THE
MADRAS LAW JOURNAL

I] JANUARY [1961

MARCH OF LAW IN 1960.

Long ago, Blackstone wrote that Judges are not delegated to pronounce a new law but to maintain and expound the old law ; that even when an earlier decision is scuttled as contrary to reason the subsequent Judges do not pretend to make new law but to vindicate the old one from misrepresentation; that the prior decision had given, as it were, a false map of the law and the later decision is merely a bit of "revised legal cartography ". This is the conventional view. Modern legal thought no longer subscribes to the view that the Judge merely speaks the law. It recognises that every decision has to be understood with regard to the facts in the case and the question actually decided, that the Courts state the general principles but the force of their observations lies in the application of them, that this application cannot be predicated with accuracy, and that out of such applications rules steadily evolve and grow. During the year under review, as many as 37 decisions of the Supreme Court have been reported in the columns of this Journal in addition to important decisions of the High Court in the several branches of the law. An attempt is made herein to touch upon the decisions so rendered on some of the relatively more important titles of the law.

The Advocate and his duties and privileges : In *G. Vasantha Pai,* In re[1] it is pointed out that an advocate owes a bundle of duties, duty to his client, duty to his opponent, duty to the Court, duty to the profession, and duty to the public and the State ; that *prima facie* his duty is to his client; that in the performance of his arduous duties he must not be hampered by any fear of offending the opposite party or any witness; and, that an advocate cannot be proceeded against either civilly or criminally for any words uttered in his office as advocate.

The High Court and its powers and jurisdiction : In *Nachiappa Chettiar* v. *Subramanian Chettiar*[2], the Supreme Court holds that the term 'Court' in section 23 of the Arbitration Act, 1940, includes the appellate Court, and that where there is an appeal pending against the preliminary decree in a suit and proceedings subsequent to the preliminary decree are pending before the trial Court, it would be open to either the appellate Court or the trial Court to make an order of reference to arbitration in respect of all matters in dispute between the parties. In *Alopi Parshad & Sons* v. *Union of India*[3], the Supreme Court decides that the High Court has jurisdiction to set aside an award on the ground of an error in the making of the award or in any document incorporated with it ; as for instance where in a note appended by the arbitrator stating the reasons for his decision there is found some legal proposition which is the basis of the award and which is erroneous ; but that if a specific question is submitted to the arbitrator and he answers it, the fact that the answer involves an erroneous decision in point

1. (1960) 1 M.L.J. 21.
2. (1960) 1 M.L.J. (S.C.) 101.
3. (1960) 2 M.L.J. (S.C.) 46.

of law does not make the award bad on its face so as to permit of its being set aside. In *Raja Prasad Singh* v. *Gajadhar Singh*[1], the Supreme Court lays down that when an appeal lies on facts it is the right and duty of the appellate Court to consider what its decision on the question of facts should be, that in reaching a decision it should not lightly reject the trial Judge's conclusions as to the credibility or otherwise of a witness particularly where it is based on an observation of the demeanour of a witness, but that where the question of credibility is not based entirely on the demeanour of the witness but is a matter of inference of one fact from proved primary facts, the Court of appeal is free to reverse the findings if it thinks that the inference made by the trial Judge is not justified. In *G. Vasantha Pai, In re*[2], it is held that while the High Court has undoubted power in a proper case to expunge irrelevant and scandalous remarks made by a subordinate Court against a party or his counsel, it has no such power in regard to the judgment of a Judge of the High Court whether it be on the original side or on the appellate side in civil or criminal proceedings, not only because the judgment is a judgment of the High Court but also because the High Court is a Court of record.

Constitution of India : In *Hamdard Dawakhana* v. *Union of India*[3], the Supreme Court lays down *inter alia* that when an enactment is impugned as *ultra vires* and unconstitutional what has to be ascertained is the true character of the legislation; that for that purpose regard must be had to the enactment as a whole, or its objects, purpose, and true intention, and to the scope and effect of its provisions or what they are directed against and what they aim at ; that it cannot be said that every advertisement is a matter dealing with freedom of speech, nor can it be said that it is an expression of ideas ; that in every case one has to see what the nature of the advertisement is and what activity falling under Article 19 (1) of the Constitution it seeks to further ; that where the advertisement relates to trade or commerce and is not a propagation of ideas, the advertising of prohibited goods or commodities of which sale is not in the public interest cannot be regarded as ' speech ' and would not fall under Article 19 (1) (*a*) ; and, that where the main purpose and true intent of the impugned Act is to prevent self-medication or self-treatment and for that purpose advertisements commending certain drugs and medicines had been prohibited there is no abridgment of a person's right of free speech. *Fedco & Co.* v. *Bilgrami*[4] decides that a provision (clause 9-*a*) in the Imports Control Order, 1955, that a license may be cancelled, if it is found after giving the licensee a reasonable opportunity to be heard to have been obtained by fraud or misrepresentation, is a reasonable restriction in the interests of the general public on the exercise of a fundamental right of a citizen guaranteed under Article 19 (1) (*f*) and (*g*) ; and that where the petitioners were concerned to show that they were not parties to the fraud rather than to show that there was no fraud practised at all, the omission to give particulars of the fraud or inspection of papers cannot be held to deprive the petitioners of a fair chance of convincing the authority that the grounds on which cancellation of the license was proposed did not exist or even if they existed they did not justify the cancellation of the license. In *Chockalingam Chettiar, In re*[5], it is pointed out that since ' extradition ' is a subject specifically provided for as the object of legislation under the Constitution the rendition of offenders for extraditable offences cannot be held to be in derogation of the fundamental rights of freedom of movement or residence and that such restriction is in the interest of the general public under Article 19 (5) of the Constitution. *Mohamed Dastagir* v. *State of Madras*[6] decides that before Article 20 (3) of the Constitution comes into play two facts have to be established : (1) that the individual concerned was a person accused of an offence, (2) that he was compelled to be a witness against himself ; that where one of these facts alone is established the requirements of Article 20(3) will not be fulfilled; and that where there was no formal accusation against a person relating to the commission of an offence and he had been only asked to produce the money in his pocket which

1. (1960) 1 M.L.J. (S.C.) 33.
2. (1960) 1 M.L.J. 21.
3. (1960) 2 M.L.J. (S.C.) 1.
4. (1960) 1 M.L.J. (S.C.) 71.
5. (1960) 2 M.L.J. 425 (F.B.).
6. (1960) 2 M.L.J. (S.C.) 39.

he was alleged to have attempted to offer to the police-officer, for marking for identification there was no testimonial compulsion since it was within his power to refuse to comply with the police-officer's request, and Article 20 (3) is not attracted. *Bhagwandas Goenka* v. *Union of India*[1] holds that the words 'accused of any offence' in Article 20 (3) indicate an accusation made in a criminal prosecution before a Court of law or a judicial tribunal where a person is charged with the Commission of an act punishable under the Indian Penal Code or under any special or local law, and that where the Reserve Bank of India acting on information about dollars acquired by a person in the United States of America in addition to the foreign exchange specifically granted to him issued a number of directions to the person at several stages with a view to ascertain the truth of the matter—the questions themselves being dependant upon the explanations furnished by the person—it cannot be said that there was any accusation levelled against that person and Article 20 (3) cannot apply so as to render his testimony inadmissible in evidence. In *Shankarlal* v. *Collector, Central Excise*[2], it is held that the scope of the protection which a witness enjoys against self-incrimination is not quite the same under Article 20 (3) of the Constitution of India as under the American Constitution inasmuch as the former provision is available only in relation to a proceeding in a criminal Court, that a person summoned to appear before the Sea Customs Authorities under section 171-A of the Sea Customs Act is not in the position of a person accused of an offence and he is bound to appear before such Authorities and answer all questions put to him; that a person who has been examined by the customs officers will not be in the position of an accused till it can be fairly and properly said that he is likely to be proceeded against in a criminal Court; and that though the question when a person can be regarded as having become an accused would depend on the decision which the departmental officers may take they cannot by merely pretending that they have not made up their minds circumvent the provisions of Article 20 (3). In *Sahibzada Saiyad Muhammad Amirabbas Abbasi* v. *State of Madhya Bharat*[3], the Supreme Court holds that exercising jurisdiction under Article 32 the Supreme Court can grant relief for enforcement only of the rights conferred by Part III of the Constitution, that an alleged right of the petitioner to the guardianship of his minor children under his personal law is not one of the fundamental rights guaranteed to him under the Constitution, and that where the petitioner claims a writ on the plea that the respondents have misappropriated or misapplied the property of his children the matter does not fall within the scope of Article 32. *Mineral Development Co.* v. *State of Bihar*[4], decides that where a legislation (Bihar Mines Act, 1947, section 25) gives the State Government power to cancel a license for *repeated* failure to comply with any of the provisions of the Act, and the State Government cancelled the license as the result of one continuous inspection and without giving an opportunity to the licensee, the action of the Government is not justified and a writ of *certiorari* can be issued. *State of Jammu & Kashmir* v. *Thakur Ganga Singh*[5] lays down that under Article 132 (2) there is no scope for granting Special Leave unless two conditions are satisfied: (1) the case should involve a question of law as to the interpretation of the Constitution, and (2) the said question should be a substantial question of law; that the principle underlying the Article is that the final authority of interpreting the Constitution must rest with the Supreme Court; that where the parties agree on the true interpretation of an Article, for instance Article 14, or do not raise any question in respect thereof it is not possible to hold that the case involves any question of law as to the interpretation of the Constitution; that the interpretation of Article 14 in the context of classification has been finally settled by decisions of the Supreme Court; that such interpretation is binding under Article 141 on all the Courts within the territory of India; that what remains to be done by the High Court is only to apply that interpretation to the facts before it; and that where the only question round which the dispute centered was whether an impugned rule stood the test of

1. (1960) 2 M.L.J. 458.
2. (1960) 1 M.L.J. 367.
3. (1960) 2 M.L.J. (S.C.) 25.
4. (1960) 2 M.L.J. (S.C.) 16.
5. (1960) 1 M.L.J. (S.C.) 67.

reasonable classification Special Leave to appeal to the Supreme Court under Article 132 (2) cannot be granted. In *Balwan Singh* v. *Lakshmi Narain*[1], the Supreme Court takes the view that merely because an appeal has been admitted by Special Leave the entire case is not at large and the appellant is not free to contest the findings of fact of the subordinate tribunals, that only those points on which Special Leave may initially be granted may be urged at the final hearing, and that normally Special Leave will not be granted by the Supreme Court under Article 136 (1) on a plea of error committed by the Courts below in the appreciation of the evidence. *Rahimtoola* v. *State of Bombay*[2] decides that where the very question raised has been already decided by a Bench of the Supreme Court consisting of five Judges it cannot be said that a substantial question of law as to the interpretation of the Constitution arises in the case requiring it to be decided again by a Constitution Bench of five Judges under Articles 143 and 145 (3). *Muthuvelappa Goundar* v. *Deputy Registrar of Co-operative Societies*[3] states that the jurisdiction of the High Court under Article 226 may properly be invoked in cases where the order of the subordinate tribunal is vitiated by error of law apparent on the face of the record and the impugned order quashed, and the fact that there is an adequate alternative remedy cannot be a bar to the issue of a writ of *certiorari*. *Chattanatha Karayalar* v. *Income-tax Officer, Nagercoil*[4], however points out that the existence of an alternative remedy is a material circumstance that is taken into account when the Court is called upon in the exercise of its discretion to issue a writ of *certiorari* under Article 226. *Vellayyan* v. *District Forest Officer*[5] holds that the provision regarding finality of the decisions of Executive Officers has always been understood to refer to proceedings before the Officers and cannot take away the jurisdiction of the High Court under Article 226 to quash a decision of an officer if it is based on a manifest error of law or the decision has the effect of the Officer exercising a jurisdiction which is not vested in him. *Rubalingam* v. *State of Madras*[6] points out that a mere breach of contract is not remediable by a high prerogative writ such as *certiorari*, that the fact that one of the parties to the contract happens to be a Government Officer makes no difference, that where there is no statutory or other legal right in the continuance of a contract entered into with a party the termination of such a contract by the Government without inquiry will not entitle that party to move the High Court under Article 226 on the ground of violation of the principles of natural justice. *Om Prakash Gupta* v. *Commissioner of Police, Madras*[7] decides that barring exceptional cases of *prima facie* perverse orders of refusal of licence it is not within the province of the High Court under Article 226 to examine the correctness of the view taken by the licensing authority whether the appellant is in lawful possession of the premises, equipment, etc., and unless it is established that the licensing authority is compelled by any statutory provision to grant or renew the license no writ of *mandamus* could lie in that regard. In *Venkataraman* v. *Controller of Estate Duty*[8], it is held that a Central legislation adopted by a State under Article 252 cannot have application to that State retrospectively from a date earlier than the date of the resolution of the concerned State Legislature adopting it, that its operation in the State would further depend on the terms of the enactment adopted, and that if under the terms of an enactment so adopted the State is brought within its ambit only from a particular date the Central Act adopted will have operation only from that date with regard to the State so adopting. In *Volkart Bros.* v. *State of Madras*[9], it is held that a sale falling within the scope of the *Explanation* to Article 286 (1) can itself be a sale in the course of inter-State trade and to such a sale the ban imposed by Article 286 will also apply, that if that ban is lifted the question to be considered will be which State can tax the transaction, that in the case of outside sales the Sales Tax Continuance Order will not enable the State from which the seller sold the goods to the buyer outside the State for consumption in that State to tax the transaction, and

1. (1960) 2 M.L.J. (S.C.) 27.
2. (1960) 2 M.L.J. (S.C.) 11.
3. (1960) 2 M.L.J. 392.
4. (1960) 1 M.L.J. 439.
5. (1960) 1 M.L.J. 434.
6. (1960) 1 M.L.J. 328.
7. (1960) 2 M.L.J. 50.
8. (1960) 1 M.L.J. 385.
9. (1960) 1 M.L.J. 140.

that it cannot be said that irrespective of whether the sales come within the scope of Article 286 (1) (*a*) or whether they were sales in the course of inter-State trade or commerce within the scope of Article 286 (3) the levy will be subject to sales tax under the Sales Tax Continuance Order. *Sreenivas & Co.* v. *Deputy Commercial Tax Officer*[1] points out that Article 286 (3) refers to two types of cases : (1) a law by the legislature of a State imposing taxation, and (2) a law by the legislature of a State authorising the imposition of a taxation ; that the decisions of the Australian Courts interpreting the words ' law imposing tax ' in the light of the constitutional practice in that country cannot be a guide for the interpretation of similar words in Article 286 (3), that the Madras General Sales Tax Act, 1939, is of a composite character and though it could be a law imposing the tax in regard to the sale of most of the commodities the Act is really one authorising the imposition of a tax in regard to such goods; and that where after the passing of Act LII of 1952 sales tax legislation was enacted in regard to the commodities declared by the former Act it would require the assent of the President notwithstanding the fact that it merely authorised the imposition of the tax. *Abdul Subban & Co.* v. *State of Madras*[2] lays down that Article 304 (*a*) prohibiting discriminatory taxation could not be construed as in effect to nullify the freedom of inter-State trade guaranteed under Article 301 which contemplates a ban on all heads where discriminatory taxation is possible since otherwise the freedom of inter-State trade guaranteed by the Article could be fettered by taxation ; that having regard to the object of the two Articles no discriminatory power of taxation is vested in any State on goods imported from other States either at the point of import or at any subsequent stage ; and that no State could levy tax on goods having its origin in a different State so as to discriminate it from goods of a similar kind manufactured or produced therein. In *Kapur Singh* v. *Union of India*[3], the Supreme Court holds that by Article 311 a public servant is entitled to show cause against the action proposed to be taken in regard to him, but the exercise of the authority to pass an order to the prejudice of a public servant is not conditioned by the holding of an enquiry at which evidence of witnesses *viva voce*, notwithstanding an earlier and full enquiry before the Enquiry Commission is recorded.

