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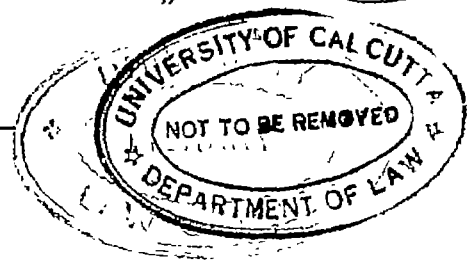

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THE MARCH OF LAW : 1947.

One more year has passed since the last review. Memorable events have taken place in the history of India. The country has achieved Independence. The old order has changed and the old thoughts will no more be thought. Rule of law is however the ideal aimed at by all civilised societies. The continued maintenance of a strong and independent Judiciary is a pre-requisite to such rule of law. The decisions rendered by Courts justly enjoy in this context the highest respect and authority. A judicial decision is not merely evidence of the law. Often it is a source of it. A matter once decided is decided for all. That which has been delivered in judgment is taken to embody the correct position—*res judicata pro veritate accipitur*. Precedents lend authority to decisions. When a number of decisions follow one another on the same lines, even apart from anything else, they have the effect of crystallising as it were into a rule of law. In the course of the year there have been rendered 35 decisions of the Privy Council, 10 decisions of the Federal Court and 10 decisions of the Full Benches of the Madras High Court reported in our columns. An attempt is made here to review the more important of such decisions and other decisions of the Madras High Court in many of the important branches of the law.

THE HIGH COURT : ITS POWERS AND JURISDICTION :—It may be recalled that in *Ryots of Garabhandho* v. *Zamindar of Parlakimedi*[1], the Judicial Committee had held that the High Court had no jurisdiction to writ the prerogative writ of *certiorari* to any Court or officer in the moffussil dealing with disputes between Indians, independently of its jurisdiction over the Presidency Town and over British subjects or their servants, inasmuch as the Supreme Court whose jurisdiction had been inherited by the High Court had no general power or control over the Courts of the East India Company in the moffussil or over their officers acting judicially even though they were British subjects and there was no later enactment giving the High Court such a power. The decision of the Privy Council in *Moulvi Hamid Hasan Nomani* v. *Banwarilal Roy*[2] is a successor to and is in line with the ruling in the *Garabhandho case*[1] in so far as it holds that the High Court has no jurisdiction to grant an information in the nature of *quo warranto* where the public officer against whom the information is sought to be exhibited does not reside within the limits of the ordinary originial civil jurisdiction of the High Court. The decision is of special significance in that it is based on a point not touched in the earlier ruling. The ground of the decision is that assuming without deciding that the Supreme Court would have had the power to grant the information in the circumstances of the case, still the High Court has no such power because it has not inherited the *personal* jurisdiction of the Supreme Court over classes of persons residing outside the limits of its ordinary original civil jurisdiction, that the power to grant a writ of *quo warranto* arises in the exercise of ordinary original civil jurisdiction only and such jurisdiction is confined to the limits of the Presidency town. In *Kandaswami Mudaliar* v. *The Province of Madras*[3], it is decided that apart from section 306 (1) of the Government of India Act, 1935, it is clear from section 223 of that Act that

1. (1943) 2 M.L.J. 254 : L.R. 70 I.A. 129 : I.L.R. (1944) Mad. 457 (P.C.).
2. (1947) 2 M.L.J. 32 (P.C.).
3. (1947) 2 M.L.J. 146.

the jurisdiction of the High Court in relation to the Governor of a Province is the same as that which it has inherited from the Supreme Court, that the protection or exemption from process in the High Court in respect of acts counselled, ordered or done by a Governor in his public capacity which had been accorded to the Governor of Madras by the Government of India Act, 1800, is still extant and accordingly the High Court cannot issue a writ of *certiorari* against the Provincial Government calling for the records relating to the rejection of a revision petition to the Government under the Madras House Rent Control Order. The ruling in *Subramania Chettiar* v. *Navaneethakrishna Marudappa Tevar*[1], points out that where an appeal to the Privy Council has been admitted and, the records printed in India have been transmitted to the Privy Council and received there, the High Court will have no jurisdiction to entertain an application to be made parties in the appeal pending before the Privy Council. This is because even for the substitution of a legal representative of a deceased party after the records have been despatched to the Privy Council the application is not dealt with by the High Court; the latter merely enquires into and expresses findings of fact upon which it reports to the Judicial Committee for that tribunal to dispose of the application.

THE BAR: ITS PRIVILEGES, RIGHTS AND DUTIES.—In *Ramappayya* v. *Subbamma*[2], it is laid down that an advocate to whom a vakalat has been given has no power, in the absence of express authorisation, to compromise the suit on behalf of the party for whom he appears. He can only contest the suit but not compromise it. In regard to the restoration of a legal practitioner in the roll of advocates, two interesting pronouncements have been made. In In the matter of *An advocate*[3], a Full Bench has held that in applications for restoration it is not the practice of the High Court to act on mere certificates of character and integrity of the applicant subsequent to the removal of his name from the roll of advocates but that the contents of such certificates have to be placed in the form of affidavits and that when so presented the High Court will have regard only to what are statements of fact regarding the applicant's conduct as distinguished from mere expressions of opinion. In In re *A Pleader*[4], it is stated that if after ceasing to be qualified as a professional gentleman in legal matters, an individual nevertheless, to the utmost extent possible continues to act for reward in legal matters and advises in such matters that would be very strong ground to refuse his application for reinstatement.

CONSTITUTIONAL LAW.—In *Province of Bombay* v. *Municipal Corporation, Bombay*[5], the Privy Council points out that ordinarily no statute binds the Crown unless the Crown is expressly named therein, but the rule is subject to the exception that the Crown may be bound by necessary implication, that is, that if it is manifest from the very terms of the statute that it was the intention of the Legislature that the Crown should be bound the result is the same as if the Crown had been expressly named. The proposition that whenever a statute is enacted for the public good the Crown though not named, would be bound by its provisions cannot now be regarded as sound except in a limited sense and if it can be affirmed that at the time the statute was passed and received the royal sanction it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound then it may be inferred that the Crown has agreed to be bound. The decision in *Mohammad Yakub Khan* v. *King-Emperor*[6] lays down that inasmuch as the jurisdiction of the Judicial Committee of the Privy Council is purely statutory, resting on the Judicial Committee Act of 1833 and the Amending Acts, where an appeal is sought to be brought from an order of a Court established under the provisions of an Act framed long after the Act of 1833, the question that will have to be considered is not whether there are express words taking away the sovereign's prerogative to entertain appeals but whether there ever was the intention of creating that tribunal with the ordinary incident of an appeal to the Crown. Inasmuch as the Indian Army Act intended the findings of a Court Martial to be final subject

1. (1947) 1 M.L.J. 357.
2. (1947) 2 M.L.J. 580.
3. (1947) 2 M.L.J. 213 (F.B.).
4. (1947) 2 M.L.J. 250.
5. (1947) 1 M.L.J. 45 (P.C.).
6. (1947) 1 M.L.J. 403 (P.C.).

only to the power of revision for which that Act provides there is no room for an appeal to the Privy Council consistently with the subject-matter and scheme of the Act. In *Kamakshya Narain Singh* v. *Commissioner of Income-tax, Bihar*[1], the Federal Court lays down that, in regard to pending appeals, when the appellate tribunal decides them, it has to do so according to the law then in operation and that if pending the litigation or pending the appeal some relevant legislation is enacted by the appropriate legislative authority the deciding tribunal must give effect to it. In *Messrs. Chatturam and others* v. *Commissioner of Income-tax, Bihar*[2], the Federal Court points out that it cannot be said that section 92 of the Constitution Act does not give legislative powers to the Governor in respect of excluded or partially excluded areas and that it is only a delegation of administrative authority. The Governor has been given the right to modify any Act of the Legislature and such a right is only legislative power and not administrative power ; hence any Regulation issued by the Governor under the power vested in him under section 92 (2) can override an Act of the Federal or Provincial Legislature in operation in the area in question. A practice point is elucidated in *Krishnaswami Pillai* v. *Governor-General in Council*[3], where it is held that for purposes of issuing a certificate under section 205 (1) of the Constitution Act no substantial question of law as to the interpretation of the Constitution Act should be deemed to be involved where guidance in respect of the interpretation of the particular section has already been furnished so far as the Federal Court is concerned by a prior decision of that Court. An exposition of the scope of section 240 of the Constitution Act and the rights of Government servants against the Crown is given in *Punjab Province* v. *Pandit Tara Chand*[4]. There the Federal Court has laid down that section 240 recognises that in the absence of express limitation a public servant holds office during His Majesty's pleasure and that sub-sections 2, 3 and 4 are statutory limitations upon the prerogative of the Crown to dismiss its servants at will. Accordingly it will follow that if any of those limitations is contravened the public servant concerned has a right to maintain an action against the Crown for appropriate relief and there is nothing in the section to suggest that the relief must be limited to a declaration and should not go beyond it. By reason of section 292, section 240 (1) must be read not merely with the other sub-sections of the section but also with the relevant provisions of the Civil Procedure Code with the result that a servant of the Crown in India has the right to maintain a suit for the recovery of arrears of pay which have become due to him. For such a suit Article 102 of the Limitation Act will apply. Even assuming that in England there is a prerogative that no servant could sue the Crown to recover arrears of pay and that the opening part of section 2 of the Constitution Act is intended to include the prerogatives of the Crown, it must be presumed that the prerogative has been abandoned in India. *Gill and Anil Lahiri* v. *King-Emperor*[5] holds that if consent is given by the Governor-General to the institution of criminal proceedings under section 270 (1) of the Constitution Act, the subsequent course of the proceedings would be controlled by the provisions of the Criminal Procedure Code and no further or fresh consent would be needed when the case is remanded by the High Court for trial on fresh charges. In *Kandaswami Mudaliar* v. *Province of Madras*[6], it is pointed out that section 306 (1) of the Constitution Act does not restrict the exemption enjoyed by the Governor under the old law from proceedings and processes of the High Court, that in fact the protection is now enlarged and it enures to a Governor not merely in respect of acts done by him in his public capacity but also in his personal capacity, so much so, all acts of whatever nature done by him in connection with and arising out of his appointment as Governor, that is, acts in relation to his Provincial Government are protected. Since a Provincial Government cannot do a thing unless there is participation by a Governor, the Governor must be deemed to be included in proceedings or processes against the Provincial Government with reference to the doing of an act by that

1. (1947) 2 M.L.J. 438 (F.C.).
2. (1947) 2 M.L.J. 432 (F.C.).
3. (1947) 2 M.L.J. 400.
4. (1947) 2 M.L.J. 389 (F.C.).
5. (1947) 1 M.L.J. 129 (F.C.).
6. (1947) 2 M.L.J. 146.

government. Section 223 of the Constitution Act also makes it clear that the protection from process in the High Court in respect of acts counselled, ordered or done by a Governor in his public capacity accorded to him under the Government of India Act, 1800 is still extant at the present time. The proper perspective as to the precedence accorded to the three lists in Schedule VII to the Constitution Act is indicated by the Privy Council in *P. K. Mukherjee* v. *Bank of Commerce, Ltd., Khulna*[1]. It points out that to say that the lists have a definite order of priority so that anything contained in list 1 is reserved solely for the Federal Legislature and that similarly an item in the Concurrent List if dealt with by the Federal Legislature is outside the power of the Provinces and it is only the matters mentioned in list 2 over which the Provinces have complete jurisdiction is to simplify unduly the task of distinguishing between the powers of divided jurisdictions. It is not possible to make so clear a cut and there is bound to be overlapping. Though the existence of the Concurrent List facilitates distinction between matters which are essential to determine to which list particular provisions should be attributed and those which are merely incidental, where there is overlapping, the test is what in pith and substance the effect of such overlapping is and in what list its true nature and character are to be found. The extent of invasion by Provinces into subjects enumerated in the Federal List has to be considered not because the validity of an impugned enactment can be determined by discriminating between degrees of invasion but for the purpose of determining what is the pith and substance of the impugned Act. The question is, is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not a Provincial subject but a Federal one. Accordingly loans in respect of which promissory notes are taken, are in pith and substance money-lending transactions and hence the Bengal Moneylenders Act though making regulations in regard to banking or promissory notes would still be valid. The same position is revealed in *Bank of Commerce, Ltd., Khulna* v. *Amulya Krishna Basu*[2]. In the case of *Mst. Prakash Kaur* v. *Mst. Udham Kaur*[3], the Federal Court holds that "agricultural land" in entry 21 of list 2 will include rights in or over agricultural land and the interest of a mortgagee in possession is not therefore for purposes of succession within the scope of the Hindu Women's Rights to Property Act, 1937. In *Uday Chand Mahtab* v. *Samarendra Nath Mitra*[4], it has been held by the Federal Court that entry 21 in list 2 covers generally the relation of landlord and tenant and the collection of rents, that the jurisdiction and powers of Courts regarding collection of rents is covered by entry 2 in that list and accordingly section 168-A of the Bengal Tenancy Act which deals with the powers and jurisdiction of the Court to get money paid to a decree-holder in respect of his decree for arrears of rent of agricultural lands is *intra vires* the Provincial Legislature. In *Sripati Lal Khan* v. *Pasupati Modak*[5], it is held that the rights of a landlord and tenant under an anomalous mortgage in respect of agricultural lands are capable of being defined and, if so, altered by the Provincial Legislature and that a Provincial Act providing that a mortgagee who is in possession for 15 years and more shall be considered and treated as if the mortgage debt and interest were paid off is within the terms of entry 21. In *Megh Raj* v. *Allah Rakhia*[6] the Privy Council points out that the key to item 21 is the opening word "land" and that item 2 is sufficient to give express powers to the Provinces to create and determine the powers and jurisdiction of Courts in respect of land, as a matter ancillary to the subject of item 21. Mortgages of land would, as a matter of construction, fall within item 21 in so far as they are mortgages of land, though in certain aspects they include elements of transfer of property and contracts. Accordingly the Punjab Restitution of Mortgaged Lands Act, the main purpose of which is to give relief to mortgagors by enabling them to obtain restitution of the mortgaged lands on terms less onerous than the mortgage deeds require is *intra vires* the Provincial Legislature. *Punjab Flour Mills, Ltd.* v. *Corporation of Lahore*[7]

1. (1947) 2 M.L.J. 7 (P.C.).
2. (1947) 2 M.L.J. 14 (P.C.).
3. (1947) 1 M.L.J. 127 (F.C.).
4. (1947) 1 M.L.J. 258 (F.C.).
5. (1947) 1 M.L.J. 263 (F.C.).
6. (1947) 2 M.L.J. 1 (P.C.).
7. (1947) 1 M.L.J. 265 (F.C.).

brings out the distinction between terminal taxes in entry 58 of list 1 and taxes leviable as cesses on the entry of goods into a local area in entry 49 of list 2. The former taxes are (*i*) terminal and (*ii*) confined to goods and passengers carried by railway or air, chargeable at a railway or air terminus and referable to services rendered or to be rendered by some rail or air transport organisation. The cesses in entry 49 contemplate the entry of goods into a definite local area and for the purpose of consumption, use or sale therein. The wording of entry 20 in list 1 and that of entry 18 in list 2 does not justify a deduction that all taxation on rail and air borne goods must be imposed, if at all, by power drawn from entry 58 in list 1 and that the power of taxation conferred in entry 49 in list 2 is confined to goods that enter by road or internal waterway only. Accordingly so far as rail-borne goods are concerned the same goods may well be subjected to local taxation under entry 49 in list 2. Nor is it necessary that in the case of cesses imposed under that entry provision should be made for refunds. The existence or non-existence of such a provision cannot affect the tax being or not being a cess within entry 49? In In re *Thiagarajan Chettiar*[1], it is held that prosecution in respect of offences under different rules and orders made under the Defence of India Act committed before the date when the Act expired can be continued after that date by reason of section 102 (4) of the Government of India Act. In *J. K. Gas Plant Manufacturing Co. (Rampur), Ltd.* v. *King-Emperor*[2], the principle is laid down that no narrow construction such as might be applicable to a body or corporation created by statute for certain purposes is to be applied to an Act like the Defence of India Act, passed to ensure the peace, order and government of the country. Such an Act must be given a large and liberal construction. Section 40 (1) of the old Government of India Act which was in force as one of the transitional provisions of the Constitution Act cannot be said to be mandatory and an order of the Central Government not expressed to be made by the Governor-General in Council cannot on that account be held to be invalid as not complying with the requirements of section 40 (1). The Federal Court also points out that what section 205 of the Constitution Act requires is that the appeal should be from a judgment, decree or final order, that it is not enough that the case before the High Court should involve a substantial question of law as to the interpretation of the Constitution Act and that the Federal Court is at liberty to determine, if necessary, whether the appeal is really from a judgment, decree or final order so as to ensure that that Court has jurisdiction in the matter under section 205.

CRIMINAL LAW.—In *Srinivasa Mall Bairoliya* v. *King-Emperor*[3], the Privy Council makes it clear that Courts should always bear in mind that unless the statute either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime the accused should not be found guilty of an offence against the Criminal law unless he has a guilty mind. In re *Munisami*[4] emphasises that although the fact of previous convictions is an element in determining the sentence, essential regard should be had to the facts of each case, the gravity of the offence, the circumstances in which it was committed, etc. And a sentence of solitary confinement, though legal, must be awarded, if ever, only in the most exceptional cases of unparalleled atrocity or brutality. The principle is reiterated in *Ramanjulu Naidu*, In re[5], where it is observed that the fact that the " sanctity of home life has become to the accused a mere mockery and the desire to take what he wants regardless of ownership is hot in him " is not a circumstance justifying the direction for solitary confinement. In *King-Emperor* v. *Sadashiv Narayan Bhalerao*[6], the Judicial Committee rejects the test of sedition suggested by Gwyer, C.J., in *Niharendu Dutt Mazumdar* v. *King-Emperor*[7]. According to the Privy Council, except as a marginal note to section 124-A the word " sedition " occurs nowhere in the section, that the contents of the section cannot be restricted by the marginal note, that the English

1. (1947) 1 M.L.J. 98.
2. (1947) 2 M.L.J. 402 (F.C.).
3. (1947) 2 M.L.J. 328 (P.C.).
4. (1947) 1 M.L.J. 336.
5. (1947) 1 M.L.J. 410.
6. (1947) 1 M.L.J. 343 (P.C.).
7. (1942) F.C.R. 38 : (1942) F.L.J. 47.

decisions on the subject could hardly be relevant to the construction of the section and there is nothing in the section to suggest that the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is the intention or tendency. *Public Prosecutor* v. *Viswanathan*[1] points out that the offering of bribe is *per se* no offence under section 160 of the Penal Code. *Venkatasubbiah*, In re[2], holds that what is forbidden by section 161 generally is receiving any gratification as a motive to do or as a reward for having done any such thing as is described in the definition, that the phrase " motive or reward " covers a case where the payment is made in respect of past favours and section 161 will also apply to a person on leave. In *Lakshmanan Nadar*, In re[3], it is held that the elements constituing the offences under sections 395 and 205 are not identical, that the offence under section 395 is much graver and that it cannot be said that for the prosecution for such an offence the sanction of the Civil Court is necessary. In such a case prosecution for a more serious offence (one under section 395 when the case had originally been admitted under section 380) cannot according to *Manicka Mudaliar*, In re[4] be ordered by the appellate Court without notice to the accused and without hearing him. In *Govindaswami Chettiar*, In re[5], it is decided that where a charge against a person is on the alternative footing that the breach of trust was committed by him either as " a clerk or as an agent of the company " the alleged offence is one under section 409 which can be tried only by a First Class Magistrate, so much so, the trial of such an offence by a Second Class Magistrate is an illegality affecting jurisdiction. *Krishnan*, In re[6], points out how there are two ways in which the offence of cheating may be committed, namely, (*i*) by fraudulently inducing a person to deliver property, and (*ii*) by intentionally inducing a person to do anything which he would not do if he had not been so deceived and which act is likely to cause damage or harm to that person in body, mind, reputation or property, that fraud is committed if any advantage is expected to the person who causes the deceit and that taking money from applicants for motor car driving licences, promising to get the same without their undergoing any of the tests and paying the incidental fees and deceiving the licensing authorities and obtaining licences is a fraudulent act and amounts to cheating. In *Varadaraja Chettiar* v. *Swami Maistry*[7], it is held that a Criminal Court is not entitled to disregard the decree of a Civil Court declaring rights to the identical property in dispute in a case before it. *Venkataratnam*, In re[8], holds that to sustain a conviction under section 504 in respect of abusive words alleged to constitute the insult, it is necessary to know what those words are to decide whether they amount to insult, and a conviction without setting out those words merely on a finding of abuse by the accused will not be justified.

