THE

MADRAS LAW JOURNAL.

I] JANUARY. [1953

NOTES OF INDIAN CASES.

SATYAVATHI *v.* STATE OF MADRAS, (1952) 1 M.L.J. 41.

Article 31 of the Constitution of India provides that no person shall be deprived of his property save by authority of law and that no property, movable or immovable, shall be taken possession of or acquired for public purposes without payment of compensation. Whether the acquisition of land for providing house-sites for Harijans would be a " public purpose " within the meaning of Article 31 had to be considered in the above case. The fifth Amendment to the Constitution of the United States includes a provision : " Nor shall private property be taken for public use, without just compensation." Likewise, Article 29 of the Japanese Constitution, 1946, says : " Private property may be taken for public use upon just compensation therefor." In India itself section 299 of the Government of India Act, 1935, had provided : " Neither the Federal nor a Provincial Legislature shall have power to make any law authorising the compulsory acquisition for public purposes of any land . . . . . unless the law provides for the payment of compensation for the property acquired." There is no definition, however, of ' public purpose ' in any of our legislative enactments to afford us a clue to the meaning of the term, save one in the Land Acquisition Act, which is only a partially inclusive and not an exhaustive definition. Section 3 (*f*) of that Act provides that the expression " ' public purpose ' includes the provision of village sites in districts in which the Provincial Government shall have declared by notification in the Official Gazette that it is customary for the Government to make such provision, and section 40 (1) (*b*) would seem to equate a ' public purpose ' with ' some work likely to prove useful to the public '." It is true that general definitions are to be avoided where the avoidance is possible, *Hamabhai Framjee* v. *Secretary of State for India*[1]. What should be the test of a ' public purpose ' will, however, have to be indicated. It is here that the decisions of the Supreme Court of America construing the term ' public use ' in the American Constitution become valuable. The power to take private property for public uses is generally called the ' right of eminent domain ' and belongs to every independent Government as an incident of sovereignty and requires no constitutional recognition, *United States* v. *Jones*[2]. [The doctrine is an offspring of political necessity, and is based upon an implied reservation by Government that private property acquired by its citizens under its protection may be taken or its use controlled for public benefit irrespective of the wishes of the owner]. ' Public use ' includes the appropriation of lands or other property by the State for its own uses in order to enable it to perform its proper functions, *Kohl* v. *United States*[3], *Cherokee Nation* v. *Southern Kansas Railway Co.*,[4]. It will not include the

1. (1914) I.L.R. 39 Bom. 279, 291.
2. (1883) 109 U.S. 513, 518.
3. (1876) 91 U.S. 367.
4. (1890) 135 U.S. 641, 656.

taking by a State of the private property of one person without the owner's consent for the private use of another for that will not be due process of law and will be a violation of the 14th Article of Amendment of the Constitution of the United States, *Missouri Pacific Railway Co.*, v. *Nebraska, ex. rel. Board of Transportation*[1]. What is a 'public use' frequently and largely depends on the facts and circumstances surrounding the particular subject-matter in regard to which the character of the use is questioned and it is not essential that the entire community, or even any considerable portion thereof, should directly enjoy or participate in an improvement in order to constitute a public use. In that view it was held that to irrigate lands and bring into possible cultivation large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest not confined to the landowners or even to any one section of the State, *Fallbrook Irrigation District* v. *Bradley*[2]. So also lands taken in a city for public park or square, whether advantageous to the public for recreation, help or business can be deemed to be for a public purpose, *Shoemaker* v. *United States*[3]. Even the acquisition of land to provide water for one individual from a stream in which he has an interest, to irrigate his land which otherwise would remain absolutely valueless, will be deemed in certain circumstances to be for 'public use.' In *Clark* v. *Nash*[4], Peckham, J., observed: "This Court has stated that what is a public use may frequently and largely depend upon the facts surrounding the object . . . . It is true that in the *Fallbrook case*[2], the question was whether the use of the water was a public use when a corporation sought to take land by condemnation under a state statute, for the purpose of making reservoirs and digging ditches to supply landowners with the water the company proposed to obtain and save for such purpose. This Court held that such use was public. The case did not directly involve the right of a single individual to condemn land under a statute providing for that condemnation. We are, however, disposed to agree with the Utah Court with regard to the validity of the state statute which provides under the circumstances stated in the act for the condemnation of the land of one individual for the purpose of allowing aonther individual to obtain water from a stream in which he has an interest to irrigate his land which otherwise would remain absolutely valueless." It would thus seem that the range of 'public use' which is very elastic, and must depend on the circumstances of each case, will include taking of land for performance of functions of state and it is not necessary that the entire community or even any considerable portion of it should directly enjoy or participate in any improvement. Even benefit immediately to one individual may be 'public use' in special circumstances. In *Moses* v. *Marland*[5], it was held by Bruce J., that a place used for a public purpose means not a place used in the public interest but a place to which the public can demand admission or to which they are invited to come. But that was with reference to the words "any other public purpose" used in the London Building Act, 1894, and cannot help in the context of the Indian Constitution. In *Hamabhai Framjee* v. *Secretary of State for India*,[6], there was a resumption of inam lands by Government for building residences for its officers to be let to them on rent. On a question whether the acquisition was one for a public purpose, Batchelor, J., observed: "It is enough to say that, in my opinion, whatever else it may mean (it) must include a 'purpose,' that is an object or aim in which the general interest of the community, as opposed to the particular interest of individuals is directly and vitally concerned." In affirming the conclusions of the High Court, the Judicial Committee, on appeal said *inter alia*: "The argument of the appellants is really rested upon the view that there cannot be a public purpose in taking land if that land when taken is not in some way or other made availabe to the public at large. Their Lordships do not agree with this view." Part XVI of the Constitution contains special provisions for safeguarding and promoting the rights of Scheduled Castes and Tribes. In the Fifth Part of the Schedule to the Constitution (Scheduled Castes) Order, 1950, made by the President in the

1. (1896) 164 U.S. 403.
2. (1896) 164 U.S. 112.
3. (1892) 147 U.S. 282.
4. (1904) 198 U.S. 361, 369.
5. (1901) 1 K.B. 668.
6. (1914) I.L.R. 39 Bom. 279.

exercise of the powers conferred by clause (1) of Article 341 of the Constitution of India, the Adi-Andhras are included in the list of Scheduled Castes. The advancement and development of the interests of that community are thus an object of special concern by Government as forming part of the policy underlying the Constitution. Acquisition of land for providing residential sites for members of Adi-Andhra community would be as much a public purpose as the acquisition of land for providing residences for Government servants was held to be in *Hamabhai Framjee's case*[1]. The decision in the instant case that such acquisition is not opposed to Article 32 of the Constitution is thus in accord with authority.

THAMSI GOUNDAN *v.* KANNI AMMAL, (1952) 1 M.L.J. 68.

The question raised in this case was whether section 488, Criminal Procedure Code, is repugnant to Article 14 of the Constitution by reason of its provision for the award of maintenance to wives deserted by their husbands while there is no similar provision in favour of husbands deserted by their wives. Article 14 of the Constitution provides: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India." The phrase "equality before the law" has been explained by Professor Jennings to mean that "among equals the law should be equal and should be equally administered, that like should be treated alike."[2] Section 40 (1) of the Constitution of Eire expressly declares that equality before the law "shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical or moral, and of social function." Article 14 corresponds to the 'equal protection clause' of the 14th Amendment to the Constitution of the United States of America which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws." The range and sweep of the phrase "equal protection of the laws" are vividly set forth by Professor Willis who observed: "It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction. It does not prohibit legislation, which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions both in the privileges conferred and the liabilities imposed. The inhibition of the amendment . . . . . was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. It does not take from the states the power to classify . . . . . but permits to them the exercise of a wide scope of discretion, and nullifies what they do only when it is without any reasonable basis. Mathematical nicety and perfect equality are not required. Similarity, not identity of treatment, is enough. If any state of facts can reasonably be conceived to sustain a classification, the existence of that state of facts must be assumed. One who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis."[2] In *Yick Wo* v. *Hopkins*[3], it was pointed out that equal protection of laws is a pledge of the protection of equal laws. It was stated in *Southern Railway Company* v. *Greene*[4], that this means subjection to equal laws applying alike to all in the same situation. In view of the foregoing, while recognising that Article 14 of the Constitution provides one of the most valuable and important guarantees in the Constitution which should not be allowed to be whittled down, it was at the same time recognised that there can be classification which should, however, never be arbitrary but must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made, see *Charanjit Lal Chowdhury* v. *The Union of India*[5], *Om*

1. (1914) I.L.R. 39 Bom. 279.
2. Constitutional Law, 1st Edn., p. 579.
3. (1886) 118 U.S. 356, 369.
4. (1908) 216 U.S. 400, 412.
5. (1951) S.C.J. 29, 34, 53.

Parkash v. *The State*[1], *Sheoshankar* v. *The State of Madhya Pradesh*[2], *Asiatic Engineering Company* v. *Achhuram*[3], *S. B. Trading Company* v. *Shyamlal Ramchandra*[4]. It has been held that a classification is reasonable if it rests on differences pertinent to the subject in respect of which such classification is made, *Power Manufacturing Company* v. *Saunders*[5]. It cannot be disputed that women as a class are weaker than men. It is familiar knowledge that women still labour under legal disabilities and discrimination in the domain of property law and in other directions. It is also one of the policies underlying the Constitution to afford special protection for women. The third clause in Article 15 declares that the State shall always be competent to make special provision for women and children. It is thus clear that both on principle and on authority the provision in section 488, Criminal Procedure Code, for the award of maintenance to wives abandoned or deserted by their husbands does not in any way contravene Article 14 of the Constitution.

ARAVAMUDHA IYENGAR *v.* RAMASWAMI BHATTAR, (1952) 1 M.L.J. 251.