Representation of the People Act:—In *Balwan Singh* v. *Lakshmi Narain*[4], the Supreme Court makes it clear that a petition which sets forth the particulars about the use of a vehicle for conveying voters to and from the polling station with details as to the time and place coupled with as full a statement as possible in support of the plea that the vehicle was hired or procured by the candidate or his agent or another person, substantially complies with the requirements of section 83 (1) (*b*) of the Representation of the People Act, 1951 ; that the corrupt practice being the hiring or procuring of the vehicle for the conveyance of the electors, if full particulars of such conveying of electors to or from any polling station are given section 83 in substantially complied with even if particulars of the contract of hiring as distinguished from the fact of hiring are not given ; that failure to set out the particulars of the contract of hiring or the arrangement of procuring will not render the petition defective ; that where the particulars of corrupt practice are insufficiently set forth the election petition should not be dismissed *in limine* but the tribunal should decide if any objection taken on that ground is well-founded ; that if it upholds the objection it should give an opportunity to the petitioner to apply for leave to amend or amplify the particulars of the corrupt practice alleged and in the event of non-compliance the tribunal may strike out the charges which remain vague ; and that insistence upon full particulars of corrupt practices is undoubtedly of paramount importance in the trial of an election petition, but if the parties go to trial despite the absence of full particulars and evidence has been led on the plea raised in the petition, the petition cannot thereafter be dismissed for want of particulars. *Kandaswami* v. *Adityan*[5] points out that

1. (1960) 1 M.L.J. 240.
2. (1960) 2 M.L.J. 542.
3. (1960) 1 M.L.J. (S.C.) 116.
4. (1960) 2 M.L.J. (S.C.) 27.
5. (1960) 1 M.L.J. 420.

section 83 makes a distinction between material facts and particulars, that the function of the particulars is to indicate the nature of the defence expected of the respondent and not to disclose the evidence which the petitioner has to let in, that as the particulars serve the double purpose of enabling the respondent and the Court to concentrate on the real point in controversy the Election Tribunal has the power to call for such particulars, that the amendment of section 83 (3) in 1956 does not make any difference since section 90 (1) of the Act which attracts the provisions of the Civil Procedure Code to the trial of an election petition is comprehensive enough to include such a power, that the Tribunal cannot direct the pleadings to be struck off without a prior order directing the furnishing of particulars, that in cases where general corrupt practice of bribery is alleged the particulars cannot be precise as to the date, time or names of all persons bribed and therefore a general statement of the character and extent of the corruption alleged will suffice, and that it is always open to the respondent in such cases to apply for directions regarding further particulars. *Kandaswami* v. *Adityan*[1] lays down that though the procedure followed in enquiries in election petitions is civil in form yet the trial is a quasi-criminal trial especially when the results and consequences like penalties, fines and disqualification that follow from the election petition are kept in view, that the standard of proof is the same as could be achieved in a criminal trial, and it cannot be contended that if a *prima facie* case against the respondent is made out it is for the respondent to rebut the *prima facie* case made against him. *Balwan Singh* v. *Lakshmi Narain*[2] makes it clear that it is not the contract of hiring but the fact of hiring for conveying voters to and from the polling station that constitutes a corrupt practice under section 123 (5), and that in considering whether a corrupt practice described in that section is committed the conveying of electors cannot be dissociated from the hiring of the vehicle.

Industrial Disputes Act and the Industrial Disputes Appellate Tribunal Act.—In *Trichy Srirangam Transport Co.* v. *Industrial Tribunal*[3] it is held that whatever matter is referred to a Tribunal by the Government should be present before it, and if any party fails to press any such claim he cannot be allowed to raise it again in relation to that period ; that adjudications which have become final cannot be re-adjudicated even before an Industrial Tribunal ; that the provisions of *res judicata* are not peculiar to the Civil Procedure Code but are applicable to all proceedings involving adjudication of disputed rights, and that an Industrial Tribunal deciding a dispute under the Industrial Disputes Act is not precluded from directing the introduction of a provident fund scheme for the workers in the establishment concerned in the dispute. *Express Newspapers* v. *Industrial Tribunal, Madras*[4] lays down that in matters of discipline such as the dismissal of a workman for misconduct it is not for the Tribunal to take evidence and decide for itself whether the workman in question merited dismissal; that all that it could decide is whether there was want of good faith on the part of the management or whether there was any basic error or violation of the principles of natural justice ; and that while it is impossible in an establishment to define exhaustively all the duties which a particular workman is to do it is clear that a compositor in a press will be under an obligation to do the work of joining which is part of his legitimate duies. In *Manager, Hotel Imperial* v. *Chief Commissioner, Delhi*[5], the Supreme Court points out that where the two parties to the dispute are clearly indicated, namely, the employer which is in management of the Hotel and the workmen, employed in the Hotel, the reference is valid in spite of mention therein that the workmen will be represented by a specified union in the dispute ; that though the reference mentioned the union itself such union can be served through some officer, such as its president or secretary ; and it is that officer who will really represent the workmen before the Tribunal ; that it is unnecessary for the purposes of section 10 where the dispute is of a general nature relating to the terms of employment or conditions of labour of a body of workmen to mention

1. (1960) 2 M.L.J. 100.
2. (1960) 2 M.L.J. (S.C.) 27.
3. (1960) 2 M.L.J. 22.
4. (1960) 1 M.L.J. 96.
5. (1960) 1 M.L.J. (S.C.) 25.

the names of the particular workmen who might have been responsible for the dispute ; and that it is only when a dispute refers to the dismissal, etc., of particular workmen as represented by the union that it may be desirable to mention the names of the workmen concerned. *Thambi Motor Service* v. *Labour Court, Coimbatore*[1] holds that where the appropriate Government have made a reference under section 10 (1) they have no power to cancel or to amend or modify the same ; but, at the same time, the Government have got the power to make an amendment by which new items are added to the disputes already referred to a Tribunal and that the inclusion of additional items to the matters to be adjudicated upon by an Industrial Tribunal would not be the exercise of a power to amend an existing reference but rather of a power to make a reference of other disputes. *Ranga Vilas Ginning, Spinning & Weaving Mills, Ltd.* v. *Industrial Tribunal*[2] states that in disposing of an application under section 33 (2) for permission to dismiss an employee during the pendency of the adjudication of a dispute the Tribunal has only to consider whether there was a *prima facie* case for the dismissal of the workman or whether there was any unfair labour practice or victimisation involved in the action prosposed to be taken; and, in the absence of any such feature, the Tribunal is bound to give the permission asked for ; and it is not for the Tribunal to satisfy itself whether the charges found against the employees have been proved. *Sandanaswami Pillai* v. *Ponnuswami*[3] points out that what section 33-A prohibits is the alteration of the conditions of service in regard to any matter connected with the dispute ; that there must therefore be some point of connection between the pending dispute and the act of the employer in respect of which a complaint may be made under section 33-A; that where the question referred to the labour Court was a general one regarding the level of wages in a particular class of industry, retrenchment of any individual worker in any particular establishment engaged in such industry, during the pendency of such a reference cannot amount to a contravention of section 33-A and the labour Court could not get any jurisdiction under it. *M. S. N. S. Transports* v. *Rajaram*[4] expresses the view that section 33-C (2) is wide enough to cover cases where an award gives a benefit to a workman, such as the benefit of back-wages without specifying the amount ; that it is open to the labour Court in such cases to determine the amount on the application of the workman ; that the term ' back-wages ' in such cases is used to describe the benefit awarded to the workman who was without employment ; and it cannot be said that such a claim for back-wages amounts to a claim for ' wages ' within the meaning of the Payment of Wages Act. *Arya Bhavan* v. *Narayana Rao*[5] holds that the question whether a particular workman is or is not a worker concerned in an appeal pending before the Labour Appellate Tribunal is a question of fact depending on the circumstances of each case, and that where a reference is made by the Government of a dispute which relates to the dismissal of one or a few of the workers and dispute is taken up by all the workers represented by the union, the workmen in general and not merely the particular workman who has been dismissed are parties to the reference and they would be workmen concerned in the appeal.

Company Laws: In *The Cauvery Spinning and Weaving Mills, Ltd.*, In re[6], it is pointed out that the Madras City Civil Court is not a ' District Court ' as defined in section 2 (14) of the Companies Act, 1956, so as to empower it to exercise jurisdiction in respect of matters enumerated in section 10 ; that in the City of Madras the principal civil Court of Original jurisdiction is the High Court in the Original Side and that the matters covered by section 10 (2) should be dealt with only by the High Court in the Original Side. *Southern Automotive Corporation, Ltd.*, In re[7], holds that the duties of the Court under section 394 are onerous and have to be carefully exercised, and the Court can come to the decision required of it only on being satisfied that the matter has been considered at an extraordinary general meeting of the shareholders

1. (1960) 2 M.L.J. 503.
2. (1960) 1 M.L.J. 483.
3. (1960) 1 M.L.J. 87.
4. (1960) 1 M.L.J. 236.
5. (1960) 1 M.L.J. 49.
6. (1960) 1 M.L.J. 272.
7. (1960) 1 M.L.J.230.

specially called under section 391, that the importance of such a meeting cannot be overlooked, and the shareholders being under a fiduciary responsibility to act in the interest not of the majority only but of the shareholders as a whole can ordinarily function only at the general meeting and at such other extraordinary general meetings as may be convened under the Act, and that where a company seeks the Court's sanction for amalganation with another company and applies for an order dispensing with the convening of an extraordinary general meeting as required by the Act on the ground that there was a general prior meeting of the members at which the arrangement for amalgamation was unanimously approved, the Court will refuse to accede to the request when it is not shown that any hardship or unnecessary undue delay will be caused by compliance with the provisions of section 391. *Indian Commerce and Industries, Ltd.* v. *Free Press Journals*[1] expresses the view that under section 467 the list of contributories should be prepared and settled speedily, that in so settling the Court is not bound by the register of shareholders and has authority to rectify the register and may go into all questions of law and fact to determine the question as to who is the real owner of the shares, that the exercise of the jurisdiction given by the section being discretionary the Court will have to be moved and will not *ex mero motu suo* and therefore whenever an application is made by the Official Liquidator for exercising the powers contained in the proviso to the section it must be scrutinised with great care as the consequences are very large. In *Mrs. N. Wapshare* v. *Pierce Leslie & Co.*[2], it is pointed out that under section 559 a company could be revived or restored by the Court within two years after dissolution under appropriate circumstances, that there are sufficient indications in the Indian Company Law that the shareholders are the residuary legatees of the debts and undistributed or concealed assets of a defunct company unlike the case in England where the Crown is the legatee under the doctrine of *bona vacantia*, and that a suit by the former share-holders of a defunct company to recover assets concealed by fraud is maintainable.