EVIDENCE.—The effect of marking a document by consent is examined in *Palaniappa Chettiar* v. *Bombay Life Assurance Co., Ltd.*[9]. It only means that the party consenting is willing to waive his right to have the document in question proved and not that the consenting party accepts the correctness of every statement made in the document. *Srinivasa Mall Bairoliya* v. *King-Emperor*[10], holds that evidence of similar transactions not the subject of any charge, relevant to the charge of abetting an offence as showing an intention to aid the commission of the offence and an intentional omission to put a stop to an illegal practice which was an illegal omission would be admissible to prove intention under section 14 of the Evidence Act. *Chinna Mallayya*, In re[11], points out that the mere fact that the person to whom a statement was made by the accused had asked him to tell the truth did not amount to a threat or inducement within the meaning of section 24. The decision in *Venkata Reddi*, In re[12], holds that a Prohibition Sub-Inspector under the Madras Prohibition Act cannot be deemed to be a police officer within the meaning of section 25. A

1. (1947) 1 M.L.J. 179.
2. (1947) 2 M.L.J. 160.
3. (1947) 2 M.L.J. 119.
4. (1947) 2 M.L.J. 137.
5. (1947) 2 M.L.J. 163.
6. (1947) 2 M.L.J. 380.
7. (1947) 2 M.L.J. 179.
8. (1947) 1 M.L.J. 359.
9. (1947) 2 M.L.J. 535.
10. (1947) 2 M.L.J. 328 (P.C.).
11. (1947) 2 M.L.J. 359.
12. (1947) 2 M.L.J. 218.

luminous exposition of section 27 is contained in *Pulukuri Kotayya* v. *King-Emperor*[1], overruling In re *Athappa Goundan*[2]. The Privy Council points out that section 27 is an exception to the prohibition imposed by the preceding section and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that the discovery of a fact in consequence of information received from a person accused of any offence in the custody of a police officer must be deposed to and thereupon so much of the information as relates distinctly to the fact discovered may be proved. The extent admissible must depend on the exact nature of the fact discovered to which such information is required to relate. It would be a fallacy to treat the "fact discovered" as equivalent to the object produced; it embraces the place from which the object is produced, and the knowledge of the accused as to this. It follows that information as to past user or the past history of the object produced is not related to the discovery in the setting in which it is discovered and so would not be admissible in evidence. Applying the test, it was held in *Nagappa*, In re[3], that where one of the accused in his confessional statement implicated himself as having decoyed the accused to a rick and assisted in his murder by holding his legs and having after the murder along with others carried the dead body and buried it in the burial ground, only the portion stating that the body was buried at a particular place could be admitted. In *Venkanna*, In re[4], it is explained that the fact discovered would be relevant only if the statement led to the discovery of the fact that the property is concealed in the particular place mentioned and is proved to have been connected with the offence. *Public Prosecutor* v. *Oor Goundan*[5] holds that where the accused had stated: "Before burying I had cut the belly asunder with the knife. There was a silver waist cord on the waist of the corpse. I removed it and gave it to my brother-in-law. I have buried in the margin of the eastern ridge of my sugarcane garden the knife with which Aran's neck was cut. If you come with me I shall take and give it." The only portion admissible would be: "I have buried in the margin of the eastern ridge of my sugarcane garden the knife. If you come with me I shall take and give it." *Ponnuswami Chettiar* v. *Kailasam Chettiar*[6] holds that when the execution of a document is admitted it need not be proved and this would be so even when the document in question is not admissible on account of any provision in the Stamp Act. In *Komirineni Rosayya* v. *Munnamgi Rosayya*[7], it is held that a recital in a document executed by a witness to which none of the parties to the suit were parties would be relevant as corroborative evidence under section 157 in a suit for ownership and possession of property as a statement made by the witness on a previous occasion.

TORTS.—A notable decision in the law of torts is that in *Mohamed Amin* v. *Jogendra Kumar Banerjee*[8]. The Privy Council explains how the foundation for an action for damages for malicious prosecution is the abuse of the process of the Court by wrongfully setting the law in motion, by perverting the machinery of justice to an improper use. The plaintiff should show that the proceedings instituted against him were malicious, without reasonable and proper cause, that they terminated in his favour and that he has suffered damage. To found an action based upon criminal proceedings the test is not whether they reached a stage at which they may be correctly described as a prosecution but whether they have reached a stage at which damage to the plaintiff results. It cannot be said that the mere presentation of a false complaint which first seeks to set the criminal law in motion will *per se* found an action for damages for malicious prosecution.

HINDU LAW.—In *Pemraj* v. *Chand Kunwar*[9], the Privy Council recognises it as settled that Hindu law generally applies to Jains in the absence of special custom and that if any such custom has been affirmed and upheld in a series of decisions it would become incorporated in the general law applicable to them. In *Kashi*

1. (1947) 2 M.L.J. 219 (P.C.).
2. (1937) 2 M.L.J. 60: I.L.R. 1937 Mad. 695 (F.B.).
3. (1947) 2 M.L.J. 295.
4. (1947) 2 M.L.J. 356.
5. (1947) 2 M.L.J. 429.
6. (1947) 2 M.L.J. 116.
7. (1947) 1 M.L.J. 60.
8. (1947) 2 M.L.J. 27 (P.C.).
9. (1947) 2 M.L.J. 516 (P.C.).

Nath v. *Bhagwan Das*[1], the Privy Council holds that where there is proof of the solemnisation of a marriage the presumption in favour of its being a valid marriage arises and it is in that light that Courts have to review the evidence when the legality of a duly solemnised marriage is challenged on the ground that the parties belonged to different sub-castes. In *Nagachari* v. *Butchayya*[2], it is pointed out that when a man and a woman were not merely living together but professed themselves to be husband and wife and were treated as such by the society in which they moved and this conduct and recognition extended over a sufficiently long period of time a presumption can well be drawn in favour of a marriage. Also, where it happens that the woman so living was a widow the presumption could none the less be drawn if the parties could have married each other. In *Ramasubbayya* v. *Chenchuramayya*[3], it is decided that cognates are not included within the ambit of the term 'kindred' whose consent is necessary for an adoption by a widow in Madras in the absence of husband's authorisation. It is the consent of the nearest male agnates that is needed as they are by virtue of the relationship her most competent advisers. Failure to consult the daughter's son is thus immaterial. *Kasiviswanathan Chettiar* v. *Somasundaram Chettiar*[4] recognises that a custom among Nattukottai Chettis permitting adoption to a person after his death and the death of his wife, by his father or other pangalis may be valid as a family custom, if proved. *Thippanna* v. *Venkataramanappa*[5] decides that in spite of an illatom adoption the father-in-law would have the right of disposing of his property by gift or will. *Seeyali Achari* v. *Doraiswami Achari*[6], reaffirms the view consistently held in Madras that a gift or bequest by a Hindu father of his self-acquired property in favour of his sons would impress it with the character of ancestral property in the absence of words indicating a contrary intention. In *Ramaswami Tevar* v. *Chinniah Tevar*[7] it is decided that, where the vendee from the father of joint family property has acted *bona fide* and after due inquiry as to the existence of necessity, he is not bound to see to the application of the purchase money and a sale cannot be set aside because the vendee is not able to prove conclusively as to how the surplus beyond the legal necessity was applied. *Isakku* v. *Seetharamaraju*[8], holds that where one of several co-sharers mortgages a specific item of property to which they are jointly entitled and afterwards there is a partition at which the mortgaged item falls to another co-sharer and other items are allotted to the mortgagor, the mortgagee can in the absence of fraud proceed only against the items allotted to the mortgagor and such right would be a right to a security though it may not amount to a mortgage and would fall within section 100 of the Transfer of Property Act. In *Ram Asra* v. *Official Receiver, South Kanara*[9], it is pointed out that where the share of a coparcener is attached and he dies thereafter his interest no doubt survives to the other members but subject to the attachment, so much so, if subsequently proceedings are taken in respect of the property and it is sold the rights of the members of the family cannot prevail, but if the attachment comes to an end the full benefit of survivorship would be available. *Chinna Venkata Reddi* v. *Sidda Reddi*[10] points out that a partition becomes complete when the title in the different shares has passed to the different sharers and in the case of immoveable properties the title passes either by the execution of a registered instrument or by an agreement to divide coupled with transfer of possession. Where the latter process has happened the fact that there was a subsequent modification of the division by a compromise only to the extent of giving to the branch of a son born after the partition a greater share than previously enjoyed does not give a right to such after-born son to challenge the partition which had become effective prior to his birth and was only subsequently modified to his own advantage. In *Bhagwat Ram* v. *Ramji Ram*[11], the Judicial Committee holds it as settled that a son begotten as well as born after partition, where a share has been allotted to the father, cannot

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1. (1947) 2 M.L.J. 301 (P.C.).
2. (1947) 2 M.L.J. 277.
3. (1947) 2 M.L.J. 39 (P.C.).
4. (1947) 1 M.L.J. 43 (P.C.).
5. (1947) 2 M.L.J. 245.
6. (1947) 2 M.L.J. 49.
7. (1947) 1 M.L.J. 398.
8. (1947) 2 M.L.J. 166 (F.B.).
9. (1947) 2 M.L.J. 509.
10. (1947) 1 M.L.J. 188.
11. (1947) 2 M.L.J. 67 (P.C.).

reopen the partition. He is only entitled to succeed to his father's share and to his separate and self-acquired property to the exclusion of the divided sons. The fact that the estate has not been divided by metes and bounds prior to the birth of the after-born son cannot affect the quantum of share to which the other members had already become entitled. *Papamma* v. *Narayana*[1] decides that where the terms of a partition have been reduced to writing but the latter has not been registered it is inadmissible to prove the partition and oral evidence to prove the terms is also precluded. If, however a party to such document is not the managing member of his branch the deed will not be operative against the other members who were not parties to it and as against them can be proved *aliunde*. The Privy Council decision in *Rajagopala Aiyar* v. *Venkataraman*[2] lays down that since the right of an unmarried daughter to maintenance and marriage expenses as against the family property is in lieu of a share on partition, provision must be made for her marriage expenses in any partition decree that may be passed and even if the marriage had already taken place and the money had been met by another that is no ground for refusing reimbursement. In *Appalaswami* v. *Suryanarayanamurti*[3], the Privy Council holds that a suit for partition on behalf of the minor sons against the father who had remarried on the death of the mother of the minors and had sons by the second wife cannot be said to be in the interest of the minors on the ground that their interest in the family property was liable to be diminished by the birth of further sons to the father; for it is of the essence of any coparcenary governed by the Mitakshara that the interest of each member is always fluctuating and the advantage of membership in the joint family is not to be measured merely by a consideration of the extent of his interest in the joint family property. The Privy Council also lays down that proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint. *Nagaraju* v. *Parvatamma*[4] points out that where pending an appeal in a maintenance action, time was given to the parties to find out whether they could live amicably and subsequently it was reported that they could not get on well, the fact that the parties tried to live together is only an attempt at settlement without prejudice and would not terminate the suit. *Vasuntharadevi* v. *Ramakrishna Naidu*[5] makes it clear that a mere diminution of physical comforts of the wife due to the disparity in the modes of life to which she was accustomed prior to her marriage in her parents' abode and the subsequent life in the husband's house is not a justifiable ground for claiming separate maintenance. Where however the husband subsequently takes a second wife, the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, will entitle the first wife to claim separate maintenance even if she had been living apart from him for no justifiable reason before the second marriage, provided it was not for an improper purpose. The decision also holds that no provision can be inserted in a maintenance decree for liberty to apply to vary the rate according to any change in circumstances. The remedy is by way of suit only. The ruling in *Commissioner of Income-tax (C. & U.P.)* v. *Mst. Bhagwati*[6] holds that the widow of a deceased coparcener has a right of maintenance against the surviving coparceners *quoad* the share of her deceased husband which they take by survivorship, that the right is an absolute right, that it does not form a charge on the properties but when necessary, it may be made into a charge on a specific portion of the joint family properties not exceeding her husband's share. In *Surayya* v. *Bala Gangadhara Ramakrishna Reddi*[7], the Privy Council points out that a maintenance grant to a female member of a Hindu family is ordinarily for the life of the grantee, that she will have no right to alienate the property and after her death the property will come back to the joint family out of whose assets it was carved. *Veeranna* v. *Satyam*[8] decides that when in Hindu law a daughter or son is referred to the law-givers contemplate only a legitimate child, that illegitimate children have no right at all

1. (1947) 1 M.L.J. 274.
2. (1947) 2 M.L.J. 37 (P.C.).
3. (1947) 2 M.L.J. 138 (P.C.).
4. (1947) 1 M.L.J. 81.
5. (1947) 2 M.L.J. 544.
6. (1947) 2 M.L.J. 574 (P.C.).
7. (1947) 2 M.L.J. 511.
8. (1947) 1 M.L.J. 301.

except in the specified special classes of cases and hence an illegitimate son of a daughter cannot be entitled to the rights and privileges of a daughter's son. In *Seshayya* v. *Venkatarathnam*[1] it is recognised that where a widow's alienation is questioned 50 years after it was made and the parties to the transaction and the witnesses were all dead and there is nevidence that the income from the property is inadequate for maintenance, the evidence is conclusive of the existence of legal necessity and presumptions are permissible to fill in the details obliterated by time. *Perireddi* v. *Venkataraju*[2] holds that though a widow cannot by a compromise entered into by her with a person claiming adversely to the estate enlarge her own rights in such properties as she obtains under the compromise it will not mean that the compromise which gives portion of the estate to the rival claimant to induce him to forbear from pursuing his claim and thereby avoids a contest which might possibly result in his getting the whole of it is not binding on the reversioners. In *Sankaranarayana Pillayan* v. *H. R. E. Board*[3], the Privy Council points out that a dedication is not invalid by reason that the members of the settlor's family are nominated shebaits or managers and given reasonable remuneration out of the income of the endowment as well as other rights like residence in the dedicated property.

MUHAMMADAN LAW.—In *Sahul Hamid* v. *Sultan*[4], it is held that Muslim law does not recognise a joint family as a legal entity, and heirship does not necessarily go with membership of the family. A custom may however be proved that a Muslim family has adopted the joint family mode of holding property. There is no fiduciary relationship between co-heirs in Muslim law as such and where the property of a co-heir is managed by others both during and after his minority the theory of a constructive trust is inapplicable for the period when such co-heir was not a minor. *Ramachandra Naidu* v. *Abdul Kadir Chisthi*[5] decides that a *de facto* guardian of a minor has no authority to deal with the property of the minor and any purported transactions effected by him are void as against the minor and the fact that the object of the transaction was to borrow money to pay a debt which was binding on the minor or to stave off litigation in respect of an earlier debt will not render the same binding on the minor.

INSOLVENCY LAW.—In *Kandaswami Pillai* v *Kandaswami Pillai*[6], it is held that the effect of section 28 (7) of the Provincial Insolvency Act is to vest the property of the insolvent in all cases in the Official Receiver from the date of adjudication. *Chengalraya Chetty* v. *Official Receiver, North Arcot*[7], points out that a claim by way of contribution arising by reason of the creditor paying a decree debt payable by the insolvent and others, does not fall within section 34 (1), that it cannot be said that the value of the debt is incapable of being estimated or that it is a demand in the nature of unliquidated damages and that the claim cannot be held to be one not provable under the Act. *Sadasivan* v. *Palaniappa Chettiar*[8], decides that before the amendment in 1935 section 39 made the composition scheme binding on all creditors so far as it related to a debt *entered* therein but now it expressly binds all creditors so far as debts *provable* under the Act are concerned. So until an order of discharge is passed a secured creditor can come in and prove the balance owing to him after the realisation of his security. The position would be different in the case of annulment. Where there is an annulment but no order discharging the insolvent, a secured creditor is bound by a composition of which the Court has approved in so far as the balance of his debt is concerned after the realisation of his security and the fact that he has taken no part in the composition proceedings makes no difference. In *Satyanarayana Rao* v. *Official Receiver, West Godavari*[9], it is pointed out that where matters of which the Court should have been apprised by the Official Receiver are not brought to its notice and the Court annuls the insolvency under section 43, the Court would have jurisdiction to entertain an

1. (1947) 1 M.L.J. 240.
2. (1947) 2 M.L.J. 87.
3. (1947) 2 M.L.J. 315 (P.C.).
4. (1947) 2 M.L.J. 366.
5. (1947) 2 M.L.J. 100.
6. (1947) 1 M.L.J. 203.
7. (1947) 1 M.L.J. 103.
8. (1947) 1 M.L.J. 134 (F.B.)..
9. (1947) 2 M.L.J. 425.

application for review of such an order when its attention is drawn to the facts which were not placed before it by the Official Receiver and which would justify a reconsideration of the previous order. *Venkata Reddi* v. *Suryanarayanamurthi*[1] recognises that an Official Receiver has no power to sell property which is not the sole property of the insolvent ; and he cannot convey the interest of all the members to the purchaser and hence where a father in a joint family composed of himself and his sons became an insolvent and the Official Receiver sold some immoveable property purporting thereby to sell the entire interest in the property, the sale could not affect the right, title and interest of the sons. In *Akkayya* v. *Appayya*[2], it is held that the order of annulment referred to in section 78 (2) means any order annulling the order of adjudication and the fact that an order had been passed under section 37 vesting the insolvent's assets in the Official Receiver has no bearing. *Manicka Nainar* v. *Murugesa Goundan*[3] holds that the operation of section 78 (2) is not confined to the narrow limits of section 49 but can be applied where there exists on the record of the Insolvency Court sufficient evidence to establish the debt due which the Insolvency Court was bound to accept. In *Samanna* v. *Ramachandra Chowdri*[4], it is pointed out that where a suit had been filed against an insolvent a day after the adjudication but without the leave of the Court and a decree was obtained without any objection by the insolvent and subsequently the adjudication was annulled, the effect of the annulment is to render the decree quite valid and as the debt was incurred prior to the adjudication the mere fact that the decree was passed after would not make it a debt incurred after adjudication and since it is a provable debt and was in fact proved there is no reason for denying to the decree-holder the benefit of section 78 (2).