In so far as this decision holds that a person, male or female, who has not attained the age of majority in Hindu Law, *i.e.*, 16 years cannot validly adopt, it is no mere copybook decision but one laying down a definite test in place of one dependent on the facts of each case, namely, the attainment of the age of discretion by the adopter. Certain dicta in the judgment, relating to the limits of a widow's capacity to adopt, call for critical examination. In reviewing the principles laid down by the Judicial Committee in *Amarendra* v. *Sanatan Singh*[6], and their effect on what had been stated in *Madana Mohan Deo* v. *Purushothama Deo*[7], after stating—— "The full legal capacity to continue the line means continuance of the line in one of two ways, *i.e.*, either by leaving a natural or adopted son, or a widow capable of bringing into existence a son by adoption. The test is to find out whether these conditions existed at the time of the son's death." Satyanarayana Rao, J., went on to add : "If they did not exist, the power did not terminate. If they existed the power came to an end and *in certain circumstances*, e.g., *if the son's widow dies without making an adoption, the mother's power may be revived.* If the object of adoption is the religious one of perpetuating the line with a view to make a permanent arrangement for the administration of the spiritual wants of the deceased, the object is not achieved when the continuance of the line came to a standstill. There must be some power somewhere to continue the line, and, *if the person lower down dies without providing for the continuance of the line, the power of the person higher up revives and continues*". (italics ours). The theory of the revival of the power of the person higher up when the continuance of the line comes to a standstill postulated in the remarks italicised above does not receive any countenance from and in fact runs against the observations of the Privy Council in *Amarendra's case*[6]. The limiting principle formulated by Chandavarkar, J., in *Ramakrishna* v. *Shama Rao*[8], was : "Where a Hindu dies leaving a widow and a son, and that son dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and *can never afterwards be revived.*" The last part of the observation expressly states that the power perishes and repudiates categorically the theory of the revival of the power under any circumstances whatsoever. The principle so stated by Chandavarkar, J., was in terms approved by the Privy Council in *Madana Mohana Deo's case*[7]. There Lord Haldane observed : "Their Lordships are in agreement with the principle laid down in the judgment of the Full Court of Bombay as delivered by the learned Judge, and they are of opinion, on the facts of the present case, the principle must be taken as applying so as to have brought the authority to adopt conferred on Adi-

---

1. A.I.R. 1951 Punjab 93.
2. A.I.R. 1951 Nag. 58.
3. A.I.R. 1951 All. 746 (F.B.).
4. A.I.R. 1951 Cal. 539.
5. 274 U.S. 490.
6. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
7. (1918) 35 M.L.J. 138 : L.R. 45 I.A. 156 ; I.L.R. 41 Mad. 855 (P.C.).
8. (1902) I.L.R. 26 Bom. 526.

konda's widow to an end when Brojo, the son she originally adopted, died after attaining full legal capacity to continue the line either by the birth of a natural born son or by adoption to him of a son by his own widow." It is noteworthy that the power of Adikonda's widow is spoken of as having come to an 'end.' In *Amarendra's case*[1], itself, explaining the phrase "full legal capactity" used by Lord Haldane in his judgment in the earlier case, Sir George Lowndes said : "Their Lordships think that the words "full legal capacity" cannot be dissociated from the r st of the passage cited, and that they cannot be taken as indicating a particular moment in the son's life when the mother's power is extinguished. The qualification that follows then shows that the continuance referred to is a continuance in one of two defined ways, either by the birth of a natural son or by the adoption of a son to him by his own widow and the test is to be whether these conditions existed at the time of the son's death. The passage under consideration is. . . . . clearly intended to be a restatement in a more critical form of the conclusion to which the Bombay High Court had come and which was affirmed in the same sentence only a few lines before, *viz.*, that the power of adoption would be extinguished on the son's death by the survival of either a grandson or the son's widow." Be it noted that the Privy Council once again talks of the power being "extinguished" and once again emphasises that the critical time is the time of the son's death with reference to which only and not with reference to subsequent events the existence of the power falls to be determined. The only reservation made was thus stated : "Whether in order to bring this principle into play the son's widow should herself be clothed with the power of adoption is left open and it is not necessary for their Lordships to consider this in the present case as Bibhudendra died unmarried." On these authorities, it is clear that where at the time of son's death there was a son's widow who could at some time have adopted, the power of the mother comes to an end and is extinguished beyond the possibility of revival. Whether the son's widow subsequently fails to adopt or refuses to adopt or dies without adopting or remarries are events which cannot be relevant to the purpose. For, as recognised by the learned Judge himself in the instant case, the material point of time is the time of the son's death. In *Ramchandra* v. *Muralidhar*[2] one *R* died leaving a widow *G* and a son *S*. Sometime later the son died leaving a widow aged about 11 or 12 years. The latter could not have adopted on her husband's death as she had not then attained her years of discretion. Nevertheless it was held that adoption by *G* will be void. The learned Judges took the view that since at the time of the son's death there was his widow who can adopt to him at some time though not immediately the power of R's widow had been totally extinguished. In *Chanbasappa* v. *Madivalappa*[3], a person had died leaving his wife and an adopted son. Subsequently the latter died leaving two daughters but no widow. It was held that, in the circumstances, the 'power of the adoptive mother of the deceased to adopt again remained unaffected. In Nagpur, the theory of revival has found countenance in cases where the daughter-in-law remarried and thereafter the mother-in-law adopted to her husband, *Bapuji Ramji* v. *Gangaram Madhorao*[4], *Govinda* v. *Shenpad*[5]. In the first of these cases, Stone, C.J., observed : "The real difficulty lies in the question : Does the power revive if the son's widow dies or otherwise becomes incapable of adopting before she (*i.e.*, the son's widow) adopts? We fully bear in mind the warning given by the Judicial Committee in *Raghunadha* v. *Brojo Kishore*[6], that it is the duty of the Court to keep the power (to adopt) strictly within the limits which the law has assigned to it. We contrast this with the warning given in *Amarendra* v. *Sanatan Singh*[1] : "great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man." The difficulty is to find the boundary line. In *Vijaisinghji* v. *Shivasangji*[7] the Judicial Committee observe : "In the present case the natural son *B* with his wife *D* having

1. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
2. A.I.R. 1938 Bom. 20.
3. I.L.R. (1937) Bom. 642.
4. I.L.R. (1941) Nag. 178.
5. I.L.R. (1949) Nag. 416.
6. (1876) L.R. 3 I.A. 164 : I.L.R. 1 Mad. 69 (P.C.).
7. (1935) L.R. 62 I.A. 161 : I.L.R. 59 Bom. 360 (P.C.).

ceased to exist for the purpose of continuing the line in the Ahima family, his mother *C* was entitled to make an adoption to secure that object." " It is, of course, true that *D* there never became a widow and so never attracted the idea that once a widow the grandwidow's power is for ever gone. Can we, however, have a rule which says that if *B* and *D* die together *C's* power which was suspended while either of them lived (was interposed), revives, but if *B* dies on Monday and *D* on Tuesday (a thing which frequently happens in time of plague) *C's* power, which was ended by *D's* becoming a widow for a day does not revive ? The Hindu Law has anomalies but this anomaly would be founded entirely on Judge-made difficulties."[1] The Court held that the grand-widow's power of adoption stood revived if the son's widow contracted a remarriage without having adopted to her deceased husband. The Nagpur view was considered by the Bombay High Court in *Shamrao* v. *Bhimrao*[2] and Chagla, C.J., observed : " In order to determine whether a widow has the power to adopt or not on the death of her son the test that has got to be applied is has that son left a grandson or has that son left a widow. If either of the contingencies is present, then the widow has no longer the power to adopt." Excepting thus for the support afforded by the Nagpur decisions there is practically no warrant for the theory of revival of a widow's power of adoption and in fact the theory is opposed to the law as set out by the Judicial Committee in *Amarendra's case*[3].

PERAMANAYAKAM PILLAI *v.* SIVARAMAN, (1952) 1 M.L.J. 308 (F.B.).

This is a Full Bench decision of importance concerning the rights of a purchaser from a member of a Mitakshara coparcenary. The decisions on the matter reveal different pulls. In legal theory, the alienee steps into the shoes of the alienor and takes the interest conveyed subject to the same limitations and conditions as the alienor. Except through and in the right of the alienor he cannot have any claims against the joint family. The working out of the alienee's equity has, however, caused not a little embarrassment in the logic of the law which had to be gathered from a bewildering array of decisions not all of them harmonious or easy to harmonise. This aspect of the matter was vividly put by the Judges in the instant case. Viswanatha Sastry, J., observed : " the touching refrain of the respondent's argument was ' overrule me if you please, but at least say something logical and consistent with the Mitakshara doctrine'," and replied : " Bluntly, I say, it is not possible to find a logical solution of an illogical problem." The learned Judge recalled the observations of Farran, C.J., in *Gurlingappa* v. *Nandapa*[4]—" The position of the purchaser of the interests of a Hindu coparcener in part or the whole of a joint estate is very anomalous. It is impossible to work out his rights on an exact logical basis "—and the references by Lord Dunedin in *Brij Narain* v. *Mangal Prasad*[5] to the Hindu joint family law as " illogical " and " anomalous." Raghava Rao, J., felt : " True it is that consistency on abstract grounds of logic cannot always prevail in the realm of judge-made law. It may also be that as said by Lord Halsbury once, law is not a logical science. But if the dictum of the learned law lord cannot as appears from *Rangaswami Goundan* v. *Nachiappa Goundan*[6] avail as a source of consolation for presuming an illogical extension of principle in interpreting the existing case-law on a subject, it can hardly be doubted or disputed that only logical applications and extensions should stand encouraged and all illogical applications and extensions of legal principles should be discouraged."

A Full Bench decision of four Judges had held in *Rangaswami* v. *Krishnien*[7] that the share to be awarded to an alienee from a coparcener should be fixed with reference to the coparcenary at the time of the partition. But a Full Bench decision, again of four Judges, had later on in *Chinnu Pillai* v. *Kalimuthu Chetty*[8], declared

1. I.L.R. (1941) Nag. 178 at 198.
2. I.L.R. (1949) Bom. 296.
3. (1933) 65 M.L.J. 203 : L.R. 60 I.A. 242 : I.L.R. 12 Pat. 642 (P.C.).
4. (1896) I.L.R. 21 Bom. 797.
5. (1923) 46 M.L.J. 23 : L.R. 51 I.A. 129 : I.L.R. 46 All. 95 (P.C.).
6. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
7. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
8. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).

that the share was to be computed as on the date of the alienation. In *Muthukumara Sthapathiar* v. *Sivanarayana*[1], Jackson, J., sitting with Mockett, J., sought to effect a reconciliation between the Mitakshara doctrine of absolute refusal of recognition of alienation of joint family property by a coparcener and the rule of equity recognising the right of a purchaser for value, by holding that the fractional share of an alienee from a coparcener stood fixed as on the date of the alienation but there was no hotchpot hooked to it, and that the properties in which the alienee was entitled to share were those existing at the time of the partition. But in *Dharma Rao* v. *Bapanayya*[2], it was ruled that the view in *Chinnu Pillai's case*[3], had become settled law and no question of reconciling it with the earlier Full Bench ruling could arise at all. It was felt by both Viswanatha Sastri and Raghava Rao, JJ., in the instant case, that that decision had not done justice to the nature of the issue involved. But while Viswanatha Sastri, J., would regard the authority of the decision of the Full Bench in *Chinnu Pillai's case*[3] as settled and the matter one of *stare decisis* though if the matter was *res integra* his inclination would be to take views which may be considered " heretical," Raghava Rao, J., was emphatic that there was really no question of *stare decisis*. While Viswanatha Sastri, J., remarked: " The respondent's advocate hopes that the ghost of *Rangaswami* v. *Krishnien*[4], which was buried 40 years ago may walk again, nay, he anticipates a flesh and blood resurrection. All that I say is that such miracles, if they happen, will reduce transactions affecting property to a mere gamble "—Raghava Rao, J., hoped that the conflict between the two Full Bench rulings is one which ought to be resloved in a proper manner in a case in which the question on which the conflict exists actually arises for determination in future, the terms of the reference to the Full Bench in the instant case not warranting the consideration of the question. Be that as it may, it falls to be noted that three learned Judges have taken the view that the decision in *Chinnu Pillai's case*[3], has become a matter of *stare decisis* and is no longer open to further consideration.