Law of Contracts : In *Alopi Parshad Sons, Ltd.* v. *Union of India*[3], the Supreme Court makes it clear that in India, in the condified law of contracts it cannot be held that a change of circumstances completely outside the contemplation of the parties at the time the contract was entered into will justify the Court while holding the parties bound by the contract in departing from its terms ; that the Indian Contract Act does not enable a party to ignore the express covenants of the contract and to claim payment of consideration for performance of the contract at rates different from the stipulated rates on some vague plea of equity ; and that the Court cannot absolve a party from liability to perform his part of the contract merely because of an uncontemplated turn of event (namely, heavy increase in prices of the commodity contracted for due to outbreak of war) the performance of the contract became onerous. *Abdul Malick Saheb* v. *Muhammad Yousuf Sahib*[4] points out that transactions in the nature of a bounty from a child to a parent are in equity looked upon with caution by the Court ; that it is the duty of the donee to prove that the gift was the result of free exercise of independent will ; and the Court must be satisfied that the donee was acting independently without any influence from the donor ; and the mere existence of the fiduciary relationship of parent and child between the donor and the donee raises a presumption of undue influence, and it is for the donor to rebut the presumption. *Vedachala Mudaliar* v. *Rangaraju Naidu*[5] takes the view that section 69 of the Contract Act can be invoked only where on person pays because he is interested in the payment of what another person is alone liable to pay, but not to a case where contribution is claimed, as for instance, where as a result of wilful wrong-doing on the part of two persons they became jointly and severally liable to pay a penalty to the State and such penalty was wholly recovered from one of them. *Thirumala-subbu Chettiar* v. *Rajammal*[6] points out that the words ' bound by law to pay ' in

(*To be continued*)

1. (1960) 1 M.L.J. 146.
2. (1960) 2 M.L.J. 401.
3. (1960) 2 M.L.J. (S.C.) 46.
4. (1960) 2 M.L.J. 355.
5. (1960) 1 M.L.J. 445.
6. (1960) 2 M.L.J. 539.

section 69 do not exclude those obligations of law which arise *inter parties* whether by contract or tort and are not confined only to those public duties which are imposed by statute or general law and extend to any obligation which is an effective bond in law. *Ananthayya* v. *Subba Rao*[1], decides that where there is no relationship of debtor and creditor, or lender and borrower, and the agreement was made out of natural love and affection by an younger brother to an elder brother for the maintenance of the latter and his dependants, by way of a percentage of the monthly income that may accrue, no question of any penalty arises within the meaning of section 74. *Nadar Bank, Ltd.* v. *Canara Bank, Ltd.*[2], declares that section 178 can be relied upon only in cases where the pledgee is aware that the pledgor is a mercantile agent but not in a case where the borrowers were themselves the owners of the goods and were not acting as agents in the customary course of business as such agents. *National Traders* v. *Hindusthan Soap Works, Erode*[3], holds that sections 15 and 16 of the Sale of Goods Act are not restricted to the sale of unascertained goods; that a sale of specific goods with or without any descripion will be within the terms of the sections; that it is a question of the construction of a contract of sale in any particular case whether it is a sale by description; that the effect of the conditions in sections 15 and 16 is to give a right to the buyer to reject the goods in case what was tendered did not answer to the description or was not of merchantable quality and to sue for the price if he had paid the price, or to accept the goods and sue on the basis of warranty for damages; that where the buyer accepts the goods he has to pay the contract price minus any claim for the breach of warranty; and that the measure of damages in such a case is the difference between the value of the goods as delivered and their value if they answered to the contract description. *Abdul Ghani* v. *Periyaswami Chetti & Co*[4], makes it clear that the legal representatives of a deceased partner cannot be validly bound for payment of the partnership debts by an acknowledgment made by the surviving partner after the dissolution of the partnership by the death of the other partner; that the theory of implied agency disappears on the dissolution of the partnership and the Proviso to section 45 of the Partnership Act would apply in such cases; and section 47 which relates to obligations *inter se* the partners so far as it may be necessary for winding up the affairs of a partnership cannot be invoked to bind the legal representatives of the deceased partner merely on the basis of an acknowledgment made by the surviving partner after the date of dissolution.

Law of Property.

In *Ananthayya* v. *Subba Rao*[1], it is pointed out that section 6 (*f*) of the Transfer of Property Act prohibited the transfer of a public office and the salary of a public officer whether before or after it has become payable; that where an agreement does not purport to deal with the salary of a public officer and by itself has nothing to do directly with any public office and no head of a department could under the agreement be requested to deduct for the benefit of the promisee any amount payable to the promisor, section 6 (*f*) cannot be invoked to invalidate it: and that where at the time of the agreement the promisor was only a University student hoping to take a degree and thereafter to make an income either as a public officer or in private employment or in independent practice of a profession and he undertook to pay his elder brother who was educating him, for his maintenance, a specified sum of money every month after the promisor began earning an income, the amount to be paid being based on the promisor's monthly earnings, and there was no obligation to pay the amount out of the salary or income that promisor might make every month, the agreement will not be hit by section 6 (*f*). *Ghulam Ahmed* v. *Basheer Ahmed*[5], states that a person who purchases from some Mahomedan co-sharers accepting without further examination some vague claim to posessory title, when

1. (1960) 1 M.L.J. 164.
2. (1960) 2 M.L.J. 489.
3. (1960) 2 M.L.J. 195.
4. (1960) 2 M.L.J. 43.
5. (1960) 2 M.L.J. 570.

the rightful owner had neither expressly permitted such ostensible title to be flaunted nor impliedly consented to it, cannot invoke section 41 ; that the mere possession of one co-owner cannot amount to the flaunting of an ostensible title against another, particularly among Muslims where ownership or co-ownership in shares is the usual incident of inheritance and that the fact that the vendor or the person from whom the vendor claimed title executed a mortgage in respect of the property would be of no consequence since a mortgagor is only dealing with a limited interest and is not an ostensible owner. In *Bhaskar Waman Joshi* v. *Shrinarayan Rambilas Agarwal*[1], the Supreme Court makes it clear that though according to the Proviso to section 58 (*c*) a transaction shall not be deemed to be a mortgage by conditional sale unless the condition is embodied in the document which purports to effect the sale it does not follow that if it is so embodied a mortgage transaction must of necessity have been intended; the question whether by such incorporation the transaction is to be regarded as a mortgage is one of intention of parties to be gathered from the language of the deed interpreted in the light of the surrounding circumstances, the value of the incorporation varying with the degree of formality attending upon the transaction ; that while a mortgage by conditional sale postulates the creation by the transferor of a relation of mortgagor and mortagee the price being charged on the property mortgaged, in a sale coupled with an agreement to reconvey there is no relation of debtor and creditor, nor is the price charged upon the property conveyed, but the sale is subject to an obligation to retransfer the property within the period specified ; that what distinguishes the two transactions is the relationship of debtor and creditor, the transfer being a security for the debt ; that the form in which the deed is clothed is not decisive ; that if the words are plain and unambiguous they must in the light of evidence of surrounding circumstances be given their true legal effect ; and that if there is ambiguity in the language the intention may be ascertained from the contents of the deed with such extrinsic evidence as may by law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. *Ghulam Mohamood* v. *Ammani Ammal* [2] lays down that a valid notice to quit under section 106 should determine the tenancy by the time of fifteen days expiring with the end of the month of tenancy ; that the notice should specifically state what the month of the tenancy was; that for a plea that a denial of the lessor's title or disclaimer of tenancy operates as a forfeiture of the lease under section 111 (*g*) the denial and forfeiture must have occurred prior to the suit and should form part of the cause of action on which the suit is based ; and a denial of the tenancy after the suit is instituted will not operate as a forfeiture under section 111 (*g*).

Madras Estates Land Act ; Madras Estates (Abolition and Conversion into Ryotwari) Act ; Madras Estates (Supplementary) Act : In *Vadivelu Mudaliar* v. *State of Madras*,[3] it is pointed out that to ascertain whether a certain enactment applies to a particular case the position as it stands on the date on which the provisions are sought to be applied is material ; that an Act when originally enacted might be applicable to areas within definite limits, but if subsequently certain areas are taken out of the limits, the Act would cease to apply to such areas; that the Madras Estates Land Act is specificaly made inapplicable to the Presidency Town of Madras, and if on the date on which the provisions of the Act are sought to be applied certain areas formerly outside the Presidency Town and as such governed by the Act have become part of the Presidency Town, then automatically the application of the Act would cease to such areas from the date when they came to be so included within the limits of the Presidency Town even though at some time in the past the Act was applicable to the areas ; and that ordinarily the proprietor of an 'estate' would be entitiled to the beds of abandoned tanks and channels within the limits of the 'estate' and the proprietor could validly give a patta in respect of such lands. *Sellappa Goundan* v. *Bhaskaran*[4] decides that for the application of section 3 (2) (*d*) of the Estates Land Act the original grant itself should have been an inam ; and the circumstance that the grant was treated as an inam at the time of the Inam Settlement proceedings, and title deeds

1. (1960) 1 M.L.J. (S.C.) 87.
(1960) 2 M.L.J. 351.
3. (1960) 2 M.L.J. 140.
4. (1960) 2 M.L.J. 363.

were issued on that basis cannot affect the original character of the grant ; and therefore the grant would not be an inam within the meaning of the Act. *Natarajan Chettiar* v. *State of Madras*[1] makes it clear that an inherent power to review should be presumed in the case of quasi-judicial tribunals like the Estates Abolition Tribunal so as to enable them to rectify an error apparent on the face of the record or for similar adequate reasons ; and that a Tribunal like the Estates Abolition Tribunal or Appellate Tribunal constituted under the Madras Estates (Abolition and Conversion into Ryotwari) Act giving a finding in the presence of the parties as to whether a village did or did not fall within the ambit of a relevant provision of the Act must be held to possess an inherent power to review its judgment on due cause being shown. *State of Madras* v. *Kamakshia Pillai*[2] takes the view that where a land which was originally an 'estate' had ceased to be so by reason of the provisions of the Madras Estates (Abolition, etc.) Act and become ryotwari the aggrieved parties should resort to the same remedies as are open to ryotwari ryots, namely, to apply to the revenue authorities for proper remedy; that section 3 vests the 'entire estate' in the Government which would comprise the tanks and the fishery rights in the former 'estate' ; that the customary rights of the ryots to fish in the tanks could not avail against the Government ; and the fact that no compensation is provided for in respect of such rights, or that no provision is made in the Act for recognition of such rights is no ground to hold that such rights do not vest in the Government. In *Gopalan* v. *Estates Abolition Tribunal*[3], it is held that section 13 (*b*) of the Estates (Abolition, etc.) Act excludes from the category of lands to which the inamdar would be entitled to a ryotwari patta tank-beds although the tank was not in factual existence and had been abandoned as such; that a land would not lose its character as tank-bed merely because cultivation had been carried on by the landholder; that such cultivation was allowed by reason of the right of the proprietor over the property (without prejudice to the rights, if any of the ryots) and not because the land got converted into ryoti or private land ; that the existence of a right in the tank which enabled the landholder to cultivate the tank-bed land is by itself of no importance for the purpose of determining the scope of the statutory right which could be claimed under section 13 (*b*) (iii); that under section 20-A of the Madras Estates Land Act the tank-bed land could be converted into ryoti land by an order passed by the District Collector, and that till such an order is made the land would not lose its character by mere non-user of the tank ; and that where no such order was made until the date of the notification of the estate under the Estates (Abolition and Conversion into Ryotwari) Act, the land must be held to retain its character as tank-bed land within the meaning of section 3 (16) (*a*) of the Estates Land Act and would fall within the sope of the lands excluded by section 13 (*b*) (iii) of the Madras Estates (Abolition and Conversion into Ryotwari) Act. *Vadivelu Mudaliar* v. *State of Madras*[4] holds that the appropriate provisions of the Estates Abolition Act applicable to the case of a person who has been lawfully in occupation of the bed of an abandoned channel or tank in an erstwhile zemindari and using it as a building site will be section 18. *Pandian* v. *Board of Revenue*[5], expresses the view that the right to hold a private market is not the same as a franchise incidental to the ownership of the 'estate' and would not be lost when the right to the 'estate' is lost on its vesting in the Government under the provisions of the Madras Estates (Abolition and Conversion into Ryotwari) Act ; that having regard to the scheme of section 18, a market consisting only of stalls would also be a 'building' and the fact that the stalls were not all pucca masonry construction will not make any difference ; that the entire stalls and all the superstructure should be viewed as one unit constituting a 'building'; that a private market will fall within the scope of 'building' in section 18 (4) ; and that the right to the building secured under that sub-section has to be viewed independently of the right to use the building in the particular way after the notified date. In *Kumararajah of Venkatagiri* v. *State of Andhra Pradesh*[6], the Supreme Court points out that the scheme of section 20 is to render ineffective all rights created after 1st July, 1945, for a period exceeding one year, that the Second proviso makes rights so

1. (1960) 2 M.L.J. 150.
2. (1960) 1 M.L.J. 276.
3. (1960) 2 M.L.J. 182.
4. (1960) 2 M.L.J. 140.
5. (1960) 2 M.L.J. 248.
6. (1960) 1 M.L.J. (S.C.) 28.

created unenforceable against the Government ; that even if the creation of such rights is not void but only voidable, all that it would imply is that there should be some overt act of avoidance by the Government and not that the avoidance must be in the terms of the Third proviso ; that the Second proviso was enacted to nullify the creation of rights in anticipation of the impending legislation and hence was made unconditional ; and the Third proviso deals with the termination of rights created *before* 1st July, 1945 ; and that when a slate quarrying lease is determined under the Second proviso, the terms as to renewal implied under rule 47 of the Mineral Concession Rules must fall with the lease. *Nanja Raja* v. *Lalitha Ammal*[1] holds that a right of review like a right of appeal is wholly statutory, and in the absence of specific provisions in the Madras Estates (Abolition and Conversion into Ryotwari) Act or the rules made thereunder, the Special Tribunal (High Court) constituted under section 51 cannot have the power of reviewing its order since the Judges of the High Court in hearing an appeal would be functioning as *persona designata*. *Mahomed Ibrahim* v. *Estates Abolition Tribunal, Vellore,*[2] lays down that under section 15 (2) the power of the Tribunal to excuse delay in the filing of an appeal is limited to those cases where the delay did not exceed six months from the date of the order of the Assistant Settlement Officer, but that it is dependent on the terms of the statute and the rules being complied with, and that where there has been a failure to obey the statutory direction it would not be consistent with principle to hold that a person could be affected by an order of which he had no notice delivered on him in the manner provided by the statute.