PROPERTY LAW.—The decision in *Pavayammal* v. *Samiappa Goundan*[5] holds that section 39 of the Transfer of Property Act contemplates a claim based on the right to receive maintenance and notice of such claim and that without both there can be no charge on the properties with an alienee. *Ramamurthi* v. *Kanakarathnam*[6] points out that the amendment to section 39 by Act 20 of 1929 was not intended to create a charge where none existed previously and that its only effect is to make it unnecessary for the widow to prove that the transfer was made with the intention of defeating her right. If the transfer is gratuitous there is nothing for her to prove beyond her right to receive maintenance. If the transfer was for consideration she has only to prove besides her right to maintenance that the transferee had notice of the same. *Ponnia Pillai* v. *Sivanupandia Thevar*[7], decides that where a suit is filed averring a tenancy and there is nothing in the nature of a perpetual lease or an absolute title which could provide a foundation for a claim under section 51, the defendant has no claim to compensation for improvements. In *Viranna* v. *Pallayya*[8], it is held that a term under which the mortgagor agrees as part and parcel of the mortgage transaction to sell the mortgaged property to the mortgagee for a named price fetters the equity of redemption and is a clog and is prohibited by law. *Arunachala Mudaliar* v. *Jagannatha Mudaliar*[9], holds that in a suit on his mortgage by a puisne mortgagee against the mortgagor and the prior mortgagee who had after the date of the second mortgage purchased the mortgaged property from the mortgagor, the prior mortgagee will be accountable for the profits on the mortgaged property from the date of the sale in his favour. *Muthukaruppa Chettiar* v. *Sinnappa Goundan*[10] makes it clear that section 69 confers power of private sale only where the mortgagee is the Secretary of State for India in Council but every contract made by or on behalf of a local government or the Government of India cannot be deemed to be such a contract.

LAND TENURES AND IRRIGATION LAW.—In *Gopalkrishnayya* v. *Province of Madras*[11] it is held that where consequent on the introduction of a new system of irrigation

1. (1947) 2 M.L.J. 507.
2. (1947) 1 M.L.J. 4.
3. (1947) 1 M.L.J. 59.
4. (1947) 2 M.L.J. 57.
5. (1947) 1 M.L.J. 329.
6. (1947) 2 M.L.J. 281.
7. (1947) 1 M.L.J. 6.
8. (1947) 1 M.L.J. 244.
9. (1947) 1 M.L.J. 399.
10. (1947) 2 M.L.J. 157.
11. (1947) 2 M.L.J. 63 (P.C.).

after the Permanent Settlement the Government agreed to supply water free of charge for such of the lands as were under wet cultivation at the time of the change of source, but the new system could supply water only for the first crop due to the closing of the channels in February, and their opening in June, and in or about 1934 the zamindar who had knowledge of this started raising sugarcane instead of paddy on those lands which required water during both seasons, and in respect of the extra supply provided by Government water cess was levied, the levy is proper and does not contravene any engagement between the Government and the zamindar. *Venkataratnam* v. *Maharajah of Pithapuram*[1] decides that where there is a grant of a single field specified as wet, the absence of any indication that that wet land has a right to water for a double crop free of charge is no bar to an inference that water capable of being used on the land for a second crop free of charge can be taken and in any event a twenty years' enjoyment of that right is enough to confer a prescriptive right.

ESTATES LAND ACT.—In *Lakshminarasimhacharlu* v. *Ratnam*[2], it is pointed out that by reason of the amendment in 1945 it is now the law that a grant constitutes an " estate " if it is expressed to be of a named village irrespective of whether some of the lands in the village are held already under inam or service grants or whether there has been reservation of part of the village for communal purposes. Where the grant is of a named village the use of the words " exclusive of poramboke " in the grant will not take it out of the category of " estate ". A similar decision is *Bapiraju* v. *Vallayya*[3]; holding that merely because a grant did not include minor inams it cannot be said that it is not a grant of the whole village. In *Rudrappa Chetty* v. *Karvetnagar Trust Estate*[4], it is held that " improvement " under section 3 (4) does not mean something which must be of a permanent character and the digging of wells by a ryot in his holding to irrigate an adjoining land of his in another estate would be an improvement and where the water has been so utilised the ryot cannot be held liable to pay at a higher rate on account of any change in the nature of the crop raised. *Bandara Jogi* v. *Seetharamamurthi*[5] decides that by virtue of the former proviso to section 185 deleted in 1934 and added to section 3 (10) an irresistible presumption will arise that ryoti land becomes private land when and if it has been cultivated in conformity with the section ; but the reclamation of land which was ryoti till 1902 and its subsequent cultivation by the landholder for six years before the commencement of the Act and the letting of the land as private land thereafter will not confer that character on it. *Masenu* v. *Bhavaraju*[6] lays down that the purport of the Explanation introduced into section 3 (15) in 1934 is to give occupancy rights to a person who was able to prove occupation for 12 years where no one else had occupancy right in it and is not meant to affect the relationship between the ryot and his lessee so as to confer occupancy rights on a person who until then was not a ryot at all. *Natarajan* v. *Vellayyan Chettiar*[7] points out that where on tank beds and bunds the plaintiff had allowed shops and sheds to be erected, he had used it for a purpose different from that for which it was intended and was therefore liable to be evicted by the Collector under section 21. *Zamindar of Devarakota* v. *Jyoti Venkadu*[8] holds that if a valid and enforceable contract exists between a landholder and a ryot in respect of the rate of rent of a particular holding from before the passing of the Estates Land Act, such contract would be enforceable notwithstanding the passing of the latter Act, provided the landholder showed not merely an agreement which may be inferred from a long course of payment at a particular rate but an agreement supported by lawful consideration. If the latter element is not proved, the fact of payment of rent for long periods at a higher rate would not entitle the landholder to enforce payment at that rate after the passing of the Act.

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1. (1947) 2 M.L.J. 492.
2. (1947) 2 M.L.J. 289.
3. (1947) 2 M.L.J. 298.
4. (1947) 1 M.L.J. 248.
5. (1947) 2 M.L.J. 263 (F.B.).
6. (1947) 1 M.L.J. 296.
7. (1947) 1 M.L.J. 180.
8. (1947) 1 M.L.J. 57.

LAND ACQUISITION.—In *Associated Oil Mills, Ltd., Katpadi* v. *Provincial Government*[1], it is explained that in regard to requisition by Government, of property, under the Defence of India Act, 1939, the claimant is not entitled to interest on the compensation awarded in the absence of any agreement by Government, as there is no provision for the award of interest in section 23 of the Land Acquisition Act which is the only section made applicable to requisition cases under section 19 (*e*) (*i*) of the Defence of India Act.

LAW OF CONTRACTS.—In *Somasundaram Pillai* v. *Provincial Government of Madras*[2], it is held that an offeror can withdraw the offer before acceptance in the absence of a condition to the contrary supported by consideration, that provisional acceptance by itself will not make a binding contract, that a condition preventing the withdrawal of a provisionally accepted offer contained in the terms of an abkari sale not amounting to a notification under section 69 of the Madras Abkari Act is not valid and the ordinary law would apply and the bidder whose bid had been provisionally accepted could withdraw his bid. *Alfred William Ludditt* v. *Ginger Coote Airways, Ltd.*[3], holds that an express condition in the ticket issued to passengers carried in an aeroplane by a duly licensed company as passengers for reward, completely exonerating the company from all liability for loss, damage or injury to passengers or property caused by negligence or otherwise, is valid and enforceable having regard to the general law and the relevant conditions of the Transport Act (Canada Dominion) 1938 and the orders of the Board of Transport Commissioners. *Venkataswami Chetti* v. *Panchakshara Reddy*[4], decides that where an agreement remits a portion of the amount due under a promissory note and makes the balance payable by a fixed date and there is a failure to so pay, the remission being one *in praesenti*, under section 63 of the Contract Act the failure to pay the balance will not nullify the remission and make the entire amount payable. *Alagappa Corporation* v. *United Brokers*[5] lays down that where the agent does not disclose the name of his principal there is a presumption that the agent can personally enforce the contracts entered by him and is personally bound by them, that where the time for the purchase and sale of shares in a contract is prescribed in the contract notes as one week but the parties by mutual consent have extended it, the subsequent breach consisting in the failure to deliver the shares is really a continuing one, and that where a person sues for the specific performance of a contract by the defendant to sell certain shares and in the alternative for damages, the plaintiff can elect at the trial whichever of the remedies would be advantageous to him. *Siddique & Co.* v. *Rangiah Chettiar*[6] holds that where after the parties had entered into a contract for sale of yarn an Ordinance was passed by Government fixing the price limit but there was nothing in the Ordinance rendering the higher prices fixed in the earlier contract illegal and the seller insisted on the buyer taking delivery at the contract rate but the latter evaded and sought the benefit of the Ordinance it is the buyer that is in breach. *Meyyappa Chettiar* v. *Palaniappa Chettiar*[7] lays down that where one of the partners discharges the entire liability arising out of a partnership transaction he cannot sue for contribution but should sue for the dissolution of the partnership and for accounts. *Veeraswami* v. *Chitti Naidu*[8] points out that in a suit for dissolution and for accounts the plaintiff is entitled to interest on the amount decreed from the date of the final decree and not from the date of the plaint. *Shanmuga Mudaliar* v. *Rathina Mudaliar*[9] explains that there is no prohibition upon an unregistered partnership making contracts either with the partners *inter se* or with a stranger or upon acquiring property ; all that the Partnership Act does is to make a suit by such a partnership not maintainable. Relief from the disability can however be obtained if the partnership is registered before the suit is instituted even if the contracts sued on had been entered into prior to the registration. One of the partners of a dissolved unregistered partnership who by an arrangement

1. (1947) 2 M.L.J. 429.
2. (1947) 1 M.L.J. 123.
3. (1947) 2 M.L.J. 237 (P.C.).
4. (1947) 1 M.L.J. 226.
5. (1947) 2 M.L.J. 200.
6. (1947) 2 M.L.J. 79.
7. (1947) 2 M.L.J. 589.
8. (1947) 2 M.L.J. 450.
9. (1947) 2 M.L.J. 241.

with the other partners had become entitled to a debt from a third party can sue to recover it and it cannot be contended that the suit is not maintainable under section 69 (2).

COMPANY LAW.—In *Ramakrishna Rao* v. *Krishna Rao*[1], it is recognised that there is no provision in the Companies Act giving the Company Court exclusive jurisdiction in company matters and that many of the special remedies provided by the Act are equally enforceable in other Courts by suits. It also holds that there is no provision in the Act conferring any special rights in a Secretary in regard to the possession of the property of the company. *Vadilal Laldas Patel*, In re[2], decides that where a company is commercially insolvent and has never paid any dividend on its shares and no interest on the debentures issued and there is no opposition either from the trustee for the debenture-holders or the managing agents of the company, it would be a fit case for the appointment of a provisional liquidator, on the application of a creditor who has not been paid his debt in spite of a statutory notice served on the company ; and any objection by a shareholder on the ground that the company might be successful if suitably and properly managed is not a relevant matter in the consideration of the petition for the appointment of a provisional liquidator. *Official Receiver, High Court* v. *Rao & Co.*[3], lays down that where a company in liquidation turns out to be solvent, a creditor of the company whose debt does not carry interest by agreement or otherwise is not entitled in winding up to payment of interest on his debt. *Official Liquidator* v. *Krishnaswami Iyengar*[4] holds that the words of limitation in section 235 (1) must be regarded as governing all proceedings under the section and a defence of limitation which might have been available to a person charged if a suit had been filed will no longer be available to him. In *Subramania Iyer* v. *The Podanur Bank, Ltd.*[5], it is pointed out that section 237 (1) does not require the Court to make any particular enquiry or to give the person who is to be prosecuted an opportunity to show cause, before the Official Liquidator is directed to file a complaint, and there is nothing in the section requiring the Court to set forth its reasons when directing the liquidator to launch prosecutions and though it is desirable to give some indication that the Court has applied its mind to the questions which have to be decided in passing the order, the order is not to be vacated merely because the reasons are not set out.

NEGOTIABLE INSTRUMENTS.—In *Commissioner of Income-tax, Bengal* v. *Chowringhee Properties, Ltd.*[6], the Privy Council holds that the position of banks holding debentures as cover is well settled, that by virtue of the charge upon the debentures to secure the overdraft, the bank may subject to the terms of the charge realise the debentures by sale or may sue for and recover the principal and interest and otherwise enforce the debentures, but whatever is thereby received becomes part of the property charged to secure the overdraft and is not receivable or held by the bank otherwise than for that purpose. *Venkatakrishniah* v. *Manickyaram*[7] decides that where a promissory note is payable on demand and is not payable at any specified place, no presentment is necessary under section 64 of the Negotiable Instruments Act to charge the maker thereof nor is there any rule to determine the reasonable time for giving notice of any assignment of such a note.

SPECIFIC RELIEF.—In *Narayanamurthy* v. *Madhavayya*[8], it is pointed out that when a person sues for specific performance and it is found that he cannot obtain an order in respect of the whole but only of part of the property, it is at that stage that he must make up his mind as to what he will do if he considers the decision to be incorrect. He cannot call in aid section 15 of the Specific Relief Act and at the same time proceed in addition to obtain the remainder of the property or

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1. (1947) 1 M.L.J. 75.
2. (1947) 2 M.L.J. 563.
3. (1947) 1 M.L.J. 242.
4. (1947) 1 M.L.J. 234.
5. (1947) 1 M.L.J. 54.
6. (1947) 2 M.L.J. 61 (P.C.).
7. (1947) 2 M.L.J. 196.
8. (1947) 2 M.L.J. 366.

damages. If he takes what the section gives him he must abandon all further claim and all further rights including the right of appeal as a condition precedent. *Thirumalayandi Thevar* v. *Uthanda Thevar*[1] holds that section 39 covers both void as well as voidable agreements.

REGISTRATION LAW.—In *Lahore Central Co-operative Bank, Ltd.* v. *Qadir Baksh*[2], where an award in respect of a claim on a mortgage after fixing the amount due and making provision for its payment by instalments, stated that in default as to any instalment the whole amount shall become payable and may be realised through a Civil Court by the sale of all the property, it was held by the Privy Council, that the provision regarding realisation must be construed as stating as an existing fact the general consequences which by law were attached to non-payment of secured debts and has no operative effect in creating any interest in any immoveable property and hence section 17 (1) (*b*) of the Registration Act will have no application. In *Subbu Naidu* v. *Varadarajulu Naidu*[3] it is decided that an unregistered partition "koorchit" cannot be said to be inadmissible for any purpose whatever, that it would be admissible to prove the adverse character of the defendant's possession of the lands allotted to him though such allotment was ineffectual for want of registration, but as evidence of the partition it would be prohibited from admission by section 49 (*c*).

STAMP LAW.—In *Nallendra Konar* v. *Venkatachala Konar*[4], it is held that section 29 (*g*) of the Stamp Act makes it clear that it is the duty of the Court in respect of a decree for partition to direct the proportion of stamp to be borne by each party and where the Court did not do so and in consequence a party had to postpone furnishing the full amount of the stamp paper required, there can be said to be no delay on the part of the party in furnishing stamps and in computing limitation for filing an appeal against the decree the time so taken should be excluded.

COURT-FEES.—In *Thirumalayandi Thevar* v. *Uthanda Thevar*[1], it is decided that a suit to set aside a registered sale deed of immoveable property executed by the plaintiff in favour of the defendant and praying for a declaration that it is sham and nominal and for delivery of possession is governed by section 7 (*iv-A*) of the Court-Fees Act as the prayer for declaration is not a mere surplusage. *Nagendram* v. *Appayya*[5] holds that where pending a suit for partition the plaintiff transfers his rights to a stranger who is then added as additional plaintiff, extra court-fee is not payable; but if the original plaintiff does not prosecute the suit and allows himself to be transposed as a defendant the suit ceases to be one for partition by a coparcener but one for partition against the other members of the family by the alienee and the latter will as transferee-plaintiff have to pay *ad valorem* court-fee on the share of the properties he is claiming under section 7 (*v*). *Satyabhigna Theerthaswami* v. *Narasayya*[6] holds that in a suit for injunction to restrain defendant from cutting certain trees in a certain land, the relief by way of injunction should be valued at not less than half the value of the trees in the manner provided by section 7 (*v*), namely, that of taking their market value. *Kesanna* v. *Boya Bala Gangappa*[7] states that where a person sues for possession of specific immoveable property the court-fee must be paid on the market value of the land notwithstanding that it had formed part of an estate paying revenue to the Government. Where he asks to be put in possession of immoveable property which fell to him at partition the boundaries of which are indicated, he is not asking for a share but for possession of what has already fallen to him and section 7 (*v*) (*d*) will apply. It is only when he seeks possession as fractional share of a portion of an estate that the Madras Government Notification of 1932 directing the assessment of court-fee at 10 times the revenue on such lands would apply. In *Soundararaja Perumal Devasthanam* v. *Soundararaja Pillai*[8], it is held that a suit by the present trustees against previous

1. (1947) 1 M.L.J. 212.
2. (1947) 2 M.L.J. 304 (P.C.).
3. (1947) 1 M.L.J. 90.
4. (1947) 2 M.L.J. 201.
5. (1947) 1 M.L.J. 15.
6. (1947) 1 M.L.J. 182.
7. (1947) 1 M.L.J. 201 (F.B.).
8. (1947) 1 M.L.J. 148.

trustees to render a true and proper account with reference to transactions, collections, expenses, etc., and for the appointment of a Commissioner to examine the accounts is one for an account falling within section 7 (*iv*) (*f*) and *ad valorem* court-fee is not payable on the basis that the suit was for the recovery of specific sums. In *Anthony Salvador Dias* v. *Sivarama Rao*[1], where the suit was for redemption of a mortgage and for damages for delay by the respondent in paying the debts for which the consideration for the mortgage had been retained by him, it was held that the claim for damages was a separate relief and hence court-fee should be paid separately for it. *Devadas* v. *Sadasiva Reddiar*[2] holds that where the main relief is for redemption of a usufructuary mortgage but there is also a prayer for an account of surplus deficiencies the suit should be deemed as substantially one for redemption only and court-fee is payable under section 7 (*ix*). *Kallianikutti Amma* v. *Kunhilakshmi Amma*[3], decides that the appropriate article applicable to a suit by an attaching decree-holder under Order 21, rule 63, Civil Procedure Code, to set aside an order of the executing Court allowing a claim under Order 21, rule 58 and for a declaration that an assignment in favour of the claimant was void is Article 17 (*i*).

