortgagor—Proper valuation—Claim for recovery of value of mortgaged land lost by the mortgagee's default in paying rent due thereon—If to be valued separately.

The mortgagor in a redemption suit is entitled to claim the return of the mortgaged property. If in addition it is alleged in the plaint that the mortgagee has occasioned to be lost a portion of the mortgaged property by reason of his default in not paying the rent due on it, the mortgagor can recover only damages in respect of that portion of the property and the balance recoverable after extinguishing the mortgage, is not liable to a separate assessment for court-fee in the redemption suit. It is sufficient to value the suit at the amount of the mortgage debt.

60 M.L.J. 698 and (1940) 2 M.L.J. 867, approved and applied.

K. V. Ramachandra Aiyar for Petitioner in C. R. P. No. 521 of 1945 and Appellant in Appeal No. 434 of 1945.

D. Ramaswami Aiyangar and the Government Pleader (*K. Kuttikrishna Menon*) and *P. S. Srinivasa Desikan* for Respondent in C. R. P. No. 521 of 1945 and in Appeal No. 434 of 1945.

K. S.

Bell, J. Parthasaradhi *v.* Venkatachalam.

28th February, 1947. C. R. P. No. 309 of 1946.

Madras Revenue Recovery Act (II of 1864), section 42—Sale for arrears of revenue to be free of all "incumbrance"—Incumbrance—Meaning—Arrears of kattubadi—*If "incumbrance" for which the purchaser at revenue sale will be free from liability.*

"Incumbrance" means a charge upon or claim against land arising out of a private grant or contract. The right of collecting *kattubadi* in respect of a land cannot be regarded as an incumbrance on such land. By virtue of an assignment from government of the right to land revenue the inamdar does not acquire a charge upon the land. I.L.R. 1940 Mad. 50 at 54 : (1939) 2 M.L.J. 579, relied. That right is a personal one. One might say that incumbrances in this regard must be those which arise out of transactions which are the acts of parties. I. L.R. 37 Cal. 328, relied on.

P. Somasundaram and *P. Suryanarayana* for Petitioner.

S. Ramamurthi for Respondent.

K.S.

[Full Bench.]

Gentle, C.J., Lakshmana Rao and Rajamannar, JJ. Srimanthu *v.* Venkatappayya.

28th February, 1947. S. A. No. 1374 of 1945.

Civil Procedure Code (V of 1908), sections 39 and 42—Transferee Court executing decree against property—Transfer of territorial jurisdiction to another Court—Effect on jurisdiction.

The position of a suit is different from that of an execution petition regarding property which is the subject-matter of the respective proceedings pending at the time of removal from the territorial limits of its jurisdiction. A suit is not governed by and subject to sections 39 and 42 of the Code which require the Court passing a decree or the Court to which it is transmitted for execution, as the case may be, to have property within its territory so as to confer jurisdiction to order execution against the property. A Court cannot make a valid order for sale in execution unless at the time the order is made, the property is within its territory. A Court to which a decree is sent for execution has no jurisdiction to order either attachment or sale of immoveable property in execution if, at the time of the order, the Court had ceased to have territorial jurisdiction over the property by reason of a notification transferring the jurisdiction to another jurisdiction. A sale in such circumstances will be a nullity and will not prevail against a later purchaser in

execution of another decree in a Court having jurisdiction though the judgment-debtor himself may be barred by estoppel.

38 M.L.J. 750, I.L.R. 43 Mad. 135 and I.L.R. 18 Pat. 670, followed; 47 M.L.J. 448, I.L.R. 55 Mad. 801 and I.L.R. 43 Mad. 675, considered.

The Advocate-General (*K. Rajah Aiyar*) and *M. S. Ramachandra Rao* for Appellants.

B. V. Ramanarasu for Respondents.

K.S.

Kuppuswami Ayyar, J. — Sivaramiah *v.* Audi Reddi.
3rd March, 1947. — A.A.A.O. No. 277 of 1945.

Civil Procedure Code (V of 1908), sections 52 and 53—Decree against the assets of Hindu father in the hands of his sons in respect of a promissory note executed by the father—If can be executed against joint properties of the father obtained by survivorship by the sons.

In respect of a promissory note by a Hindu father a decree can be passed after his death not only against the separate assets of the father in the hands of his sons but also against the share of the father in the joint family properties obtained by the sons by right of survivorship. Under section 53 of the Code of Civil Procedure, the decree-holder is entitled to proceed against the joint family properties of the father obtained by his sons by right of survivorship.

(1946) 2 M.L.J. 361, relied on.

(1947) 1 M.L.J. 183, followed.

Under section 53 of the Code of Civil Procedure the property in the hands of an undivided Hindu son or other descendant which is liable under Hindu Law for the payment of the debt of a deceased ancestor, in respect of which a decree has been passed shall be deemed to be the property of the deceased which has come to the hands of the son or other descendant as his legal representative.

P. S. Raghavarama Sastri for Appellant.

Kasturi Seshagiri Rao and *T. V. R. Tatachari* (Court guardian) for Respondents.

K.S.

Bell, J. — Venkataramudu *v.* Krishnayya.
5th March, 1947. — C. R. P. No. 286 of 1946.

Civil Procedure Code (V of 1908), section 151—Dismissal for default of petition to set aside a sale under Order 21, rule 90 and sections 47 and 151—Application for restoration under inherent jurisdiction—If lies.

A judgment-debtor filed a petition to set aside a sale under Order 21, rule 90 and sections 47 and 151, Civil Procedure Code. The petition was dismissed as the petitioner and his pleader were not present in Court at the time when it was called on for hearing. He applied then under section 151, Civil Procedure Code, to revise the order of dismissal, to set aside the sale and to re-open the said petition and enquire into the same.

Held, that the application would not lie in law and the Court has no power to restore the petition. It cannot be said that if a Court has inherent power to dismiss, it must have inherent power to restore. The Court derives its powers from the Civil Procedure Code and other statutes, and possesses only such powers as are therein conferred. (Case-law discussed.)

V. Subramanyam for Petitioner.

A. L. Narayana Rao and *V. Parthasarathy* for Respondents.

K.S.

Yahya Ali, J. The Public Prosecutor, Madras *v.* Chakka Kondappa.
6*th March*, 1947. Cr. A. No. 645 of 1946.

Madras Local Boards Act (*XIV of* 1920), *section* 228 *and rule* 31—*Prosecution for non-payment of profession tax levied by and due to District Board—Accused if and when barred from questioning legality of assessment when he has not appealed against the same in time.*

Where a person is prosecuted for non-payment of profession tax due to a District Board, he is entitled to question the legality of the assessment even though he had failed to appeal against the assessment at the proper time thereby allowing the assessment to become final. It is for the prosecution affirmatively to prove that the accused is lawfully bound to pay the tax. Where it is found that notices in respect of the tax were not properly served on the assessee there is no substantial compliance with the provisions of the Act and the prosecution will not be sustainable.

K. S. Jayarama Aiyar for Accused.

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

K.S.

Yahya Ali, J. Karunai Ammal *v.* Karuppan Goundan.
10*th March*, 1947. Cr.R.C. No. 509 of 1946.
(Cr.R.P. No. 489 of 1946.)

Criminal Procedure Code (*V of* 1898), *section* 145—*Property in* custodia legis—*Declaration of title in civil suit without prayer or decree for possession—Duty of Criminal Court to give effect to mere declaration of title and deliver possession.*

Where at the time when a party to proceedings under section 145 of the Criminal Procedure Code files a civil suit, the property is in *custodia legis* of the Criminal Court, all that is necessary for the plaintiff in the civil suit is to seek a declaration of his title. It is not necessary for him to ask further for possession of the property as the Criminal Court will be bound to respect the declaration made by the Civil Court and to give due effect to it.

I.L.R. 1939 Mad. 986 : (1939) 2 M.L.J. 624 and A.I.R. 1941 Mad. 803 (2), referred to.