Bhaskaran v. *Sellappa Goundan,*[3] points out that the Madras Estates (Supplementary) Act, 1956, was enacted to provide the machinery for decision as to whether an area is an 'estate' or not for the purpose of the Madras Rent Reduction Act, 1947, and the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948. *Karuppan Chettiar* v. *State of Madras*[4] explains that the nature of the proceedings under section 7 (1) of the Madras Estates (Supplementary) Act is not that of an appeal *simpliciter*, but is in the nature of an application, as the jurisdiction of the Special Appellate Tribunal under the Act is wider than that of the original Tribunal; and that where a party was *bona fide* prosecuting a writ application against the order of the Tribunal the time taken therein could be excluded in computing limitation under section 7 (1). *Sellappa Goundan* v. *Bhaskaran*[5] holds that section 7 (4) makes an adjudication by the Special Appellate Tribunal of the question whether a non-ryotwari area is or is not an 'estate' final and binding on all persons claiming an interest in the lands in such area notwithstanding that any such person was not a party to the proceeding before the Tribunal ; that section 6 enables the party interested to appear and put forward his case before the Tribunal with a right of appeal ; that section 7 confers a right of appeal on every person aggrieved by the Tribunal's order, and a person aggrieved is one who has suffered a legal grievance by reason of the order, and the term would comprehend a wider category of persons than those who were parties *eo nomine* before that tribunal ; that a person whose right or title would be affected by the decision of the Tribunal would be a person aggrieved ; that under section 8 there will be a presumption in the case of an inam village that the grant was of the melvaram alone and not of both the varams, but the presumption will not apply where the controversy is whether the grant was of an entire village ; and that the proceedings under section 3 being of a judicial nature, the onus would lie on the Government to prove that the grant was of the whole village. In *Bhaskaran* v. *Sellappa Goundan,*[3] it is suggested that section 10 should not be understood as prohibiting the ordinary civil or revenue Courts or other tribunals from deciding the question whether an area is an 'estate' *incidentally* if that were necessary for the purpose of exercising its jurisdiction ; that section 11 relates only to those proceedings which if initiated after the Act could be done under section, 3, *i.e.*, a proceeding at the instance of a person interested ; and that if the defendant is only a tenant under a terminable

1. (1960) 1 M.L.J. 415.
2. (1960) 1 M.L.J. 347.
3. (1960) 1 M.L.J. 183.
4. (1960) 2 M.L.J. 511.
5. (1960) 2 M.L.J. 383.
6. (1960) 1 M.L.J. 183.

lease he will not be a person interested in the question whether the suit land was situated in an 'estate' or not. *Harìharamuthu Pillai* v. *Ranì Subbalakshmì Nachiar*[1], however suggests that under section 11 all proceedings where the question arises whether a particular area formed part of an 'estate' or whether they are only minor inam lands shall be transferred to the appropriate Tribunal for the determination of such question ; that the transfer of such suits to the Tribunal is only for the limited purpose of determining that question; that the Tribunal cannot decide any other issue raised in the suit ; and that in such cases after the determination of such issues by the Tribunal the suit will have to be retransferred to the Civil Court.

MADRAS CULTIVATING TENANTS PROTECTION ACT.

In *Arumugham Pillai* v. *Tulasì Konar*[2], it is pointed out that the Madras Cultivating Tenants Protection Act is designed to protect from eviction only the actual tillers of the soil and not the intermediaries ; that the lessee—a mill owner—who had converted the adjoining land demised for stocking groundnut husk into a cultivable land by cultivating cholam on a part of it cannot thereby acquire the character of a cultivating tenant within the meaning of section 2 (*a*) ; and the very fact that the lessees had made such an alteration to the detriment of the reversion would constitute an act of waste enabling, the landlord to determine the tenancy. *Munìan Muthuraja* v. *Rajaratnam*[3] holds that a person who takes a lease for enjoyment of the usufruct of a cashew-nut plantation on the land is a 'cultivating tenant' as defined in section 2 (*a*) and must be held to be engaged in 'cultivation' as defined in section 2 (*b*) ; that irrespective of the nature of the produce of the land whatever is grown by the aid of human labour and effort would be an agricultural produce, and the process of producing it would be agriculture ; and the lessee in respect of a cashew-nut plantation would be a person enagaged in 'cultivation' and hence entitled to the benefit of section 4-B as amended by Act XIV of 1956. *Ramaswamì Raja* v. *Ellappa Goundar*[4], decides that having regard to the scheme of the Madras Cultivating Tenants Protection Act, the Code of Civil Procedure does not wholly apply to the Revenue Courts acting under the Act ; that a Revenue Divisional Officer will have no jurisdiction to grant an injunction restraining a landlord from entering his property ; and that there is no inherent power in the Tribunal in that behalf and such a power cannot be assumed by implication. *Periyaswamì* v. *Muthìah Chettiar*[5] lays down that what is contemplated by section 3 (3) (*b*) is only the deposit of a 'sum' which means an amount of money, and not the aggregate of the paddy rent as well as the costs ; that a Revenue Divisional Officer acting under section 3 (4) (*b*) can only direct a deposit of the rent in terms of its money equivalent and not in kind ; that it is open to the Revenue Divisional Officer in the exercise of his discretion to give him time to deposit the rent; and that the discretion would incluse a power to refuse to grant time and pass an order for eviction without giving the defaulter an opporunity to deposit the arrears of rent. *Muthukumara Padayachì* v. *Sambandan Pillai*[6] decides that since the ascertainment of the arrears of rent by the Revenue Divisional Officer must be in terms of cash and the direction must be to pay them into Court and not to the landlord, an order of the Revenue Court ascertaining the arrears of rent payable by the tenant in kind and directing that if the tenant failed to pay the same on or before a certain date and report the fact the next day, eviction would follow is illegal ; and that a determination of fair rent will hold good for five years after such determination but cannot be made retrospective. *Chinnamuthu Kandar* v. *Ganapathì Pillai*[7], points out that the provisions of section 3 enjoin the Revenue Divisional Officer to hold a summary inquiry and pass appropriate orders on a petition filed under the section for eviction on the ground of default in the payment of rent ; that in the absence of such inquiry the Revenue Divisional Officer will have no jurisdiction to pass an order for possession against a tenant on the basis of a compromise agreement entered into in previous proceedings which agreement had gone beyond the subject-matter of the proceedings ; and that the Revenue Divisional Officer will have no

1. (1960) 1 M.L.J. 232.
2. (1960) 2 M.L.J. 143.
3. (1960) 2 M.L.J. 475.
4. (1960) 2 M.L.J. 555.
5. (1960) 1 M.L.J. 194.
6. (1960) 1 M.L.J. 20.
7. (1960) 2 M.L.J. 370.

jurisdiction to execute a decree which embodies terms beyond the scope of the petition itself. *Panchapakesa Iyer* v. *Subramania Moopan*[1] expresses the view that restoration to possession of a cultivating tenant under section (4) (1) will be barred only if such restoration is not possible as a result of another tenant being in *bona fide* possession of the land and who does not fall within the terms of the proviso ; and that where some other tenant enters into possession of the land but surrenders the possession before the application of the former tenant for restoration of possession there is no bar to an application under section 4 (1). *Muhammad Badsha Saheb* v. *Duraiswami Goundan*[2], holds that section 6-A does not by itself effect an automatic transfer of the suits referred to therein from the civil Court to the Revenue Divisional Officer without an order of transfer being made by the civil Court on whose file such suits or proceedings are pending ; hence where a suit or proceeding is pending on the file of a civil Court it is open to that Court to make an order for restitution to possession to the aggrieved party before transferring the suit to the Revenue Divisional Officer; and sections 4 and 6 will not bar the civil Court from making such an order. *Periyaswami* v. *Muthiah Chettiar*[3], decides that section 13 does not have the effect of nullifying the provisions of section 3 of Madras Act XXV of 1955 especially where there is no provision in the Fair Rent Act for enforcing the orders made thereunder.

MADRAS AGRICULTURISTS RELIEF ACT.

In *Somasundarathu Odayar* v. *Kalyanasundarathu Odayar*[4], it is pointed out that the effect of *Explanation III* to section 8 of the Madras Agriculturists Relief Act is to emphasise the identity of the debt ; that so long as the identity can be traced any changes or alterations in the debtor or creditor will not take away the case from the ambit of the *Explanation* ; that a debtor cannot be denied the advantages of section 8 even if certain inter-current transactions have entered into the stream of transactions ; that the fact that the renewal does not take account of the statutory reduction of liability will be immaterial; that it will always be open to the debtor subsequently to plead failure of consideration to that extent ; and that a transaction purporting to be a settlement of accounts cannot *ipso facto* have the effect of preventing the debtor from tracing back the debt in order to obtain relief under the Act. *Rajagopalan Chettiar* v. *Ishack Rowther*[5] makes it clear that section 9-A would apply only to a case where the mortgagor seeks to redeem a subsisting mortgage ; that in a case where the mortgaged property had been taken over by the Government under the Madras Estates (Abolition and Conversion into Ryotwari) Act no question of the redemption of the mortgaged property could arise ; and therefore, where an erstwhile mortgagor applies for payment, out of the compensation amount after making provision for payment to the mortgagee of the estate, no case of redemption can arise, and section 9-A will not apply and the debt cannot be scaled down. *Balasubramania Thevar* v. *Nallamuthu Moopanar*[6], expresses the view that under section 9-A (9) (*a*) (1) as amended in 1950, the rents paid towards a lease by a mortgagor who had taken the mortgaged properties back on lease should be deemed to be the interest and section 8 or 9 read with section 12 or 13 as the case may be should be applied to scale down the debt ; that the *Explanation I* to section 8 cannot however apply, because it has not been enacted that the person making the payment must also be deemed to have considered himself as a debtor repaying a creditor and demanded to have exercised a right of appropriating those payments in a particular manner, either by actually appropriating them towards interest in writing or failing to do ; and the Court to give effect to the legal fiction in section 9-A will assume the existence only of those facts on which the fiction could operate, and cannot create further legal fictions which have not been enacted in order to make applicable a certain state of rights which does not flow or follow from the assumption of the identity *per se* which the legislature has actually enacted. *Ammalu Ammal* v. *Samalam Iyer*[7], expresses the view that section 8 and *Explanation III* thereto can not apply

1. (1960) 1 M.L.J. 349.
2. (1960) 1 M.L.J. 413.
3. (1960) 1 M.L.J. 194.
4. (1960) 1 M.L.J. 225.
5. (1960) 2 M.L.J. 495.
6. (1960) 2 M.L.J. 116.
7. (1960) 2 M.L.J. 158.

to the case of a unsufructuary mortgage in which no special provision is made for interest on the principal amount secured in addition to the provision for the enjoyment of the usufruct instead of interest in view of section 16 (2) ; and that under section 9-A (3) (11) it is only where any interest on the principal amount has been stipulated for in addition to the usufruct from the property that section 8 and *Explanation III* would apply. *Thulasi* v. *Ammayappa Pillai*[1], lays down that where the decree of the original Court, so far as the applicant for relief under the Madras Agriculturists Relief Act is concerned, has become final long before the commencement of the Amendment Act XXIII of 1948, but an appeal is filed against a part of the decree by persons other than the applicant and in respect of matters other than that in which the applicant is interested, and a decree passed in such appeal after the commencement of the Amending Act, the latter cannot be availed of by the applicant ; and that when the decree sought to be scaled down has been satisfied by deposit into Court of the amount directed by the decree to be paid to the plaintiff, and all that remains is only a direction to the defendant to deliver possession of the concerned properties to the plaintiff section 16 (ii) of the Amending Act can have no application. *Logambal Achi* v. *Muthia Pillai*[2] expresses the view that under the provisions of section 18, when a suit is filed after 1st October, 1937, even where the suit has been instituted for the proper amount as per the provisions of the Act as it then stood, if the ultimate scaled down amount for which the decree is passed is different due to the subsequent amendment of the Act, the plaintiff can be awarded costs only on the basis of the scaled down debt. *Balasubramania Thevar* v. *Nallamuthu Moopanar*[3], points out that sections 19 and 20 have to be read together and the explanation of the expression 'Court which passed the decree ' in section 20 equally applies to section 19 : and that even when an appellate Court had confirmed or modified the decree, still the Court to which an application lies under section 19 is the Court of first instance which passed the decree. See also *Ramanathan Chettiar* v. *Ramanathan Chettiar*[4], which further decides that section 19 (2) as amended in 1948 rendered the provisions of sections 19 (1) applicable to the decrees passed after the main Act ; that in order to obtain the benefit of section 19 (2) the debtor must establish that his case fell under one of the three clauses of section 16 of the Amending Act XXIII of 1948 ; that the three clauses are disjunctive each of them relating to a distinct category ; that where a decree was passed on 27th February, 1946 and an appeal and a memorandum of cross-objections were filed and were pending in the High Court on the date of the coming into force of Act XXIII of 1948 and both were dismissed on 14th September, 1951, section 16 (iii) of the Amending Act would not apply but section 16 (ii) would apply and entitle the debtor to appy for relief under the Act even at the time when the appeal was heard ; that the debtor's omission to so apply for relief at that stage would not preclude him from applying at a later stage on the principle of *res judicata* ; that section 16(ii) which relates to suits and proceedings instituted before that Act came into force would apply when no decree or order had been passed and also when the decree or order had not become final on that date ; and that the section does not prescribe as to when the relief is to be claimed, but having regard to the generality of section 19 (2) of the main Act it must be held that the Act expressly gave a right of amendment of the decree thereunder. *Ammalu Ammal* v. *Samalam Iyer*[5], states that though the general rule is that a mortgage decree is one and indivisible, exceptions thereto are admitted in special circumstances where the integrity of the mortgage has been disputed at the instance of the mortgagee himself ; that having regard to the object of the Madras Agriculturists Relief Act to give relief to a specified class of debtors it trenches upon the general law and a mortgage decree can therefore be legally scaled down in favour of one of several judgment-debtors who is an agriculturist, while as regards others the decree is kept intact ; that this principle is not confined to the case of a mortgage decree but

1. (1960) 2 M.L.J. 564.
2. (1960) 1 M.L.J. 326.
3. (1960) 2 M.L.J. 116.
4. (1960) 1 M.L.J. 1 (F.B.)
5. (1960) 2 M.L.J. 158.

equally applies to a mortgage debt which has not ripened into a decree ; and that an agriculturist mortgagor-debtor is entitled to redeem only his or her share of the mortgage or interest therein and cannot redeem the entire mortgage by paying the scaled down amount in view of the fact that the other executants of the mortgage are not agriculturists.

HINDU LAW.