Another point which the instant case had to consider was whether in a coparcener's suit for recovery of his share in property alienated by another coparcener impugning the validity of the alienation, if it is found that a portion of the consideration had been applied for binding purposes, he can recover his share without paying his quota of the common burden as a condition precedent. In *Vadivelam* v. *Natesam*[5], the principle to be applied was formulated as follows : " According to accepted equitable principles, in the absence of anything appearing to the contrary, the consideration for the sale must be distributed over the whole of the property sold in proportion to the value of each part . . . . . The valid portion of the consideration as well as the invalid portion must be distributed over each of the half shares of the plaintiff and Chinnappa respectively." In *Venkatapathi* v. *Papiah*[6], it was, however, observed, " In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share." A majority of the Full Bench have held in the instant case in favour of the former view, while Raghava Rao, J., thought that the latter view was the more acceptable.

ANNAGOUDA NATHGOUDA *v.* COURT OF WARDS, SATARA, (1952) 1 M.L.J. 414 (S. C.).

In this case the Superme Court decides a *vexata questio*. The conflict of judicial opinion which had existed as to the applicability of the provisions of the Hindu Law of Inheritance (Amendment) Act, of 1929 to cases of Stridhana succession is resolved and it is declared that the Act is inapplicable to ascertain the heirs to

1. (1932) 64 M.L.J. 66 : I.L.R. 56 Mad. 534.
2. (1941) 1 M.L.J. 15.
3. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
4. (1891) 1 M.L.J. 603 : I.L.R. 14 Mad. 408 (F.B.).
5. (1912) 23 M.L.J. 256 : I.L.R. 37 Mad. 435.
6. (1928) 55 M.L.J. 489 : I.L.R. 51 Mad. 824.

the stridhana property of a maiden. The preamble to the Act is quite clear that the object of the Act was to alter the order in which certain heirs of a Hindu male dying intestate are entitled to succeed to his estate. Again section 1, clause 2 lays down expressly that the "Act applies only to persons who but for the passing of this Act would have been subject to the law of Mitakshara in respect of the provisions herein enacted, and it applies to such persons in respect only of the property of males not held in coparcenary and not disposed of by will." The Act thus operates only in regaard to the separate property of a Hindu male who dies inststate. That the propositus should be a male is a condition precedent. In *Sakuntalabai* v. *Court of Wards*[1], Stone, C.J., and Vivian Bose, J., held that where the subject of enquiry is not who is entitled to a male's estate the Act cannot apply. So the Act cannot be invoked in regard to succession to stridhana property. The Madras High Court took the same view in *Manda Mahalakshmamma* v. *Mantravadi Suryanarayana Sastri*,[2] and *Kuppuswami Asari* v. *Manickasari*[3]. In the latter case it was stated that the rule of succession to stridhana property laid down in the Mitakshara has not been in any way altered by Act II of 1929. In *Talukraj Kuer* v. *Bacha Kuer*[4], in dissenting from the rulings of the Lahore High Court on the point. Manohar Lall, J., observed: "I cannot understand how the succession to the property of a female could be governed by Act II of 1929 which distinctly states that it shall only apply to the succession to the property left by a male." A contrary view was taken in *Mt. Charjo* v. *Dinanath*[5], where it was held that in cases of succession to stridhana in default of heirs to a married woman including her husband it is the husband's heirs on that date that should take and therefore Act II of 1929 will apply. Tek Chand, J., observed: "It is quite true that the Act is very limited in scope. It, in terms, regulates succession only to the separate property of a Hindu male dying in intestacy. It does not purport to alter the law in respect of the devolution of other property or the property of a female . . . . The rule of succession to stridhana as laid down in the Mitakshara is that in the absence of the issue of the female holder, it devolves on her husband, and if he is dead, it descends in the same way as if it had belonged to the husband himself. To ascertain as to who the heirs of the husband are, we must *ex necessitate rei* refer to the law governing succession to the property of the husband in force at the time when succession opened out." A similar view was taken by the Bombay High Court in *Raghunandan* v. *Keshavrao*[6], where the father's sister's son was preferred to the paternal grandfather's brother's son's son as stridhana heir to the property of a maiden. The Lahore High Court followed its previous decision, in *Kehar Singh* v. *Attar Singh*[7]. The Allahabad High Court also followed that view in *Indar Pal Singh* v. *Mt. Humangi Devi*[8]. The Supreme Court has now disapproved of the latter view. It has held that where the enquiry is for the purpose of finding out who the successor to the estate of a female owner is, the operation of Act II of 1929 is excluded by its express terms and for that purpose the Act is to be treated as non-existent. In other words the stridhana heirs are to be ascertained with reference to the general provisions of the Hindu law of inheritance ignoring the statutory heirs who are introduced by the Act.

---

1. I.L.R. (1942) Nag. 629.
2. (1946) 1 M.L.J. 196: I.L.R. (1947) Mad. 23.
3. (1949) 2 M.L.J. 126.
4. (1948) I.L.R. 26 Pat. 150.
5. A.I.R. 1937 Lah. 196.
6. I.L.R. (1939) Bom. 228.
7. A.I.R. 1944 Lah. 442.
8. I.L.R. 1949 All. 816.

ARUNACHALA CHETTIAR *v.* VADLA KOUNDAN, (1952) 1 M.L.J. 400.

This decision deals with a point on which there is not much authority. It holds that where after an execution sale and before its confirmation the judgment-debtor died, a confirmation order without impleading the legal representatives of the judgment-debtor will be a nullity. Order 21, rules 89, 90 and 91 of the Civil Procedure Code provide for the preferring of applications to set aside a sale and rule 92 states that where no application under any of the rules is made or where an application made is disallowed the Court shall make an order confirming the sale and the sale thereupon shall become absolute. Confirmation is thus a condition precedent for the sale to become absolute. Also when once a sale has been held, in the absence of any application to set it aside the Court has no jurisdiction to refuse to confirm it. In other words confirmation is automatic. The title of the purchaser dates only from confirmation. The question still remains whether an order of confirmation can be passed without the presence of the parties who are sought to be bound. The language of sub-clause 3 of rule 92 that no suit to set aside an order made under this rule shall be brought by any person against whom such order is made would suggest that the bar will operate only if the party sought to be affected had notice, and conversely a person who had no notice and against whom therefore the order could not be deemed to have been passed will not be bound by it. In *Kamakhya Dutt Ram* v. *Shyam Lal*[1], a sale of property in execution had taken place in the lifetime of the judgment-debtor and had been confirmed without bringing the deceased's legal representatives on the record of the execution case and without notice to them. It was held by Wazir Hasan, Ag. C.J., and Misra, J., that the confirmation was not on that account invalid. It was observed : "The sale had taken place in the lifetime of the judgment-debtor and there are no provisions in the Civil Procedure Code which require legal representatives of a judgment-debtor who has died after the sale, to be brought on the record for purposes of confirmation. The case may be different if a judgment-debtor dies before the date of the sale and the sale takes place behind the back of his legal representatives." The observation fails to take note of the spirit behind rule 92 (3) of Order 21. In view of it, the position adopted in the case under review seems to be more acceptable.

ABDUL AZEEZ *v.* PATHUMMA BI, (1952) 1 M.L.J. 463.

This decision draws attention to the definite cleavage of judicial opinion which exists in regard to the precise scope of section 2 (*a*) of the Indian Majority Act. Section 3 of the Act lays down that every person domiciled in India shall be deemed to have attained his majority when he shall have completed his age of eighteen years and not before. So till completion of eighteen years a person is a minor. And Order 32, rule 1 of the Civil Procedure Code, provides that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. It follows that a suit by a person who has not completed the age of eighteen years can be instituted only by a next friend. Section 2 (*a*) of the Majority Act has, however, laid down that nothing contained in that Act shall affect the capacity of any person to act in the matter of marriage, dower, divorce and adoption. The question is whether these words can be taken to control the provision in Order 32, rule 1, Civil Procedure Code and dispense with the requirement of a next friend where the suit in question concerns the matters specified in section 2 (*a*). The expression "capacity to act in the matter of marriage" is ambiguous in import and unhappy, *Maung Tun Aung* v. *Ma E Kyi*[2]. It is also not very apt as applied to dower though it is full of meaning as applied to the other three classes, *Abi Dhunimsa Bibi* v. *Mahammad Fathiuddin*[3]. In *Puyikuth Ithayi Umah* v. *Kairhirapokil Mamod*[4], it was pointed out by Turner, C.J. and Tarrant, J., that the words must be taken to refer to the capacity to contract which is limited by

1. A.I.R. 1929 Oudh 235.
2. (1936) I.L.R. 14 Rang. 215 : A.I.R. 1936 Rang. 212 (F.B.).
3. (1917) 35 M.L.J. 468. I.L.R. 41 Mad. 1026.
4. (1881) I.L.R. 3 Mad. 248.

section 11 of the Contract Act and not to the capacity to sue which is purely a question of procedure and regulated by the Civil Procedure Code. In that view it was held that a suit by a Mapilla woman against her husband and her father-in-law for past maintenance, dower and stridhana cannot be brought without being represented by a next friend, though she had attained puberty and was a major according to the Muslim personal law inasmuch as she was a minor under the general law being not even 15 years old. This decision was followed in *Abi Dhunimsa Bibi* v. *Mahammad Fathiuddin*[1], where it was held that a Muslim wife who was a major under her personal law but not under the Majority Act cannot make a valid relinquishment of her dower. It was pointed out by the learned Judges that the object of section 2 (*a*) was to confer a privilege and not to endanger ordinary civil rights and that the ordinary law was intended to take its course in respect of the correlative rights flowing out of marriage, etc., that the word "act" only meant initiate to the religious act or ceremony. In *Maung Tun Aung* v. *Ma E Kyi*[2], it was observed that the words "capacity to act in the matter of marriage" meant capacity to be a party to a valid marriage and related to the acts of the parties by which the status is changed and could not apply to a pre-nuptial agreement to contract a marriage in future. The scope of the expression "capacity to act in the matter of marriage" etc., fell to be examined in *Najmunnissa Begum* v. *Sirajuddin Ahmad Khan*[3], by the Patna High Court and Mohamad Noor, J., observed in the course of his judgment: "The provisions of the section govern only the performance of marriage or effecting of divorce by persons who though not majors according to the Act are so according to their personal law. But once a marriage has been performed and the dower has been settled, the dower becomes a property of the wife like her any other property. The dower is a debt payable to the wife and any transfer of this debt, or foregoing it altogether or any portion of it are not matters in any way connected with marriage and such acts must be governed by the ordinary law of the land." Yet another point favouring a restricted interpretation of the word "act" in section 2 (*a*) of the Majority Act is brought out in the decision of the Lucknow Chief Court in *Usman Ali Khan* v. *Mt. Khatton Banu*[4], where it is observed: "dower and divorce are themselves connected with marriage, and if the words "to act in the matter of marriage" were given the expanded meaning . . . . . then it would only be necessary to say, 'the capacity of any person to act in the following matters, namely, marriage and adoption' . . . . . These words must be construed in a restricted sense and . . . . 'to act in the matter of marriage' means only to enter into the contract of marriage'. The learned Judge concluded by holding that section 2 (*a*) merely relieves a party of some of the consequences of minority, but the party remains a minor none the less, and that being so, the provisions of Order 32, rule 1, Civil Procedure Code, still apply and in respect of the institution of a suit the party will have to act through a next friend only. A different view as to the meaning of the words 'to act in the matter of marriage, *etc.*,' has been taken in decisions of the Bombay, Calcutta, and Allahabad High Courts. In *Bai Shirinbai* v. *Kharshedji*[5], Farran, C.J., observed that what section 2 (*a*) of the Majority Act stated was about 'capacity to act' and not about 'capacity to contract' and hence the former words will take in capacity to sue as well. In *Mozharul Islam* v. *Abdul Ghani Ala*[6], Suhrawardy, J., took the view that 'act in the matter of dower' meant the doing of 'all acts in relation thereto'. And in *Mt. Fatima Khatun* v. *Fazlal Karim Mea*[7], adopting a similar wide construction, Cumming and Mukherji, JJ., held that capacity to act in the matter of divorce will include a capacity in a minor husband to delegate to his wife a power of divorce. So also on similar lines of reasoning, in *Naksetan Bibi* v. *Habibar Rahaman*[8], Akram, J., held that the words 'act in the matter of divorce' are wide enough to include the institution of a suit for dissolution of her marriage