V. V. Raghavan for Petitioner.

G. Gopalaswami for Respondent.

K.S.

Yahya Ali, J. Fernandez, *In re.*
11*th March*, 1947. Cr. A. No. 306 of 1946.

Criminal Procedure Code (*V of* 1898), *section* 188—*Applicability—Trial under Criminal Law Amendment Ordinance* (*XXIX of* 1943) *for offence committed in Civil and Military Station, Bangalore—Sanction of Political Agent—If necessary.*

The Civil and Military Station, Bangalore, is not for all purposes part of the Mysore territory, but is so for certain purposes only, and in any case the Mysore Civil, Revenue and Criminal authorities have no powers at all in that area. The Criminal Law Amendment Ordinance (XXIX of 1943) read with the notification issued by the Central Government with reference to the particular case is inconsistent with the applicability of section 188 of the Code of Criminal Procedure. The provisions of section 188 are not applicable and no certificate from the Political Agent was necessary for making legal the trial under the Ordinance for an offence of taking illegal gratification committed in the Civil and Military Station, Bangalore. Section 188 is not a bar to the prosecution under the Ordinance (XXIX of 1943) as amended by Ordinance XII of 1945. (1944) 1 M.L.J. 503 : 1944 F.C.R. 262 : 1944 F.L.J. 167, applied.

K. V. Ramaseshan, R. Subramanyam and *Ch. Sankar Rao* for Accused.

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

K.S.

Yahya Ali, J.
12*th March*, 1947.

Pakkiriswami Pillai, *In re.*
Cr. R. C. No. 865 of 1946.
(Cr. R. P. No. 832 of 1946).

Criminal Procedure Code (*V of* 1898), *section* 476—*Absence of finding that prosecution is expedient in the interests of justice—Effect.*

The failure to give a finding by the Magistrate in an order under section 476, Criminal Procedure Code, that the prosecution is expedient in the interests of justice is an incurable defect and a complaint filed on the strength of such an order is unsustainable.

P. Radhakrishnayya for Petitioner.

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

K.S.

Yahya Ali, J.
12*th March*, 1947.

Ramanujulu Naidu, *In re.*
Cr. App. No. 114 of 1947.

Penal Code (*XLV of* 1860), *sections* 73 *and* 379—*Conviction under section* 379 —*Solitary confinement—When proper.*

In convicting a person under section 379 of the Penal Code solitary confinement should not be ordered unless there are special features appearing in the evidence such as extreme violence or brutality in the commission of the offence. That the " sanctity of home life has become to the accused a mere mockery and the desire to take what he wants regardless of ownership is hot in him " is not a sufficient reason to order solitary confinement.

Accused not represented.

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

K.S.

Yahya Ali, J.
18*th March*, 1947.

Munuswami, *In re.*
Cr. App. No. 136 of 1947.

Penal Code (*XLV of* 1860), *sections* 379, 73 *and* 75—*Case of simple theft—Sentence —Previous convictions—Consideration in awarding sentence—Solitary confinement—When proper.*

Although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of the case, the gravity of the offence and the circumstances in which it was committed in assessing the punishment and the mere circumstance that there were previous convictions should not result in the infliction of a sentence that is far out of proportion to the merits of the main case. In a case of simple theft, notwithstanding that the accused has been convicted on several occasions before under section 379 of the Penal Code, a sentence of rigorous imprisonment for one year would more than meet the ends of justice.

A sentence of solitary confinement though legal must be rarely exercised by a Criminal Court. It must be administered, if ever, in the most exceptional cases of unparallelled atrocity or brutality. Decision in Cr. A. No. 114 of 1947, referred to. Although in mediaeval times under the influence of the ecclesiastics it was considered that cellular confinement was a means of promoting reflection and penitence, it came since to be realised that this kind of treatment leads to a morbid state of mind and not infrequently to mental derangement and as a form of torture it fails in its effect on the public.

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

The accused not represented.

K.S.

Gentle, C.J. and Rajamannar, J. Siddique & Co. *v.* Rangiah Chettiar.

28th February, 1947. Appeal No. 541 of 1945.

Cotton Cloth and Yarn (Contracts) Ordinance (II of 1944)—*Not applicable to sales completed before* 15*th August*, 1943—*Contract of sale and appropriation of yarn towards it completed before* 15*th August*, 1943, *but delivery to be after* 19*th August*, 1943—*Failure of buyer to take delivery*—*Damages*—Quantum—*Difference between price realised on re-sale and the contract price only and not the ceiling price fixed under the Ordinance.*

Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of the payment of the price or the time of delivery of the goods or both is postponed. A contract for sale of 31 bales of cotton yarn was entered into on 26th April, 1943 and delivery was agreed to be given in July, 1943. The sellers appropriated the goods in July but the buyer when asked to take delivery put off doing so claiming that the contract would be governed by the ceiling price then under contemplation of the Government. On 2nd August, 1943, the parties agreed to a reduced price and stipulated that delivery should be taken by about 15th August, 1943. The buyer did not take delivery and the goods were re-sold by the sellers who claimed from the buyer as damages the difference between the reduced contract price and the price realised on re-sale. The buyer contended that only the difference between the ceiling price under the Cotton Cloth and Yarn (Contracts) Ordinance (II of 1944) and the price realised by re-sale can be recovered as damages.

Held : There is nothing in Ordinance II of 1944 to render anything illegal which was legal at the time when it was done. When the sellers demanded the price as settled on 2nd August, 1943, there was no Government order or notification which precluded them from doing so.

The Ordinance was not applicable to the contract which was complete before 15th August, 1943, by the appropriation of goods in July or at any event by the agreement for reduced price on 2nd August, 1943, though time for taking delivery was extended and therefore the seller could recover damages as claimed.

C. R. Pattabhiraman, *R. Ramasubbu Aiyar* and *V. Ramaswami* for Appellants.

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

K.S.

Happell and Rajamannar, JJ. Rajarajeswari Ammal *v.* Sankaranarayana Iyer.

3rd March, 1947. Appeal No. 91 of 1945.

Limitation Act (IX of 1908), *section* 20 (1)—*Payment of interest towards two promissory notes—Endorsement in acknowledgment of both payments in the wrong notes respectively—Evidence* aliunde *to show that endorsement on each note related to payment of interest on the other note—Admissibility—Testamentary guardian of Hindu minor daughter—If person authorised to pay and make acknowledgments even after the minor is married.*

Where interest has been paid towards two promissory notes but by mistake endorsement in acknowledgment of payment in respect of each is made on the other note, evidence *aliunde* is admissible to show that the endorsement made on one note was an acknowledgment of the payment of interest due in respect of the other so as to save limitation.

(1937) 2 M.L.J. 54, applied.

A testamentary guardian can be appointed by a Hindu father both as regards the person as well as the property of his minor daughter. On the marriage of the minor the husband would in law become the guardian of her person but unless there is an express provision in the will, the guardian appointed by it will not cease to be the guardian so far as the property is concerned. The testamentary guardian of a minor daughter continues to be the lawful guardian of the property of the minor in spite of her marriage and payments and acknowledgments made by such guardian will save limitation.

B. Sitarama Rao, V. Ramaswami Aiyar and *A. Sambasiva Rao* for Appellant.

R. Ramamurthi Aiyar, T. R. Venkataraman and *V. Meenakshisundaram* for Respondents.

K.S.

Bell, J. Venkateswara Rao *v.* Sithapathy Sastry.

4th March, 1947. C.R.P. No. 865 of 1946.

Civil Procedure Code (V of 1908), Order 20, rule 12—Future mesne profits—Jurisdiction of Court to decree in partition suits.

In a suit filed for partition and possession the plaintiff asked for mesne profits for three years prior to suit and there was a preliminary decree of 1932 which was ultimately affirmed on second appeal in 1939 and being unable to obtain delivery until April, 1945, the plaintiff filed an application for ascertaining mesne profits from 1935 to 1945 and also for the years since the suit was filed.