In *Meenakshi Achi* v. *Manickam Chettiar*[1], it is pointed out that a mortgage of joint family property by the father to discharge his antecedent debt not tainted with illegality or immorality will bind the interests of the sons in such property ; that an alienee making a *bona fide* enquiry as to the existence of the antecedent debt for the discharge of which the moneys were borrowed ostensibly by the father would be protected though there is no proof that the borrowed amount was actually utilised for the discharge of the entire debt ; that the rule as to enquiry is based on the inability of the lender or the alienee to control the disposition of the money once it leaves his hands ; and that the rule as to enquiry has found statutory recognition in section 38 of the Transfer of Property Act. *Kothanda Naidu* v. *Kuppayya Naidu*[2] states that where the sons challenge the debts incurred by the father as not binding on them on the ground of their being avyavaharika or immoral the burden is on them to prove the allegation by establishing a direct connection between the debts and the immoral purposes, and the burden will not be discharged by merely showing that the father lived an extravagant or immoral life. *Karuppa Goundan* v. *Periyaswami Goundan*[3] lays down that the *de facto* manager of the estate of an adult Hindu who is incapable of contracting due to unsoundness of mind cannot alienate his property even in case of necessity ; that such an alienation will be void and can confer no title on the alienee ; that a man who is born deaf and dumb has to be regarded as being in the same state as an idiot because being deaf and dumb and incapable of understanding he is lacking in all those senses which furnish the human mind with ideas ; and that he would therefore be a 'lunatic' within the scope of section 3 (5) of the Lunacy Act. *Thimmi Ammal* v. *Venkatarama Chetti*[4] decides that the right of a Hindu widow in the joint family property of which her husband was a coparcener devolving on her under section 3(3) of the Hindu Women's Rights to Property Act, 1937, is liable to be attached and sold in execution of a decree obtained against her even though the amplitude of the estate is limited. *State of Madras* v. *Ramanatha Rao*[5] points out that when the State claims by escheat the onus lies on it to show that the last proprietor died without heirs ; and that a mother's mother's sister's son of the last holder, despite the fact that the latter was an illegitimate offspring, will be eligible to succeed as a matru bandhu. In *Muthammal* v. *Subramaniaswami Devasthanam*[6], the Supreme Court makes it clear that under the Hindu Law, lunacy to operate as a bar for inheritance need not be congenital. *Sankaranarayana Aiyar* v. *Lakshmi Ammal*[7], holds that while it is true that the rate of maintenance determined by a prior decree in favour of a Hindu widow must prevail unless it is varied it does not necessarily imply that a Court has no power to vary that rate from a period anterior to the date of the suit brought for variation ; and that would depend entirely, upon the time from which the changed circumstances have prevailed, the reasonableness of the claim, of the maintenance-holder to an enhanced allowance, the existence or absence of demand and refusal and such factors. *Kuppanna Goundar* v. *Periyanna Goundar*[8], states that whether an arrangement, under which a portion of the property surrendered by a widow is given, at her instance, to a person who is not a stranger to the family, would be a device to divide the husband's estate between the reversioner and the widow's nominee cannot be decided on the basis of the relationship which the widow's nominee bears to the family of the reversioners, but upon whether the surrender is of the entire estate

1. (1960) 1 M.L.J. 89.
2. (1960) 1 M.L.J. 329.
3. (1960) 1 M.L.J. 360.
4. (1960) 2 M.L.J. 135.
5. (1960) 2 M.L.J. 55.
6. (1960) 2 M.L.J. (S.C.) 65.
7. (1960) 1 M.L.J. 215.
8. (1960) 1 M.L.J. 125.

or whether under the guise of surrender a portion of the property is diverted from the reversioners to a person who is not a reversioner involving an element of transfer, in which case, it could not be a valid surrender.

INCOME-TAX ACT.

In *Pierce, Leslie & Co., Ltd.* v. *Commissioner of Income-tax*[1], it is pointed out that it is not always easy to decide whether a particular payment received by a person is income or capital receipt; that where a company as part of its normal trading activities takes up certain managing agencies also which if terminated would entitle the assessee to receive a lump sum compensation, the receipt of such sum would be part of the income of the assessee and not a capital receipt, since the other business activities of the assessee company as its profit-making machinery as a whole were not affected by the termination of the managing agency agreement which was only one of the several activities of the assessee ; that where the whole trade of the assessee is built on such managing agency and the managing agency constituted the whole structure or framework of the assessee's profit-making apparatus, the receipt of a lump sum amount as compensation for the cancellation of the agreement of managing agency might constitute a capital receipt and not income ; but where the receipt of compensation for the cancellation of the managing agency is in the course of the normal trading activities of the assessee leaving the general framework of the assessee's business unimpaired, such compensation will be only part of the assessee's income. In *Godrej & Co.* v. *Commissioner of Income-tax*[2], however, the Supreme Court expresses the view that since a managing agency yielding a remuneration calculated at a rate of 20 per cent. of the profits is not the same thing as a managing agency yielding a remuneration calculated at 10 per cent of the profits provided under a subsequent agreement varying the original agreement, it amounts to a deterioration in the character and quality of the managing agency viewed as a profit-making apparatus, and that such deterioration is of an enduring kind ; that the reduced remuneration having been separately provided, the lump sum of Rs. 7½ lakhs paid by the managed company as compensation for releasing the company from the term as to 20 per cent. remuneration contained in the original agency agreement must be regarded as having been paid as compensation for injury to or deterioration of the managing agency ; that the sum was paid and received not to make up the difference between the higher and reduced remuneration but as a compensation for releasing the company from onerous terms ; and that so far as the managed company was concerned it was paid for securing immunity from the liability to pay higher remuneration to the managing agency, for the rest of the term of agency and it was a capital expenditure, and so far as the managing agency was concerned it was received as compensation for the deterioration or injury to the agency by reason of release of right to get higher remuneration and it was therefore a capital receipt not liable to tax. In the *Commissioner of Income-tax* v. *Vazir Sultan & Sons*[3], the Supreme Court states that whether compensation received for loss of agency business is capital or revenue receipt depends upon whether the agreement of agency in question constituted its profit-making apparatus and was in the nature of its fixed capital or was a trading asset or circulating capital or stock-in-trade of the business; that if it was the former the payment received would be a capital receipt, but if it was entered into by the assessee in the ordinary course of business and for the purpose of carrying on the business it would fall under the latter category and the compensation received would constitute a revenue receipt ; and it is immaterial whether the asset (agency) was of an enduring character or terminable at will. In the *Bihar State Co-operative Bank* v. *Commissioner of Income-tax*[4], the Supreme Court makes it clear that it is a normal mode of carrying on banking business to invest moneys in a manner that they are readily available ; that it is just as much a part of the

1. (1960) 2 M.L.J. 1.
2. (1960) 1 M.L.J. (S.C.) 55.
3. (1960) 2 M.L.J. (S.C.) 73.
4. (1960) 2 M.L.J. (S.C.) 54.

mode of conducting a bank's business as receiving deposits or lending moneys or discounting hundis or issuing demand drafts; that that is how the circulating capital is employed; that the moneys laid out in the form of deposits would not cease to be circulating capital and the returns flowing from them would form part of the profits of the business; and that as such interest is derived from the business of the bank it is income exempted under C.B.R. Notification No. 35 of 20th October, 1934 and No. 33 of 18th April, 1943. *Annamalai Chettiar* v. *Commissioner of Income-tax, Madras*[1] holds that to constitute a receipt of money in the taxable territories under section 4 (1) (*b*) (iii) of the Income-tax Act it should be remitted *in specie* or in any form known to the commercial world for the transmission of money from one country to another; that where the assessee purchased a car in Singapore and had a radio fitted into it and later on brought the car with the radio to India, the cost of the car and the radio purchased out of the foreign profits cannot represent money or money's worth brought over into the taxable territory and would not constitute 'remittance' of foreign profits within the meaning of section 4 (1) (*b*) (iii); and the fact that the assessee had the benefit of what he had purchased and brought into India is not a test at all in deciding whether there was a remittance; nor would the fact that the assessee had debited his head-quarters account with the cost of the car and the radio-set affect the position. *Associated Oil Mills* v. *Commissioner of Income-tax, Madras*[2] states that a mere prevention of a part of business cannot, for that reason alone, be held to be a destruction of the profit-earning apparatus of the assessee; that the mere fact that an intended business premises was requisitioned by Government cannot amount to sterilisation of a part of the business unless it be that but for the premises no business could be conducted; that the compensation awarded to the assessee in such circumstances cannot be a capital receipt but will form a revenue receipt; that though the receipts could be correlated to the ownership of the business which had to be transferred to another place, it could not for that reason be said to arise out of the conduct of the business; and that the receipt should be held to fall under section 6 (*v*), that is, income from other sources; and the receipt being of a casual and non-recurring nature would be exempt from tax under section 4 (4) (*vii*). *Chattanatha Karayalar* v. *Income-tax Officer, Nagercoil*[3] lays down that the effect of the *Explanation* added to section 5(7-A) by the Amending Act XXVI of 1956 is that once an order of transfer is made all the proceedings stand transferred; and the Income-tax Officer to whom the transfer is made would be in a position to continue not merely the pending proceedings but also to initiate further proceedings against the assessee in respect of any year, past or future; and that would include a power to re-open under section 34 the assessment for any earlier years which had been completed at the time the transfer was made. *Lakshmi Rajyam* v. *Commissioner of Income-tax, Madras*[4], points out that the question whether a payment made to an employee was by way of testimonial gift or by way of remuneration for past services would depend on whether the payment was altogether unconnected with the service rendered by the assessee, and though connected with it whether it was made merely out of admiration for personal qualities displayed in the course of the employment or was intended to confer a special benefit with respect to the services rendered so as to increase the earnings in the exercise of the profession; that it cannot be said that a payment made after the services had terminated could only be by way of testimonial gift; that the mere fact that the payment was made by a person other than the employer would not also be decisive of the question whether it was intended as a remuneration or as a present; that where the terms of the document are specific that the payment was made to the assessee as an employee by way of additional remuneration in respect of her employment as an actress in the film there could be no doubt that the income thereunder accrued to her by virtue of her having acted in the film; and the fact that the amount so paid was not allowed as a permissible deduction in the assessment of the donor cannot determine the character of the receipt in the hands of the assessee, and the receipt is assessable to tax. In

---

1. (1960) 2 M.L.J. 558.
2. (1960) 2 M.L.J. 282.
3. (1960) 1 M.L.J. 439.
4. (1960) 2 M.L.J. 276.

Piyare Lal Adishwar Lal v. *Commissioner of Income-tax, Delhi*[1], the Supreme Court makes it clear that the emoluments received by the karta of a Hindu joint family as Treasurer of a bank are in the nature of salary and therefore assessable under section 7 and not under section 10 as profits and gains of business; and that the salary is the income of the individual and not the income of the joint family. In the *Commissioner of Income-tax, West Bengal* v. *Kalu Babu Lalchand*[2], the Supreme Court takes the view that where the promotion of a company and taking over a concern (of which the karta of a Hindu joint family was a partner) and the financing of it were all done with the help of joint family funds, and the karta did not contribute anything out of his personal funds, the managing director's remuneration received by the karta was as between him and the undivided family the income of the latter and should be so assessed in its hands. *Commissioner of Income-tax, Madras* v. *S. R. V. S. Ltd*,[3] states that the term 'installed' in relation to any machinery or plant means such installation as that machinery or plant is capable of; that it does not necessarily connote some thing fixed to the earth or immovable; that a bus or lorry purchased by an assessee and put on road in the course of the business which he carried on will certainly satisfy the test of installation of such vehicles which are also 'plant' within the meaning of section 10 (5); that the expression 'plant or machinery installed' should be given the same meaning in both sub-clauses (*a*) and (*b*) of section 10 (2) (vi); and that an assessee will be entitled to claim development rebate in respect of such vehicles. *Mir Mohamed Ali* v. *Commissioner of Income-tax, Madras*[4] holds that in the absence of a statutory definition the normal meaning of the word 'machinery' should be given to that expression in section 10 (2) (vi) and section 10 (2) (vi) (*a*); that a diesel engine fitted to a motor vehicle is 'machinery' within the meaning of the section; that 'machinery' does not cease to be so merely because it has to be used in conjunction with one or more machines or merely because it is installed as part of a manufacturing or industrial plant; and hence an assessee, a bus owner, is entitled to claim depreciation both under section 10 (2) (vi) and section 10 (2) (vi) (*a*) in cases where he has fitted diesel engines to his motor vehicles in replacement of the existing engines; the fact that the diesel engines were part of the motor vehicles is not relevant in deciding the claim for depreciation allowance; and the diesel engines being 'machinery' the assessee will be entitled to claim the statutory allowance for depreciation. *Francis Vallabarayar* v. *Commissioner of Income-tax* [5], decides that though clauses (*a*) and (*b*) of section 10(5) define the written-down value with reference to the actual cost to the assessee and section 10 (5) (*c*) introduced by the Amending Act, 1953, provided a further definition for arriving at the written-down value of assets acquired by an assessee by way of gift or inheritance, even prior to the introduction of the latter clause an assessee would be entitled to depreciation allowance under section 10 (5) even with reference to property acquired by him by inheritance from his father; that the original cost thereof to the assessee in such cases would be the real value of the property at the time the assessee acquired it; that the amendment made in 1953 only gives statutory recognition to the principle which should govern the statutory expression 'actual cost to the assessee' in clauses (*a*) and (*b*) of section 10 (5); and that the limitation introduced by clause (*c*) as to cases where the market value in the hands of the assessee differs from the written-down value in the hands of the previous owner would not apply to assessment cases earlier to 1953. In *Commissioner of Income-tax, Bombay* v. *Chandulal Keshavlal & Co*[6], the Supreme Court expresses the view that it is a question of fact in each case whether an amount claimed as 'deductible allowance' under section 10 (2) was 'laid out wholly and exclusively for the purpose of business'; that in deciding whether a payment of money is deductible expenditure, one has to take into consideration questions of commercial expediency and principles of ordinary trading; that if the expense is incurred for fostering the business of another only or was made by way of distribution of profits or for some improper

1. (1960) 2 M.L.J. (S.C.) 111.
2. (1960) 1 M.L.J. (S.C.) 81.
3. (1960) 1 M.L.J. 325.
4. (1960) 1 M.L.J. 460.
5. (1960) 2 M.L.J. 241.
6. (1960) 2 M.L.J. (S.C.) 101.