1. (1917) 35 M.L.J. 468: I.L.R. 41 Mad. 1026.
2. (1936) I.L.R. 14 Rang. 215: A.I.R. 1936 Rang. 212 (F.B.).
3. (1937) I.L.R. 17 Pat. 303.
4. (1941) I.L.R. 17 Luck. 572: A.I.R. 1942 Oudh 243.
5. (1896) I.L.R. 22 Bom. 430.
6. A.I.R. 1925 Cal. 322.
7. A.I.R. 1928 Cal. 303: 47 C.L.J. 372.
8. A.I.R. 1948 Cal. 66.

by a minor who under her personal law may have attained the age of majority. In *Qasim Husain* v. *Bibi Kaniz Sakina*[1] the Allahabad High Court held that the settlement of dower as well as its relinquishment will fall within the exceptions contained in section 2. On a review of the different lines of reasoning it looks as if the view taken by the Madras High Court is more acceptable. Words take colour from the setting in which they occur and the context in which they are employed. The Majority Act is essentially concerned with substantive law. In matters of procedure the Civil Procedure Code is exhaustive on the matters with which it deals and there is no saving of personal laws to any extent. Also to give a wide construction to the words " act in the matter of marriage " will make otiose the reference to acting in the matter of dower and divorce. *Prima facie* acting in the matter of marriage means doing everything till the marriage and participating therein. It cannot refer to correlative rights or consequences flowing from it. Again the right of suit is a remedy and not a consequence of marriage.

DEVANUGRAHAM, *In re*, (1952) 1 M.L.J. 550.

This decision is of interest for its statement, that section 403, Criminal Procedure Code, is nothing more than an elaboration of the principle which underlies Article 20 (2) of the Constitution of India, that no citizen should be put in jeopardy of his life or liberty more than once. It is a time-honoured maxim of English common law that a man, whether he has been acquitted or convicted should not be tried again for the same offence. At the same time that law had recognised that if the case were one where the tribunal was *ex facie* wholly unauthorised, and the accusation and the accused plainly *coram non judice* the matter would be entirely different and in such a case the pretended adjudication of the usurping tribunal would appear to be a mere nullity, not merely voidable but void. See *Reg* v. *Justices of Antrim*[2]. In that view it was held that where the conviction of a prisoner was technically a nullity, a second trial was not barred. The plea of *autrefois convict* will be of no avail when the first indictment was invalid and when on that account no judgment could have been given, because the life of the defendant was never before in jeopardy[3]. In *Rex* v. *Bowman*[4] the prisoner had been convicted on a day to which the case had not been adjourned properly and the conviction was on that ground held to be a nullity and not to preclude a fresh trial. In *Rex* v. *Bates*[5], a prisoner had been convicted on an indictment charging him with an offence under section 2 of the Explosive Substances Act, 1883. Section 7 of that Act required the consent of the Attorney-General to the preferment of the indictment and such consent not having been obtained it was held that there was no jurisdiction to try the indictment and the conviction was therefore a nullity. In *Rex* v. *Marsham*: Ex parte *Emmeline Pethick Lawrence*[6] a person had been convicted by the Magistrate of assaulting a police constable in the execution of his duty, but by some inadvertence the constable who was assaulted gave his evidence at the hearing of the charge without being sworn. On the Magistrate's attention being called to this irregularity, he later in the same day reheard the case, all the evidence being given upon oath. The Magistrate again convicted the person. It was held that as the accused had not been in peril at the time of the second hearing the second conviction was good. Lord Alverstone, C.J., observed : " In order to set aside the second conviction the applicant must show that the Magistrate has done something on the previous hearing which either exhausted his jurisdiction to rehear or which made it unjust that the applicant should be put on her trial in regard to the offence charged. In my judgment the Magistrate, finding out that upon the first hearing he had before him evidence which was not admissible and had therefore not heard and determined the case according to law, was entitled in the exercise of his jurisdiction to have the case heard and tried before him on proper evidence ". In India there

1. (1932) I.L.R. 54 All. 806.
2. (1895) 2 Ir. Rep. at p. 636 (per Lord O'Brien, C.J.).
3. Chitty's Criminal Law, 2nd Edn., Vol. I, p. 463.
4. (1834) 6 C. & P. 337 : 172 E.R. 1266.
5. (1911) 1 K.B. 964 (C.C.A.).
6. (1912) 2 K.B. 362.

are two statutory provisions which bear on the matter, namely, section 403 of the Criminal Procedure Code and Article 20 (2) of the Constitution of India. Section 403 states *inter alia* that a person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence. Article 20 (2) of the Constitution provides : " No person shall be prosecuted and punished for the same offence more than once ". In *Basdeo Agarwalla* v. *King-Emperor*[1], the Federal Court had pointed out that a prosecution launched without a valid sanction is a nullity. The position was carried further by the Judicial Committee in *Yusofalli Mulla Noorbhoy* v. *The King*[2], where it was pointed out that the whole basis of section 403 (1), Criminal Procedure Code, is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal and that a Court cannot be competent to hear and determine a prosecution the institution of which is prohibited in the absence of a valid sanction. It was further held that where in a prosecution launched without a sanction as required by law, an order of acquittal is passed, it would not, on the omission of the Government to appeal against it become binding, because the order being a nullity there is nothing to appeal against. It was also laid down that an order of acquittal passed in such a prosecution cannot be pleaded as a bar to a subsequent prosecution on the same facts but after obtaining a proper sanction. The decision is perhaps of larger interest in so far as it considered the scope of section 403 and whether it precludes appeal to the common law rule on the matter. The question whether section 403 constitutes a complete code in India upon the subject of *autrefois acquit* and *autrefois convict* or whether in a proper case the common law can be called in aid to supplement the provisions of the section was left open, but it was stated by the Judicial Committee that to rely apart from the terms of section 403 upon the common law rule that no man should be placed in jeopardy twice, it must be shown that the first trial was before a Court competent to pass a valid order of acquittal or conviction and for this purpose there is no distinction between a conviction and an acquittal. Now Article 20 of the Constitution bars double punishment for the same offence. The language of the Article has given rise to a number of questions. One of these relates to the construction of the words " prosecuted and punished ". If construed in the literal sense, taking the word " and " conjunctively, it would mean that a second trial would not be precluded unless the accused had been not only prosecuted but was also punished as well on a former occasion for the same offence. That would mean that the protection afforded by *autrefois acquit* will not be available. If on the other hand the word " and " is to be interpreted disjunctively the clause will not only include the plea of *autrefois acquit* but would also prevent a fresh prosecution. In *Gopalakrishna Naidu* v. *State of Madhya Pradesh*[3] it is pointed out that the word " and " in Article 20 cannot be read as " or ", that though by construing the Article literally the protection given by the Constitution will not be as extensive as that given by section 403, Criminal Procedure Code, to a person who has been tried for an offence, there is no reason why the literal meaning should be departed from. In the instant case also it is held that the word " and " has certainly been used in a conjunctive and not a disjunctive sense because to hold differently would be reading into the Article something which is not there. As to the argument that in that view Article 20 (2) would not cover other cases known to the existing law either with reference to the permissibility of fresh prosecutions or with reference to the non-maintainability thereof it is pointed out that this is so for the reason that the criminal law of the land " can hereafter be amended in the ordinary way for the purpose of altering the existing law subject to the provision in clause 2 of Article 20 which being one of the fundamental rights cannot be taken away or abridged or contravened." In this view the instant case decides that where an accused is discharged for want o

1. (1945) 1 M.L.J. 369 (F.C.).
2. (1949) 2 M.L.J. 461 : L.R. 76 I.A. 158 (P.C.). See also *P. Banerjee* v. *Bepin Behari*, (1926) 30 C.W.N. 382; *Hori Ram Singh* v. *The Crown*, (1939) F.C.R. 159: (1939) 2 M.L.J. (Supp.) 23 (F.C.) and *Gopalakrishna Naidu* v. *State of Madhya Pradesh*, A.I.R. 1952 Nag. 170.
3. (1952) Nag.L.J. 221: A.I.R. 1952 Nag. 170.

sanction there is no punishment and when a man is punished departmentally there is no prosecution and therefore Article 20 (2) of the Constitution of India does not take away the right to institute a second prosecution when the first is found to be a nullity by reason of want of sanction, a pre-requisite for the maintaining of the prosecution.

OFFICIAL ASSIGNEE *v.* NARAYANA MUDALIAR, (1952) 1 M.L.J. 662.

Competence to contract is covered by section 11 of the Indian Contract Act. It provides that every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. Section 103-A of the Presidency Towns Insolvency Act and section 73 of the Provincial Insolvency Act enumerate the disqualifications arising on insolvency but there is nothing in them to disqualify an insolvent from entering into a contract. In *Morgan* v. *Knight*[1], it was held by Erle, C.J., that a person may become insolvent a second time before he has received his final discharge under the first insolvency. The principle has been followed in *Dossa Gopal* v. *Bhanji*[2]. These decisions suggest that insolvency is not a disqualification precluding a person from contracting and there is nothing in law to prevent an insolvent who has not yet obtained his discharge from borrowing again or making himself liable financially and in that way get himself adjudicated bankrupt on the basis of the debts not covered by the prior insolvency. Consistently with this one finds that in regard to debts incurred after adjudication they are not provable in insolvency and a creditor is remitted to his ordinary remedy at law. Thus a debt incurred on a promissory note executed by the insolvent after the adjudication cannot be proved under section 34 of the Provincial Insolvency Act and the creditor can file a suit for its recovery, *Kallu* v. *Agha Salim*[3], *Hiralal* v. *Tulsi Ram*[4]. In *Sriram* v. *Ram Chunder*[5], it was held that in respect of a debt contracted subsequent to adjudication and prior to discharge, leave of Court was not necessary for its enforcement and that section 28 (2) does not apply. Similarly in *Gustasp Behram Irani* v. *Bhagvandas Sobharam*[6], it was held that the debt or liability would not be provable and section 46 (2) of the Presidency Towns Insolvency Act would not apply if the debtor had become subject to the liability by reason of any obligation incurred after the date of the order of adjudication. The instant decision is in line with these authorities in holding that there is nothing in any of the provisions of the Presidency Towns Insolvency Act which prohibits expressly or impliedly an insolvent from borrowing or entering into contracts giving rise to financial liability after adjudication and prior to discharge and that the liability under the contract so entered can be enforced in appropriate proceedings and that it would be wrong to say that no Court has got any power or jurisdiction to entertain a suit against an insolvent on the basis of a debt incurred by him while an undischarged insolvent.