LIMITATION.—In *Kollegal Silk Filatures, Ltd.* v. *Province of Madras*[4], it is held that no bar of limitation is applicable to an appeal against the award of compensation by an arbitrator under section 19 of the Defence of India Act for compulsory acquisition of immoveable property since the words of exclusion in section 19 (*g*) of that Act are very wide and must cover the Limitation Act as to which there is no saving provision to be found in the section or in the rules. *Rajarajeswari Ammal* v. *Sankaranarayana Aiyar*[5] holds that under section 20, before the amendment of 1942, there should be a payment, it must be towards interest as such, it must be by a person liable to pay or his duly authorised agent and the acknowledgment of the payment should be in the writing of or signed by the person paying. There is no warrant for importing further conditions as that the interest should be for a particular period or that the acknowledgment itself should specify the period. *Sooryanarayana Rao* v. *Sarup Chand Rajaji*[6] holds that where the mortgagee purchased the equity of redemption but the sale was later annulled, the receipt of rents by the vendee in the interval is to be deemed as receipt *qua* mortgagee and therefore tantamount to payment within section 20 (2). *Kempamma* v. *Racha Setty*[7] lays down that so long as the mortgagor has not parted with his interest in the mortgaged properties and continues to be liable under the mortgage he can make a payment which will afford a fresh starting point under section 20. In *Venkatarama Aiyar* v. *Zamindar of Sivagiri*[8], it is held that the word "suit" in Article 84 is used in its ordinary and not in a technical sense and cannot be construed as including execution proceedings and appeal; hence a claim by an advocate for fees payable to him for services in the suit in which he was engaged should be filed within 3 years of the rendering of judgment in such suit. *Western India Oil Distributing Co.* v. *Ratnasabapathi*[9] decides that where a petrol pump and tank is provided by the principal to the agent for the sale of petrol, to be returned on termination of agency, the cause of action for the return arises on such termination and Article 89 applies. The cause of action and the right to sue first arose when the business between the parties ceased and not on the date when they were delivered to the agent. *Sankaralingam Pillai* v. *Thenpalaniandavar Temple*[10] holds that inasmuch as an application under section 44 of the Hindu Religious Endowments Act to enforce a charge created in favour of a temple under a settlement deed is filed as an application rather than as a suit by reason of the special procedure laid down in that section, the limitation applicable would be that applicable to a suit for the same relief, that is to say, the period provided by Article 132. *Veeraraghavayya* v. *Venkataraghava Reddy*[11] points out that though an application by a judgment-debtor to set aside an execution sale

1. (1947) 1 M.L.J. 231.
2. (1947) 1 M.L.J. 333.
3. (1947) 1 M.L.J. 1.
4. (1947) 2 M.L.J. 378.
5. (1947) 2 M.L.J. 93.
6. (1947) 1 M.L.J. 373.
7. (1947) 1 M.L.J. 153.
8. (1947) 1 M.L.J. 173.
9. (1947) 1 M.L.J. 360.
10. (1947) 2 M.L.J. 258.
11. (1947) 2 M.L.J. 468.

of his property on the ground that he had no saleable interest the property being a village service inam, is to be under section 47, Civil Procedure Code and not under Order 21, rule 91, it must be made within 30 days of the sale and Article 166 will apply. *Sankaralingam Pillai* v. *Thenpalaniandavar Temple*[1] holds that Article 181 does not apply to applications other than those under the Civil Procedure Code. *Kamakshi Ammal* v. *Ananthanarayanaswami Pillai*[2] decides that the *terminus a quo* under Article 181 has to be determined having regard to the nature of the particular case and the right to relief claimed therein. *Sivalinga Thevar* v. *Srinivasa Mudaliar*[3] holds that where there is a decree against both father and son, the decree against the son would become barred if an application is not made within the time prescribed by Article 182, notwithstanding that for some reason or other the execution of the decree against the father is not barred. *Nataraja Pillai* v. *Narayanaswami Iyer*[4] points out that where an execution petition is ordered to be returned for supplying certain information within the time specified but the decree-holder does not take the return from the court and thereupon the Court rejects the petition on a subsequent date, the order of rejection would be a "final order" within Article 182 (5) on a subsisting petition for the purpose of saving limitation. *Seetharama Chettiar* v. *Muthukrishna Chettiar*[5] takes a similar view. In *Lakshminarasimham* v. *Suryanarayana*[6] it is held that there is only one decree within the meaning of Article 182 notwithstanding that it includes several reliefs based upon distinct causes of action and the decree-holder can rely on clause (5) of the Article for limitation to be calculated from the dates of the final orders in previous execution applications notwithstanding that they sought execution of reliefs other than those sought in the later execution petition.

CIVIL PROCEDURE CODE.—In *Pedda Jiyyangarlu* v. *Venkatacharlu*[7], the Privy Council holds that a suit to establish the right to conduct the service in a temple in a particular manner is cognisable in a Civil Court. *Oor Nayakan* v. *Arunachala Chettiar*[8] holds that where a Court wrongly acts under an appealable provision of law and passes an order, a party is not deprived of the right of appeal though on the facts the order should not have been passed under that provision. So where a suit of a small cause nature is tried as an original suit an appeal is competent and the appeal Court will entertain the appeal and send the case back to be tried by the proper Court. *Kasi* v. *Ramanathan Chettiar*[9], states that the question whether an adjudication is a decree or not must be determined with reference to section 2 (2) and not with reference to implications, true or supposed, arising from the general provisions relating to judgments and decrees or to disposal of suits. Nor can any considerations of policy as to expeditious administration of justice or avoidance of delay and expense be imported. *Komarappa Goundan* v. *Ramaswami Goundan*[10] points out that as the words "the matter in issue" in section 10 should be taken to denote the entire subject in controversy, relief under that section would not be available where the facts in the two suits are not common except only with regard to one matter in issue. *Papamma* v. *Narayana*[11], recognises that the question of *res judicata* being one of law can be taken for the first time in second appeal. In *Brijlal Ramji Das* v. *Gobindram Gordhandas Saksaria*[12], the Privy Council holds that despite the definition of judgment in section 2 (2) the expression "foreign judgment" in section 13 means an adjudication by a foreign Court upon the matter before it. Not every step in the reasoning which led the foreign Court to its conclusion should have been directly adjudicated upon and "directly" does not mean "expressly"; hence where the "matter" which was "directly adjudicated upon" by the foreign Court was the validity of an award and the order of the Court in effect was that that it had been properly filed and that the objections to it must be dismissed, the order is a judgment within the meaning of section 13 which is conclusive between

1. (1947) 2 M.L.J. 258.
2. (1947) 1 M.L.J. 142.
3. (1947) 2 M.L.J. 583.
4. (1947) 1 M.L.J. 393.
5. (1947) 2 M.L.J. 553.
6. (1947) 2 M.L.J. 443.
7. (1947) 1 M.L.J. 159.
8. (1947) 2 M.L.J. 496.
9. (1947) 2 M.L.J. 523.
10. (1947) 1 M.L.J. 365.
11. (1947) 1 M.L.J. 274.
12. (1947) 2 M.L.J. 498 (P.C.).

the parties as to the validity of the award. *Srimanthu* v. *Venkatappayya*[1] holds that section 21 does not cover any objection going to the nullity of an order on the ground of want of jurisdiction and hence though an objection to the jurisdiction of the executing Court to order sale is not taken by the judgment-debtor it would be open to other judgment-creditors or the same judgment-debtor to proceed in execution against the property so sold as the sale is a nullity. *Nagi Reddy* v. *Kotamma*[2] points out that a Court to which a decree is sent for execution is the only Court which has seisin of the execution proceedings and it retains its jurisdiction to execute till it reports under section 41 to the decree Court the fact of execution or in case of failure to execute the circumstances attending such failure. In such a case the decree Court cannot entertain any execution application unless concurrent execution had been ordered or proceedings in the Court to which the decree has been sent has been stayed for purposes of executing the decree in the former Court. *Gopalaswami Mudaliar* v. *Thiagarajaswami Devasthanam*[3] decides that an order dismissing an application for amendment of an execution petition is a decision on a question relating to the execution of a decree and falls within section 47 and where the order definitely negatives the right of the decree-holder there is a final adjudication and the order is appealable. *Londa Abboyee* v. *Badam Suryanarayana*[4] holds that a recital of reasons for ordering arrest of judgment-debtor as required by section 51 is not necessary if the order eventually passed is not one that the judgment-debtor should be detained. *Sivaramiah* v. *Audi Reddy*[5] affirms that section 53 allows a decree to be passed against the separate assets of the father with the sons as well as the share of the father in the family properties. *Khaja Hasanulla Khan* v. *Royal Mosque Trust Board*[6] points out that a decree in a scheme suit under section 92 has the effect of precluding any one, whether a party to the suit in which the decree was passed or not, from asserting any rights vested in him which conflict with or attack the scheme. *Narasimhiah Chetty* v. *Sivaramiah Chetty*[7], holds that an appellate decision in a contribution suit remanding the case to the trial Court for passing a final decree in the light of the findings of the appellate Court (the liability having been decided and the working of the arithmetical result being only consequential) is a " decree " and as such appealable. *Chinnaswami* v. *Nallappa Reddiar*[8] points out that where the principles of law are well settled and the only question is as to their application to a certain set of facts there is no substantial question of law arising for purposes of section 110. *Tirumalai Tirupati Devasthanam Committee* v. *Chengama Naidu*[9] explains that the revisional jurisdiction under section 115 is only a variety of appellate jurisdiction and it will be competent to the High Court to issue a temporary injunction in its revisional side. *Brahamaramba* v. *Seetharamayya*[10] holds that as an application for leave to sue as pauper embodies a plaint, if the applicant dies during its pendency, his legal representative can come on the record and continue the suit on paying court-fee and limitation for the suit must be deemed to have stopped when the application to sue as pauper was filed, and section 149 will apply. *Bojjanna* v. *Kristappa*[11] states that the Court should not presume the existence of an inherent power to do that for which a statutory provision has been made and an execution sale cannot be cancelled after confirmation on the ground of fraud on Court in regard to the valuation of the property sold, such fraud not having been the subject of any application under O. 21, rule 90, within the prescribed time. *Ravu Venkata Mahipathi Surya Rao* v. *Chalamayya*[12] decides that there will be no justification to deny to the Court inherent jurisdiction to pass appropriate orders, revoking where the ends of justice so require its own wrong order based on assumptions which later have proved to be baseless. *Balaji Rao* v. *Natesa Chetty*[13] points out that the High Court can stay the trial of a suit out of which the proceedings

1. (1947) 1 M.L.J. 306 (F.B.).
2. (1947) 1 M.L.J. 156.
3. (1947) 1 M.L.J. 235.
4. (1947) 1 M.L.J. 246.
5. (1947) 1 M.L.J. 239.
6. (1947) 1 M.L.J. 395.
7. (1947) 2 M.L.J. 532.
8. (1947) 2 M.L.J. 194.
9. (1947) 1 M.L.J. 411.
10. (1947) 1 M.L.J. 119.
11. (1947) 1 M.L.J. 10.
12. (1947) 1 M.L.J. 87.
13. (1947) 1 M.L.J. 330.

in the High Court do not arise subject to the limitation that the applicant for stay has no other remedy open to him which he can seek in the Civil Court and that the ends of justice require such stay being given, to prevent abuse of process of Court. *Komarappa Goundan* v. *Ramaswami Goundan*[1] takes a similar view. *Chellappa Chettiar* v. *Manickam Pillai*[2] holds that an order setting aside a sale in execution consequent on the petitioner's omitting to abide by Court's previous order in another petition relating to the same property is justified under the Court's inherent powers as necessary to avoid abuse of process of Court. *Ankamma* v. *Raghavamma*[3] decides that once a preliminary decree has been passed in a suit for dissolution of partnership the Court has no jurisdiction thereafter to dismiss the suit for default as the Court has a duty to work out the details of the preliminary decree independently of the conduct of the parties and hence a wrong order dismissing the suit can be set aside under section 151. *Venkataramudu* v. *Krishnayya*[4] rules that merely because the Court has inherent power to dismiss, it cannot be said that it must also have the power to restore. *Pulla Madduletti Reddi* v. *Rahiman Bi*[5] lays down that a Court has no jurisdiction to re-open under section 151 a decree which has become final when there is neither any mistake nor accidental slip in the proceedings before it. *Ramakrishnan Chettiar* v. *Radhakrishnan Chettiar*[6] declares that section 152 which embodies the "slip rule" of the Supreme Court Rules enables correction only of errors, etc., in judgments, orders, etc., but gives no authority to correct errors in documents not directly involved in the proceedings themselves or to correct errors anterior to the proceedings. *Ramaswami Reddi* v. *Deivasigamani Pillai*[7] rules that where the dispute as to title to property is between *A* and *B*, it is not open to *C* to come in and insist on his title which is contrary to that set up by *A* being investigated and it would not be right to implead such a person as a defendant and then transpose him at the fag end of the trial as a co-plaintiff and pass a decree in his favour. *Kothandarama Reddi* v. *Lakshminarasimha Reddi*[8] points out that Order 2, rule 2 has no application to proceedings before the Hindu Religious Endowments Board. *Seshamma* v. *Seshadri Aiyangar*[9] lays down that where a claim is based on specific alternative titles an amendment relying on a third title cannot be permitted. *Bojjanna* v. *Kristappa*[10] holds that the principle of Order 7, rule 6 can be applied to an application to set aside an execution sale. *Vaithilinga Naidu* v. *Devanai Ammal*[11] points out that Order 9, rule 9 could be invoked on behalf of a minor plaintiff if the non-appearance of the next friend is *bona fide* but not where he has been negligent or deliberately obstructive. *Somasundaramma* v. *Seshagiri Rao*[12] decides that where on the refusal of an application for adjournment the plaintiff's pleader reports "no instructions" and the plaintiff though present during the defendant's arguments asks for time to engage another pleader which is refused, the trial Judge should in those circumstances pass an order dismissing the suit for default and not pass a decree on the merits against the plaintiff and where a decree on the merits has been in fact passed the plaintiff could still apply under Order 9, rule 9, for the restoration of the suit as if it had been dismissed for default. *Venkataratnam* v. *Appa Rao*[13] lays down that that Order 17, rule 3 applies only to cases where the parties are present. *Venkatarama Pillai* v. *Parusurama Pillai*[14] holds that Order 22, rule 10 must be read as providing only for cases of assignment, creation and devolution of interest other than those mentioned in rules 2, 3, 4, 7 and 8. *Murugappa Chettiar* v. *Thirumalai Nadar*[15] declares that an attachment could not be said to have been made, unless the provisions of both sub-rules of Order 21, rule 54 have been complied with; there must be both prohibition of transfer as also publicity by tom tom, etc. *Ponnuswami Mudaliar* v. *Subbaraya Mudaliar*[16] rules that an insolvent is a

1. (1947) 1 M.L.J. 365.
2. (1947) 2 M.L.J. 353.
3. (1947) 2 M.L.J. 233.
4. (1947) 2 M.L.J. 244.
5. (1947) 2 M.L.J. 587.
6. (1947) 2 M.L.J. 72.
7. (1947) 1 M.L.J. 371.
8. (1947) 2 M.L.J. 23.
9. (1947) 2 M.L.J. 183.
10. (1947) 1 M.L.J. 10.
11. (1947) 2 M.L.J. 566.
12. (1947) 1 M.L.J. 292.
13. (1947) 1 M.L.J. 271.
14. (1947) 1 M.L.J. 348.
15. (1947) 2 M.L.J. 310.
16. (1947) 1 M.L.J. 37.

"person interested" within the ordinary meaning of that term and can apply under Order 21, rule 90, and the amendment of Order 21, rule 22 does not affect the question. *Venkatarama Ayyar* v. *Sait Khialdass Topandass*[1] declares that there is nothing in Order 21, rule 90 to show that the auction purchaser should appear in the array of parties as a respondent and failure to implead the auction purchaser does not render an application under that rule incompetent and a petition for impleading him though made beyond 30 days should be allowed. *Kanagasabhai Pathar* v. *Pooranathammal*[2] states that in an application under Order 21, rule 100 the Court is not concerned with the title to the property but only with the factum of possession at the time when the applicant is alleged to have been dispossessed and the nature of such possession whether it was on his own account or on account of a person other than the judgment-debtor. *Arunachalam Aiyar* v. *Lakshminarasimham*[3] decides that while Order 22, rule 9 (2) limits an application to set aside an abatement to the legal representatives of a deceased plaintiff there is no similar limitation in respect of an application to bring on record the legal representatives of a deceased plaintiff or appellant. *Saradambal Ammal* v. *Kandaswami Goundan*[4] holds that the words "any interest" in Order 22, rule 10 include a transferable right to sue. *Namagiri Ammal* v. *Subba Rao*[5], declares that Order 39, rule 1 has no application to an appeal against a decree granting probate and in probate proceedings it is not correct to say that any property is in dispute. *Lakshmi Achi* v. *Subramania Pillai*[6], lays down that where a number of causes of action against separate defendants are joined together for reasons of convenience, and an order for security for costs passed in appeal in favour of some of the respondents is not complied with, it is not incumbent on the Court to dismiss the appeal in its entirety but to reject it only so far as it is against those respondents in whose favour the order for security for costs has been made leaving it to be prosecuted against the other respondents. *Gopalkrishna* v. *Narayana*[7], points out that under Order 47, rule 2 an application for review should be made only to the Judge who passed the decree and not to his successor but where the latter has entertained such an application without objection by the other party and disposed of it on the merits it is not open to that party, in appeal, to contest the entertainment of the application by the successor judge.