and oblique purpose outside the scope of the business of the assessee then the expense is not deductible : that if the expenditure is incurred for the trade of the assessee or as part of the assessee's legitimate commercial undertaking in order to facilitate his carrying on of business it is immaterial if a third party benefits thereby ; and the decision of such questions is for the Appellate Tribunal, and the decision must be sustained if there is evidence on which the Tribunal could have come to such a conclusion. *T. V. S. & Sons* v. *Commissioner of Income-tax, Madras*[1], points out that in order to attract section 12-B it is sufficient if the profits, capital gains, arose during the accounting year and they need not have been actually received ; that the liability to tax is on the profits which have arisen to an assessee by the sale of his capital asset ; that if it subsequently happens that the profit is not actually received that would be a capital loss arising in the year when the money became irrecoverable ; and that to attract the tax under secion 12-B it is sufficient if the assessee has a right to receive the profits and it is not necessary that it should have been actually received. *Abdul Khadir* v. *Commissioner of Income-tax, Madras*[2] expresses the view that if there are unexplained cash credits in the accounts produced by the assessee that by itself would certainly be a relevant factor to justify a rejection of the book results; that once the Department and the Tribunal find that the credit entries in the names of the relatives of the assessee are not really loans but fictitious entries to cover up income from undiclosed sources, in view of the poor circumstances in which the family had started and the fact that those relations had no such large sums of money which they could have advanced to the assessee, there is ample justification for the rejection of the book results and for the application of the Proviso to section 13. *Commissioner of Income-tax, Madras* v. *Ramnarayan Chellaram*[3] points out that it is clear from section 15-A that the earned income relief does not enter into the computation of the total world income ; that under section 17 (1) neither the computation of the total world income nor the computation of the assessee comes into play ; that there is no scope for reducing the total world income by the earned income relief for the purpose of ascertaining the world income ; and hence the earned income relief is not reducible from the total world income of the non-resident assessee for the purpose of calculating the average rate of tax. *Vedachala Mudaliar* v. *Rangaraju Naidu*[4], takes the view that the basic principle underlying section 28 (1) is that a penalty can be levied under the section only on a person in existence on the date the penalty is levied by the competent authority ; that the order levying a penalty might be an order passed without jurisdiction, and so long as the order was not set aside in appropriate proceedings it would be lawful for the income-tax authorities to enforce that order and collect the amount ; that in a case where action is taken under section 28 (1) against a firm consisting o [two partners the notice required by section 28 (3) may be served on any partner ; and the fact that the order levying the penalty was passed without jurisdiction and no notice was served on the other partner does not by itself disentitle the partner suing to the relief of contribution. *Seethai Achi* v. *Income-tax Officer*[5] holds that since section 23-A is only a procedural section not concerned with any assessment or reassessment if an order under the section is passed the question of the assessment of the shareholder will have to be taken up ; that the Department will have no right independent of section 34 to reassess the assessee under the terms of section 23-A itself; that the service of a notice is a condition precedent to the assumption of jurisdiction under section 34 ; that the period of limitation of 4 years under section 34 (1) is to be computed only with reference to the assessment year of the assessee or share-holder ; and the date on which an order under section 23-A was passed against the company would not be relevant in computing the period of limitation either for the assessment or for the reassessment of the share-holder ; and that where the notice was served upon the assessee after the period of limitation the Income-tax Department would have no power to re-open the assessment or to re-assess the assessee

1. (1960) 1 M.L.J. 58.
2. (1960) 2 M.L.J. 161.
3. (1960) 2 M.L.J. 560.
4. (1960) 1 M.L.J. 445.
5. (1960) 2 M.L.J. 259.

even though there was a valid order under section 23-A. *Ramaswami Iyengar* v. *Commissioner of Income-tax, Madras*[1] points out that under section 33 there would be a right of appeal against an order of the Assistant Appellate Commissioner both to the assessee and the Deparment; that the jurisdiction of the Appellate Tribunal should be governed by the subject-matter of the appeal; that since section 33 (4) unlike section 33(3) does not vest power in the Appellate Tribunal to enhance the tax except when there is an appeal by the Department, the Tribunal would have no jurisdiction to pass an order so as to permit a ground to be raised by the respondent department which if allowed would make the position of the appellant worse than what it was before; that though a power to remand is not expressly given by section 33(4) such power is implicit; and that reading section 33 (1) with the relevant rules it is clear that the power of remand conferred by rule 28 is only incidental to the power to hear and dispose of the appeal, and the power of remand cannot be exercised for the purpose of enhancing the tax. *S. P. K. K. Khader Mohideen* v. *Commissioner of Income-tax, Madras*[2] makes it clear that section 44-D is designed to prevent avoidance of income-tax by persons who were liable to tax in respect of income-producing assets by adopting the device of transferring them to persons outside the taxable territories retaining in themselves the power of enjoyment of the income; that in such a case even if the income is received by a person who is not taxable by reason of his not being a resident, it is deemed to be income received by the transferor and rendered liable to tax; that if the assets transferred constituted the entire capital of the foreign company it would follow that the entire profits of the company and not merely the dividends which the company chose to declare should be held to be the income of the assessee; that the section will not however apply if the transfer of assets was not for the purpose of avoiding tax-liability or if it was a *bona fide* commercial transaction not designed for the purpose of avoiding liability; that the burden of proof lies on the assessee, and that where there is no such proof two conditions must be satisfied, namely, that the transfer of assets is by a resident in India to a person not so resident or not ordinarily resident in India in such a way that the income in respect of those assets becomes payable to the latter, and that notwithstanding the transfer the transferor has power to enjoy at present or in future the income received by the transferee in the foreign country. *Union of India* v. *Arunachalam*[3], expresses the view that in realising the arrears of income-tax as arrears of land revenue by virtue of the provisions of section 46, the Collector is not constituted into a civil or revenue Court, and his adjudication on a claim petition in respect of the property attached for recovery of the arrears of income-tax will not be tantamount to a decision by a civil or revenue Court within the meaning of section 41 (1) of the Madras Court-fees and Suits Valuation Act.

Court-fees Act.

In *Union of India* v. *Arunachalam*[3], it is pointed out that under section 3 (11) of the Madras Court-fees and Suits Valuation Act there are four classes of Courts, civil, revenue, criminal, and any authority or Tribunal having jurisdiction under any special or local law to decide questions affecting the rights of parties; that a Collector acting under section 46 of the Income-tax Act may be a Court but will not constitute a civil Court for purposes of section 41 (1) of the Court-fees Act; nor could the Collector be deemed to be a civil Court even though he exercises the powers of one for certain purposes in proceedings under the said section; and that in suits for the setting aside of an adjudication by the Collector on a claim petition in respect of properties attached to recover arrears of income-tax section 50 of the Court Fees Act alone could apply for purpose of Court-fees payable. *Janaki Ammal* v. *Rangachari*[4] makes it clear that ordinarily there are three stages at which a Court can enquire into the question whether a plaint or appeal has been properly valued, namely, (*a*) before its registration, in which case, the Court can review, correct, and further review its decision in the manner specified in section 12 (1) of the Court-fees Act; (*b*) after registration of the suit or appeal, when the question of Court-fee is raised by the

1. (1960) 2 M.L.J.516.
2. (1960) 1 M.L.J. 152.
3. (1960) 1 M.L.J. 137.
4. (1960) 2 M.L.J. 527.

defendant or respondent and the Court has to decide the matter, in which case, the decision rendered by the Court will be binding on it unless a fresh decision is asked for by the Court-fee Examiner; (*c*) on the objection of the Court-fee Examiner under section 18, in which case, when once a decision is given there can be no further consideration or review except by an appellate Court under section 12 (4) ; that a decision given under section 18 (2) will be final so far as that Court is concerned ; and that in the absence of an express statutory provision enabling the Court to review its decision, a decision on a question of Court-fee once given will be binding on the Court which gave the decision at all subsequent stages. *Parameswaran* v. *Sarveswaran*[1] lays down that though it is true that a Court is not bound by the valuation of the relief given by the plaintiff, its power to go behind it is also limited to ascertaining the real value on the basis of the plaint allegations assuming them to be true for the purpose; that the power is limited only to ascertain the plaintiff's estimate and not to substitute its own estimate ; that if the plaintiff's estimate is *ex facie* sham or obviously wrong the Court can ask the plaintiff to make a proper estimate ; that mere inaccuracy in the estimate will not make it sham ; and that reality and not accuracy is the test for ascertaining a proper valuation under section 36 (1). *Qamrunnissa Begum* v. *Fatima Begum*[2] lays down that where a plaintiff, a Mahomedan co-sharer, claims partition and possession of his share in the estate of a deceased on the footing that though several items of properties were standing in the names of other co-sharers they really belong to the estate of the deceased he could value the relief under section 37 (*a*); that so long as there is no allegation in the plaint that any of the co-sharers was claiming any of the items adversely to the others, the plaintiff should be deemed to be in joint possession of the same ; and that where the plaintiff claims moneys standing in the names of the defendants on the allegation that they were put in their names nominally and they were really for the benefit of the family, the suit would fall under section 37(ii) and the plaintiff need not pay Court-fee on the value of his share. *Firm of Chakravarthi Iyengar* v. *Collector of Madras*[3] states that since the Madras Court Fees and Suits Valuation Act provides for payment of Court-fee not only in regard to suits but also in regard to matters before other Tribunals or Officers who may be either revenue or administrative officers the term 'proceeding' referred to in section 87 (2) will comprehend all matters other than suits ; that the term should be held to be used as meaning a proceeding in the nature of a suit; that the Collector or Land Acquisition Officer acting under section 11 of the Land Acquisition Act is deciding the rights of parties, and such proceedings will fall under section 87 (2) ; that a reference under section 18 of the Land Acquisition Act is only a continuation of or at any rate arises out of the initial proceeding under section 11 ; and so, appeals filed in the High Court arising out of such proceedings started before the coming into force of the Court-fees Act of 1955 will be governed by the old Court-fees Act by virtue of section 87 (2) of the new Act. *Coonoor Mosque* v. *Abdul Hamid Sahib*[4], holds that an application under section 7 (2) of the Madras Buildings (Lease and Rent Control) Act, 1949, for eviction of a tenant made before a Subordinate Judge as Rent Controller is liable to be affixed with a Court-fee stamp of Rupee One under Article 10 (*k*) (i) of Schedule II to the Madras Court-fees and Suits Valuation Act, and that the Court-fee is not determinable with reference to the office which the officer who has been appointed as Rent Controller holds ; nor could the Rent Controller be considered to be a Court for purposes of Court-fee.

Law of Evidence.

In *Govindarajulu* v. *Lakshmi Ammal*[5], it is pointed out that there is nothing in the Evidence Act which makes a doctor's certificate as to the illness of a person by itself evidence at all ; that in order to rely on it as evidence it should be proved in the normal way by the testimony of the person giving it ; that the statement of a doctor or report is not evidence unless he is called as a witness ; and the fact that such medical certificate or report was called for by the Court itself does not make any difference to the principle. *Vazir Begum Ammal* v *Sait Tholaram*[6] states.

1. (1960) 1 M.L.J. 468.
2. (1960) 1 M.L.J. 354.
3. (1960) 2 M.L.J. 207.
4. (1960) 1 M.L.J. 135.
5. (1960) 2 M.L.J. 274.
6. (1960) 1 M.L.J. 142.

that where in a suit on a pro-note executed by a pardanashin lady the evidence is that the pro-note was taken by the lady's husband inside the house and was brought back after obtaining the signature, and the husband stated that the signature on the note was his wife's, the statement so made is admissible in evidence to prove the signature of the lady on the pro-note under the exception enacted to section 6 of the Evidence Act. *Naina Mohamed, In re*[1], makes it clear that the ordinary rule which applies to criminal trials that the onus lies on the prosecution to prove the guilt of the accused is not in any way modified by the provisions contained in section 106; that even where there are facts specially within the knowledge of an accused person which could throw light upon his guilt or innocence as the case may be the accused is not bound to allege or prove the same; but in a criminal trial where the guilt of the accused is to be established by circumstantial evidence and the accused does not throw any light at all upon facts which ought to be specially within his knowledge and which could support any theory or hypothesis compatible with his innocence, the Court can take into consideration his failure to adduce any explanation in finding him guilty. *Shankerlal* v. *Collecor of Central Excise*[2] points out that section 132 will apply only to judicial proceedings in or before any Court, and that proceedings before the Sea Customs Officers are not judicial proceedings and such officers do not constitute Courts and therefore the section will have no application to such cases:

LIMITATION ACT.