Held, that the plaintiff was entitled to invoke the aid of the Court in ascertaining the mesne profits although the preliminary decree was silent as to future mesne profits. The practice of the Court has always been to assist a person who obtains a decree for possession of immoveable property by holding the defendant answerable to him for mesne profits either until delivery of possession or relinquishment of possession with notice to the decree-holder through the Court. It is immaterial that there was no direction in the decree itself as to future mesne profits.

[Case-law discussed.]

B. V. Subramanyam for Petitioners.

B. C. Seshachala Aiyar and *C. S. Rajappa* for Respondents.

K.S.

Happell and Rajamannar, JJ. Bhupayya *v.* Chandra Reddi.

7th March, 1947. Appeal No. 620 of 1945.

Hindu Law—Widow—Sale of mortgaged and other properties by—Discharge of mortgage—Existence of nearer reversioner entitled to limited estate—Reversioners next to her can sue for declaration that sales were not binding on reversion—Right to sue to challenge mortgage barred—If bars right to sue challenging the sale.

Under Hindu Law where the nearest reversioner is a female and would only be entitled to a limited interest, the reversioner next to her is competent to sue for a declaration that an alienation by a widow was not binding on the reversion.

I.L.R. 33 Mad. 410, applied. Mayne's Hindu Law (10th Edition, page 813, approved).

Where the sale questioned had no direct relation to an earlier mortgage and it was not a necessary consequence of the mortgage, the fact that the plaintiffs are debarred by limitation from attacking the mortgage itself will not debar them from attacking the sale which is connected only in the most indirect way with the mortgage as for instance where the mortgage debt is discharged from the amount realised by the sale.

21 L.W. 277 and A.I.R. 1932 Mad. 97, distinguished.

P. Satyanarayana Rao and *K. Mangachari* for Appellants.

V. V. Sastri for Respondents.

K.S.

Horwill and Bell, JJ. Venkataraman, *In re.*

10th March, 1947. Cr. M. P. No. 299 of 1947.

Criminal Procedure Code (V of 1898), sections 167 and 344—Remanding an under-trial prisoner to custody—Limits if any to jurisdiction of Magistrate.

An under-trial prisoner in Madura District remanded to the Central Jail, Trichinopoly, instead of to the Central Jail, Madura, to which prisoners are normally remanded when under trial in the Court of Madura District, cannot say that such remand is irregular or illegal.

Section 167 of the Criminal Procedure Code empowers a Magistrate having jurisdiction to remand a prisoner to such custody "as he thinks fit". Section 344 does not use the words "as he thinks fit" with regard to the order of remand; but there is nothing in the section which suggests that after a charge-sheet has been filed, the Magistrate has not the same freedom with regard to the custody to which he commits the accused as he had before a charge-sheet was filed. Section 29 of the Prisoners' Act does not apply to an under-trial prisoner and it cannot be said that only the Inspector-General of Prisons can transfer a prisoner from one jail to another. Whenever an accused is brought before the Court and the Magistrate issues an order of remand, the Magistrate has complete freedom to remand the accused to whatever custody he thinks fit. But it is illegal for a Magistrate to issue an order of remand without having the prisoners produced before him and asking them whether they wished anybody to represent their cause and giving them an opportunity of showing cause why they should not be further remanded.

N. Rajagopalan for *Messrs. Row and Reddy* for Petitioner.

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

K.S.

Chandrasekhara Aiyar, J. — Pavayammal *v.* Samiappa Goundan.

12th March, 1947. — S.A. No. 2091 of 1945.

Transfer of Property Act (IV of 1882), section 39—Applicability—Suit by wife and daughter of X for maintenance—Immoveable properties in the hands of transferee from X—When subject to charge for the maintenance.

It cannot be said that the wife of a person has got a right to receive maintenance "from the profits of immoveable property" of the husband, when only section 39 of the Transfer of Property Act will come into play. Further mere knowledge of the legal right would not be enough, as if it were so, there could be no sale by a husband of his properties to third parties without the risk of the wife turning up later and saying that they had notice of her right and that therefore the transferee was bound to recognise the right. What section 39 contemplates is a claim based on the right to receive maintenance and notice of such claim. Unless these conditions are present there can be no charge on the properties in the hands of transferees.

The daughter stands in no better footing.

S. T. Srinivasagopalachari for Appellant.

S. Ramaswami Aiyangar for Respondents.

K.S.

Horwill, J. — Angathevan *v.* Natarajan Chettiar.

13th March, 1947. — S.A. No. 1342 of 1945.

Res judicata—*Execution—Claim suit—Decision in—How far operates as* res judicata.

A claim suit arising as it does out of claim proceedings has relationship only to the particular decree that was being executed.

(1945) 2 M.L.J. 89 : I.L.R. 1946 Mad. 79 (F.B.), relied on.

The decision in such suit as to whether property proceeded against in execution was joint family property in which the defendant had a share, cannot operate as *res judicata* when the same question arises again in execution of another decree by a person who was impleaded as one of the defendants in the other execution proceedings.

N. Sivaramakrishna Aiyar for Appellant.

P. S. Ramachandran for Respondent.

K.S.

Rajamannar, J. — Kandaswami Chettiar, *In re.*

14th March, 1947. — Cr. R. C. No. 702 of 1946. (Cr. R. P. No. 671 of 1946).

Madras Rice Mills Licensing Order (1943), clause 2—Applicant for licence under the order hulling paddy even before the grant of such licence—If offence.

In a prosecution of a rice mill owner for hulling paddy after he had applied for the licence under the Madras Rice Mills Licensing Order, 1943, but before it was granted,

Held, it is not unreasonable to suppose that when an application for licence is made and in the ordinary course it is granted, the licence shall be deemed to be in operation from the date of the application. In some enactments there is express provision for such result. But such a result can also be inferred by necessary intendment. Having regard to the terms of Form I of the schedule to the Order, it must have been the intention of the enactment that when an application for licence is granted in due course such a licence must be deemed to be valid from the date of the application. Any benefit of obscurity in the order should be given to the accused person.

N. Somasundaram and *P. S. Kailasam* for Petitioner.

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

K.S.

Yahya Ali, J.
19*th March*, 1947.

Tirumalai Tirupathi Devasthanams *v.* Chengamma Naidu.
C.M.P. No. 506 of 1947.

Civil Procedure Code (*V of* 1908), *section* 115—*Revisional jurisdiction—Nature and scope of—Power of High Court to issue temporary injunction pending decision of a revision petition.*

The revisional jurisdiction of the High Court is a variety or form of appellate jurisdiction and as such the High Court has authority to issue a temporary injunction on its revisional side pending the decision of a revision petition.

[Case-law discussed.]

W. S. Krishnaswami Naidu for Petitioners.

W. Chakrapani Naidu for Respondents.

K.S.

Yahya Ali, J.
26*th March*, 1947.

Komarappa Goundan *v.* Ramaswami Goundan
C.M.P. No. 6033 of 1946.

Civil Procedure Code (*V of* 1908), *sections* 151 *and* 10—*Scope—Inherent power of High Court to stay independent suit in the course of other proceedings pending before it—Section* 10—"*The matter in issue*"—*Meaning.*

The trial of an independent suit can be stayed by the High Courtin the exercise of its inherent powers under section 151 of the Code of Civil Procedure in the course of other proceedings before it, provided that the stay has to be ordered in the ends of justice or to prevent an abuse of the process of the Court and that there was no other remedy in law as for instance under section 10 of the Civil Procedure Code available to the applicant for stay. Decision in C.M.P. No. 664 of 1947 followed. For stay under section 10 of the Code to be available "the matter in issue" in the two suits must be the entire subject in controversy.

S. Thiagaraja Aiyar for *K. V. Ramachandra Aiyar* for Petitioner.

K. S. Desikan for Respondents.

K.S.

Yahya Ali, J.
1*st April*, 1947.