RAVIPATI SITARAMAYYA, *In re*, (1952) 1 M.L.J. 690.

This decision deals with a point which occurs only rarely but is still of unusual interest. Difference of opinion in referred trials and murder cases involving life and death arises in exceptional cases only. It does however arise. Section 378, Criminal Procedure Code, provides for a resolution of differences of opinions in referred trials on the submission of sentences for confirmation by the High Court. Section 429 applies to references to a third Judge in other cases. It reads : " When the Judges composing the Court of appeal are equally divided in opinion, the case, with their opinion thereon, shall be laid before another Judge of the same Court, and such Judge after such hearing as he thinks fit shall deliver his opinion, and the judgment or order shall follow such opinion." It is clear that both sections 378 and 429 make it mandatory for the judgment or opinion of the Court to follow the opinion of the third Judge. There is, however, a dearth of case-law defining

1. (1864) 15 C.B. (N.S.) 669 : 143 E.R. 947.
2. (1901) I.L.R. 26 Bom. 171.
3. (1925) 89 I.C. 923.
4. A.I.R. 1925 Nag. 77.
5. (1929) I.L.R. 52 All. 439.
6. (1931) I.L.R. 55 Bom. 649.

the scope of the third Judge's method of approach to such a reference. In *Daulat Ram* v. *Emperor*[1], it is said that the case laid before the third Judge is the *complete* case of the prisoner as to whom the Judges are divided in opinion and that it is his duty to consider *all* the points involved before he delivers his opinion upon the case. In *Khetri Bewa* v. *State*[2], it has been suggested that the hearing before the third Judge *need not be a full hearing and then giving an independent opinion*, but that all that is required is that the hearing should only consist of judging the respective merits of the two conflicting opinions of the two learned Judges for the purpose of deciding whether to agree or disagree with any one of them. The instant case deals in particular with the method of approach to be adopted by a third Judge in references under section 378 or section 429 and to the sentence which such Judge could pass. In *Empress* v. *Debi Singh*[3], Mahmood, J., favoured the view that where the difference of opinion related to the weight of evidence as to the propriety of conviction, the opinion of the Judge as to acquittal should generally prevail. And it is stated that in R.T. No. 31 of 1951, the learned third Judge observed : " Where the main question at issue is identity of the assailants. . . . the very fact, that one of the two learned Judges, who had to decide that question was of the view, that the identity of the accused with those assailants had not been established beyond all reasonable doubt, should suffice to establish the basis for such a reasonable doubt the benefit of which, of course, the accused have to get. In my opinion, a third Judge to whom the question is referred under section 378. . . . . should normally accept that finding, unless the compelling necessity of conclusive evidence on record drives him to deny the existence of any basis for a reasonable doubt." This line of approach would to some extent affect the complete freedom which seems to be available to the third Judge on the language, for instance, of section 429 to form his opinion. It would give as it were a sort of weightage in effect to the opinion of the Judge who had favoured an acquittal. That it ought not to be so seems to be the view of Edge, C.J., in *Empress* v. *Bundu and another*[4]. There the learned Chief Justice observed : " When Judges unfortunately differ in opinion, I conceive it to be the duty of each Judge to express and act upon the opinion which he himself has definitely arrived at. Before so expressing himself he should of course carefully weigh the reasons adduced by his brother Judge for forming a different opinion ; but if those reasons do not commend themselves to his mind, he must not in the exercise of his duty, allow the fact that his brother Judge has arrived at a different conclusion, to influence his conduct whether his view—to take a criminal case—be in favour of a conviction or of an acquittal. There would be no meaning in sections 378 and 429 if it was intended that the opinion of one Judge in favour of an acquittal should prevail." The approach to be made by the third Judge on a reference consequent on difference of opinion between the two appellate Judges has been considered in *Md. Illias Mistri* v. *The King*[5], where it was stated : " There can be no doubt upon the wording of the section (429) that the whole case is now before me, which means not only that I am at liberty, but that it is also my duty to examine the whole of the evidence for myself and come to a final judgment. It is not a case of merely weighing the opinion of one learned Judge against that of the other deciding which of these opinions I should accept." Even as in a first appeal the entire case is liable to be examined so also the third Judge has the whole case before him. There is much to commend this view. As to the sentence which the third Judge may on such reference pass, there are conflicting opinions set out in the instant judgment. One of the learned Judges felt that the third Judge cannot pass a death sentence in a case where the Judge favouring conviction, thinks a sentence of transportation will be adequate and appropriate while the other Judge favoured acquittal and that the Bench referring the case can always express their opinion that in the event of the conviction being confirmed a sentence of transportation is the appropriate one in which case the third Judge would be bound by the opinion. The other learned

1. A.I.R. 1947 Lah. 244.
2. A.I.R. 1952 Orissa 37.
3. (1880) All.W.N. 287.
4. (1887) All.W.N. 137.
5. I.L.R. (1949) 1 Cal. 43.

Judge took the view that no such fetter can be imposed on the third Judge and that he is at liberty to express and act upon the opinion he arrives at and can pass a sentence of death even though one Judge has favoured an acquittal and the other has awarded a sentence of transportation for life in convicting the accused. In *Ramaswami Goundan* v. *Emperor*[1], the Sessions Judge had convicted the accused on a charge of murder and sentenced him to death. On appeal, Subrahmanya Ayyar, Offg. C.J., confirmed the conviction and commuted the sentence to transportation for life. Boddam, J., set aside the conviction and sentence and acquitted the accused. On a reference under sections 378 and 429, Criminal Procedure Code, Bhashyam Ayyangar, J., confirmed the sentence passed by the Sessions Judge and dismissed the appeal. There is no doubt no advertence to the question whether the third Judge on reference was competent to pass any sentence that he liked. The fact, however, remains that he exercised such a power and there is nothing in the statutory provisions against such exercise. Also if the entire case is before the third Judge on the reference there is no reason to hold that he cannot have a discretion in the matter of passing the sentence.

NAGI REDDI *v.* DURAIRAJA NAIDU, (1952) 1 M.L.J. 746 (S.C.).

This is an instructive decision relating to surrender by a Hindu widow. It is now bootless to inquire what foundation is afforded by the texts of Hindu law regarding the principles of surrender. For in any case it is settled by long practice and confirmed by decisions that a Hindu widow can renounce in favour of the nearest reversioner if there be only one or of all the reversioners nearest in degree if more than one at the moment, *Rangaswami Goundan* v. *Nachiappa Goundan*[2]. The basis of it is the effacement of the widow's interest and not the *ex facie* transfer by which such effacement is brought about, *Sitanna* v. *Viranna*[3]. Being an effacement or renunciation by her, it follows that the surrender can only be in favour of the nearest reversioner or reversioners. No surrender and accelaration can possibly be made in favour of anybody except the next heir of the husband. In favour of a stranger there can be an act of transfer but not one of renunciation. The position cannot be different where the surrender purports to be made in favour of the next heir and another. In such a case admittedly what passes to the next heir is not the totality of the interest of the widow, the entire estate of the husband, but something less. In *Abhoya Pada Trivedi* v. *Ram Kinkar Trivedi*[4], the surrender had been made by a widow in favour of her husband's brother and three sons of another brother of the husband. It was argued that it cannot be considered a surrender in favour of the next reversioner but was really partly a surrender and partly an alienation. Cumming, J., rejected the argument and said : " I do not think there is much substance in this contention. It is a question more of form than of substance." In *Mt. Jagrani* v. *Gaya*[5], a widow had executed a deed of gift of her husband's estate in favour of her daughter and a stranger, a son of her daughter's husband's brother. It was held that it was not a valid surrender. It is, however, interesting to note that Rachhpal Singh, J., in distinguishing the previous case spoke of it as a case of surrender to the nearest reversioners and others who also were reversioners and therefore was valid. Niamatulla, J., the other learned Judge, however, observed : " but if the learned Judge meant . . . . that in every case where a transfer is made in favour of the next heir and a third person jointly, the transaction amounts to a surrender in favour of the presumptive heir and an assignment by the latter of half to the other, I regret, I am unable to endorse the proposition of law." In *Bala* v. *Baya*[6], a Hindu widow made a gift of the entire estate of her husband in favour of her daughter and her husband jointly, the daughter being the next heir at the time. It was held it was not a valid surrender inasmuch as it was not a gift in favour of the daughter alone. The facts of the case were similar to those of the Bombay case and the Supreme Court held that the surrender in those circumstances was invalid. The instant case is of importance really in regard to

1. (1903) 14 M.L.J. 226 : I.L.R. 27 Mad. 271.
2. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
3. (1934) 67 M.L.J. 20 : L.R. 61 I.A. 200 : I.L.R. 57 Mad. 749 (P.C.).
4. A.I.R. 1926 Cal. 228.
5. A.I.R. 1933 All. 856.
6. (1935) I.L.R. 60 Bom. 211.