In *Veeraswamy Reddy* v *Kanakammal*[3], it is made clear that the proper way of reading sections 9 and 13 of the Limitation Act for purposes of ascertaining whether a suit is in time or not is to first compute the interval between the date when the cause of action arose and the date when the suit was instituted, and then, to deduct from that the time during which the defendant had been absent from India; and if the resultant period does not exceed the time specified in column 3 of Schedule I the suit would be in time. *Karuppan Chettiar* v *State of Madras*[4], holds that section 29 (2) will have the effect of applying the various sections referred to therein to proceedings under section 7 (1) of the Madras Estates (Supplementary) Act, 1956, which are in effect in the nature of an application, and hence would attract section 14 (1) of the Limitation Act to such proceedings, with the result that where a party was prosecuting *bona fide* a writ application against the order of the Tribunal the time taken therein could be excluded in computing the limitation under section 7 (1) of the Madras Estates (Supplementary) Act. *Pena Parayan Ambalam* v. *Venkatachalam Chettiar*[5] states that an acknowledgment in a sale proclamation about the subsisting character of a mortgage, by the decree-holder, who becomes ultimately the auction-purchaser of the property for a low value on the ground that it was being bought subject to the subsisting mortgage would operate to save limitation in so far as that mortgage is concerned; but section 17 of the Limitation Act can be invoked only by the actual person disabled and not by his assignee. *Abdul Ghani* v. *Periyaswami Chetti*[6], takes the view that under section 21 (2) the theory of implied agency underlying the concept of partnership is not by itself sufficient to enable a partner to bind the other partners by an acknowledgment of the liability of the firm unless there is evidence however slight, or other circumstances such as a course of business or conduct of parties as to make the non-acknowledging partner also liable. In *Savalram Pujari* v. *Dnyaneshwar*[7], the Supreme Court points out that section 23 refers not to a continuing right but to a continuing wrong; that if a wrongful act causes an injury which is complete there is no continuing wrong even if the resulting damage may continue; and that where the wrongful act complained of amounts to ouster the resulting injury to the right is complete at the date of that ouster and there is no scope for the application of section 23 to such a case. *Ganapathi Pandaram* v. *Collector of Coimbatore*[8] makes it clear that the essential condition for the application of section 28 is the right of an aggrieved person to institute a suit for the possession of the property concerned, and

1. (1960) 1 M.L.J. 118.
2. (1960) 1 M.L.J. 367.
3. (1960) 2 M.L.J. 379.
4. (1960) 2 M.L.J. 511.
5. (1960) 1 M.L.J. 346.
6. (1960) 2 M.L.J. 43.
7. (1960) 2 M.L.J. (S.C.) 87.
8. (1960) 1 M.L.J. 247.

if the right of such person is either expressly or by necessary implication barred by statute section 28 cannot be invoked and there can be no extinguishment of the title of such person to the property concerned. *State Electricity Board* v. *Govindarajulu*[1] holds that a suit by the State Electricity Board to recover from the defendant a sum of money, being the cost of a pole belonging to it broken by the defendant's vehicle and the loss of revenue on account of the interruption of electric supply to consumers, is governed by Article 36 and not by Article 149. *Balagurumurthi Chettiar* v. *Ranganayaki Ammal*[2] decides that where there was a deposit and an agreement that it was repayable on demand Article 60 will apply. *Kesava Chettiar* v. *Ramanatha Mudaliar*[3] points out that when the course of dealings between the parties amounts to a mutual, open and current account involving reciprocal demands between the parties, Article 85 will be attracted ; that for an account being mutual there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on one side only, those on the other being merely complete or partial discharge of such obligation ; that it is not necessary for the purpose that the dealings must refer either to different businesses or to different subject-matters or that actual reciprocal demands should have been made ; that the presence of a shifting balance in an account is one of the tests of its mutuality ; that what the Court has to see is not whether the balance actually shifts but whether the nature of the transactions is such that it was capable of giving rise to shifting balances ; and that in order to decide whether a particular account is mutual or not it is the essence of the transaction that has to be looked into, and the number of dealings do not count. In *Savalram Pujari* v. *Dnyaneshwar*[4], the Supreme Court holds that Article 124 applies to suits for possession of hereditary offices, and the period is 12 years, and it runs from the time the defendant takes possession of the office 'adversely' to the plaintiff ; that unlike Article 142 where the plaintiff could be defeated by his not being in possession for 12 years, under Article 124, he can be defeated only by the adverse possession of the defendant for the prescribed period of 12 years ; that where the worshippers who were performing the services in the place of the plaintiff were not parties and the defendants were the trustees who were not holding the offices in question themselves, Article 124 cannot apply and Article 120 will apply ; and that the act of the trustees in denying the rights claimed by the plaintiff as hereditary worshippers and claiming and obtaining possession by a suit in 1922 was not a continuing wrong and will not provide scope for the application of section 23. *Natesa Nattar* v. *J. D. Daniel*[5] states that under Article 142, in a suit for ejectment, the plaintiff cannot rest his claim on title alone but must also show that he has exercised rights of ownership by being in possession within 12 years of suit. *Mrs. N. Wapshare* v. *Pierce, Leslie & Co*[6], expresses the view that while Article 144 no doubt applies to a suit by an owner seeking to recover a possessory interest against the person who has no answer to that claim unless it is the answer of adverse possession, such claim must of course be tried on the merits. *State Electricity Board* v. *Govindarajulu*[7], holds that Article 149 applies only to a suit by or on behalf of the Central or State Government and cannot be availed of by the grantee from the Government or a statutory body created by the Government to take over certain functions of the Government like the Madras State Electricity Board ; and the fact that the Government may have power to make rules and other controlling power over the body would not make it a part or limb of the Government for purposes of Article 149. *Ramaswami Chettiar* v. *Official Receiver*[8] decides that an application for execution made by the transferee of a decree in fraud of creditors prior to the annulment of the transfer which being legal when made, will not be rendered illegal by reason of the transfer becoming void on annulment from the date of transfer, satisfies the requirements of Article 182 (5) and gives a fresh starting point of limitation.

(to be continued).

1. (1960) 2 M.L.J. 245.
2. (1960) 2 M.L.J. 48.
3. (1960) 1 M.L.J. 452.
4. (1960) 2 M.L.J. (S.C.) 87.
5. (1960) 1 M.L.J. 488.
6. (1960) 2 M.L.J. 401.
7. (1960) 2 M.L.J. 245.
8. (1960) 1 M.L.J. (S.C.) 41.

CIVIL PROCEDURE CODE.

In *Ranganathan Chettiar, In re*[1].—It is suggested that where in one of two suits between the same parties a decree is made with a condition that if the plaintiff in the other suit succeeded the decree passed already will become a joint decree in favour of the plaintiff in the other suit; and by a separate clause in the decree the interest of the plaintiff in the other suit is safeguarded by directing that the decree now passed will not be executed till the disposal of the other suit, the direction amounts to a 'decree' as defined in section 2 (2) of the Civil Procedure Code and is not a mere order postponing execution. *Ganapathi Gounder* v. *State of Madras*[2], points out that there can be no *res judicata* regarding a cause of action that has arisen subsequent to the previous proceeding; that the bar arises only where the issue has been directly and substantially raised in a former suit or proceeding; and that where there was no cause of action no matter of the litigation can be said to be directly and substantially in issue in the former suit or proceeding. *Mohanram* v. *Sundararamier*[3], states that the doctrine of *res judicata* results from a decision of the Court, that it is based on public policy and ousts the jurisdiction of the Court and presumes conclusively the truth of the former decision; and that the principle of *res judicata* cannot prevail to the extent of compelling the executing Court to sell inalienable service inam lands prohibited on grounds of public policy either by statute or under the general law. *Collector of Tiruchirapalli* v. *Velan Chettiar*[4], holds that in a suit under section 92 where there has been no diversion of funds as to be termed a misappropriation or malversation of the trust funds or even a breach of trust, the persons in management of the trust properties should not be asked to account for the period of their management and a mere spending for other religious or charitable purposes cannot always amount to a diversion of trust funds. *Kanihammal* v. *Rajalakshmi*[5], points out that section 95 (1) provides *inter alia* for two classes of cases in which compensation may be ordered to be paid to a defendant where an attachment has been effected at the instance of the plaintiff, namely, where the attachment has been applied for on insufficient grounds, or where the suit of the plaintiff fails and it appears to the Court that there was no reasonable or probable ground for instituting the suit. In *Khalilul Rahman Sahib* v. *Syed Hussain*[6], it is held that though the setting aside of an attachment alleged to have been obtained on insufficient grounds is not an essential preliminary to the grant of compensation; yet when an order of attachment so obtained has been made absolute after hearing the parties it would mean that according to the Court the application for attachment was made on sufficient grounds; and it will not be open to the Court on a subsequent application under section 95 to hold the contrary; that so long as the prior order of attachment is not set aside either by appeal or otherwise an application under section 95 cannot be allowed on the ground that the order had been obtained on insufficient grounds; that it is really a case of applying the principle of *res judicata* which may not however in terms apply; and that where the attachment order has been confirmed only *ex parte* and there is no final order on the merits after considering the objections of the defendant it will not be equitable to apply the above rule. *Lakshmi Ammal* v. *Ramachandra Reddiar*[7], holds that the jurisdiction of the High Court under section 100 does not extend to interference with a finding of fact merely on the ground that a different inference is possible on the evidence recorded from that drawn by the Courts below. *Kalimuthu Servai* v. *Govindaswami Servai*[8], takes the view that the true principle in all cases of granting leave to sue *in forma pauperis* is that it is primarily for the State to challenge the correctness of such orders and hence the High Court will not normally interfere in revision against such orders at the instance of the parties to the dispute. *Marcalline Fernando* v. *Francis Xavier Church*[9], makes it clear that the examination of a witness on commission is not an alternative to an examination in Court since one of the fundamental rules of procedure in a judicial trial is that the Judge should himself hear the evidence; that unless the conditions laid down in section 133 or Order 26, rule 1 are satisfied a Court will have no jurisdiction to

1. (1960) 1 M.L.J. 330.
2. (1960) 1 M.L.J. 322.
3. (1960) 2 M.L.J. 30.
4. (1960) 1 M.L.J. 364.
5. (1960) 2 M.L.J. 484.
6. (1960) 2 M.L.J. 479.
7. (1960) 2 M.L.J. 252.
8. (1960) 2 M.L.J. 313.
9. (1960) 2 M.L.J. 349.

delegate the examination of witnesses to a commission on the supposed theory that evidence in Court is necessary only in cases where the witness is likely to speak an untruth elsewhere ; and the mere fact that by reason of his culture and background as a priest a person could be expected to speak only the truth would not by itself be a sufficient ground to entitle him to examination on commission. *Janaki Ammal* v. *Krishnaswami Mudaliar*[1], states that a security bond executed in favour of an officer of Court in the form mentioned in Form 3 of Appendix G of the Schedule to the Code of Civil Procedure is not executed in favour of a particular person either by designation or by name and is not assignable ; and even if such a case does not fall within section 145 the Court has ample jurisdiction in its inherent powers to enforce such a bond by way of execution in the same proceedings to realise the money ; and there is no need to bring a separate suit to enforce the bond. *Venkataraman* v. *Lakshmi Ammal* [2], decides that section 151 could confer no power on a Court to vary a consent decree under which a limited estate was given before the coming into force of the Hindu Succession Act, 1956, into a decree granting her absolute right ; and the section, though wide, cannot grant power to any Court to grant such a substantive declaration. *Foolchand* v. *Union of India*[3], points out that Order 1, rule 3, permits joinder of several defendants against whom any right to relief in respect of or arising out of the same act or transaction is alleged to exist whether jointly, severally, or in the alternative, when if separate suits are brought against such persons any common question of law or fact would arise ; and that the words used being 'same act or transaction' and not 'same cause of action' the provisions of Order 1, rule 3 are wider than the corresponding provisions of section 80, Civil Procedure Code of 1882. *Venugopal* v. *Triplicane Urban Co-operative Society*[4], states that where a Court passes an order under Order 9, rule 8, directing the restoration of a suit dismissed for default on condition of payment of costs to the opposite party before a specified date, and provides that in default of such payment the application will stand dismissed, the Court no longer remains seised of the application but becomes *functus officio*. *Meenakshisundaram* v. *Radhakrishna Pillai*[5], holds that Order 11, rule 1, would no doubt apply to Election Tribunals and the Tribunal would have power to issue interrogatories ; that before doing so, it should see the effect, import and significance of the interrogatories sought to be administered ; that if any objection is raised by the party to whom they are sought to be administered on the ground that they are likely to incriminate him in any criminal offence it is the duty of the Tribunal to examine the objection, because a party is not bound to answer such interrogatories ; and that where the Tribunal does not so apply its mind the High Court will interfere in revision and set aside the order. *Bhagyalakshmi* v. *Srinivasa Reddiar*[6], makes it clear that in cases where the right to discovery in any form depends upon the determination of any question or issue in dispute in the cause or matter or it is desirable that some issue or question of law or fact or mixed question of law and fact in dispute should be determined first, the question of discovery should be deferred till after the issue or question has been determined ; that the mere fact that certain documents have been produced and filed in a suit by a party does not by itself give the other side the right to inspect the same as a matter of course when the party producing the same objects to its being inspected before the determination of a particular issue or question ; and that the documents are relevant for purposes of the suit is not by itself a sufficient reason for ordering premature inspection. *Alsidass Kaverlal* v. *Hiriya Gowder*[7], lays down that where an order of attachment of amounts payable by a garnishee to the judgment-debtor is applied for under Order 21, rule 46, the Court will not be justified in accepting the uncorroborated statement of the garnishee as to the state of account but should enquire and come to an independent conclusion ; that where a debt is being attached it is not necessary that the exact amount of the debt should be stated provided there is a debt actually due at the time of the attachment ; and the prohibitory order issued by the Court will operate to bar the payment to the judgment-debtor by the garnishee of all amounts

1. (1960) 1 M.L.J. 148.
2. (1960) 2 M.L.J. 157.
3. (1960) 2 M.L.J. 243.
4. (1960) 2 M.L.J. 136.
5. (1960) 1 M.L.J. 401.
6. (1960) 1 M.L.J. 292.
7. (1960) 2 M.L.J. 561.