Thulukanam *v.* Robert Ponnan.
Cr.R.C. No. 752 of 1946.
(Cr.R.P. No. 721 of 1946.)

Criminal trial—Practice—Revision petition by complainant against acquittal—Death of petitioner—Proceedings do not abate—Legal representative of deceased—If to be brought on record.

On the death of a complainant after filing a revision petition against acquittal of the respondents, the revision case would not abate. The complainant in such a case is after all in the position of a witness who had already been examined in the case and the revision case would not abate and must be heard on its merits, there being no need for the son of the deceased petitioner to come on record.

C. Narasimhachariar for Petitioner.

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

K.S.

Horwill, J. Ramaswami Goundan *v.* Arunachala Goundan.
13*th March*, 1947. S.A. No. 5 of 1946.

Mortgage—Usufructuary mortgage—Provision for payment of mortgage amount and redemption in five years—Mortgagor if entitled to redeem within the five years.

In a mortgage deed it was provided *inter alia* :—

"I shall pay usufructuary mortgage amount of Rs. 600 in a period of five years from this date.....," and "in default you shall receive the amount whenever it is paid and leave the land in my possession."

Held : The provision entitled the mortgagor to redeem even within the period of five years. A clause permitting redemption in or within a particular period means "on or before the date of the expiry of that period". [Case-law discussed.]

K. V. Ramachandra Ayyar for Appellant.

E. R. Krishnan for Respondent.

K.S.

Gentle, C.J. and *Happell, J.* Subramaniam Chettiar *v.* Navaneetha Krishna Marudappa Thevan
19*th March*, 1947. C.M.P. No. 835 of 1947.

Privy Council—Practice—Appeal—Appeal admitted, records printed in India and transmitted to Privy Council and received there—Financier of one of the parties who though impleaded in all the proceedings had remained ex parte *throughout—If can apply to the High Court in India to be added as party to appeal pending before His Majesty in Council.*

Where an appeal to His Majesty in Council has been admitted, (the records printed in India, transmitted to the Privy Council and received there, though not formally lodged) the Privy Council has seisin of the appeal and an application of persons (in this case a financier who had remained *ex parte* though impleaded in all the proceedings and his sons) to be added as party respondents to the appeal before the Privy Council will not lie to the High Court from which the appeal went up to the Privy Council.

Even for substitution of a legal representative of a deceased party, the application itself is not dealt with by the High Court. It merely enquires into and expresses findings of fact upon which it reports and that report is sent to the Judicial Committee for that tribunal to dispose of the application.

A. Sundaram Ayyar for Petitioner.

R. Purushothama Ayyangar, T. Aravamuda Ayyangar, S. Ramaswami Ayyar and *N. Subramaniam* for Respondents.

K.S.

Rajamannar, J. Balraj *v.* Pichamuthu Chettiar.
21*st March*, 1947. S.A. No. 90 of 1946.

Hindu Law—Joint family—Suit by father or manager for permanent injunction restraining interference with plaintiff's possession of property—Dismissal—Son of plaintiff, if can put forward same claim in a separate suit again—Civil Procedure Code (V of 1908), *section* 11*—Explanation VI—Applicability.*

After a father fails in his suit for permanent injunction restraining interference with his possession of property the son cannot file a separate suit for the same relief.

Under Hindu Law it is true that a son does not claim his right to joint family property through his father. But it is well-established that a decree obtained against a father or a manager of a joint family in respect of a claim to immoveable property would bind all the members of the joint family represented by the father or by the managing member. It is not necessary that the other members of the family

should *eo nomine* be parties. All the members must be deemed to have been impliedly represented by the managing member unless it was clear that the right sought to be litigated was a right in which the manager was claiming a right adverse to the interests of the joint family.

K. V. Srinivasa Aiyar for Appellant.

A. V. Narayanaswami Aiyar for Respondents.

K.S.

Rajamannar, J. — Chellam *v.* Shanmughavelu.

21st March, 1947. — S.A. No. 2123 of 1945.

Hindu Law—Widows entitled to maintenance out of estate—Partition agreement for each widow enjoying a definite share for life without power of alienation—Clause that "each person if she likes has a right to encumber (alienate) the properties for charitable purposes"—Alienation by widows if can enure beyond life time of such widow.

An agreement for partition was entered into by a number of widows each of whom had a right to be maintained out of an estate of a deceased Hindu. Under it, each was to be in possession and enjoyment of her share of the income for life. "After the life-time of each widow such person who is entitled to the properties shall take them. From now on, each person is entitled to the properties specified in the respective schedules and *each person if she likes has a right to encumber* (alienate) *the properties for charitable purposes.*" On a question as to the validity of a settlement by two of the widows of properties which fell to their shares for certain charitable purposes,

Held, that the widows had no power to alienate the properties allotted to them for charitable purposes beyond the lifetime of the respective widow and the property reverted to the estate.

(Leave granted.)

Sir A. Krishnaswami Aiyar, K. Subrahmanyam and *Alladi Alladi Kuppuswami* for Appellant.

T. R. Venkatarama Sastri, K. S. Sankara Aiyar and *V. Sundaresan* for Respondent.

K.S.

Lakshmana Rao, J. — Devasenambal Ammal *v.* The Board of Commissioners

25th March, 1947. — for the Hindu Religious Endowments, Madras.

C.C.C.A. No. 48 of 1946.

Madras Hindu Religious Endowments Act (II of 1927), section 77—Application to Board under for making an allocation of the income of an endowment—Order by Board that no allocation need be made—Suit to modify or set aside order filed in Madras City Civil Court —Duty to return plaint for presentation to District Court which alone had jurisdiction to entertain the plaint.

The appellant applied to the Madras Hindu Religious Endowments Board under section 77 (1) of the Madras Hindu Religious Endowments Act, 1926, for making an allocation of the income of the endowment in question and an order was passed by the Board that no allocation need be made. The appellant filed a suit in the City Civil Court to get the order modified. The City Civil Judge dismissed the suit. On appeal,

Held : Under sub-section 3 of section 9 of the Act the Court to which the application should be made for modifying or cancelling the order of the Board is the District Court and the City Civil Judge had no jurisdiction to entertain the plaint. Accordingly the plaint should have been returned for presentation to the proper court and the suit should not have been dismissed.

K. S. Sankara Aiyar for Appellant.

K. Subba Rao and *M. Chockalingam* for Respondent.

K.S.

Yahya Ali, J.
26th March, 1947.

Venugopal Naidu, *In re.*
Crl.R.C. No. 808 of 1946.
(Cr.R.P. No. 776 of 1946.)

Criminal Procedure Code (*V of* 1898), *section* 162—*Madras Food Grains Control Order* (1945), *clause* 3 (1)—*Procurement Tahsildar intercepting person actually transporting food grains—Statements of accused recorded by him and again by the Assistant Commercial Tax officer—If by an investigating officer—Criminal Procedure Code* (*V of* 1898), *section* 162 *and Evidence Act* (*I of* 1872), *section* 27—*Applicability.*

Where a Special Deputy Tahsildar for procurement of grain intercepted on the spot a person actually transporting paddy without a permit as required under the Madras Food Grains Control Order held an enquiry and recorded a statement from the accused and other witnesses (the cart drivers) and forwarded them to the Assistant Commercial Tax Officer who held another enquiry and recorded statements from the accused and another person who was alleged to be his partner.

Held, that it cannot be contended that the Assistant Commercial Tax Officer was in the position of an investigating officer and as such statements recorded by him should be excluded under section 162 of the Criminal Procedure Code. There is no provision in the Madras Food Grains Control Order, 1945, which clothes any officer or officers of the Commercial Tax Department with the powers of an officer in charge of a police station to investigate an offence.

(1946) 1 M.L.J. 368 distinguished.

In any event the statements recorded by the Tahsildar for procurement cannot be excluded from the evidence under section 162 of the Criminal Procedure Code.