CRIMINAL PROCEDURE CODE.—The question of holding identification parades was considered in *Sangiah*, In re[8], which holds that the accused cannot demand that one should be held at or before the trial or enquiry. Nor is it that whenever the accused disputes the ability of witnesses to identify him, the Court should direct the holding of a parade. The test of the ability of a witness to identify should be decided in Court only. *Verghese Vaidyar* v. *Rex*[9] holds that section 54 of the Criminal Procedure Code does not require that the person arrested should be liable to be arrested without a warrant in case the offence had been committed in British India. *Krishnavataram*, In re[10], states that when an application under section 144 (4) is made and the applicant offers to show cause against the continuance of the *ex parte* order against him the Magistrate should hold an enquiry and cannot anticipate the nature of the evidence without doing so and confirm his order. *Munia Servai* v. *Thangayya Onturiyar*[11] holds that an application for stay of delivery of possession during the pendency of a revision petition against the final order in section 145 proceedings is incompetent. *Venkatasuryanarayanaraju* v. *Sundararamachandraraju*[12] lays down that possession of a fugitive, scrappy or recent character is not the possession contemplated in section 145 (4) as the possession to be maintained by the Magistrate subject to the result of the decision of the Civil Court. *Bheemavarappu Subba Reddi*, In re[13], holds that section 161 does not require the police officer to record individual statements though it is desirable that the statements should be recorded

1. (1947) 1 M.L.J. 355.
2. (1947) 2 M.L.J. 97.
3. (1947) 1 M.L.J. 276.
4. (1947) 2 M.L.J. 374.
5. (1947) 2 M.L.J. 364.
6. (1947) 2 M.L.J. 20.
7. (1947) 2 M.L.J. 585.
8. (1947) 2 M.L.J. 252.
9. (1947) 1 M.L.J. 2.
10. (1947) 2 M.L.J. 191.
11. (1947) 1 M.L.J. 171.
12. (1947) 2 M.L.J. 276.
13. (1947) 1 M.L.J. 193.

except where reasons of urgency or the exigencies of investigation make such recording undesirable. An important pronouncement on section 162 is made in *Pulukuri Kotayya* v. *King-Emperor*[1], which explains that the right conferred on the accused to copies of statements made by the prosecution witnesses during the investigation stage to the police is a valuable one as providing often important material for the cross-examination of those witnesses, and where the statements are not made available to the accused an inference, almost irresistible, will arise of prejudice to the accused. *Zahiruddin* v. *King-Emperor*[2] points out that the effect of a contravention of section 162 depends on the nature of the prohibition which has been contravened. If it consists in the signing of a statement made to the police and reduced to writing, the evidence of such a witness would not be inadmissible nor can allowing the witness to give evidence vitiate the proceedings. The use by the witness however, while giving evidence, of such a statement would raise different considerations. It is further stated by the Privy Council that a contravention of section 172 lays the evidence of the police officer open to adverse criticism but does not make it inadmissible. *Verghese*, In re[3], decides that section 188 as amended in 1923 is not controlled by sections 179 to 187 but controls them. *Ayamutty* v. *Baputty*[4] holds that section 203 confers ample jurisdiction on the Magistrate to dismiss a complaint if in his opinion no sufficient ground is made out for proceeding with the enquiry. In re *Ummal Hasanath*[5] states that section 205 applies only where the Magistrate has issued a summons in the first instance and not where the accused has been arrested without or after the issue of a warrant. It also holds that section 353 by necessary implication confers a power on the presiding officer, be he a Magistrate or a Sessions Judge or a Judge of the High Court to dispense with the personal attendance of an accused person. *Muppanna Appanna*, In re[6], holds that under section 238, the Sessions Judge can convict the accused of a minor offence even though the accused would have been tried by a jury and not by assessors in such a case. *Natesa Naicker* v. *Mari Gramani*[7], declares that section 247 requires the Magistrate to acquit the accused where in a summons case the complainant does not appear unless there is a proper reason for adjourning the hearing. An order thus passed is not revisable. *Miyala Narasimhacharya*, In re[8], points out that commencement of proceedings within the meaning of proviso (*a*) to section 350 (1) means an effective commencement and not a mere posting of the case from one date to another. Where a trial is effectively commenced the accused may demand that the witnesses or any of them may be resummoned and reheard. *Mahadevan*, In re[9], holds that where an appealable sentence has to be awarded in a case, the Magistrate is bound to take down the evidence of the witnesses and the evidence must form part of the record. The scope of section 411-A is explained by the Privy Council in *Thiagaraja Bhagavathar* v. *King-Emperor*[10]. An appeal under that section on a matter of fact can be brought only on a certificate of the trial Judge or with the leave of the Court of appeal. The Judge hearing an application for leave has a discretion, which however, should be exercised judicially, that is, after considering the special features of the case and without ignoring the effect which the grant of leave without due discrimination may have upon the whole system of trial by jury in the High Court. When once leave is given the entire matter is at large and the appellate Court must dispose of the appeal on the merits giving proper weight and consideration to the views of the jury implicit in their verdict as to the credibility of the witnesses, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt, etc. If the High Court thereupon concludes that the verdict of the jury is wrong it must allow the appeal and cannot uphold the verdict merely on the ground that it is not perverse or unreasonable This statement of the law is adopted in *Crown Prosecutor* v. *Krishnan*[11]. In *Godala Sanyasi*, In re[12], it is held that section 413 is really

1. (1947) 1 M.L.J. 219 (P.C.).
2. (1947) 1 M.L.J. 339 (P.C.).
3. (1947) 1 M.L.J. 277.
4. (1947) 2 M.L.J. 460.
5. (1947) 2 M.L.J. 142.
6. (1947) 2 M.L.J. 203.
7. (1947) 2 M.L.J. 156.
8. (1947) 1 M.L.J. 186.
9. (1947) 2 M.L.J. 307.
10. (1947) 1 M.L.J. 404 (P.C.).
11. (1947) 2 M.L.J. 128.
12. (1947) 2 M.L.J. 383.

in the nature of a limitation on the right of appeal given under section 408 to a convicted person and hence it should be seen in each case whether the Magistrate has passed a sentence of fine not exceeding Rs. 50 only. *Akbar Sheriff*, In re[1], holds that the tendering of a pardon by a Magistrate under section 337 is not revisable by the High Court under section 435. *Thanikachala Mudali* v. *Ponnappa Mudali*[2] decides that the proviso to section 436 requires notice only in the case of any person who has been discharged and not in the case of a person to whom no process has been issued and when the complaint has been dismissed without notice to him. *Tirumalraju*, In re[3], points out that under section 439 (3) the High Court as a Court of revision can inflict the same punishment which might have been inflicted by the First Class Magistrate. *Public Prosecutor* v. *Atchamma*[4] holds that where an order under section 476 is made to lay a complaint in respect of contradictory statements by a witness at different stages of the proceedings the absence of an express finding as to which of the statements is false does not vitiate the complaint, for even if it cannot be proved which of the statements is false a person may be charged and convicted in the alternative of intentionally giving false evidence at one stage or another. *Pakkirisami Pillai*, In re[5], makes it clear that the absence of a finding in such a case that the prosecution is expedient in the interests of justice is an incurable defect. *Kuppuswami Padayachi* v. *Jagadambal*[6] states that when once after the passing of an order for maintenance under section 488 the spouses have resumed co-habitation the order becomes automatically ineffective. Subsequent neglect can afford cause only for a fresh application. *Mohamed Rahimullah*, In re[7], holds that when a valid divorce under Muslim law has been given by a husband to his wife and the iddat maintenance is also paid he is no longer bound to pay the maintenance awarded under section 488 to the wife as the marriage has ceased. *Appayyamma* v. *Subba Rao*[8] holds that when once an order under section 488 is cancelled on an offer by the husband to take the wife back, the wife cannot resist the demand to live with him except by showing cruelty by the husband. *Grisilda Titus* v. *Louis Titus*[9] lays down that for purposes of section 489 (2) the Criminal Court should take the decision of the Civil Court as it stands and consider the effect of it on the order passed under section 488. *Venkataramaniah Chetty* v. *Pappamma*[10] decides that a husband seeking to recover the custody of his minor wife illegally detained by others can proceed under section 491 in spite of the fact that he may proceed under the Guardians and Wards Act. *Venkata Appala Naidu*, In re[11], points out that for restoration of possession of land under section 522 (3) it should appear to the Court that by criminal force or show of force or by criminal intimidation the complainant had been dispossessed. *Babakka* v. *Pedda Varadappa*[12], holds that failure to record under section 539-B a memorandum of the Magistrate's inspection will not lead to interference in revision if there has been no failure of justice. *Subbammal* v. *Alamelu Ammal*[13], states that under section 552 it has to be established that the detention of the child as well as the purpose of such detention were both unlawful. Detention by a step-mother of her step-daughter with a view to dispose of her in marriage as she pleases is an unlawful detention and for an unlawful purpose and in such a case the natural mother is entitled to ask for and obtain restoration of the custody of the child from the step-mother. *Thirumalraju*, In re[8], decides that section 545 empowers any Criminal Court which imposes any fine or any Criminal Court confirming in appeal that sentence of fine to make an order for compensation as comtemplated in that section.

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1. (1947) 2 M.L.J. 388.
2. (1947) 1 M.L.J. 368.
3. (1947) 1 M.L.J. 238.
4. (1947) 1 M.L.J. 197.
5. (1947) 2 M.L.J. 384.
6. (1947) 1 M.L.J. 34.
7. (1947) 1 M.L.J. 70.
8. (1947) 2 M.L.J. 288.
9. (1947) 1 M.L.J. 321.
10. (1947) 2 M.L.J. 153.
11. (1947) 1 M.L.J. 225.
12. (1947) 2 M.L.J. 306.
13. (1947) 2 M.L.J. 461.

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UNVEILING OF THE BUST OF THE LATE MR. R. NARAYANASWAMI IYER.

A bust of the late Mr. R. NARAYANASWAMI IYER, Proprietor of the Madras Law Journal, presented by the staff of the Madras Law Journal Office and Kalaimagal Office as a mark of their esteem and affection for the late Mr. R. Narayanaswami Iyer was unveiled on the 4th January, 1948, in the premises of the Madras Law Journal by the Hon'ble Mr. Justice N. Chandrasekhara Iyer. Mr. T. S. S. Rajan, Minister for Food presided over the function.

Mr. T. R. Venkatarama Sastri on behalf of the Editorial Committee of the Madras Law Journal requesting Mr. Chandrasekhara Iyer to unveil the bust said that the late Mr. Narayanaswami Aiyar belonged to that class of people who deserved to be honoured by all. Knowing him intimately the speaker could say that Mr. Narayanaswami Aiyar was loved and respected by his employees on account of his affable manners and generous heart towards them. He hoped that his son who was now in charge of the concern would continue in the foot-steps of his father rendering greater service to the legal public.

Mr. Justice N. Chandrasekhara Iyer in unveiling the bust said :

When my young friend Mr. Ramaratnam asked me to unveil this bust of his revered father, I accepted the invitation with pleasure. I knew Mr. Narayanaswami Iyer ever since 1909 when I walked into Mr. V. Krishnaswami Iyer's house as a raw apprentice at law. He was helpful to me during my six months stay with Mr. Krishnaswami Iyer as an apprentice and he became my friend later on. So, I can speak with a fair amount of knowledge and authority about the several qualities which endeared Mr. Narayanaswami Iyer to those with whom he came into contact. He was a lovable person, with a sweet and disarming smile and a unique charm of manner. As a friend, his loyalties were steadfast and strong. He was a man of simple habits and was deeply pious and austere. Ostentation was unknown to him and when he prospered in business, he helped silently many a poor man with financial assistance. In fact, he took a genuine delight in secret help of this kind.

As a lawyer or as an advocate, he was perhaps not much of a success. This was because he did not possess in abundance some of the qualities requisite for making a mark in the profession—such as a spirit of adventure, companionship and camaraderie and discreet pushfulness. He was of a shy and retiring disposition rather, and the competitive struggle involved in the stress and conflict of the legal arena was not exactly suited to his temperament. But he had great capacity for organisation and proved his skill and ability when he took up the Madras Law Journal

and brought it to its present position of pre-eminence in the legal world all over India. His business instincts and straight-forwardness as well as high integrity of character enabled him to achieve this result; and today, it can be safey asserted that the Madras Law Journal is of no less authority than the Indian Law Reports. In fact, its usefulness is greater and it has acquired a reputation for accurate and prompt reporting and sober criticism.

Mr. Narayanaswami Iyer was not content with his efforts to make the Madras Law Journal a first-rate legal periodical. He turned his hands to other publications as well. For instance, the "Kalaimagal" is his creation. The publication of Sanskrit classics was one of his favourite enterprises and several Sanskrit works, notably the SRIMAD VALMIKI RAMAYANA, have been made accessible at comparatively cheap prices to the public by Mr. Narayanaswami Iyer.

He furnished a good example of how piety and godliness can be combined with business efficiency. The popular notion that to attain success in a business venture, a certain amount of deviation from strict standards of integrity or honesty is inevitable, and lapses from the strait path of rectitude must be tolerated is not true or correct. In the long run, it is the man of fundamental honesty and high probity of character who flourishes even in business. Our friend Mr. Narayanaswami Iyer furnishes proof of this statement.

He maintained cordial relations with his employees. It is the Editorial Committee and the staff of the Madras Law Journal and the employees of the Press that have raised this bust to honour a man who richly deserves it. He was a kindly person, benovolent, charitable and religious. He was conservative in habits and outlook and saw much wisdom and sense in our daily usages, unlike some of our modernised friends. This quality made him steady and sober and one who adhered to certain standards in daily life. It is a matter of satisfaction that his son Mr. Ramaratnam is following in his father's footsteps.

May this bust serve as an example of a good and capable man who brought a business venture into great prominence by honest and indefatigable efforts and strove hard to be helpful not only to those who served with or under him but also to a wider public by his acts of benevolence and generosity.

Mr. T. S. S. Rajan expressed his great pleasure in having been given the opportunity of taking part in the function He said that though he had not had the pleasure of meeting the late Mr. R. Narayanaswami Iyer often, he was sure that the late Mr. R. Narayanaswami Iyer richly deserved what all had been said of him this morning. The fact that the staff of the Madras Law Journal had presented the bust was evidence of the happy relationship that had existed between the employer and the employees. He was thankful to the late Mr. R. Narayanaswami Iyer for the opportunity given to him to bring out some of his own books. He concluded with the hope that the Madras Law Journal under the management of his son Mr. N. Ramaratnam would continue to serve the public in the same manner as heretofore.

Mr. N. Ramaratnam the present proprietor of the Madras Law Journal in accepting the bust expressed his thanks for the honour done to his father.

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THE HIGH COURT.

Things move very slowly with the Government. There is no sense of urgency even where urgent action is called for. There are eleven judges working now. Less than sixteen will not do at present in the present state of arrears and the increasing number of institutions and arrears are growing.

It is being stated that the Government are going to have twelve judges only at present. I consider it a mistake. If twelve judges work for the year 1948 more than sixteen judges will be found necessary next year. If on the other hand they appointed sixteen judges now and it was found that the reduction of arrears permitted the reduction of judges, they may leave future vacancies unfilled.

I was among those who at first felt that sixteen judges were perhaps too many but the unreduced arrears soon showed that sixteen judges were required.

The strength of judges in the High Court depends on another programme of the Government. It was said that they were contemplating the appointment of District judges for Madras, taking away the Original Civil Jurisdiction of the High Court. Some years ago the idea was mooted but finally dropped. Sir Tej Bahadur Sapru was here at the time. I took the opportunity of consulting him as one whose views should be valuable. He said that he regretted the lack of Original Civil Jurisdiction in Allahabad and it would be a great mistake to abolish it in the three Presidency Towns. Neither Bombay nor Calcutta is thinking of its abolition. Madras should consider whether it will go forward alone on a matter which admits of wide divergence of informed opinion. If they decided to go forward notwithstanding these considerations and abolish the Original Civil Jurisdiction of the High Court, the question of the strength of the High Court will wear a different aspect. Fourteen Judges may even then be required. So it seems to me. Time and experience will show whether we should have fourteen or can do with less.

Before deciding on the question of the strength of the High Court, let the Government obtain information as to the state of arrears under all heads on the 1st January, 1947, 1st July, 1947, and 1st January, 1948. That will help to decide the question. I think less than sixteen will not do at present. Twelve will be inadequate in any case.

T. R. VENKATARAMA SASTRI.

RETIREMENT OF SIR FREDERICK WILLIAM GENTLE, CHIEF JUSTICE.

His Lordship Sir Frederick William Gentle, the Chief Justice, has decided, rather suddenly, to relinquish his high office which he assumed only less than a year ago. We regret that His Lordship should have felt compelled to quit his office before the expiry of its full term. After having been a Judge of the Madras High Court for some years, he went to Calcutta as a Judge of the High Court of that Province and came back to Madras as the Chief Judge of our High Court in February last. The period of his office as Chief Justice though short, has been enough to demonstrate his resolve to discharge the duties of his exalted office conscientiously and thoroughly. There could not be any complaint as to the manner in which he heard and decided the cases before him and he was uniformly courteous to everyone who appeared before him. He can always look back upon the period of his office as head of the Judiciary in this Province with pride and satisfaction.

FAREWELL ADDRESS IN COURT BY THE ADVOCATE-GENERAL.*

Before a full Court of all the Judges of the High Court, Mr. K. Rajah Iyer, the Advocate-General made a reference to the retirement of His Lordship, Sir Frederick William Gentle, Chief Justice. In bidding him good-bye, Mr. Raja Iyer said:

" It is less than a year ago that I had the privilege of extending a hearty welcome to your Lordship when you assumed charge as Chief Justice of this Court. Little did I anticipate that I would be called upon to bid your Lordship good-bye and farewell within so short a time.

I believe your Lordship had also looked forward to more years of association with us but Providence has willed otherwise and we are reminded of the adage that " man proposes God disposes." Your decision to quit the high office has come upon the Bar as a complete surprise. We had high hopes and expectations that your lordship would discharge the duties of your office with ability, courage and distinction and that you would be a worthy successor to the galaxy of eminent Chief Justices who have presided over this Court. It is indeed a matter for satisfaction that brief though your stay has been, you have not disappointed us in our expectations and you leave behind pleasant memories and recollections ; and it is with a genuine feeling of regret that we bid you good-bye. From the very start you treated all the members of the Bar with unfailing courtesy. You brought to bear a high degree of conscientiousness in the disposal of cases. No member of the Bar ever left your court with a feeling that he did not have his full say. Your Lordship combined firmness of conviction with openness of mind and while extending utmost courtesy your Lordship insisted on the discipline and decorum of the court being observed. Your Lordship has also set a high standard of rectitude as the ideal to be maintained by the Bar as well as by the clientele public. The experience which your Lordship gained as a judge sitting on the Original Side of this Court for years before you went to Calcutta and as a Judge of the Calcutta High Court has stood you in very good stead and your Lordship never felt yourself on unfamiliar ground in dealing with any branch of law.

We know that you have always had a warm corner in your heart for the members of the Bar and that your endeavour and anxiety has been to maintain the prestige of the Bar and the dignity of the Bench.

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* 16th January, 1948.

Your kindly thought and interest towards the members of the Bar is amply testified by the parting gift of your Law Library consisting of several volumes of text books by well known writers, all in excellent condition, as an addition to the Bar Council Library for use of the apprentices.

Our best wishes go with you in your retirement."