another aspect of the law of surrender. It had been argued that the transaction can be looked upon as a surrender by the widow in favour of her daughter, and a conveyance by the latter of half of the estate in favour of her husband. The basis for the argument was sought in the view taken in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[1], where Sir Richard Garth, C.J., had observed that if it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make. More as a matter of *stare decisis* than for any other reason it had been held that such a transaction if it related to the entire estate could be supported on the theory of surrender. In *Debi Prosad Chowdhury* v. *Golap Bhagat*[2], Sir Lawrence Jenkins, C.J., observed apropos of *Nobokishore's case*[1]: "The road to the decision in *Nobokishore's case*[1] was not without its difficulties, but the learned Judges felt it had to be travelled that *titles* might be quieted." Certain observations of the Judicial Committee in the *Gounden case*[3] lent countenance to the view that the position reached in *Nobokishore's case*[1] was not open to review hereafter. Lord Dunedin had said: "The surrender, once exercised in favour of the nearest reversioner or reversioners, the estate became *his* or theirs, and it was an obvious extension of this doctrine to hold that inasmuch as he or they were in title to convey to a third party, it came to the same thing if the conveyance was made by the widow with his or their consent. This was decided to be possible by *Nobokishore's case*[1]. The judgment went upon the principle of surrender and it might do so for the surrender there was of the whole estate." That the matter is not so concluded seems clear from the observations of the Privy Council in *Narayanaswami Aiyar* v. *Rama Ayyar*[4]. There one Thayammal whose two daughters Thailammal and Lakshmiammal were the nearest reversioners had executed deeds by which her husband's estate was passed to remoter persons. It was found that the daughters had not consented to the transaction. It was observed by the Privy Council: "It was, however, argued . . . . . that the surrender by the widow was valid because the daughters Thailammal and Lakshmiammal consented to the transactions carried out by the deeds of July, 1867, so as to efface their own interests and that consequently not only the interest of the widow, but also the interests of her daughters in the property were effaced. Their Lordships are relieved from the necessity of expressing any opinion on the important question of law involved in this contention in view of their above-mentioned conclusion that it was not proved that the daughters . . . . . did in fact consent or acquiesce in the said transactions". It is really difficult to see how an alienation otherwise unauthorised can acquire sanctity by the blessings of a person who himself has no right in the property but is merely an expectant heir and which expectation may never come to fruition. Also it seems strange that mere consent should be regarded as equivalent to a conveyance by the reversioner in favour of a stranger, particularly when the widow never gave the property to the next heir but gave it directly to the stranger. Again it is quite possible that the widow would never have given it to him even if he wanted it and it is not even certain that if he got it, he would ever have sold it, *Ali Mohammad* v. *Mt. Mughlani*[5]. It is difficult to say in the first place why a surrender should be presumed at all when the property is given directly to the stranger. Further if the actual reversioner at the time of the widow's death is a person different from the one who gave consent there seems to be no justification for holding that he would be bound by the consent expressed by a person who had nothing but a chance of succession at that time and which chance did not materialise at all. In view of these and other weaknesses inherent in the position indicated in *Nobokishore's case*[1] the Supreme Court in the instant case observed: "It may be necessary for this Court at some time or other to reconsider the whole law on this subject. It seems probable that the Privy Council did not subject the decision in *Nobokishore's case*[1] to a critical examination from the point of view of the doctrine of surrender, as the transfer in that case was upheld on the ground of legal necessity as well."

---

1. (1884) I.L.R. 10 Cal. 1102 (F.B.).
2. (1913) I.L.R. 40 Cal. 728 (F.B.).
3. (1918) 36 M.L.J. 493 : L.R. 46 I.A. 72 : I.L.R. 42 Mad. 523 (P.C.).
4. (1930) L.R. 57 I.A. 305 : I.L.R. 53 Mad. 652 (P.C.).
5. A.I.R. 1946 Lah. 180 (F.B.).

APPALANARASIMHALU *v.* BOARD OF REVENUE, MADRAS, (1952) 1 M.L.J. 641.

Section 57 (1) of the Stamp Act gives power to the Chief Controlling Revenue Authority to state any case referred to it under section 56 (2) or otherwise coming to its notice and refer such case to the High Court. The scope of the power as well as the duty which it engenders are matters of considerable interest. In *Julius* v. *Lord Bishop of Oxford*[1], with reference to the provision in section 3 of the Church Discipline Act, 3 and 4 Vic., c. 86, that it shall be lawful for the Bishop of the Diocese within which the offence was alleged to have been committed to issue a commission for the purpose of inquiry, Lord Cairns, L.C., observed : " They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so." In *Alcock Ashdown & Co.* v. *Chief Revenue Authority, Bombay*[2], on the wording of section 51 of the Indian Income-tax Act, stating that the Chief Revenue Authority may state a case, after recognising that " when a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it," Lord Phillimore went on to observe : " In their Lordships' view, always supposing there is a serious point of law to be considered there does lie a duty upon the Chief Revenue Authority to state a case for the opinion of the Court and if he does not appreciate that there is such a serious point it is in the power of the Court to control him and to order him to state a case." The Bombay High Court had to consider the scope of section 57 of the Stamp Act in *The Chief Controlling Revenue Authority, Bombay* v. *Maharashtra Sugar Mills, Ltd.*[3], and it was pointed out that it would be no safeguard at all if section 57 (1) were to be interpreted as giving a power to the Revenue Authority without any duty being coupled with it and therefore the subject must be held definitely to have a right given to it in certain cases to have a case referred to the High Court and that right makes it obligatory upon the Revenue Authority to exercise the power given to it for the benefit of the subject. It was held that when a serious question of law is involved there is a duty cast upon the Chief Controlling Revenue Authority to state a case under section 57 (1) and the subject has a right to have such a case determined by the High Court and that duty can be enforced by section 45 of the Specific Relief Act. On appeal, the Supreme Court of India has in *Chief Controlling Revenue Authority* v. *Maharashtra Sugar Mills, Ltd.*[4], affirmed the judgment of the High Court and stated that the power contained in section 57 is in the nature of an obligation or is coupled with an obligation and can be demanded to be used also by the parties affected by the assessment of the stamp duty. Kania, C.J., observed : " It is coupled with a duty cast on him as a public officer to do the right thing and when an important and intricate question of law in respect of the construction of a document arises, as a public servant it is his duty to make the reference." In the instant case, the principle thus enunciated has been followed and it was held that if the public servant omitted to do so, the Court can issue a mandamus to direct him to discharge that duty and make a reference.

VEERAPPA PILLAI *v.* RAMAN AND RAMAN, LTD., (1952) 1 M.L.J. 806 (S.C.); PARRY AND CO. *v.* COMMERCIAL EMPLOYEES ASSOCIATION, (1952) 1 M.L.J. 813 (S.C.)

Both these are decisions of the Supreme Court relating to the issue of *certiorari*. The former case arose in relation to the Motor Vehicles Act—Act IV of 1939, and the latter with reference to the Madras Shops and Establishments Act—Act XXXVI of 1947. In both cases the issue of the writ by the High Court was set aside. Both decisions draw pointed attention to the fact that however extensive the jurisdiction of the High Court under Article 226 of the Constitution may be, it is not so wide or large as to enable the High Court to convert itself into a Court of

---

1. (1880) 5 A.C. 214, 222.
2. (1923) 45 M.L.J. 592 : L.R. 50 I.A. 227 : I.L.R. 47 Bom. 742 (P.C.).
3. I.L.R. (1948) Bom. 672.
4. (1950) 2 M.L.J. 564 (S.C.).

appeal and examine for itself the correctness of the decisions impugned. In the first case it is also stated that where the remedies for the redress of grievances or the correction of errors are found in the statute itself, it is to those remedies that resort must generally be had and not to *certiorari*. The second case suggests that in spite of statutory provision laying down that the decision of the Special Authority or Tribunal (for instance, the Labour Commissioner) would be final and incapable of being challenged in any Court of law, the superior Court is not absolutely deprived of the power to issue a writ of *certiorari*, although it can do so only on the ground of either a manifest defect of jurisdiction in the Tribunal that made the order or of a manifest fraud in the party procuring it. An ambitious claim for *certiorari* is to be seen in the language of Holt, C.J., in *Viner's Abridgment*[1] that "there is no Court or jurisdiction which can withstand a *certiorari*." It had also been said that the King's Bench will never "allow a nullity to remain upon the record whatever be the power or competence of the King's Bench Court as regards the question in issue," Re *Heaphy*[2], *Lalor* v. *Bland*[3]. These were however decisions of the Irish Courts. The English practice is that the writ will issue only in respect of matters which are within the Court's jurisdiction.[4] Even if decisions of special tribunals may have been declared to be final and *certiorari* taken away *certiorari* may be granted where the inferior Court has acted without or in excess of jurisdiction, for, in such a case the Court has not brought itself within the terms of the statute taking away *certiorari*, *Colonial Bank of Australia* v. *Willan*[5]. The enunciation mentioning the circumstances under which the writ will be granted, generally quoted in this connection is that of Atkin, L.J., in *Rex* v. *Electricity Commissioners*[6]. The Lord Justice laid down : "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." And in *Rex* v. *Chancellor of St. Edmondsbury and Ipswich Diocese*[7], Evershed, L.J., observed : "Whenever, as a result of the establishment by Act of Parliament of some new jurisdiction or some new tribunal exercising judicial or quasi-judicial functions, it is necessary to consider the application thereto of well-established forms of remedy, the Court will not be afraid to extend the older principles to new circumstances." This is a valuable statement supporting the trend reflected in the second of the instant decisions.

MURUGAPPA CHETTI & SONS *v.* COMMISSIONER OF INCOME-TAX, MADRAS, (1952) 2 M.L.J. 17.

It is familiar knowledge that there is nothing precluding the *karta* or manager of a joint Hindu family from holding offices and positions of a remunerative character. In such cases, the question often arises whether the income earned will appertain to the joint family of which he is the *karta* or will be his self-acquired or separate property. The yardstick applied in all such cases is to find out from the facts of each case whether the acquisition is referable to any detriment to the paternal estate. In regard to the case of a manager holding the office of managing agent of a company, Chagla, J., remarked : "To my mind it is impossible to contend that the mere office of managing agents without any benefits attaching to it can never be deemed to be joint family property," *Ramchandra* v. *Chinubhai*[8]. In *Commissioner of Income-tax, Bihar and Orissa* v. *Darsanram*[9], two undivided families represented by their respective managers owned a limited company and the managers received certain sums as directors' fees. It was held for purposes of section 3 of the Income-tax Act that the amounts must be regarded as their personal earnings and not as the income of the joint family, inasmuch as joint family property had not been spent in earning the remuneration by way of directors' fees. *Haridas*

1. Vol. IV, p. 336.
2. (1888) 22 L.R. Ir. 500.
3. (1858) 8 Ir. C.L.R. 115.
4. Halsbury, Laws of England, 2nd edn., Vol. IX, p. 854.
5. (1874) L.R 5 P.C. 417.
6. (1924) 1 K.B. 204 (C.A.).
7. (1928) 1 K.B. 195, 222-223 (C.A.).
8. A.I.R. 1944 Bom. 76, 79.
9. A.I.R. 1946 Pat. 50.

Purushottam, In re[1], illustrates when the income could be regarded as joint family property. There an assessee was partner in a Mill as *karta* of a joint family consisting of himself and his sons, the other partners being his two divided brothers. In 1918 these three with five others purchased a Mill in partnership, the assessee being partner as *karta* of his family. In 1920, the eight partners promoted a limited company which took over the Mill of the 1918 partnership. Under an agreement between the partnership and the new company, the eight partners who sold the Mill to the company became the Managing Agents of the new company. The assessee got the opportunity of being appointed a Managing Agent directly from the sale of the Mill which in part was the joint family property of himself and his sons. In the circumstances, it was held by Stone, C.J. and Chagla, J., that the assessee's share of the income from the Managing Agency must be treated as income of the family. In *Commissioner of Income-tax, Madras* v. *Sankaralinga Ayyar*[2], the shares necessary for qualifying for the managing directorship of a concern were acquired by the *karta* from out of the family funds. But inasmuch as it cannot be said that his appointment was on behalf of and for the benefit of the family and inasmuch as the remuneration earned was in consideration of the services which he rendered to the company, it was held that the remuneration will ordinarily be self-acquisition only unless thrown into the common stock. It was observed that so long as there is no detriment to the family property and so long as the corpus or the income of the family property is not utilised or spent in making the acquisition or in earning the remuneration, the latter cannot be treated as joint family property. The instant case is in line with these authorities in holding that the commission earned under a managing agency agreement by the *karta* of a coparcenary would *prima facie* be his individual property unless it is shown that the rights were acquired by utilising joint family funds.