M. C. Rajagopalan for Petitioner.

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

K.S.

Yahya Ali, J.
26th March, 1947.

Appavoo Pillai, *In re.*
Cr.R.C. No. 1309 of 1946.
(Cr.R.P. No. 1249 of 1946.)

District Police Act (*XXIV of* 1859), *sections* 47 *and* 53—*Scope and applicability—Complaint under section* 47 *of making false charges against police officer—If to be within three months of act with which the officer was charged.*

Section 53 of the District Police Act applies to those actions and prosecutions which are taken against persons for anything done or intended to be done either under the provisions of the District Police Act or under the provisions of any other law for the time being in force conferring powers on the police. The actions and prosecutions contemplated under the section are those instituted againt police for acts done in the discharge of their police duties. The section therefore does not apply to an action taken under section 47 of the District Police Act against a person for " maliciously and without probable cause preferring a false or frivolous charge against a police officer." The fact that the act of the police officer complained of by the accused was beyond three months will not make section 53 of the Act applicable.

As in the case of defamation the place of posting of the letter containing the false charges against the police officer is one of the places where complaints can be filed.

P. Chandra Reddi and *R. Rangachari* for Accused.

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

K.S.

Yahya Ali, J.
28th March, 1947.

Mooken Ouseph Thomas, *In re.*
Cr.R.C. No. 610 of 1946.
(Cr.R.P. No. 583 of 1946).

Hoarding and Profiteering Prevention Ordinance (1943), *section* 6 (2) (b)—*Applicability—Sale of article for which no maximum price was fixed and no evidence of normal trade practice (as to the profit which can be added to the sale price) was available—Adding* 18 *per cent. margin—If makes it "unreasonable consideration" and an offence.*

In a prosecution for an offence under the Hoarding and Profiteering Prevention Ordinance, in respect of a sale of gingelly bags at a profit of 18 per cent., evidence as to the normal trade practice in adding profits was totally wanting. In the circumstances,

Held, that unless the normal trade practice of adding profits exceeds 20 per cent. the dealer or purchaser is empowered to add a margin not exceeding 20 per cent. and it cannot be said that the addition of 18 per cent. was an unreasonable consideration to constitute an offence under the Ordinance.

K. S. Jayarama Aiyar for *V. V. Radhakrishnan* for Petitioners.

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

K.S.

Yahya Ali, J.
1st April, 1947.

Abdul Kareem, *In re.*
Cr.R.C. No. 93 of 1947.
(Case Referred No. 7 of 1947.)

Criminal Trial—Appeal—Conviction for offence under section 381, *Penal Code—Magistrate of opinion that accused as a young man without previous conviction ought to be released under section* 562 (i) (a) *of the Code of Criminal Procedure—Transmission of case under section* 380, *Criminal Procedure Code to magistrate having jurisdiction—Appeal against conviction though there is no sentence—Competence.*

A right of appeal is given in the Criminal Procedure Code against a conviction under section 381 of the Penal Code. The conviction cannot be said to be incomplete without a sentence for the purpose of exercising the right of appeal. Where on a conviction under section 381 of the Penal Code the Magistrate is of the opinion that the accused as a young man without any previous conviction ought to be released under section 562 (*i*) (*a*) of the Code of Criminal Procedure and as he had no power to do so forwarded the accused under section 380 of the Code of Criminal Procedure to a First Class Magistrate for taking appropriate action under section 562, an appeal by the accused against his conviction is not incompetent or premature by reason of the absence of a sentence against him.

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

K.S.

Yahya Ali, J.
3rd April, 1947.

Natesan Naicker *v.* Mari Gramani.
Cr.R.C. No. 67 of 1947.
(Cr.R.P. No. 61 of 1947.)

Criminal Procedure Code (*V of* 1908), *section* 247—*Scope—Summons case—Complainant absent—Duty of Court to acquit accused—Order of acquittal if open to revision on the ground of hardship to parties.*

Section 247 of the Code of Criminal Procedure makes it obligatory on the magistrate to acquit the accused in a summons case if the complainant does not appear, unless there was proper reason before the magistrate for the adjournment of the hearing of the case. There can be no question of revising such an order merely because it would cause some hardship to the party.

51 M.L.J. 730 followed. The order of acquittal being legal and competent cannot be interfered with in revision.

S. Krishnamurthi and *Vepa P. Sarathi* for the Petitioner.

V. Rajagolachariar for Respondents.

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

K.S.

Bell J.
5*th March*, 1947.

Kumara Sri Ramulu Pantulu *v.* The Province of Madras (represented by the District Collector, Chittoor).
S.A. No. 1634 of 1945

Madras Local Boards Act (*XIV of* 1920), *sections* 78 *and* 79—*Lesses of forest land with right to cut timber—Land cess if payable by lessor or lessee—Annual rental value—Computation.*

Where pending the registration of his name as the purchaser of some forest lands, *X* the purchaser, grants to strangers the right to cut and carry away the timber from the forest, land cess is payable by *X* as the occupier of the lands and the amounts which the strangers pay to him must be treated as the annual rental value within the meaning of sections 78 and 79 of the Madras Local Boards Act. It cannot be said that the grant of the rights to the strangers was not a lease but a licence. Royalty or seigniorage collected in respect of a right to cut trees, quarry lands, remove earth from tank beds and so on, is equivalent to "rent" and the owner retaining the land and getting benefit from it is liable to pay land cess.

E. Subramanian for Appellant.

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

K.S.

Gentle, C.J. and Happell, J.
11*th March*, 1947.

Corporation of Madras *v.* S.A. Khan and others.
O.S.A. No. 10 of 1946.

Madras City Municipal Act (*IV of* 1919), *section* 301, *as amended by Madras City Municipal* (*Amendment*) *Act*, 1936—"*Charge and levy*"—*Meaning—Subsisting leases of stalls in Moore Market not terminated—*"*Charging and levy*" *of increased rents by the Standing Committee under amended section—Validity—Distraint for arrears—If permissible.*

Stalls in the Moore Market were let out under tenancy agreements with the respective holders. The contractual relationship was to continue until terminated by one party or the other giving one month's notice. There was no provision in the agreement for the amount payable being increased during the time that the agreements subsisted Section 301 (2) of the City Municipal Act enables the standing committee to "charge and levy" such rates as it may determine. In September, 1944, the Corporation served upon the stall-holders notices stating that the standing committee at its meeting held on the 30th August, 1944, determined that a specified fee per mensem should be levied for each of the stalls and that with effect from 1st November, 1944, the revised rate per mensem would be levied. The enhanced rate of fee was not paid and the commissioner in the purported exercise of his statutory authority, distrained for the recovery of the amount sought to be obtained at the enhanced rate from one of the stall-holders by way of a test case. Some of the stall-holders and their association filed a suit claiming (1) a declaration that the demand for enhanced rent and act of realisation and threat to realise by distraint were illegal and *ultra vires*, and (2) an injunction restraining the levying of any distraint by the Corporation.

Held: The word "charge and levy" in section 301 (2) of the Madras City Municipal Act as amended in 1936 means no more than "fix and recover." But the exercise of the power to "charge and levy" the increased rates has not the effect of terminating the existing contracts between the Corporation and stall-holders which were in force at the time of the amendment of sub-section (2) of section 301 in 1936. All that the sub-section as now amended does is to authorise a fee to be charged and levied in accordance with the decision of the standing committee. Before the fee or rent under the subsisting agreement can be increased the contractual relationship must be terminated. The purported increased fee was not leviable

and the commissioner was not entitled to utilise the machinery which he did, for its recovery by distraint.

Dr. V. K. John and *R. Rajeswara Rao* for Appellant.

N. K. Mohanarangam Pillai and *M. V. Gopalaratnam* for Respondents.

K.S.

Yahya Ali, J. — The Public Prosecutor, Madras *v.* Parameswara Iyer.
28*th March*, 1947. — Cr.App. No. 27 of 1947.