The Chief Justice, replying to the farewell address said :

" It was with the deepest sorrow and regret that I felt compelled to terminate my responsibilities as Chief Justice of Madras so soon after I had assumed the appointment and earlier than I should have done ordinarily. It is an office which, I trust I am not guilty of exaggeration in saying, every holder of it is proud to fill ; and speaking for myself, I must ask you to allow me to be forgiven when I express a feeling of pride of having been privileged to be the head of the Judiciary in this Province. Since I took my seat as Chief Justice, less than a year ago, India has undergone a vast and wonderful change. Her independence has been attained and established ; and now she is the largest self-governing Dominion in the Commonwealth of Nations. Difficulties already she has had ; her troubles are not yet over ; there are many tasks to be performed and burdens to be borne. But whatever may be the problems which lie ahead, all of them will be found capable of solution and unquestionably, will be solved. Throughout the world, real and genuine expressions and feelings of congratulation and of goodwill have been manifested. It is the universal wish and the belief that, in the not far distant future, this great country will be a land of peace and plenty. I desire earnestly and in all sincerity and confidence to extend my own wishes to India for its prosperity and happiness ; long may it flourish.

Real freedom is freedom from being robbed, exploited, oppressed, tortured, killed. That freedom is assured to mankind solely by the Rule of Law. To ensure that that freedom is maintained, courts are established to enforce the law. Courts cannot properly and sufficiently discharge their functions unless they are completely independent and are unfettered from interference by the State executive and unless they are manned by an adequate number of competent magistrates, using that word in its widest meaning. Be it the State or a Corporation or a private citizen, however high or low his status in society, each is entitled to expect, and to receive, disposal of his cause by virtue of its merits alone and not by reason of any other consideration.

To you, Mr. Advocate-General, and to the gentlemen of the Bar on whose behalf you have spoken, it is difficult for me to acknowledge in adequate language how much I feel and appreciate the very charming observations which you have made. I should like to think that to some extent I am worthy of what you have so kindly expressed. When I assumed the office of Chief Justice in reply to the welcome you extended to me, I observed that I hoped, when the time came to lay down the responsibilities of my position, it could be thought I had not proved unworthy of the trust imposed on me. I pray that my hope is not entirely unfulfilled. If during the years it has been my privilege to spend in India it is felt I have made some positive contribution to the administration of justice in this country, there is some solatium upon my departure from it.

I also desire to assure you of the high regard, indeed the affection in which I hold the members of the Bar of Madras and of my admiration and respect for their intellect, learning and ability. The assistance and courtesy which have always been extended by the gentlemen of the Bar to the Bench are characteristics which, I am convinced will always exist. I wish to express my deep appreciation of the many kindnesses which I have been accorded by the members of the Bar.

It was nearly 12 years ago that, for the first occasion, I took my seat on the Bench of an Indian High Court. The time has now come for me to rise for the last occasion and to bid farewell. I do this, Mr. Advocate-General, with every expression of goodwill, good wishes, good fortune and gratitude to the Bar of Madras, coupled with a sincere and earnest hope that the prestige, dignity and independence of the High Court of Judicature at Madras will ever continue and remain undisturbed.

Administration of the law must not be and must not even appear to be affected by any factor other than the rendering of fair and pure justice as between citizen and State and between citizen and citizen. Justice must not be postponed since that may result in justice being withheld, and perhaps, denied.

Heretofore, the Courts in this country have commanded universal respect and regard. Indubitably, that must be retained. That continuance will prevail only so long as the Courts remain completely independent and the Judges are and are recognised as being devoid of any semblance of adherence to party, person or patron. Judges must, in all their actions, act with the fear of God, but without the fear of man. As long as those circumstances are not disturbed, confidence in the courts and the Judges will be unbroken and everyone will be secure with the knowledge that all decisions will be pronounced without fear, favour, affection or ill-will. That is no more and it is no less than what every subject is entitled to expect and to receive from the seat of justice and which is essential in order to preserve good government, good order and a general well-being of the State and its citizens.

I desire to express my profound gratitude to my brethren on the Bench for their able assistance and sage advice which invariably they accorded to me whenever sought. To the Registrar and to the officers of the Court, I wish to acknowledge their unfailing loyalty, untiring energy and marked ability in the faithful discharge of their difficult and manifold duties connected with the administration of justice. To all members of the staff of this High Court, I assure them of my deep appreciation for their co-operation, acute realisation of responsibility and their invaluable help and their contribution towards the smooth and successful running of the Court and its work. I wish also to make reference to the excellence of the work performed by the judicial officers and the members of the staff of the subordinate Courts in the province ; their tasks are difficult, but they are carried out with a high regard to all necessities required in the dispensation of justice.

I am also gratified to learn and I am certain, there will be universal approval, of the appointment of Mr. Justice Rajamannar as my successor to the office of Chief Justice of this High Court, which he is in every way so qualified to occupy. I desire to express to him my hearty congratulations and my sincere wishes for a long, happy and successful tenure."

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OUR OFFICIATING CHIEF JUSTICE.

It is with great pleasure and satisfaction that we welcome the appointment of Mr. Justice Rajamannar as Officiating Chief Justice of our High Court. It is but most appropriate that in the new era of Independent India, the exalted office of the head of the Judiciary should be held by a son. of the soil. That Mr. Justice Rajamannar is in every way eminently qualified to fill that high office is an acknowledged fact. He possesses in abundance the many qualities of head and heart required to successfully discharge the rather onerous and exacting duties of the office of the Chief Justice of a premier Province.

After qualifying for the Bar, he was practising as a lawyer, was appointed the Advocate-General and then a Judge of the High Court. Could anything be more natural than that one who has had such an all-round experience should have been chosen to preside over the judicial administration of our Province? It would have been strange indeed, if it had been otherwise. His very pleasant manners and unfailing courtesy are enough to endear him to everyone. The practitioners appearing before him have always had a patient and attentive hearing and his Judgments are well balanced and characterised by a thorough grasp of facts of the cases and an accurate knowledge of the law on the relevant subject. His knowledge of law and his ability as a lawyer have made him a most successful judge. Apart from all this, he is a refined gentleman of culture interested in arts and literature.

It is at this time in the history of our country that we need an honest, efficient, strong and independent judiciary. In fact a strong and independent judiciary is the best safeguard that a citizen can have in a free and democratic country. It is really fortunate for our Province that Mr. Justice Rajamannar should have been selected to occupy the post of Chief Justice at this juncture. A gentleman of high character, deep learning and sound experience, he has been given the opportunity to occupy that office at a comparatively early age and we are certain that he would acquit himself with great distinction and set an illustriuos example to the future occupants of that office.

WELCOME TO THE OFFICIATING CHIEF JUSTICE IN COURT.

In the course of a welcome address to the Officiating Chief Justice, Mr. K. Rajah Iyer, the Advocate-General said :

" It is my privilege and pride to offer your Lordship on behalf of the Bar our greetings and congratulations on your appointment as the Officiating Chief Justice as a prelude to your appointment as the first Indian Chief Justice of the Madras High Court in a free and independent India. The high office to which you have been called carries with it great duties and responsibilities but we are confident that you will rise equal to every occasion and that during your tenure of office, the Madras High Court will acquire even greater prestige than it has had in the past. Let me tell your Lordship that your appointment has been acclaimed with satisfaction and rejoicing on all hands ; and we of the Bar have no hesitation whatsoever in offering our whole-hearted co-operation in the tasks which lie ahead of you, so that under your auspices the Bench and the Bar functioning together as one unit can achieve the ideals which our retiring Chief Justice has formulated in such clear terms. A strong and independent Judiciary and an equally strong and independent Bar are the pivots of any well-ordered society and efficient government. It is even more so in the India of today when changes of a far-reaching and perhaps revolutionary character are in the offing and it may be a matter of great difficulty to maintain the balance between the clash of conflicting ideologies and interests and between the rights of the subject and the needs of the state. We have however every hope and confidence that under your guidance, the Bar and the Bench will play their proper role in the new order.

It is needless for me to dilate upon the great traits of high character, erudition and ability which you possess in such abundance and which have contributed to raise you to the lofty position which you occupy today. The deep-rooted interests which you have in other fields such as art, music, English, Sanskrit and Telugu literature mark you out from the majority of lawyers and judges, who have known no other lure except that of the law. You are just in that period of life when you combine the bubbling energy and enthusiasm of youth with the sobriety and mature discrimination of age and experience. You have charmed every one who has come into contact with you by your unfailing courtesy and winning manners. You have given the practitioners who have appeared before you the fullest liberty of argument ; and you have brought to bear on the disposal of cases a calm and dispassionate judgment. It is with these assets that your Lordship enters upon your new sphere of greater activity and usefulness and your work as Chief Justice is bound to be crowned with glory and success. It is indeed a happy augury for the future that this Province is having as its Chief Justice one like you who is so entirely free from all narrow prejudices of every description and who is actuated solely by high and lofty ideals. The illustrious son of an illustrious father who is happily alive to-day to see his son occupy the highest position in the Judiciary of the Province, you have vindicated the rich heritage of tradition, culture and legal lore and our expereience of you as Judge during the past three years amply justifies our expectations that you will endear yourself to us in the future in the same manner and degree as in the past. It is a happy coincidence that to-day we are meeting under good auspices—I refer to the nation-wide jubilation at the termination of Mahatma Gandhi's fast.

REPLY OF THE OFFICIATING CHIEF JUSTICE.

Replying to the welcome, the Officiating Chief Justice said " I am deeply grateful to you Mr. Advocate-General and members of the Bar for the generous welcome you have accorded me. I feel that I need this welcome and the strength it imparts to sustain me in the onerous task which I have to perform in this office. I greatly appreciate the flattering words expressed by you regarding myself and

the reference to my respected father. But Mr. Advocate-General, knowing me as you do, you would understand me if I did not say more than thank you very much.

I am of course happy and proud that it has fallen to me to be the first to hold this exalted office after the momentous change in India's history on August 15th. But I am not in the least degree vain, for I know that prizes are accidents. And I have a conviction that everyone of us and more so, one who holds a responsible office like this, is but an instrument of Providence, *Nimitta Matram* in the words of the *Bhagavad Gita*. You have adverted to a very important matter, the independence of the Judiciary. I am in entire agreement with all that you have said. It might interest you to know that five months ago, I contributed an article to the Independence Day supplement published by a daily newspaper in Madras in which I said as follows : " It cannot be sufficiently emphasised that the greatest device for the maintenance of public confidence in a State is an absolutely independent Judiciary. And linked up with it, is the other great principle known as the Rule of law. New India should foster both ". I wrote those words when I did not dream that I would occupy this office as soon as now. But I promise you that I shall strive my utmost to ensure that the fair administration of justice is not hampered or diverted by political interference or party exigencies. Any attempt to weaken or destroy the independence of the Judiciary will be resented by me and my learned brothers as much as by the Bar and the public. But one need not be unduly apprehensive. The fair name of this country must, I believe, be as dear and sacred to those who are at the head of the Government as it is to us.

In the discharge of my duties I have one advantage. For over 20 years, I have been one of you and I shall never forget that fact. If you have grievances and difficulties, they were equally mine. If you are zealous of your privileges and ideals, I have been so equally with you. Without the hearty and voluntary co-operation of the Bar, the efficiency of judicial administration cannot be maintained at a high level. I seek at the hands of the Bar such help and co-operation and I am gratified to be assured of such co-operation through you. It is far easier to inherit a fortune and keep it than to maintain a tradition. In the case of this office which has a great and noble tradition, I am faced with a stupendous task in maintaining and fostering it. It has pleased God to give me this opportunity to serve. The fruits of my actions are not mine. '*Karmanyeva Adhikarasthe ma paleshu Kadachana*'. That has been also the principle of that great soul, Mahatma Gandhi, whose life has been once more spared to us. Thank you once more."

RETIREMENT OF MR. JUSTICE N. CHANDRASEKHARA IYER.

Bidding farewell to a retiring popular Judge like Mr. Justice Chandrasekhara Iyer is not at all an easy matter. A high spirited and independent Judge, he had discharged his duties all these years with conspicuous ability and distinction. His wide experience as a successful lawyer and as a District Judge have been his invaluable assets. His frank and pleasant manners have always made every practitioner feel quite at home in his Court. His ebullient spirits was always contagious and it became quite natural for practitioners to argue their cases before him with zest and enthusiasm. No doubt, sometimes his quickness to come to conclusions might have been disconcerting to some. But that was because he felt so strongly about the justness of the view which he took. Bare technicalities never appealed to him. He decided the cases before him according to the spirit rather than the letter of the law, and his decisions have invariably been just and sound.

Mr. Justice Chandrasekhara Iyer, while yielding to none in maintaining the dignity of his high office, felt that it should not interfere with his social life outside the Courts of law. A more genial companion and a better or truer friend it

would be hard to find. Though he has reached the age of retirement, he is quite hale and hearty and his mind is as active and alert as ever. Is it too much to hope that his unbounded enthusiasm and remarkable ability for sustained work would in the momentous days ahead be diverted in channels for the betterment of the country and the people? We wish him long life and happiness.

REFERENCE IN COURT.

On the eve of the retirement of His Lordship Mr. Justice N. Chandrasekhara Iyer, The Advocate General, Mr. K. Rajah Aiyar in the course of a reference in Court said :

" One familiar face after another is retiring from the High Court and now we have assembled here to bid your Lordship goodbye on the eve of your retirement. My memory goes back to the very early years of your practice when as a junior under the illustrious son of South India, Sir C. P. Ramaswami Iyer, you were associated with him in his wide practice on the Original side of the High Court. Your conspicuous attainments and ability compelled attention from several other quarters including Sir K. Sreenivasa Iyengar, Mr. Alladi Krishnaswami Iyer and Sir Murray Coutts-Trotter ; and it was no surprise to us when you were appointed City Civil Judge in the year 1927. Even at that time many of us knew that you were closely following in the footsteps of Sir C. V. Kumaraswami Sastriar who similarly became a City Civil Judge and thereafter a Judge of the High Court. It was therefore no surprise again when in the fullness of time you were elevated to a seat on the Bench of the High Court after having gathered wide experience as a District Judge in all parts of the Presidency, Andhra, Tamilnad and Karnataka. Judging from your appearance and your buoyant energy, one would hardly think that you are completing the age of 60 in another three days and that you have reached the stage of retirement from active life. One of your great characteristics has been your utter unconventionality and a disregard of the outer trappings of form and appearance. Your life and career have been an outstanding example of plain living and high thinking. Being by nature and temperament of a highly religious frame of mind, you have ever endeavoured steadily to discharge the duties of your office impartially and without fear or favour. You have kept your Court always lively and to a large extent free from that sombre atmosphere which generally prevails in a Court of law. It may be that occasionally your good humour has been mistaken for brusqueness but every one must have known and realised that there was no sting behind your utterance and manner of expression. You have never made other people feel the weight of your office while maintaining its full dignity. On the other hand you have mixed freely, one might almost say too freely, with all members of the Bar, senior and junior alike, making no distinction between one man and another. Your legal learning and quickness of grasp enabled you to comprehend the questions arising in any case with alacrity ; and herein again that very quickness might have been responsible for a feeling in certain quarters that they had not been allowed as full a hearing as they might have liked or enjoyed elsewhere; but no one can say that justice had suffered in your Lordship's Court. You have been a great lover of sport and the Districts in which you have served have reason to remember your name with the several sporting institutions which owed their orgin and inspiration to you. Your friends who have known you intimately knew that no better friend could be found in every sense of the word. You have had a kindly thought for every one and never harboured resentment or illwill against any one. A well-read scholar in Sanskrit and Telugu you have upheld and maintained the traditions of a devout Hindu. You have also been a patron of learing, art and music ; and your great interest in education has found practial shape in the Vivekananda College. Now that the shackles of office are falling from your shoulders, you will be at liberty to devote the rest of your life to promote those causes which contribute to the social and moral well-being of your country and which are nearest your heart. May God bless your Lordship with long life, happiness and prosperity."

MR. JUSTICE CHANDRASEKHARA IYER'S REPLY.

Thanking the Advocate-General for the generous terms in which he had referred to him, Mr. Chandrasekhara Aiyar said :

" It is a matter of much satisfaction to me to learn that my work as a Judge, such as it has been, has met with approval at the hands of such an intellectual and critical body as the members of the Madras Bar. Everyone of you extended to me in full measure your help and co-operation in the discharge of my duties and such success as has been given to me to achieve is due to this generous assistance for which I feel really grateful. During the six and odd years I have been with you as a Judge of this High Court, I always felt that I have been in the midst of an intimate circle of friends who were prepared to overlook my shortcomings and magnify my virtues. You, Mr. Advocate-General, have alluded to my activities outside the Court in fields not strictly pertaining to law. May I say that while it is perfectly true that a Judge must confine himself mainly to his judicial world and should not get himself mixed up with controversial affairs political, economic or social, it is my conviction that he would be failing in his obligations to the exalted position he holds in society if at the same time he does not devote himself to the service of causes and measures calculated to promote public good and on which there could be no real difference of opinion.

Before I bid you *au revoir* and not " farewell," I desire to state that I associate myself unreservedly with every sentiment expressed by Sir Frederick Gentle and Mr. Justice Rajamannar, our Officiating Chief Justice, on the need for maintaining unimpaired the great traditions of this High Court for efficiency, impartiality and independence. In this connection, I would beg you, my brethren, to think of recruitment to the High Court Bench not in terms of sectional, class, credal or regional representation, but only from the standpoint of securing absolutely the best men available whether they are to be found in the ranks of the Bar, or the subordinate judicial service, and whether they are Telugus or Tamils, Brahmins or non-Brahmins, Muslims or Christians. Much of the stability of the Government depends on the existence of a competent and fearless judiciary inspiring confidence in the minds of the public by the soundness of their conclusions and in their freedom from prejudice or bias. Men of true culture, high character and lofty attainments must man the highest courts in the land, for it is only then that standards will be set up and examples furnished which would elevate and purify not merely the legal atmosphere in Courts of law and justice, but also the general level of society in the much wider sphere around.

Let me conclude by tendering thanks once again to you, Mr. Advocate-General and the members of the Bar on whose behalf you have spoken. Let me wish all of you collectively, and every one of you individually, happiness and prosperity. As I shall be remaining largely in Madras even after my retirement there will be many opportunities of our meeting one another and exchanging ideas or comparing notes. I count among you many personal friends and I have no doubt that you will all extend to me in the future as in the past, your trust, goodwill and co-operation. I must also express my indebtedness to the staff of the High Court for all the help they have given me right through ".

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CONFESSION : MEANING OF

By

V. B. RAJU, I.C.S., DISTRICT AND SESSIONS JUDGE, SURAT.

Stephen's definition of a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he had committed that crime has been adopted in *Queen Empress* v. *Nana*[1], *Emperor* v. *Cunna*[2], by Mahmood, J., in *Queen Empress* v. *Babu Lal*[3], and by Abdur Rahim and Sundara Aiyar, JJ., in *Muthu Kumaraswami Pillai* v. *Emperor*[4].