MARIYAMUMMA *v.* UMMAR KUTTI, (1952) 2 M.L.J. 43.

This decision deals with an interesting question under section 13 of the Madras Survey and Boundaries Act of 1923. Section 13 provides for the notification in the District Gazette of the completion of the survey and provides that "unless the survey so notified is modified by a decree of the civil Court under the provisions of section 14 the record of the survey shall be conclusive proof that the boundaries determined and recorded therein have been correctly determined and recorded." Different views have been taken in regard to the scope of the finality postulated. In *Nagaratnam Pillai* v. *Guruswami Pilai*[3], Byers, J., held that it is only the boundaries determined and recorded that are conclusively established and the finality refers therefore to the boundaries and not to the question of title. The learned Judge said: "The meaning of these words is self-evident. . . . . The contention of the learned Advocate-General that the bar imposed by section 14 of the new Act applies only to the correctness of the boundaries and not to questions of title must be upheld." A somewhat different view was taken by Abdur Rahman, J., in *Ponnuswami* v. *Mariappa Servai*[4]. He observed: "It was contended . . . that the Survey Officer might have had the power to determine the boundary . . . or recording it as undisputed, but he had no power to determine the question of title of the plot in dispute. The contention is not sound in my opinion. It may be that if the dispute merely related to the title of the plot in dispute as distinguished from a dispute as to its boundary, the order passed by the Survey Officer would not have become final. But when as a result of the Survey Officer's order or of the decision of the appellate authority from that order, the limit of a person's boundary has been determined and recorded the question of title as to the area falling within that boundary must be in the absence of any claim as to acquisition of title by prescription or otherwise held to have been equally determined as being implicit in that order or decision and would not be liable to attack after the expiry of the period provided under section 14 of the Act for the institution of a civil suit." Thus if the lands are not adjoining each other and if there is no dispute

1. A.I.R. 1947 Bom. 299.
2. (1950) 1 M.L.J. 443.
3. (1943) 2 M.L.J. 311.
4. A.I.R. 1943 Mad. 420.

with reference to the boundaries a pure question of title cannot be decided by the Survey Officer and if for the purpose of the survey he regards one person as the owner that will not be conclusive. But if the two properties adjoin and in the course of survey whether there is boundary dispute or not it becomes necessary to decide the exact boundary line between the two plots such determination involves with it as a matter of logic determination of the title to the disputed portion as well. The matter had also been considered by the Orissa High Court in *Narayana Deo* v. *Venkatappa Rao*[1], where it was held that whether the decision of the survey officer in determining boundaries will affect title to a piece of land lying within the said boundaries would depend very much on the nature of the claim to that land and the questions that fell for decision before him. Thus if the claim to the land were based on the ground that it lay within a particular village belonging to one of the parties and the Survey Officer while determining the boundaries holds that the plot lies in the adjacent village, such determination of the boundary unless set aside by a suit under section 14 will undoubtedly conclude title in respect of the plot. But if the rival claim has nothing to do with the question as to whether the plot lies within the boundary of one village or of the adjacent village it will not entail that result. The view of Abdur Rahman, J., as well as that of the Orissa High Court have found approval in *Krishna Chandra* v. *Ramamurthy Pantulu*[2]. Rajamannar, C.J., said : "We agree with Abdur Rahman, J., that there may be a case in which the result of a boundary fixed by the Survey Officer becoming conclusive under section 13 of the Act may have an indirect effect on the title to an area covered by the boundary. To take a concrete example, if adjacent survey numbers say 1 and 2, belong to two persons *A* and *B* and either after dispute or without any dispute the Survey Officer proceeds to fix the boundary between these two survey numbers 1 and 2, and on doing so he marks the boundary in such a way as to include a portion of what is really survey number 2 as part of survey number 1, it may be that after the lapse of the period specified in section 14 of the Act, *B* the owner of survey number 2 would be precluded from challenging the correctness of the boundary and would virtually lose his title to that part of the survey number belonging to him which had been wrongly included in survey number 1 on account of the wrong boundary fixed by the Survey Officer. It is obvious, however, that strictly speaking, this is not because the Survey Officer has any jurisdiction to determine a question of title. It is the indirect result of fixing the boundary." The learned Chief Justice added that in their opinion a correct construction had been placed on sections 13 and 14 by the Orissa High Court. In the case under notice, a survey officer after demarcating the boundary of a plot of land bearing a survey number gave notice to the registered holders of that number and when they found that more land than what they were legitimately entitled to had been included in that number they kept quiet. The party whose land had been wrongly included in that number was not given any notice. It was held, in the circumstances that the Survey Officer's decision will not be binding upon the real owners of the excess land included in the survey number.

VENKATA RAO *v.* VENKATARATNAM, (1952) 2 M.L.J. 60.

Statutory provision regarding relief to be given in the case of usurious transactions of loan of money is contained in section 3, sub-section 1 of the Usurious Loans Act of 1918. Under that section where the Court has reason to believe (*a*) that the interest is excessive and (*b*) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise any of the powers specified therein. For the section to apply two conditions should be satisfied. The Court should find (i) the interest excessive and (ii) the transaction substantially unfair. Either circumstance alone will not suffice. In Madras, the provision has been amended by Act VIII of 1937. Under the amended provision the Court if it has reason to believe that the transaction was as between the parties thereto substantially unfair can exercise any of the powers mentioned there. Whereas under the Central enactment the conjunction of two factors was necessary to give relief, under the State legislation the second requirement alone was needed. The

1. I.L.R. (1949) Cuttack 165. 2. (1951) 2 M.L.J. 325.

amending Act also inserted a new Explanation 1 to the effect: "If the interest is excessive, the Court shall presume that the transaction was substantially unfair; but such presumption may be rebutted by proof of special circumstances justifying the rate of interest." Thus it comes to this. If the interest is excessive the Court shall presume the transaction to be substantially unfair and give relief. Whether the interest in any case is excessive or not is necessarily a question of fact. From the decided cases a few rules affording guidance have emerged. In *Samuel* v. *Newbould*[1], apropos of the word 'excessive,' Lord James observed: "What amounts to excessive interest is to be determined by the tribunal in each case; the question of risk being a material matter for consideration . . . . The word 'excessive' applied to interest is, of course, a relative and elastic term impossible of absolute definition. But we know the general rule of interest in commercial transactions and in loans on perfect security . . . . But in respect of ordinary loans deviations from these guides, dependent upon the facts of each case, must doubtless be expected and ought to be allowed. But such deviation must be reasonable in relation to facts." In In re *a Debtor*[2], Cozens-Hardy, L.J., remarked that in considering whether the interest is excessive the Court must have regard to all the circumstances of the case. In *Carringtons, Ltd.* v. *Smith*[3], Channell, J., stated: "There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality a Judge cannot, I think, do better than adopt what they themselves have agreed on, although of course, when that is not the case he has to adjudge what is reasonable as best as he can under the circumstances." This statement was approved by the Court of Appeal in *Reading Trust, Ltd.* v. *Spero*[4]. In the case of secured loans the rate of interest is regarded as excessive if it be extraordinary, such as higher than 10 per cent. or even less, *Part* v. *Bond*[5]. In *Chethambaram Chettiar* v. *Loo Thom Poo*[6], the Privy Council had to consider the question with reference to the Usurious Loans Act—Act IV of 1937 of Malaya. That provision corresponded to section 3 (1) of the Indian Act of 1918. It was held that the charge of 24 per cent. interest per annum should be deemed to be unfair and it was scaled down to 15 per cent. The transaction was one by way of secured debt. In the United Provinces, the Central Act has been amended by the State Act XXIII of 1934 and the Legislature itself has laid down principles on which the excessiveness or otherwise of the interest is to be judged. And it was held in *Lala Ram Narain* v. *Thakur Chandrika Prasad*[7], that all cases coming before the Courts after the passing of the local amending Act must be decided according to the principles laid in the Act. In *Gajraj Singh* v. *Muhammad Mushtaq Ali*[8], which was a case under the Central Act of 1918, 12 per cent. simple interest was held to be a fair, proper and reasonable rate inasmuch as the mortgagor had given ample security for the loan and there were no incumbrances on the property. In *Narasimham* v. *Premayya*[9], it was observed by Horwill, J.: "This Court has frequently held that 9 per cent. is a very liberal remuneration for a secured debt. One has to remember that the times have changed a great deal since some of the decisions relied on were made and rates of interest are now very much lower than what they were a decade or two ago. I am certainly not prepared to say that a creditor suffers hardship because he gets no more than 9 per cent. simple interest on a secured debt." The decision in *Venkataraju* v. *Venkataramana*[10], held that where a mortgage of the year 1922 had stipulated for compound interest at 9 per cent. per annum it was not excessive. It is of interest to note that where a father in a joint Hindu family had made a mortgage of ancestral property carrying compound interest at 36 per cent. per annum with quarterly rests, in *Ram Bhujwan Prasad Singh* v. *Nathu Ram*[11], the Judicial Committee reduced it to simple interest at 1 per cent. per mensem. The nature of interest in the case of simple loans fell to be considered by the Privy Council in *Narain Das* v. *Abinash Chandra*[12], where with reference to an interest of 12 per cent. per annum allowed by the lower Court, Lord Buckmaster

1. (1906) A.C. 461, 473, 475.
2. (1903) 1 K.B. 705, 711 (C.A.).
3. (1906) 1 K.B. 79, 91.
4. (1930) 1 K.B. 492 (C.A.).
5. (1903) 93 L.T. 49.
6. (1940) 1 M.L.J. 68 (P.C.).
7. (1938) I.L.R. 14 Luck. 49.
8. (1933) I.L.R. 56 All. 263.
9. (1945) 1 M.L.J. 219.
10. (1951) 2 M.L.J. 84.
11. (1922) 44 M.L.J. 615 : L.R. 50 I.A. 14 : I.L.R. 2 Pat. 285 (P.C.).
12. (1922) 44 M.L.J. 728 (P.C.).

said: "The rate is 12 per cent. It appears according to our notions in this country, a high rate of interest, but that has nothing whatever to do with the matter which their Lordships have to consider. It may very well be that having regard to the local conditions in India it is a very proper and reasonable rate to impose, and their Lordships see no reason whatever why any alteration should be made as to the amount." In a case under the Usurious Loans Act of 1918, it was considered in *Ziaul Rahman* v. *Mt. Ganga Dei*[1], that *prima facie* and in the absence of special circumstances 12 per cent. per annum will be a fair and proper rate of interest. In the United Provinces where the amending Act of 1934 had fixed limits within which the Courts can exercise discretion in *Sarsuit Prasad* v. *Lala Baijnath Singh*[2], the learned Judges observed: "We are to be guided by the law as it stands in these provinces at present. The United Provinces Act XXIII of 1934 has fixed limits within which a Court has discretion to hold whether a certain rate of interest is excessive or not. Proviso 3 added by the local Act to section 3 (2) (*b*), Usurious Loans Act of 1918, provides that in the case of unsecured debts, the Court shall deem the interest excessive if the rate exceeds 24 per cent. per annum and proviso 5 lays down that if the rate does not exceed 9 per cent. per annum, the Court shall not deem it to be excessive. If therefore the stipulated rate ranges between 9 per cent. and 24 per cent. the Court has discretion, of course with due regard to all the circumstances, to hold that it is excessive." In *Sevugan Chettiar* v. *Chinnaswami Chettiar*[3], where the note carried interest at 24 per cent., interest at 12 per cent. per annum was awarded. The points that emerge from these decisions are: (i) the term 'excessive' does not admit of being defined absolutely; (ii) whether interest is excessive in any case must be determined with reference to all the circumstances of the case; (iii) the risk involved, the parties having been on reasonable terms of equality, the nature of the times as well as the locality of the debt will be relevant in this behalf; and (iv) in the case of secured debts the rate of interest is excessive if extraordinary, that is, if more than 9 per cent. normally, whereas in the case of simple loans 12 per cent. per annum will be a fair and proper rate. The instant case has taken the view that 12 per cent. simple interest is a proper rate.