Madras Prevention of Adulteration Act (III of 1918), *section* 20—*Rules framed under —Rules* 29 *and* 28-B (*as amended by G.O. No.* 3097, *dated* 30*th November*, 1945 *and coming into force on* 15*th January*, 1946)—*Adulterated ghee used in making "jilobi"—If ingredient of the sweetmeat, making it an offence.*

To get over the effect of the decision in *Crown Prosecutor* v. *Ramanatha Aiyar*, (1945) 2 M.L.J. 366 : I.L.R. (1946) Mad. 514, where it was held that the ghee, oil or other fatty substance used for frying a sweetmeat is not an ingredient of the sweetmeat, the Provincial Government have altered the rule and have brought in an amendment (published in the Fort St. George Gazette, dated 15th January, 1946, G.O. No. 3097, dated 30th November, 1945, Education and Public Department) whereby they have enacted that where a sweetmeat is fried or otherwise cooked in ghee, such ghee for the purpose of rule 29-B framed under section 20 of the Madras Prevention of Adulteration Act shall be deemed to be an ingredient of the sweetmeat. The notification came into force on 15th January, 1946. Accordingly where a person is charged with having on 25th February, 1946, in his possession and having sold "jilobi" which was made of ghee adulterated with 20 per cent. fat not derived from milk or cream, it must be held that an offence has been committed under rule 28-B read with rule 29. It is imperative on persons selling sweetmeats to exhibit a notice that the sweetmeats are not made of ghee.

The Public Prosecutor (*V. L. Ethiraj*) for Appellant.

C. A. Md. Ibrahim for Respondent.

K.S.

Chandrasekhara Aiyar, J. — Ammanamma *v.* Venkatarathnam Sarma.
1*st April*, 1947. — S.A. No. 1715 of 1945.

Transfer of Property Act (IV of 1882), *section* 68 (d)—*Scope—Usufructuary mortgage —Mortgagee failing to get possession—Right to sue for recovery of mortgage money.*

There was a mortgage executed by the first defendant in favour of the plaintiff. The lands were to be put in possession of the plaintiff under the mortgage deed. But the plaintiff did not get possession of the lands and that was because of the first defendant's notice to the tenants asking them not to pay the rents due to the plaintiff but to pay over the same to himself.

Held : In the circumstances the plaintiff has got a right under section 68 (*d*) of the Transfer of Property Act to sue for the recovery of the mortgage money. It cannot be said that the plaintiff must pursue the tenant or the mortgagor and is not entitled to sue for the recovery of the amount on the security of the property mortgaged) which had meanwhile been purchased by strangers).

B. Jagannadha Das and *C. V. Dikshatulu* for Appellant.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondents.

K.S.

Yahya Ali, J.
9*th April*, 1947.

Ahmad Naina Maracair, *In re.*
Cr.R.C. No. 1167 of 1946.
Cr.R.P. No. 1118 of 1946.

Arms Act (XI of 1878), sections 14, 19 (f) *and* 21—" *Extent*"—*Meaning—Licensee possessing more gun powder than is mentioned in his gun licence—Offence is one under section* 14 *and not section* 21 *of the Arms Act—Prosecution for—Not maintainable without the previous sanction of District Magistrate.*

The word " extent " in section 14 of the Arms Act includes the quantity of ammunition permitted by the licence. Possession or control of any quantity in excess of it must be deemed, apart from its not being covered by the licence, an offence under section 14 read with section 19 (*f*) because it is not according to the " extent " permitted by the licence. A prosecution of the licensee is not maintainable under section 29 without the sanction of the District Magistrate.

Ram Saroman Singh v. *Emperor*, A.I.R. 1946 Oudh 124, not followed ; *Malcom* v. *Emperor*, A.I.R. 1933 Cal. 218, relied on.

K. V. Ramachandra Aiyar for Petitioner.

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

K.S.

Yahya Ali, J.
10*th April*, 1947.

Varadaraja Chettiar *v.* Swami Maistry.
Cr.R.C. No. 987 of 1946.
(Cr.R.P. No. 948 of 1946).

Penal Code (XLV of 1860), *section* 447—*Charge of having carried away the usufruct of a tamarind tree in the possession and enjoyment of complainant—Title of complainant to the tree declared by Civil Court—Duty of Criminal Court to have regard to the declaration.*

A Criminal Court is not entitled to disregard the decree of a Civil Court declaring rights to the identical property in dispute in the criminal case. Where there is a decree of a Civil Court declaring the right of the complainant to the possession and enjoyment of a tamarind tree, the Criminal Court cannot disregard that decree and rely on other materials and acquit the accused of the charge of having carried away the usufruct of the tree.

M. K. Harihara Aiyar for Petitioner.

A. Dorairaj for Respondent.

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

K.S.

Yahya Ali, J.
10*th April*, 1947.

Govindaswami Chettiar, *In re.*
Cr.M.P. No. 265 of 1947.

Penal Code (XLV of 1860), *sections* 408 *and* 409—*Charge of committing criminal breach of trust by accused either as " a clerk or as an agent of the company"—Trial by a Second Class Magistrate—Is an illegality affecting the jurisdiction of the trying magistrate and vitiates the proceedings.*

If a charge had merely been that an alleged breach of trust was committed by the accused in the capacity of a clerk of the company, there could be no objection to the charge being framed under section 408 of the Penal Code and to such a charge being tried by a Second Class Magistrate. But where the charge is on the alternative footing that the breach of trust was committed either as " a clerk or as an

agent of the company" a Second Class Magistrate has no jurisdiction to try such an offence. The insertion in the charge of the alternative expression "or the agent of the company" has the effect of making the alleged offence one under section 409 of the Penal Code, which is triable only by a Court of Session, Presidency Magistrate or a Magistrate of the First Class. The trial of such an offence by a Second Class Magistrate is an illegality affecting the jurisdiction of the trying Magistrate and vitiating all proceedings which must therefore be quashed.

M. Srinivasagopalan for Petitioner.

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

K.S.

Yahya Ali, J.
11th April, 1947.

Lakshmana Nadar, *In re.*
Cr.R.C. No. 226 of 1947.
(Cr.R.P. No. 215 of 1947).

Penal Code (*XLV of* 1860), *sections* 206 *and* 395—*Cattle attached in execution of decree and left in custody of sureties—Forcible removal by owner after committing dacoity armed with deadly weapons and accompanied by a number of persons—Written complaint by the Court which had attached the cattle—If essential under section* 195 (1) (*b*), *Criminal Procedure Code* (*V of* 1898).

Some cattle belonging to the accused were attached before judgment by the complainant as the plaintiff in a small cause suit. After attachment the cattle were left in the custody of two sureties. The accused along with others went in a body and committed dacoity armed with deadly weapons and forcibly removed the cattle.

Held: An offence under section 395 of the Penal Code had been committed. It cannot be said that the removal of the cattle constituted an offence under section 206 of the Penal Code requiring the sanction of the Civil Court under section 195 (1) (*b*) of the Criminal Procedure Code for prosecuting the accused.

S. Krishnamurthi for Petitioner.

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

K.S.

Happell and Shahabuddin, JJ.
11th April, 1947.

Sandiappan Servai, *In re.*
Cr.App. No. 808 of 1946.

Criminal Procedure Code (*V of* 1898), *section* 423—*High Court setting aside order of Sessions Judge and directing him to continue the trial from the point where it was broken off—Validity and finality of order—If can be questioned subsequently—Trial before same jury—Validity.*

Where the High Court set aside an order of the Sessions Judge and directed him to continue the trial from the point where it was broken off, there is no order for re-trial and the trial could be concluded with the same jury. The order to continue the trial being final, it cannot be contended in a subsequent stage in an appeal against the conviction of the accused that the order of the High Court was not one permitted by section 423 of the Code of Criminal Procedure. A conclusion of the trial before the Sessions Court with the same jury cannot be set aside on that ground.