But it has not been adopted in *Queen Empress* v. *Jagrup*[5], *Emperor* v. *Santyabandu*[6], *The Empress* v. *Dabi Pershad*[7], *Barindra Kumar Ghose* v. *Emperor*[8] and *Ambar Ali* v. *Emperor*[9]. It was also not adopted by the Privy Council in an *obiter dictum* in *Pakala Narayana Swami* v. *Emperor*[10].

In the latter group of cases it was held that the Evidence Act draws a distinction between an admission and a confession of guilt and that the word, "confession" used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

This view is based on the reasoning that if confession merely means an admission by an accused then a mere inculpatory admission falling short of admission of guilt could be used under section 30 of the Evidence Act against a co-accused. In *Queen Emperor* v. *Jagrup*[5], Straight J., gives the following reasons :—

"I cannot think that this was ever intended by the Legislature. What was intended was that where a prisoner—to use a popular phrase—'makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word 'confession' in section 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of a guilt. It must not therefore, in my opinion, be so construed in the other sections relating to confessions." In none of the other cases in which this view was adopted have

1. (1889) 14 Bom. 260.
2. (1920) 22 Bom.L.R. 1247.
3. (1884) I.L.R. 6 All. 509 at 539.
4. (1912) I.L.R. 35 Mad. 397.
5. (1885) I.L.R. 7 All. 646.
6. (1909) 11 Bom.L.R. 633.
7. (1881) I.L.R. 6 Cal. 530.
8. (1909) I.L.R. 37 Cal. 467.
9. A.I.R. 1929 Cal. 539.
10. (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234 : L.R. 66 I.A. 66 at p. 81 (P.C.).

any additional or different reasons been given. In these cases it is submitted, with great respect, that the correct principle of construction has not been followed.

The proper way of construing the meaning of a word is to find out the natural meaning after a consideration of the language used in the Act and then to see whether the natural meaning would lead to any absurd results. It is not proper to take a particular section where the word 'confession' is used and assuming that that section was never intended to be applied to a particular type of cases to proceed to assign a meaning to the word ' confession ' on the assumption that that section (*e.g.*, section 30 of the Evidence Act) was never intended to apply to a particular type of cases. In *Queen Empress* v. *Jagrup*[1], Straight, J., did observe that the word 'confession' must be construed as meaning the same in section 30 as in sections 24, 25 and 26. But instead of considering all the sections, he assigned a meaning to the word ' confession ' from a mere consideration of the wording of section 30 and held that the word ' confession ' cannot include a mere inculpatory admission not amounting to an admission of guilt. He then held that the word ' confession ' must be construed similarly in other sections relating to confessions. But if this construction is adopted in section 24 an equally absurd result might follow. For instance, an admission of a gravely or conclusively incriminating fact, *e.g.*, that an accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man's possession cannot be excluded under section 24, even if that admission was the result of a threat as described in section 24 because section 24 applies only to confessions and the above admission of an incriminating fact does not amount to a confession.

Similarly section 25 of the Evidence Act can be rendered tame in its application. An admission of a gravely or conclusively incriminating fact made to a Police Officer can be proved, if the view of Straight, J., is correct.

But even the Privy Council has adopted this view although the observations of the Privy Council are clearly *obiter*. The Privy Council has observed as follows in *Pakala Narayana Swami* v. *The King Emperor*[2].

" In view of their Lordships' decision that the alleged statement was inadmissible by reason of section 162, the appellants' contention that it was inadmissible as a confession under section 25 of the Evidence Act becomes unnecessary. As the point was argued, however, and as there seems to have been some discussion in the Indian Courts on the matter, it may be useful to state that in their Lordships' view no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, *e.g.*, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in article 22 of Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles :—confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act 1872 ; and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused ' suggesting the inference that he committed ' the crime."

1. (1885) I.L.R. 7 All. 646. L.R. 66 I.A. 66 at 80, 81 (P.C.).
2. (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234 :

Their Lordships have not given any detailed reasons for their view that in the Evidence Act it would not be consistent with the natural use of language to construe "confession" as a statement made by an accused "suggesting the inference that he committed the crime."

Now let us see the scheme of sections 17-31 of the Evidence Act. For convenience of reference the necessary parts of the sections are reproduced below.

Admissions.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

18. Statement made by a party to the proceeding or by an agent to any such party . . . . . are admissions. Statements made by . . . . . are not admissions . . . . . .Statements made by . . . . . are admissions if they are made during. . . . . .

19. Statement made by . . . . . are admissions if . . . . . .

20. Statements made by . . . . . are admissions.

21. Admissions are relevant and may be proved . . . . . .

22. Oral admissions as to the contents of a document are not relevant unless and until . . . . . .

23. In civil cases no admission is relevant if . . . . . .

24. A confession made by an accused person is irrelevant in a criminal proceeding if . . . . . .

25. No confession made to a Police Officer shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat, or promise, has in the opinion of the Court, been fully removed, it is relevant.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made . . . . . .

30. When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

They are all headed "Admissions." Section 17 defines admissions. This definition is completed in sections 18-20 which explain the last clause of section 17 namely "which is made by any of the persons and under the circumstances hereinafter mentioned." Sections 18-20 may be regarded as part of section 17 and explanatory of it or as special explanatory definitions for civil matters. Sections 21-23 say when admissions are relevant and by whom they can be proved. Sections 24-30 say when confessions made by accused are irrelevant, and when they can be proved or not proved. Section 31 refers to the evidentiary effect of admissions which have been proved. Now, what is the scheme of arrangement of these sections?

If admissions by accused persons are to be distinguished from confessions by accused persons why is not this distinction defined? Why is there only one definitiion? If a distinction was intended between an admission by an accused and a confession made by an accused should we not expect a definition of confession? Does not one definition namely that of admissions show that the analytical talent of the draftsman did not visualise a distinction between admissions and confessions but admissions are classified according to the nature of the proceedings and the nature of the persons making admissions. To my mind, the scheme of sections 17-31 is as follows :—

17-20. Defining admissions.

21-22. General rules regarding the relevancy and proof of admissions, applicable both to civil matters and criminal matters (admissions made by accused).

23. Special rule for civil proceedings.

24-30. Special rules for admissions made by accused ; for convenience admissions made by accused person being referred to as confessions.

31. General rule regarding the evidentiary effect of all admissions when proved.

If it was intended to distinguish between admissions and confessions in criminal matters we should expect to find a section defining the distinction and at least one section which applies only to admissions made by accused and which does not apply to confessions by accused. If a distinction was intended between admissions made by accused and confessions made by accused the natural arrangement of the sections would have been thus :

1. Defining admissions in civil matters.
2. Defining admissions made by accused.
3. Defining confessions made by accused.
4. Laying down principles applicable to 1.
5. Laying down principles applicable to 2.
6. Laying down principles applicable to 3.

Even if 1 and 2 could be combined into a general proposition, 3 would not have been combined with 1 and 2 if a distinction was intended to be drawn between admissions by accused and confessions by accused ; and there should have been a similar three grouping for propositions regarding relevancy.

The real scheme of the Evidence Act appears to have only one concept of admissions and to have principles of evidence applicable (*a*) in general, (*b*) only to civil matters and (*c*) only to criminal matters.

The analysis of section 17-31 given above clearly shows that this is the scheme. For admissions in criminal matters no further sub-grouping into (*a*) admissions and (*b*) confessions is made. All admissions by accused are put in one group and given the name " confessions." With great respect I submit that the Evidence Act does not make a distinction between a confession and an admission by an accused person and that the view adopted in *Queen Empress* v. *Nana*[1], *Emperor* v. *Cunna*[2], and by two Judges in *Muthukumaraswami* v. *Emperor*[3], and one Judge in *Queen Empress* v. *Babu Lal*[4] is correct.

This view would not, I submit, lead to any absurd results even when applied to section 30 because the words used in section 30 are only " may be taken into consideration." The contrary view taken by the Privy Council in *Pakala Narayana Swami* v. *Emperor*[5], would lead to more absurd results when applied to sections 24 and 25, because Police Officers can with impunity give evidence of admissions of conclusively incrminating facts and the safeguard of sections 24 and 25 would be illusory.

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1. (1889) I.L.R. 14 Bom. 260.
2. (1920) I.L.R. 22 Bom. 1247.
3. (1912) I.L.R. 35 Mad. 397.
4. (1884) I.L.R. 6 All. 509.
5. (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234 : L.R. 66 I.A. 66. (P.C.).

JOINT FAMILY AND INSOLVENCY

By

MR. R. RAJAGOPALA IYENGAR, ADVOCATE, MADRAS.

Nice and interesting questions arise when the father or manager of a joint Hindu family or one of the members thereof is adjudicated an insolvent and the scope of this article is to deal with some of the questions. The answers depend upon the construction of the provisions of the Insolvency Acts bearing on the point and on the general principles relating to joint family and the nature and effect of insolvency.

It is well established that insolvency does not put an end to the joint status and does not bring about a severance in status between the insolvent and the other members of the family, *Venkatarayudu* v. *Sivaramakrishnayya*[1]. The Receiver in Insolvency whether he is called the Official Receiver or Official Assignee or Trustee in Bankruptcy merely steps into the shoes of the insolvent. The joint status continues and the Receiver is entitled to joint possession along with the other members of the family, *Official Assignee of Madras* v. *Ramachandra Aiyar*[2]. Even in the case of the insolvency of the father or manager it is only his share that vests in the Receiver and the shares of the other members do not vest in him. Whether the father's power to sell the son's share for the payment of his debts, not being illegal or immoral, and the manager's power to sell the other member's share vests in the Receiver, are points, on which, there is difference between the Preidency Towns Insolvency Act and the Provincial Insolvency Act. Under the Provincial Insolvency Act it is now settled, so far as Madras is concerned, that the power does not vest in the Official Receiver, *Rama Sastrulu* v. *Balakrishna Rao*[3], and *Virupaksha Reddi* v. *Chanalal Siva Reddi*[4] ; but the decisions of the other courts are not uniform, *Biswanath Sao* v. *The Official Receiver*[5], *Anand Prakash* v. *Narain Das*[6], and *Hari Das Himatlal* v. *Lallubai Mulchand Mehta*[7]. Under the Presidency Towns Insolvency Act, it has been held that the power also passes to the Official assignee and he can in the exercise of such power sell the son's share for the payment of the father's debts not tainted with illegality or immorality and the other member's share for debts contracted for necessity in the case of a manager, not being a father. This power does not terminate even on death (*see* S. 17 of the Provincial Insolvency Act and section 93 of the Presidency Towns Insolvency Act), *Seetharama Chettiar* v. *Official Receiver, Tanjore*[8], and *Fakirchand Motichand* v. *Motichand Hurruch Chand*[9] ; but the power can be exercised only subject to its limitations and the power subsists only so long as the family remains joint, *Sat Narain Das* v. *Sri Kishen Das*[10]. The institution of a suit for partition puts an end to the joint family status and with it the power of the manager or father, *Official Assignee of Madras* v. *Ramachandra Iyer*[11]. It is also terminated by the attachment by a creditor of the entire family properties including the sons' shares[12], *Gopala Krishnayya* v. *Gopalan*[13], *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das Johari*[14], *Indubala* v. *Bakkeswar*[15]. Though some of those cases were decided under the Provincial Insolvency Act they were decided at a time when it was held that the power vested even under that Act. The principle of these cases will thus apply to cases arising under the Presidency Act.

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1. (1934) 67 M.L.J. 486 : I.L.R. 58 Mad. 126.
2. (1922) 43 M.L.J. 569: I.L.R. 46 Mad. 54.
3. (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.) (Case of Manager).
4. (1943) 2 M.L.J. 87 : I.L.R. 1944 Mad. 212 : (Case of father).
5. (1936) I.L.R. 16 Pat. 60 (F.B.).
6. (1930) I.L.R. 53 All. 239 (F.B.).
7. (1930) I.L.R. 55 Bom. 110.
8. (1926) 51 M.L.J. 269 : I.L.R. 49 Mad. 849 (F.B.).
9. (1888) I.L.R. 7 B. 438.
10. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 384 : I.L.R. 17 Lah. 644 (P.C.).
11. (1928) I.L.R. 51 Mad. 417 : 55 M.L.J. 175 (F.B.).
12. (1939) 1 M.L.J. 889.
13. (1928) I.L.R. 51 Mad. 342 : 54 M.L.J. 674.
14. (1925) I.L.R. 48 All. 343
15. 41 C.W.N. 1079: A.I.R. 1937 C. 517.

The established principle of the Insolvency Law is that the trustee is bankruptcy takes the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens, *See Sheobaran Singh* v. *Kulsum-un-nissa*[1]. Apart from certain exceptional cases in which he takes by a title superior to that of the bankrupt the broad general principle is that the trustee takes the insolvent's property subject to all equities and liabilities which affected it in the insolvent's hands. Thus it was held in the above case that the trustee takes the property of the bankrupt subject to the pre-emption rights of his co-sharer. As regards the insolvent's contracts for the purchase or sale of lands or goods whatever interest therein the insolvent possesses and any liability to which he is subject therein at the time of the insolvency passes to the receiver. Thus it has been held that where in the case of a building contract it was provided that upon the default of the builder in fulfilling his part of the agreement the owner might re-enter upon the land and expel the builder and on such re-entry all moveables of the builder in and about the building shall be forfeited and become the property of the owner " as and for liquidated damages " and the builder became bankrupt before the owner seized the goods, the right of the owner to seize is not defeated by the bankruptcy of the builder before the seizure was made and that the trustee in bankruptcy takes subject to the rights of the owner under the agreement. As stated by James, L.J., in the above-case, *Ex parte Newitt. In re Garrud*[2], "the broad general principle is that the trustee in bankruptcy takes all the bankrupt's properties but takes it subject to all the liabilities which affected it in the bankrupt's hands unless the property which he takes as the legal personal representative of the bankrupt is added to by some Express provision of the bankrupt Law." In *Ex parte Holthausen*[3], it was held that the trustee is bound to perform the contract of the bankrupt in exactly the same way as he himself was bound to perform it. The principle was stated thus :—" The trustee in bankruptcy is bound by all the equities which affect a bankrupt or liquidating debtor that is to say, if a bankrupt or a liquidating debtor under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency enters into a contract with respect to his real estate for a valuable consideration that contract binds himself." It is worthy of note that the learned Lord Justice assimilates the position of the trustee to that of a legal personal representative and holds that even a forfeiture clause can be enforced against him. The same view is taken in *Official Assignee of Madras* v. *Ramachandra Aiyar*[4], and it is decided that the Official Assignee is not an alienee but the representative of the insolvent and as much entitled to joint possession of the insolvent's share along with the other members of the family.

Turning now to the provisions of the Insolvency Acts, we shall examine whether there are any particular provision or provisions under which the above position can be impeached. The provisions bearing on the point are contained in section 28, clauses (2), (4) and (7); section 37; section 56, clauses (1) and (3) and section 67 of the Provincial Insolvency Act and section 17; section 23; section 51; section 52 (2) (*a*); section 58 (2) and section 76 of the Presidency Towns Insolvency Act.

Section 28 (2) enacts that " on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided and shall become divisible among the creditors." (Section 17, Presidency Towns Insolvency Act.) Section 28 (4) enacts " All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver and the provisions of sub-section (2) shall apply in respect thereof. (Section 52 (2) (*a*), Presidency Towns Insolvency Act). Section 28 (7) (section 51, Presidency Act) deals with the doctrine of relation back. Section 37 (Section 23 Presidency Act)

1. (1927) I.L.R. 49 All. 367.
2. (1881) L.R. 16 Ch. D. 522.
3. (1874) L.R. 9 Ch. A. 722.
4. (1922) 43 M.L.J. 569 : I.L.R. 46 M. 54.

provides for reverting of the property to the insolvent on annulment. Section 56, clause (1), [section 58, clause (2), Presidency Act] provides for the appointment of a receiver on adjudication and the vesting of such property in the receiver and clause (3) provides for the removal of any person in possession or custody of such property. The proviso enacts " that nothing in this section shall be deemed to authorise the court to remove from the possession or custody of property any person whom the insolvent has not a present right to remove." Section 67 (section 76) of the Presidency Act provides for the vesting of the surplus in the insolvent. There is thus nothing in these provisions which in any way impeaches or detracts from, the general proposition stated above. On the other hand the provisions contained in sections 37, 56 and 67 lend support to it ; for they recognise that the Receiver stands exactly in the position of the Insolvent and he has no higher rights and that the property reverts to the insolvent on annulment and that the surplus revests in him on the termination of the insolvency.

It has next to be considered what is meant by " the property of the insolvent " which vests in the Receiver on adjudication. Is it merely the undivided, unspecified interest which the father or manager has in the joint family property or is it the share to which the father or manager would be entitled on the date of adjudication if there was a severance on that date ? It has to be remembered in this connection that it is the basic principle of Hindu Law that no member of a joint family is entitled to any definite share in the joint family property ; nor can he predicate at any time to what share he is entitled. The share is subject to fluctuations by births and deaths in the family and the share is defined, specified and ascertained only when a severance or partition takes place. If insolvency does not operate as a severance, as has been uniformly held, how can it be contended that on insolvency the share of the insolvent is defined or specified ? If the correct view is, as has been held, that the Receiver takes on adjudication only the undivided interest of the insolvent in the joint family property with all its advantages and disadvantages until a partition is effected, strictly and logically, even an alienee from him will acquire no right in the property but merely an equity to work out his rights in a suit for partition, as in case of an alienee from a coparcener, at any rate, in cases falling under the Mitakshara Law, see *Nanjaya Mudali* v. *Shanmuka Mudali*[1] and *Dada Sahib* v. *Mahomed Sultan Sahib*[2]. It has been held that the alienee from a coparcener will be entitled only to the share to which the alienor was entitled on the date of the alienation, that he is not entitled to any increase or subject to any decrease in such share by subsequent births and deaths. *Ramachandran Pillai* v. *Kalimuthu Chetti*[3] and *Vasireddi Balachandrasekhara Varaprasad* v. *Lakshminarasimham*[4]. He is not also entitled to claim joint possession or mesne profits from the date of purchase, *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[5] and *Kandaswami Udayan* v. *Velayutha Udayan*[6].

What then is the position of the Receiver in Insolvency ? Is he a representative of the insolvent taking the property of the insolvent with all its advantages and disadvantages or is he an alienee ? By the term ' alienee " I mean only alienee for consideration ; for in Hindu Law no member has got a power to make a gift barring an exception in the case of the head of the family with which we are not at present concerned. If he is merely a representative of the insolvent and steps into his shoes and takes the property exactly as it stood in his hands with all the benefits and burdens, then it is difficult to understand how the property in his hands will not be subject to the same fluctuation as in the hands of the insolvent,

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1. (1911) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
2. (1920) 39 M.L.J. 706 : I.L.R. 44 Mad. 167.
3. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
4. (1940) 1 M.L.J. 820 : I.L.R. 1940 Mad. 913.
5. (1914) 27 M.L.J. 409 : I.L.R. 39 Mad. 265.
6. (1926) 51 M.L.J. 99 : I.L.R. 50 Mad. 320.

unless it be that some other principle of law crystallises the share of the insolvent as on the date of adjudication.