VENKATAPERUMAL NAIDU *v.* RATHNASABAPATHI CHETTIAR, (1952) 2 M.L.J. 241.

In regard to the nature of the lien of an unpaid vendor of land different views have been held. While the Madras High Court has been guided by the language of section 55 of the Transfer of Property Act, the Allahabad and Calcutta High Courts have permitted equitable considerations to come in. In *Subrahmanya Ayyar* v. *Poovan*[4], a sale deed had been executed in the plaintiff's favour more than seven years before suit but the purchase money had not been paid and the vendors had continued in possession of the land. In a suit by the plaintiff for a declaration of his right and recovery of possession, it was held that the unpaid vendor's charge on the property sold for the purchase money was a lien which will give him the right to retain possession till the purchase money was paid and the lien was extinguished by such payment. The same view was taken in *Rama Ayyar* v. *Vanamamalai Ayyar*[5]. This conclusion was held to be wrong in *Velayutha Chetti* v. *Govindasami Naicken*[6], where it was pointed out that the unpaid vendor had only a right to retain the title deeds under section 55 (3) and to a charge for the unpaid purchase money under section 55 (4) (*b*) while the vendee was entitled to possession under section 55 (1) (*f*), and, consequently, the vendor cannot retain possession of the property sold against the vendee. When the case was reheard later due to the appellant being dead at the time of the first hearing, the learned Judges laid down[7], that it is not competent to the Courts in a suit for possession by the vendee to pass a decree conditional on the vendee paying the balance of the purchase money and that the provisions of the statute cannot be controlled by equities in favour of the vendor. This view has since then been consistently followed in Madras, *Krishnamma*

---

1. A.I.R. 1936 All. 323.
2. (1939) I.L.R. 14 Luck. 464.
3. (1950) 1 M.L.J. 181.
4. (1902) I.L.R. 27 Mad. 28.
5. (1914) 27 I.C. 336.
6. (1907) 17 M.L.J. 400: I.L.R. 30 Mad, 524.
7. (1911) I.L.R. 34 Mad. 543.

v. *Kotipalli Mali*[1], *Poomalai Padayachi* v. *Annamalai Padayachi*[2]. In the last case Somayya, J., held that a vendee who has not paid the purchase money for the lands bought by him is entitled to a decree against the vendor for possession of such lands and the Court cannot make the decree conditional on payment of the purchase money, nor can it decree payment of the price to the defendant in the vendee's suit. In *Baij Nath Singh* v. *Paltu*[3], the Allahabad High Court has held in favour of such a conditional decree being passed. And in *Nilmadhab* v. *Hara Proshad*[4], the Calcutta High Court has held that where the vendor has a lien for the unpaid balance of the purchase money the right of the purchaser to obtain possession under section 55 (1) (*f*) and the right of the vendor to realise the unpaid balance of the purchase money under section 55 (4) (*b*) may be enforced in one suit. In *Baslingava* v. *Chinnava*[5], while recognising the force of the argument founded on the statutory provisions, the Bombay High Court at the same time held itself against a multiplicity of suits for the working out of the rights of parties. Patkar, J., said : "Though I feel difficulty in giving effect to the equitable principle of vendor's lien which is not recognised in the Transfer of Property Act, I do not think there is any insuperable objection to recognise the statutory charge provided in section 55 (4) (*b*), Transfer of Property Act and to incorporate the statutory charge in the decree in the suit brought by the purchaser for recovery of possession". The instant case has stuck to the view taken in Madras and held that a mortgagee from the vendor would be in no better position than the vendor for this purpose.

UNION OF INDIA *v.* HIRA DEVI, (1952) 2 M.L.J. 265 (S.C.).

In this case the Supreme Court holds that provident fund money being exempt from attachment and inalienable, no execution can lie normally against such a sum and execution cannot be sought against the provident fund money by the appointment of a receiver. Section 60 (1) (*k*) of the Civil Procedure Code exempts from attachment and sale 'compulsory deposits' and other sums in or derived from any fund to which the Provident Funds Act (XIX of 1925) applies. 'Compulsory deposit' is defined in section 2 (*a*) of the Provident Funds Act as a subscription to or deposit in a Provident Fund which under the rules of the Fund, is not until the happening of some specified contingency repayable on demand otherwise than for the purpose of payment of premia in respect of a policy of life insurance (or the payment of subscriptions or premia in respect of a family pension fund). Section 3 (1) of the Act provides that such a deposit cannot be assigned or charged and is also not liable to attchment. The prohibition against assignment or attachment of these deposits is based on grounds of public policy. And it stands to reason that where such prohibition is absolute it should not be allowed to be defeated and the deposit reached by a creditor through equitable executiion. That the object of the legislation should not be permitted to be frustrated or circumvented was brought out in *Lucas* v. *Harris*[6]; in the comparable context of section 141 of the Army Act of 1881. Apropos of the question of the appointment of a receiver to collect the pension of an army officer, Lindley, L.J., stated : "In considering whether a receiver of a retired officer's pension ought to be appointed, not only the language but the object of section 141 of the Army Act, 1881, must be looked to ; and the object of the section would, in my opinion, be defeated and not advanced if a receiver were appointed". Lopes, L.J., observed : "It is beyond dispute that the object of the legislature was to secure for officers . . . . . a provision which would keep them from want and would enable them to retain a respectable social position. I do not see how this object could be effected unless those pensions were made absolutely inalienable, preventing not only the person himself assigning his interest in the pension, but also preventing the pension being seized or attached under a garnishee order, or by an execution or other process of law. Unless protection is given to this extent the object which the Legislature had in view is frustrated, and a strange anomaly would exist. A person with a pension would not be able to utilise his pension to pay a debt beforehand, but immediately his creditor

1. (1920) 38 M.L.J. 467 ; I.L.R. 43 Mad. 712.
2. (1943) 2 M.L.J. 515.
3. (1908) I.L.R. 30 All. 125.
4. (1913) 20 I.C. 325.
5. (1931) I.L.R. 56 Bom. 566.
6. (1886) 18 Q.B.D. 127.

had obtained judgment might be deprived of his pension by attachment, equitable execution or some other legal process. It is impossible to suppose that the Legislature could have intended such an anomaly". In the teeth of this forceful reasoning no other view seems possible in regard to a compulsory deposit as well. The decision of the Judicial Committee in *Rajendra Narain Singh* v. *Sundara Bibi*[1], however, gave rise to a current of thought that though the property may not be liable to attachment still it could be reached *via* equitable execution. One of two brothers who were parties to a compromise was declared under it to have a right of maintenance in 16 villages enumerated, the right being conferred expressly without power to transfer. A decree-holder sought to proceed against the right of maintenance by having a receiver appointed to realise the rents and profits so that the decretal amount may be paid out of the said realisation as far as possible. It was held it was a fit case for the appointment of a receiver. Lord Shaw observed: "Their Lordships are of opinioon that the right of maintenance is in point of law not attachable and not saleable; they think that section 60 of the Civil Procedure Code, head (*n*) precludes an application for that purpose. The proper remedy lies in a fitting case, in the appointment of a receiver for realising the rents and profits of the property paying out of the same a sufficient and adequate sum for the maintenance of the judgment-debtor and his family, and applying the balance if any to the liquidation of the judgment-debtor's debt". In *Nawab Bahadur of Murshidabad* v. *Karnani Industrial Bank, Ltd.*[2], it was held that since the Nawab had a disposing power over the rents and profits assigned to him to maintain his dignity and station, no question of public policy was involved and though the corpus itself was inalienable a receiver of the rents and profits could be appointed. In *Secretary of State* v. *Bai Somi*[3], Beaumont, C.J., distinguished *Rajendra Narain's case*[1] as one proceeding on the finding that the property involved there was not future maintenance and therefore was not made unattachable by the Civil Procedure Code. It was pointed out that if the Privy Council had held that an exempted payment could be reached in execution by the appointment of a receiver the protection afforded by section 60 would become to a great extent lost. In *Dominion of India* v. *Ashutosh Das and others*[4], Roxburgh, J., remarked: "surely it is an improper use of that equitable remedy to employ it to avoid a very definite bar created by statute law to achieving the very object for which the receiver is appointed". A number of cases had however taken *Rajendra Narain's case*[1] as laying down that though a property may not be attachable a receiver could be appointed in respect of it in execution, *Secretary of State* v. *Venkata Lakshmamma*[5], *Janakinath* v. *Pramatha Nath*[6]. In the decision under examination, the Supreme Court has explained what exactly is the true scope of the decision in *Rajendra's case*[1]. It is observed: "Taking the prayer of the judgment-creditor to be that the right of maintenance be proceeded against, their Lordships observed that the right was in point of law not attachable and not saleable. If it was an assignment of properties for maintenance the amount of which was not fixed, it was open to the judgment-creditor to get a receiver appointed subject to the condition that whatever may remain after making provision for the maintenance of the judgment-debtor should be made available for the satisfaction of the decree debt. The right to maintenance could not be attached or sold. In so far as the decree-holder sought to attach this right and deprive the judgment-debtor of his maintenance, he was not entitled to do so, but where his application for the appointment of a receiver was more comprehensive and sought to get at any remaining income after satisfying the maintenance claim, the appointment of a receiver for the purpose was justified. The decision of the Privy Council does not appear to lay down anything beyond this. In our opinion it is not an authority for the general proposition that even though there is a statutory prohibition against attachment and alienation of a particular species of property, it can be reached by another mode of execution, *viz.*, the appointment of a receiver". By this decision the law is brought into line with the principles laid down in *Lucas's case*[7].

1. (1925) 49 M.L.J. 244 : L.R. 52 I.A. 262 : I.L.R. 47 All. 385 (P.C.).
2. (1931) 61 M.L.J. 208 : L.R. 58 I.A. 215 (P.C.).
3. (1933) I.L.R. 57 Bom. 507.
4. (1950) 54 Cal.W.N. 254.
5. (1926) 50 M.L.J. 279 : I.L.R. 49 Mad. 567.
6. (1939) 44 Cal.W.N. 266.
7. (1886) 18 Q.B.D. 127.