K. S. Jayarama Aiyar for *C. K. Venkatanarasimham* for Appellants.

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

K.S.

Gentle, C.J. and Happell, J. Ramakrishnan Chettiar *v.* Radhakrishnan Chettiar.
12th March, 1947. Appeal No. 354 of 1945.

Civil Procedure Code (V of 1908), sections 152 and 151—Scope—Mortgage decree—Description of property in mortgage deed, plaint and decree—Alteration of on the ground of mutual mistake—If can be by way of amendment—Proper remedy—Specific Relief Act (I of 1877), section 31.

Section 152 of the Code of Civil Procedure corresponds to Order 27, rule 11 of the rules of the Supreme Court, where it is known as the "slip rule". The alterations, amendments or corrections which the section authorises are limited by its provisions. They are the following: Clerical or arithmetical mistakes in judgments, decrees or orders and in addition, errors arising in judgments, decrees or orders from any accidental slip or omission.

Where it is alleged that a mistake was made in the description of the property in the mortgage deed by describing the property as No. 1467 instead of as properties Nos. 1463 and 1466 and in the decree the same description has been followed, the remedy is to have the mortgage deed rectified by a suit under section 31 of the Specific Relief Act and not under section 152 of the Code. Section 152 of the Code is for the purpose of correcting errors directly involved in the proceedings themselves and not for correcting errors which are anterior to the proceedings particularly in documents upon which proceedings are brought. As remedy by rectification would be available under section 31 of the Specific Relief Act, the inherent jurisdiction under section 151 of the Code cannot be invoked.

61 M.L.J. 805; (1941) 2 M.L.J. 452 and A.I.R. 1924 Rang. 104, not approved.

A.I.R. 1934 All. 100, approved.

T. V. Muthukrishna Aiyar and *S. Ramachandra Aiyar* for Appellant.

S. Panchapakesa Sastri and *K. S. Rajagopala Aiyangar* for Respondent.

K.S.

Lakshmana Rao, J. Ganesan *v.* Ganapathy Aiyar.
21st March, 1947. S.A. No. 705 of 1946.

Hindu Law—Adoption—Will authorising widow to adopt within one year of testator's death to ensure his spiritual benefit—Adoption by widow—Death of adopted boy after seventeen years—Subsequent adoption of another boy—Validity.

Where the will of her husband authorises a widow to make an adoption within a year of his death to ensure spiritual benefit for himself and the boy adopted in pursuance of that authority died after 17 years and the widow again adopted another boy,

Held: The authority to adopt was not exhausted by the first adoption and there was no time limit set for the second adoption should it become necessary for the fulfilment of the object and purpose of the authority to adopt, and the second adoption beyond a year after the testator's death is therefore valid.

S. Ramachandra Aiyar for Appellant.

A. V. Viswanatha Sastri for Respondents.

K.S.

Gentle, C.J. and Horwill, J. Ramachandrayya Naidu *v.* Abdul Kadar Chirth.
24th March, 1947. Appeal No. 538 of 1945.

Mahomedan Law—Minor—Mortgage by de facto *guardian to discharge a debt binding on the minor—If binds minor.*

A *de facto* guardian of a minor has no authority whatever to deal with the property of a minor and any purported transactions effected by him are void and invalid so far as the minor is concerned.

I.L.R. 45 Cal. 878 : L.R. 45 I.A. 73 : 35 M.L.J. 422 (P.C.), relied on.

Even if the object of such *de facto* guardian in creating the mortgage was to borrow money to pay a debt which may be binding upon the minor or to stave off litigation in respect of the earlier debt, the mortgage is a nullity and cannot be enforced against the minor.

(1939) 2 M.L.J. 463, approved.

(1935) M.W.N. 943 and A.I.R. 1929 Rang. 107, dissented from.

K. Subba Rao and *P. Ramachandra Reddi* for Appellant.

B. Pocker for Respondent.

K.S.

Rajamannar, J.
2nd April, 1947.

Kuppuswami Rao, *In re.*
Cr.R.C. No. 1091 of 1946.
(Cr.R.P. No. 1044 of 1946).

Penal Code (*XLV of* 1860), *section* 120-*B—Conspiracy—Gist of offence—Trial for conspiracy dropping charges for substantive offences—Propriety—Taluk Head Accountant of Sub-treasury discharging functions as Motor Licensing Officer—Conspiracy to commit and commission of criminal breach of trust, cheating, etc.—Trial for conspiracy alone—Propriety —Sanction of Governor—If essential—Government of India Act* (1935), *section* 270 (1) *—Applicability—Criminal Procedure Code* (*V of* 1898), *section* 197—*If applicable.*

The petitioner, the Taluk Head Accountant of a Sub-treasury and Motor Licensing Officer, Madura, was charged along with two others under sections 120-B, 420, 468, 197 and 477-A of the Indian Penal Code. The charges were based upon the allegations that the accused conspired to commit criminal breach of trust and cheat and defraud the Provincial Government of the revenue due to it by way of motor tax on certain vehicles belonging to a particular motor service and in pursuance of that conspiracy committed criminal breach of trust by dishonestly issuing motor licences without collecting in full the amount of tax due on them and cheated and defrauded the Provincial Government of its revenue by causing delivery of the licences on the false representation contained in the certificate of endorsement of payment of tax in the registration certificates and falsified accounts by omitting to enter particulars relating to such licences in the treasury accounts. On objection being taken the magistrate held that for the institution of proceedings under sections 409, 420, 197 and 477-A of the Indian Penal Code the consent of the Governor was necessary under section 270 (1) of the Government of India Act but no such consent was necessary in respect of the charge under section 120-B and directed that the charges under the former sections be dropped and the charge under section 120-B alone be proceeded with. On revision,

Held: (*i*) The fact that the trial of the substantive offences under sections 409, 420, 197 and 477-A of the Indian Penal Code is incompetent for want of sanction cannot prevent *ipso facto* the use of the same evidentiary material which might have been used to prove the offence, in support of the charge of conspiracy under section 120-B. It is legal to try an accused on a charge of conspiracy to commit an offence even though the substantive offence has been carried out. A charge of criminal conspiracy can be sustained without a charge in respect of the substantive offence committed in pursuance of the conspiracy. The gist of conspiracy consists in the agreement to commit certain illegal acts. It may be that in many cases the evidence at the disposal of the prosecution is insufficient to secure a conviction for the substantive offence alleged to have been committed. In such cases it is very unfair, though it may be lawful to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of the very offences. So too

if sanction has been refused in respect of the substantive offence it will not be fair that the prosecution should continue proceedings confined to the charge under section 120-B.

(*ii*) The offence of conspiracy with which the petitioner was charged cannot be said to be " an act done or purporting to be done in the execution of his duty as a servant of the Crown in India ", as to require the consent of the Governor of the Province for the institution of criminal proceedings under section 270 (1) of the Government of India Act. (Case-law discussed.)

(*iii*) The petitioner was liable to be removed from service by the District Collector. He was not appointed *eo nomine* as licensing officer by the Provincial Government. Section 197 of the Criminal Procedure Code does not therefore afford any protection to the petitioner.

(Authorities discussed.)

Certificate under section 205 of the Government of India Act granted.

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

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

K.S.

[F. B.]

Gentle, C.J., Lakshmana Rao and Happell, JJ.
8th April, 1947.

An application for restoration to the roll of advocates, *In re*.
C.M.P. No. 6484 of 1946.

Legal practitioner—Petition for restoration to the roll of advocates—Evidence in support of—Certificates as to integrity—If can be acted upon—Necessity for affidavits—Value to be attached to the statements in such affidavits.

It is not the practice of the High Court to act upon certificates as to the subsequent integrity of a person applying for restoration to the roll of advocates in his application for such restoration. The contents of such certificates has to be placed in affidavits. The Court in such a case will not pay attention to statements as to opinions but only to statements of fact regarding the applicant's conduct, behaviour and trustworthiness.