payable up to the date of the attachment. In *Jiban Krishna Mukherjee* v. *New Beerbhum Coal Co. Ltd.*[1], the Supreme Court lays down that Order 21, rule 89, does not apply to a sale held by a receiver appointed by the Court in execution of a decree and authorised to sell the property. *Venkatesh Kotadia* v. *Shantha Bai*[2], states that having regard to the fact that the vesting of the property sold in execution of a decree is on the date of the sale under Order 21, rule 94, though such vesting becomes effective only when the sale is confirmed and the continued subsistence of the decree is not a condition precedent to the issue of a sale certificate, confirmation of the sale under Order 21, rule 92, is no longer conditional upon the existence on the date of confirmation of an outstanding decree in execution of which the sale had taken place; that Order 21, rule 92, is imperative and the Court is bound to confirm a sale unless it is set aside under Order 21, rules 89 to 91, though cases of fraud, restitution, etc., may stand on a different footing, and different considerations may apply in particular circumstances where the decree-holder is himself the purchaser; and hence, an execution sale in favour of a stranger auction purchaser has to be confirmed under Order 21 rule 92 notwithstanding the fact that the decree in execution of which the sale took place, had, before its confirmation, been modified on appeal with the result that on the date of the sale the decree remained overpaid and nothing was due under it. *Kannappa Chettiar* v. *Srinivasan Chettiar*[3], expresses the view that rules 89 to 92 of Order 21 proceed on the basis that the purchase money is deposited in Court and where that is not done the basis of the rules goes and there can be no confirmation under rule 92 ; and that where the decree-holder under Order 21, rule 72, bid and purchased the property of the judgment-debtor setting off the purchase money against the amount due under the decree pending the appeal, and the decree was modified in appeal, and the amount due as scaled down under Madras Act IV of 1938 was much below the purchase money, but the Court confirmed the sale in ignorance of the facts and recorded part-satisfaction, the Court can under section 151 declare that the order of confirmation of the sale was illegal. *Santha* v. *Natarajan Pillai*[4], points out that in an application under Order 22, rule 3, the only question for consideration is whether the petitioners are the legal representatives of the deceased and the Court is not interested in adjudicating, at that stage, what exactly was the extent of the interest possessed by the deceased plaintiff and whether the suit as laid by the deceased was sustainable against the defendants ; and that universal legatees under a will executed by the deceased ,the genuineness of which is not disputed, are legal representatives entitled to be brought on record in the place of the deceased. *Ranganayaki* v. *Bapu Iyer*[5], holds that Order 24, rule 3, will apply only when the decree-holder is in a position to take out the money deposited by the judgment-debtor in Court and is not prevented from doing so by any order passed by the Court on the invitation of the judgment-debtor ; and that where the judgment-debtor in the appeal filed against the decree had applied for stay of execution and had been directed by the appellate Court to deposit the decree amount in Court with liberty to the decree-holder to withdraw the amount on furnishing security, but the decree-holder was unable to draw out the whole amount till the appellate Court confirmed the decree the decree-holder was undoubtedly entitled to interest, and to such a situation Order 24, rule 3, will not apply. *Kandaswami Naicker* v. *Raju Naicker*[6] decides that once the plaintiff is not allowed to continue the suit *in forma pauperis* and he had not paid the requisite Court-fee, the suit must be deemed to be not on the file ; and if the plaintiff did not choose to pay the deficit Court-fee what the Court can do is to return the papers to him ; and in such circumstances, the provisions of Order 33, rule 11, will have no application ; and the plaintiff could not be directed to pay any further Court fee under that provision. *Kalimuthu Servai* v. *Govindaswami Servai*[7], states that the true principle in all cases of granting leave to sue *in forma puperis* is that it is for the State to challenge the correctness of such orders, and hence the High Court will not normally interfere in revision against such orders

1. (1960) 1 M.L.J. (S.C.). 96.
2. (1960) 2 M.L.J. 346.
3. (1960) 2 M.L.J. 93.
4. (1960) 1 M.L.J. 318.
5. (1960) 2 M.L.J. 270.
6. (1960) 1 M.L.J. 481.
7. (1960) 2 M.L.J. 313.

at the instance; of the parties to the dispute. *Ahamed Rowther* v. *Bathumal Beevi*[1], states that rules 23 and 25 of Order 41 do not enable an appellate Court to remand a suit for retrial merely on the ground that reception of additional evidence is necessary, for rule 23 refers to remand on a decree being reversed on appeal and such decree was based on a preliminary, point, and rule 25 provides for an appellate Court directing the trial Court to take additional evidence required and to return the evidence to the appellate Court together with its findings if necessary. *Viswanatha Pillai* v. *Indian Overseas Bank*[2], holds that it will be open to the High Court to grant a stay of all dependent proceedings while it is in seisin of the appeal against the order refusing to set aside an *ex parte* decree, and in an appeal against an order refusing to set aside an *ex parte* decree it is open to the appellate Court to stay the execution of the *ex parte* decree itself even though no appeal has been filed against the said decree. *Chockalingam Chettiar* v. *Chidambaram Pillai*[3], states that while it is true that the expression 'for any other sufficient cause' in Order 47, rule 1, should be construed *ejusdem generis* with the other provisions of the rule laying down the limits of the exercise of the power of review, a too narrow interpretation of the words will not be in accord with equitable principles.

Indian Penal Code.

In *Kamaraj Goundar*, In re[4], it is pointed out that section 34 of the Penal Code requires that there must be a general intention shared by all the persons concerned in the offence; and therefore, the foundation of the constructive liability is the common intention animating the accused in the doing of the criminal act and the doing of such act in furtherance of the common intention. *Parvathi Ammal*, In re[5], holds that where a woman murders her children and attempts to commit suicide by drowning owing to proverty, ill-health and mental depression and the evidence showed that she was suffering from periodical fits of depression and mental confusion, but there was nothing to show that at the time of committing the offences the accused was by reason of unsoundness of mind incapable of knowing the nature of her acts or that those acts were wrong or contrary to law, section 84 cannot be availed of and the accused has to be convicted under sections 302 and 309. In *Vishwanath* v. *State of Uttar Pradesh*[6], the Supreme Court expresses the view that when the accused's sister was being abducted, though by her husband, and there was an assault upon her and she was compelled by force to go away from her father's place, the accused will have the right of private defence of the body of his sister against an assault with the intention of abducting her by force; that such right will extend to the causing of death; that the giving of only one blow with an ordinary knife, which if it had been a little this way or that could not have been fatal, cannot be said to be causing of more harm than was necessary for the purpose of defence. *Krishnamurthy*, In re,[7] states that in a prosecution for an offence under section 161 it is necessary to prove all the ingredients of the offence as set out in the section; that mere receipt of money by a public servant in order to get a job for another person somewhere would not by itself necessarily be an offence under section 161; and that the rendering or attempting to render any service with any public servant should be referred to in the charge and established before the accused could be convicted of an offence under that section. In *Mahomed Dastagir* v. *State of Madras*[8], the Supreme Court expresses the view that a sentence of six months rigorous imprisonment and fine of Rs. 1000 could not be said to be severe in a case where there had been an attempt to corrupt a responsible public servant. *Public Prosecutor* v. *Semalai Pannadi*[9] decides that where the deceased was committing mischief within the meaning of section 430 by wrongfully diverting water, the accused would be justified in preventing him forcibly from consummating that mischief in defence of the property of his master; but by the using of a heavy instrument like a spade on the head of

1. (1960) 1 M.L.J. 37.
2. (1960) 2 M.L.J. 11.
3. (1960) 2 M.L.J. 327.
4. (1960) 1 M.L.J. 12.
5. (1960) 1 M.L.J. 332.
6. (1960) 1 M.L.J. (S.C.). 21.
7. (1960) 1 M.L.J. 339.
8. (1960) 1 M.L.J. (S.C.). 39.
9. (1960) 1 M.L.J. 341.

the deceased so forcibly as to fracture the skull extensively and injure the brain causing his death, the accused had exceeded the right of private defence and his act would fall within *Exception* 2 to section 300, and a conviction under section 304 will be justified. *Adimoola Moopan*, In re[1], decides that in the absence of the necessary criminal intention the mere fact that a person removed another's property with a view to compelling the other to pay up his lawful dues, such as rent etc., will not make him an offender and he cannot be convicted either under section 379 or under section 426.

CRIMINAL PROCEDURE CODE.

In *Perumal Konar* v. *Ponnan*[2], it is held that for the purpose of proceedings under section 145, Criminal Procedure Code, what is more important is not adjudication of title but possession at the crucial time ; and in the case of waste lands where khas possession cannot be demonstrated, possession will follow title. *Mookerjee*, In re[3], points out that section 177 laying down the ordinary rule as to jurisdiction adopts the English common law rule as to venue ; but the offence of criminal conspiracy has always been recognised as an exception with regard to the question of venue, and it may be tried not only in the place where the conspirators agreed to do the wrongful act which is the object of the conspiracy but also in any place where one of the criminal acts in pursuance of the conspiracy is committed ; that under section 180 where an act, which is an offence by reason of its relation to any other act which is also an offence, is committed, a charge of the first mentioned offence may be tried by the Court within the local limits of whose jurisdiction either act was done; and that where the offence of criminal conspiracy occurs and an offence in pursuance thereof is also committed, the offence of criminal conspiracy may be tried either at Calcutta where the offence, in the instant case, itself occurred, or at Madras where the offence or offences in pursuance of the conspiracy occurred ; and the fact that conspiracy is a substantive offence in itself would not take the offence of criminal conspiracy out of the ambit of section 180. In *Dhannjay Ram Sharma* v. *M. S. Uppadhaya*[4], the Supreme Court makes it clear that the mere fact that an opportunity to commit an offence (theft) is furnished by the official duty of the public servant (in the course of witnessing a search conducted by Special Police) is not such a connection of the offence with the performance of such duty as to justify even remotely the view that the act complained of is within the scope of the official duty of the accused and accordingly sanction under section 197 is not necessary for a complaint for such offence. *Public Prosecutor* v. *Sampath Kumar*[5], lays down that where a prosecution stopped under section 249, Criminal Procedure Code, is reopened it is not as if the prosecution commences only after the reopening but it is only a continuing of the prosecution orginally launched ; and hence, where a prosecution for non-payment of tax was commenced within the prescribed time under section 345 of the Madras District Municipalities Act but the proceedings were stopped under section 249, Criminal Procedure Code and were subsequently reopened, the mere fact that the period of three years had elapsed in the meantime will not bar the prosecution. In *Pramatha Nath Mukherjee* v. *State of West Bengal*[6], the Supreme Court holds that a Magistrate after making an order of discharge under section 251-A (2) in respect of a charge for an offence triable as a warrant case can still proceed to try the accused for another offence disclosed by the police report and triable as a summons case; and thus when a Magistrate took cognisance under section 190 (1) (*b*), Criminal Procedure Code of the offence under section 332, Indian Penal Code, he cannot but have taken cognisance also of the minor offence under section 323, Indian Penal Code; and so even after the order of discharge was made in respect of the offence under section 332 the minor offence under section 323 of which also he had taken cognisance remained for trial for which the procedure under Chapter XX of the Criminal Procedure Code can be followed. *Oomayan*, In re[7], expresses the view that the procedure indicated under section 361 cannot be applied to the case of a deaf-mute, since under that section whenever any evidence is given in a language not understood by the

1. (1960) 1 M.L.J. 84.
2. (1960) 2 M.L.J. 473.
3. (1960) 2 M.L.J. 340.
4. (1960) 2 M.L.J. (S.C.) 98.
5. (1960) 1 M.L.J. 94.
6. (1960) 2 M.L.J. (S.C.) 59.
7. (1960) 1 M.L.J. 83.

accused it should be interpreted to him in open Court in a language understood by him, whereas a deaf and dumb man can understand by signs and gestures only which do not form a language within the meaning of section 361. *Athipalayan*[1], In re, states that since sections 366 and 367 require that judgments must be pronounced in open Court, signed, and dated, where a Magistrate had merely noted in the docket-sheet the conviction and sentence, and no judgment had been written at all it would amount to an a illegality rendering the conviction and sentence liable to be set aside. *Seeni Ammal*, In re[2], states that it is permissible for a party to appeal by special leave against the acquittal under section 417 though he is a private party and not the State. *Public Prosecutor* v. *Joseph*[3], holds that in an appeal against acquittal the High Court will interfere only for substantial and compelling reasons ; and it will not interfere unless it is convinced that the interests of justice require that the acquittal must be set aside. In *Raban Ghela Jadhav* v. *State of Bombay*[4], the Supreme Court points out that while an appellate Court has power to dismiss an appeal summarily if it considers that there is no sufficient ground for interfering it has no power to direct that the appeal shall be only heard on the point of sentence; that such an order is not an order of summary dismissal under section 421 nor an order under section 422 ; that when an appeal is filed it is an appeal both against conviction and sentence, so much so, under section 423 the appellate Court can after hearing the appeal in disposing of it reduce the sentence ; but that does not entitle it to direct that an appeal is admitted only on the question of sentence. In *Mohamed Dastagir* v. *State of Madras*[5], the Supreme Court makes it clear that section 422 does not speak of notice of appeal being *served* on the accused but only states that notice is to be *given* to the accused ; that if the High Court is intimated that the accused has entered appearance and has notice of the appeal filed against him and the Court is requested not to issue any summons to him it can hardly be said that notice of the appeal has not been given to the accused; and in any event notice issued under section 422 to the advocate who had entered appearance for the accused is sufficient. *Nallathangal* v. *Nainan Ambalam*[6], holds that where a Magistrate makes an order dismissing a Hindu wife's petition against her husband under section 488 (1), on a finding of fact that the petitioner had been actually divorced from her husband by virtue of a caste panchayat and that there was no subsisting marriage between them, the High Court will not be justified in criminal revision in interfering with such a finding. *Seeni Ammal* In re[2], points out that if a party instead of appealing by special leave against an acquittal under section 417 prefers to file a revision under section 439 it may be done within two months of the date of acquittal ; it will then be possible for the High Court to order immediate notice to the Public Prosecutor for the State even before admitting the revision petition ; and that if the Public Prosecutor on a perusal of the records on such notice is satisfied that it is in the interests of justice to press for interference with the acquittal he may institute a regular appeal against the acquittal ; and the Court may then in the interests of justice deal with the appeal and also convict the accused in appropriate cases. In *Dr. Pal Chaudhury* v. *State of Madras*[7], the Supreme Court makes it clear that the combined effect of sub-sections (1) and (5) of section 479-A is to require the Court intending to make a complaint to record a finding that, in its opinion, a person appearing as a witness has intentionally given false evidence and that for the eradication of the evils of perjury and in the interests of justice it is expedient that such witness should be prosecuted for the offence, and to give the witness proposed to be prosecuted an opportunity of being heard as to whether a complaint should be made or not. The Supreme Court further points out that the finding required by section 479-A (1) is only of a *prima facie* nature; that it cannot be a finding which would have any force at the trial upon the complaint made pursuant to that finding ; and the notion of avoiding prejudice at the trial upon the complaint would not justify a clear breach of the terms of the section requiring a *prima facie* finding.

1. (1960) 2 M.L.J. 450.
2. (1960) 2 M.L.J. 507.
3. (1960) 1 M.L.J. 334.
4. (1960) 2 M.L.J. (S.C.) 35.
5. (1960) 2 M.L.J. (S.C.) 39.
6. (1960) 1 M.L.J. 134.
7. (1960) 2 M.L.J. (S.C.) 69.