P. Govinda Menon The Crown Prosecutor and *V. P. Gopalan Nambiar* for Petitioner.

The Advocate-General (*K. Rajah Aiyar*) on behalf of the Crown.

K.S.

Rajamannar, J.
10th April, 1947.

Perumal Chettiar *v.* Kailasam Chettiar.
C.R.P. No. 434 of 1946.

Evidence Act (I of 1872), section 58—Scope—Admission by defendant of execution of hand letters evidencing loans but plea of substitution of liability by execution of another promissory note—Effect on proof and admissibility of document.

Where the defendant admits having executed two hand letters evidencing the suit loans but only pleaded a substitution of liability by the execution of another promissory note and a partial discharge towards it there is no necessity for the plaintiff to adduce proof of his claim by seeking to get the hand letters admitted in evidence. The document need not be proved and this would be so even when such document is not admissible on account of any provision of the Stamp Act. The plaintiff will be entitled to a decree on the failure of the defendant to make out the plea set up by him in defence.

63 M.L.J. 303 (308), relied on.

M. S. Vydianatha Aiyar for Petitioner.

N. Suryanarayana for Respondent.

K.S.

Wadsworth, J. Krishna Moorthy *v.* Kanti Gowd.
11*th April*, 1947. C.R.P. No. 452 of 1946.

Madras Agriculturists' Relief Act (IV of 1938), *section* 8—*Private arrangement in debtor family for partition of liability—If breaks integrity of debt.*

A private arrangement in the debtor family for the partition of the liability will not bind the creditor or break the integrity of the debt.

T. S. Narasinga Rao for Petitioner.

V. S. Narasimhachar for Respondent.

K.S.

Rajamannar, J. Kanakasabapathi Pathar *v.* Poornathammal.
16*th April*, 1947. C.R.P. No. 44 of 1947.

Civil Procedure Code (V of 1908), *Order* 21, *rules* 100, 101 *and* 102—*Scope—Petition under rule* 100—*Transfer of Property Act (IV of* 1882), *section* 52—*If applicable—Transfer—Test.*

The Court in dealing with an application under Order 21, rule 100 of the Civil Procedure Code is not concerned with the determination of the title to the property which is the subject-matter of the application. It is only concerned with the factum of possession at the time when the applicant is alleged to have been dispossessed and the nature of such possession, *viz.*, whether it was on his own account or on account of a person other than the judgment-debtor. Section 52 of the Transfer of Property Act in terms prohibits a transfer or otherwise dealing with the property in suit by any party to the suit. The principle underlying that section has to a certain extent been embodied in Order 21, rule 102, Civil Procedure Code and it is not permissible to travel beyond that provision and rely upon the analogy of section 52 of the Transfer of Property Act in a petition under Order 21, rule 100 of the Civil Procedure Code.

A judgment-debtor surrendering possession to a stranger in pursuance of a notice to quit must be deemed to have "transferred" the property to him within the meaning of rule 102 of Order 21, Civil Procedure Code, and such transferee will not be entitled to any relief under rule 101.

S. Ramachandra Aiyar for Petitioner.

R. Desikan for Respondent.

K.S.

Happell, J. Sivarama Padayachi, *In re.*
17*th April*, 1947. Cr.R.C. Nos. 907 and 908 of 1946.

Madras Food Grains Control Order (1945), *section* 3 (1)—*Act done in contravention of before the coming into force of the Order—Sanction for prosecution—Validity.*

The Collector and District Magistrate has no jurisdiction to make an order sanctioning the prosecution under the Madras Food Grains Control Order (1945) in respect of an offence committed before the date on which that order came into force although a prosecution could have been instituted under section 3 (1) of the repealed Madras Food Grains Control Order, 1942, for that offence.

T. R. Ramachandran for Petitioner.

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

K.S.

Gentle, C.J.
18*th April*, 1947.

Sattemma *v.* Ramayya.
C.R.P. No. 655 of 1946.

Provincial Small Cause Courts Act (*IX of* 1887), *Schedule II, Articles* 30 *and* 31—*Suit by Hindu widow for reimbursement by Kartha of family of amounts spent by her for marriage of her daughter—Not excluded from jurisdiction of a Small Cause Court as one for accounts.*

A suit by a Hindu widow for reimbursement (of amounts spent by her for the marriage of her daughter) by the Kartha of the family is not a suit for accounts and is not excluded from the jurisdiction of a Small Cause Court.

K. Kameswara Rao and *N. Rammohana Rao* for Petitioner.

T. Satyanarayana for Respondent.

K.S.

Yahya Ali, J.
18*th April*, 1947.

Venkatasubbiah, *In re.*
Crl.R.C. No. 685 of 1946.
(Crl.R.P. No. 655 of 1946.)

Penal Code (*XLV of* 1860), *section* 161—"*Motive or reward*"—*Covers also a case where the payment is made in respect of past favours—Person on leave—Does not cease to be a public servant.*

What is forbidden by section 161 of the Indian Penal Code generally is receiving any gratification as motive to do or a reward for having done any such thing as is described in the definition. Accordingly the phrase "motive or reward" under section 161 covers a case where the payment is made in respect of past favours. Section 161 will apply also to a person who is on leave as he cannot be said to have ceased to be a public servant. Such leave counts as duty and so long as a person is on duty he must be deemed to be a public servant.

N. Somasundaram for Petitioner.

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

K.S.

Yahya Ali, J.
23*rd April*, 1947.

Vidyarathna Thirtha Swamiar, *In re.*
Crl.R.C. No. 719 of 1946.
(Crl.R.P. No. 688 of 1946.)

Madras Rationing Order (1943), *clause* 3-*A—Scope—Head of religious institution—If person in charge of authorised establishment who will be liable for importing rice under clause* 3-*A—Existence of manager—Effect.*

Under clause 3-A of the Madras Rationing Order, 1943, there can be no doubt that every person other than an authorised wholesale distributor is liable if it is found that he imported rice within the rationed area contrary to the prohibition contained in that section. Where rice is imported into a mutt whether it was done by the principal or by his agent the manager, the head of the mutt is liable under clause 3-A. In such a case it cannot be said that the manager was the person in charge of the authorised establishment and the head of the mutt is not liable.

V. T. Rangaswami Aiyangar and *K.P. Adiga* for Petitioner.

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

K.S.

Lakshmana Rao and Yahya Ali, JJ.
23*rd April*, 1947.

Crown Prosecutor *v.* Krishnan.
Cr.App. No. 256 of 1946.

Criminal Procedure Code (*V of* 1898), *section* 411-*A—Leave to appeal on the facts—Discretion of Judge hearing application—Principles for exercising—Grant of leave—Effect—Scope of appeal.*

A judge hearing an application for leave to appeal on the facts has an absolute discretion to grant or withhold such leave, but it is a discretion to be exercised judicially. The judge is bound to consider any special features in the particular case, but he cannot ignore the effect which the granting of leave to appeal without due discrimination may have upon the whole system of trial by jury in the Court.

Leave once having been granted, however, the matter is at large and the Court of Appeal must dispose of the appeal upon the merits paying due regard however to the principles on which Courts of Appeal always act in such cases. The considerations applicable to appeals under section 411-A, Criminal Procedure Code, are the following :—(1) the views of the jury implicit in their verdict as to the credibility of the witnesses ; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at the trial ; (3) the right of the accused to the benefit of any doubt ; and (4) the slowness of the appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.

The test that was hitherto applied, namely, whether the verdict of the jury is perverse or unreasonable in order to entitle the Court to interfere with it has now been definitely discarded, and the test to be applied is whether the verdict is upon the evidence right or wrong.

Thiagaraja Bhagavathar v. *The King-Emperor*, P.C. App. No. 79 of 1946, relied on.

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

T. V. Ramanathan, *T. S. Venkataraman* and *T. C. Raghavan* for Respondent.

K.S.

[End of (1947) I M.L.J.]