Suppose, when the father was adjudicated insolvent he had three sons, one of whom died during the pendency of the insolvency proceedings and subsequently two sons were born to the insolvent, what is the position? Does the Receiver get the increase caused by the death of the two members? The logical result of the principle that insolvency does not affect the status, and without invoking any other provision of the statute, will be that he is entitled to the benefit. Then what happens when two more sons are born? Is the share *pro tanto* reduced? Applying the same principles and apart from other considerations it will follow that the share will get also reduced.

It has however been held that the share of the insolvent gets crystallised as on the date of adjudication and that it is not subject to decrease by the addition to the coparcenary by subsequent births, see *Kuppuswami Naidu* v. *Krishnama Naicken*[1] and *Hanumantha Gowd* v. *Official Receiver, Bellary*[2]. In *Kuppuswami Naidu* v. *Krishnama Naicken*[1] the father was adjudicated and subsequently two sons were born to him. They filed a suit for partition impleading the Official Receiver and got an *ex parte* decree. The Official Receiver then filed an application for setting aside that *ex parte* decree which was dismissed. The creditors then filed a suit to have it declared that the decree was not binding on the estate as the Receiver was guilty of gross neglect. The suit was decreed ultimately by the High Court on the ground that as the sons were not even conceived on the date of adjudication they "could have no reasonable claim to a share in their father's property." The judgment relating to the question is very short and there is no discussion of the principles involved or reference to any decided cases. In fact, it looks as though there was no dispute about the point. In *Hanumantha Gowd* v. *Official Receiver, Bellary*[2], the question directly arose whether the receiver is entitled to the benefit of the increase in the share caused by the death of one of the members of the family. It was held that the benefit of the increase will accrue to the Official Receiver. It was observed that he was entitled to such increase, not because the Official Receiver is a coparcener in Hindu Law, but because by the operation of section 28 (4) of the Provincial Insolvency Act he is entitled to all property which is acquired by or devolves on the insolvent and their Lordships further held that the expression 'devolves on" includes also devolution by survivorship. They then deal with an argument advanced by counsel based on decrease by subsequent births and it is remarked in that connection that the Official Receiver does not lose that which was vested in him because the vesting amounts to an alienation which crystallises the share of the insolvent to which the alienee is entitled as on the date of adjudication. This conception of treating the Official Receiver as an alienee is not quite in consonance with the well established position that he is merely the representative of the insolvent and stands in his shoes. It has been pointed out in several cases that the Receiver is not in the position of an alienee and that the vesting on adjudication does not amount to an alienation. It has further been held that though he is a stranger, he is entitled to joint possession along with the other coparceners unlike alienees because he is not an alienee but a representative of an insolvent. If he is in the position of an ordinary alienee he will not strictly be entitled to any interest in the property but will merely have an equity to work out his share by means of a suit for partition, see *Srinivasa Aiyangar* v. *Cunniappa Chetty*[3] and *Subbe Goundan* v. *Krishnamachari*[4].

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1. (1935) 70 M.L.J. 90 : I.L.R. 59 Mad. 770.
2. (1946) 1 M.L.J. 247.
3. (1914) 26 M.L.J. 567 : I.L.R. 38 Mad 684.
4. (1921) 42 M.L.J. 372 : I.L.R. 45 M. 449.

It may be noticed here that even in cases falling under the Provincial Insolvency Act, there is a conflict of decisions amongst the various High Courts as to whether the after-acquired property vests immediately without any intervention by the Receiver or as to whether the principle of *Cohen* v. *Mitchell*[1], applies also to cases arising under the said Act, see *Ma Phaw* v. *Maung Ba Thaw*[2], *Nagindas Bhukandas* v. *Ghelabai Ghulabdas*[3], *Jagdish Narain Singh* v. *Musammat Ramsakal Kuer*[4] and *Kamal Lal Gurda* v. *Chandrika Charan Ray*[5].

Turning now to the provisions of the Presidency Towns Insolvency Act there are no words in that Act corresponding to " shall forthwith vest " which are found in section 28 (4) of the Provincial Insolvency Act and it has been uniformly held that after-acquired property is the property of the insolvent which he is entitled to deal with so as to pass complete title to the alienee unless and until the Official Assignee intervenes, following the principle embodied in *Cohen* v. *Mitchell*[1]. Consequently, the benefit of any subsequent increase in the share of the insolvent by the subsequent death of a coparcener will not automatically accrue to the Assignee and he will be entitled to deal with it as he pleases. If however the Assignee is treated as the representative of the insolvent and as standing in his shoes, it will vest automatically on acquisition or devolution.

There is one other aspect of the matter which may be considered in this connection. What is the effect of annulment or termination on the property in the hands of the receiver? Both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act the property remaining undisposed of will on annulment revert to the debtor in the absence of an order by the Court continuing the administration by a person in whom the property is to vest. It is also clear that the surplus if any, remaining in the hands of the Receiver after the termination of the insolvency will revest in the insolvent. The question then arises as to the nature and character of the property when it reverts or revests. Does the debtor take it as joint family property or as separate property? The effect of the termination of the insolvency by annulment or otherwise is to remit the debtor to his original position at the moment of adjudication as if there had been no insolvency and therefore, as at the moment of adjudication the debtor was a member of the joint family, the property goes back to him as joint family property. In other words, the nature and character of the property does not undergo any change by reason of adjudication and the insolvent or debtor gets back the property as joint family property. The observations of Cockburn, C.J., with reference to the corresponding provision of the English Bankruptcy Act in *Bailee* v. *Johnson*[6] are in point. " The effect of section 81 of the present Act is, subject to any *bona fide* disposition lawfully made by the trustee prior to annulling of the bankruptcy and subject to any condition which the Court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation." To the same effect are the following observations of Kelly, C.B., in *Bailee* v. *Johnson*[7]. " The only sensible meaning which can be attached to the word ' revert ' is that what was apparently the property of the trustee at the time of the annulling of the bankruptcy shall thereupon become the property of the person whose bankruptcy has been annulled, *as if it had always been his.*" (The italic is mine) The observations are made in a case where the adjudication ought not to have been made but the same principle will apply to other cases also.

In *Lakshmana Chettiar* v. *Srinivasa Aiyangar*[8], it was held by a single judge that " under section 37 of the Provincial Insolvency Act it reverts to the debtor as his

1. (1890) 25 Q.B.D. 262.
2. (1926) I.L.R. 4 Rang. 125.
3. (1919) I.L.R. 44 Bom. 673.
4. (1928) I.L.R. 8 Pat. 478. A I.R. 1939 Pat. 18.
6. (1871) L.R. 6 Ex. Cases 263.
7. *Ibid.*, 279.
8. (1937) 71 M.L.J. 707 : I.L.R. 1937 Mad. 203.

property, that is, as his individual property so that, if on the date of the reversion, he is not alive, it will go to his heir under the " Hindu law " ; and in this case the widow, the 4th defendant. The property thus being not joint family property defendants 1 to 3 have not taken it by survivorship." The reasoning was " Once the effect of insolvency is to divest the share of insolvent of its character as joint family property, it cannot regain that character when it comes back to the insolvent on annulment, unless he can by an unequivocal act of his own impress it with the said character." The basis of the said decision, that the effect of insolvency is to divest the share of the insolvent of its character as joint family property is not correct and is opposed to accepted principles and the decision was overruled in *Suryanarayanamurthi* v. *Veerraju*[1] by a Bench. The said decision lays down that the property in the hands of the receiver on annulment under section 37 of the Provincial Insolvency Act reverts to the debtor as joint family property and not as separate property. It has since been referred to with approval and followed in *Hanumantha Gowd* v. *Official Receiver, Bellary*[2].

In *Suryanarayanamurthy* v. *Veerraju*[1], a father and son constituted a joint Hindu family when the father was adjudicated an insolvent. Subsequent to the adjudication another son was born to him. Some of the properties were realised and dividends distributed. Thereafter the adjudication was annulled. A suit for partition was then brought by the first son and the question arose as to the nature of the property taken by the father on annulment and as to the share of the plaintiff and his brother. The learned Judges hold that the property reverts as joint family property and that the father and sons " will each be entitled to a third share in the family properties including thoselgot back from the Official Receiver." Referring to the case in *Lakshmana Chettiar* v. *Srinivasa Iyengar*[3], they observe: " It is not in our opinion correct to say that an insolvent coparcener's share ceases to be joint family property while it is vested in the Official Assignee merely because the other coparceners lose their right of survivorship in the share or because it is not divested from the Official Assignee on the insolvent's death."

Suppose there is a disruption of the joint status during the pendency of the insolvency proceedings by the institution of a suit for partition or otherwise, will it make any change in the nature or character of the property that will come back to the debtor on termination of the insolvency. Once there has been a severance it will cease to be family property and consequently when it reverts or revests, it will revert or revest as separate property and not as joint family property. The observation in *Suryanarayanamurthi* v. *Veerraju*[1] that " the division in status cannot affect the partible character of the property when it comes back to him and he must hold it as a divisible family asset " must be read with reference to the particular facts of the case, *viz.*, that the point arose for decision in a suit for partition instituted pending the insolvency and that the rights of parties had to be determined as on the date of the institution of the suit when it was joint family property. Otherwise it will be difficult to reconcile it with the decision of the Privy Council in *Sat Narain Das* v. *Sri Kishan Das*,[4] or the decision of the Full Bench of the Madras High Court in *Official Assignee of Madras* v. *Ramachandra Iyer*[5].

If however, the vesting on adjudication amounts to alienation and the share of the insolvent gets crystallised as on that date, it is difficult to understand how the property will revert or revest as joint family property. The share will get crystallised on that date either on the footing that the Receiver is treated as an alienee or assignee, of course statutory, or on the footing that there has been ascertainment or definition of the insolvent's share as on that date. Treated as an

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1. (1945) 1 M.L.J. 292 : I.L.R. 1946 Mad. 54.
2. (1946) 1 M.L.J. 247.
3. (1936) 71 M.L.J. 707 : I.L.R. 1937 Mad. 203.
4. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 384 : I.L.R. 17 Lah. 644 (P.C.).
5. (1928) 55 M.L.J. 175 : I.L.R. 51 Mad. 417 (F.B.).

alienation, the alienee will be entitled to the share as on the date of alienation and so far as that share is concerned it gets ascertained and separated from the rest. If there has been ascertainment and definition even then that share gets separated from the rest. In either view it will be difficult to hold that it continues to be joint family property when it reverts or revests.

What then is the position of the after-born son if the property comes back as joint family property? Are his rights taken away once for all on adjudication or are his rights merely suspended during the insolvency? If the right is extinguished on adjudication can it revive on annulment or termination? These are some of the questions which may arise for consideration. The correct view is that his rights are merely suspended and that if the property comes back as joint family property, it may be the same property as originally vested in the Receiver together with its accretion or substitute, then certainly the son is entitled to a share in it.

The next question is what is the quantum of share to which he is entitled - Is it the quantum to which he would be entitled as on the date of adjudication or of his conception or is it limited to his interest in the properties as they stand when they come back? The point seems to be bare of authority. There is however an observation in *Suryanarayanamurthi* v. *Veerraju*[1], that when the property reverts on annulment, the father and the sons, one of whom was born subsequent to adjudication " will each be entitled to a third share in the family properties." If thereby it is meant a third share of the properties then in existence, irrespective of what was disposed of by the Receiver, then it will be neither fair nor reasonable. It is not possible to find out from the judgment whether the dispositions by the Receiver were taken into account or not. The correct and equitable view seems to be to treat the properties disposed of by the Receiver as having been alienated by the insolvent and to divide and allot the remaining properties on that footing. That is to say, the properties disposed of will be allotted to the share of the insolvent and if he is still entitled to anything more he will be allowed to share in the other properties, and to the extent necessary to make up that share ; otherwise they will be divided amongst the other coparceners in accordance with their shares.

One other point may be considered in this connection. Suppose a son is born before the date of adjudication but after the presentation of the insolvency petition, what is his position? Is he in a better position than a son born or conceived after adjudication? Here the doctrine of relation back may come into play and operate to vest the property in the Receiver as and from the date of presentation of the petition or as and from the date of the act of insolvency according as the matter falls to be decided under the Provincial or Presidency Insolvency Act and he will not be in a better position than if he was born or conceived after adjudication. The point is covered by a decision of a single Judge of the Madras High Court reported in *Official Receiver, High Court, Madras*, v. *Rao & Co.*[2]

In conclusion, considering all the aspects, the true principle is to treat the Receiver as a representative of the insolvent and to treat the vesting on adjudication as a statutory assignment or conveyance for the limited purpose of paying off the creditors of the insolvent. In other words, " the trustee takes all the bankrupt's property, not for an absolute estate in Law, but for limited purposes only, *viz.*, for the payment of creditors under the bankruptcy and that bankruptcy only. Subject to that, he is a trustee for the surplus " The Receiver will thus be entitled to deal with the property for the purpose of paying off the debts and the property in his hands will not be affected by any subsequent infirmities to which it may be subject in the hands of the insolvent until the object of the trust is carried out, as for instance, where the share is liable to diminution by subsequent births in the family. He will be entitled to the increase in the share by subsequent deaths

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1. (1945) 1 M.L.J. 292 : I.L.R. 1946 Mad. 54.
2. (1947) 1 M.L.J. 242.

in the family as the representative of the insolvent and without the necessity for intervention. In the above view, the principle of reverter or revesting also can be explained. If anything remains after the object of the trust is carried out there will be a resulting trust in favour of the author of the trust.

SUMMARY OF ENGLISH CASES.

B. JELIC *v.* CO-OPERATIVE PRESS, LTD., (1947) 2 All.E.R. 767 (C.A.).

Practice—Security for costs against plaintiff residing "ordinarily out of jurisdiction" —Test—R. S. C., O. 65, R. 6-A.

The plaintiff in a suit for libel was a native of Yugo-Slavia and early during the recent war was brought to England and was there for 2 years. There was no evidence that he was likely to go abroad.

Held, it cannot be said that the plaintiff was residing ordinarily out of jurisdiction within the meaning of R. S. C., O. 65, rule 6-A and make him liable to furnish security for costs.

Re LUCAS, (1947) 2 All.E.R. 773 (Ch.D.).

Will—Gift to institution which had ceased to exist during testator's lifetime—Gift lapses.

Where a bequest is made for the upkeep a particular institution which had ceased to exist during the lifetime of the testator it cannot be applied *cypres* but must fall into the residue and be treated as undisposed of.

MCCULLOCH *v.* LEWIS A. MAY (PRODUCE DISTRIBUTORS), LTD., (1947) 2 All. E.R. 845 (Ch.D.).

Trade Name—Passing off—Broadcaster using fancy name, "Uncle Mac", in Children's programmes—Defendant using "Uncle Mac's Puffed Wheat" as children's food—If infringement.

A radio artist giving children's programmes under the fancy name "Uncle Mac" cannot claim an injunction to restrain a manufacturer marketing a food product under the name "Uncle Mac's Puffed Wheat" as the plaintiff was not engaged in that class of business.

BAXTER *v.* BAXTER, (1947) 2 All.E.R. 886 (H.L.).

Divorce—Insistence by wife on husband using contraceptive—If refusal to consummate entitling the husband to a decree of nullity.

The use of contraceptives did not prevent the consummation of the marriage and a husband is not entitled to a decree of nullity of marriage on the ground of the wife's insisting on the use of contraceptives by the husband.

(1945) 2 All.E.R. 197, overruled; (1946) 2 All.E.R. 760, not approved; (1947) 1 All.E.R. 387, affirmed.

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ALIENATIONS BY GUARDIAN—SUITS TO AVOID THEM BY THE QUONDAM MINOR.

By

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There are three classes of cases involving transfer of properties in which minors are interested which generally come up for consideration before the Courts.

(*i*) Alienation of joint-family property by the managing member and other adult co-parceners of the family where the minor members are represented by the managing member or any other adult member acting as the guardian of the minor co-parceners.

(*ii*) Alienation of joint-family property where there are no adult co-parceners at all in the family and the alienation is effected by the mother or other natural or legal guardian acting as the guardian of the minor co-parceners constituting the joint family.

(*iii*) Alienation of the separate property of the minor by the guardian of the minor.

What is the proper frame of the suit which the quondam minor has to file in order to avoid the alienation in respect of the three classes of cases mentioned above and what is the period of limitation within which the suit must be filed?

In respect of the first class of cases indicated above, the law seems to be well settled that the minor members of the joint family are not bound to set aside the alienation and that they can simply ignore it and can sue for possession or partition as the case may be within the period of 12 years prescribed by Article 126 or Article 144 of the Limitation Act. Article 44 of the Limitation Act has been held to be inapplicable to such cases (*Vide Ganesa Iyer* v. *Amrithasami Odayar*[1], and *Kanna Panickkar and others* v. *Nanchan and others*[2]). In the case in *Ganesa Iyer* v. *Amrithasami Odayar*[1], the father alienated family properties in the year 1907 and the sons (plaintiffs 1 and 2) brought the suit for partition of the properties. The first plaintiff had attained majority more than three years prior to suit. The second plaintiff was a minor. The Subordinate Judge found some of the alienations to be not binding on the family, but disallowed the first plaintiff's claim for partition on the ground that he, not having brought the suit within three years of his attaining majority, Article 44 of the Limitation Act would apply and his claim was barred. In appeal, the High Court held that the case fell under Article 126 of the Limitation Act and the first plaintiff was given a decree for partition of his 1/3 share in the properties. The learned Judges observe that the fact that the father executes the document as guardian of his son will not take the case out of Article 126 of the Limitation Act and bring it under Article 44 which applies to cases where property belonging to a minor is transferred. In the case of joint-family property the father is co-owner with the sons. He sells the property as the managing member of the family and the mere fact that he describes himself as guardian of the sons would not take the case out of the express terms of Article 126. In the case reported in

1. (1918) M.W.N. 892.
2. (1923) 46 M.L.J. 340.

Kanna Panickkar and others v. *Nanchan and others*[1], the Karanavathi of a Malabar tarwad made an improper alienation of tarwad properties not only as Karnavathi, but also as guardian of the minor members who sued to recover the properties on behalf of the tarwad on the strength of the tarwad title. The alienee contended that the minor plaintiffs were parties to the document of alienation and were bound to set it aside. It was held that the case was governed by Article 144 of the Limitation Act. The learned Judges observed that minors cannot act and that the mere addition of their names cannot make the document their act which must be set aside and they held that Article 44 of the Limitation Act did not apply to the case as the alienation did not purport to be by the guardian alone, but also by the Karnavathi who, under certain circumstances has authority to alienate tarwad property apart altogether from her guardianship of the minor members. Article 44 of the Limitation Act applies only to cases where the property transferred is the separate property of the minor. It does not apply to cases of alienation of joint family property by the father or the manager in which the minor co-parceners also join through their guardians. The circumstance that in the alienation of the joint-family property by the Kartha or manager the minor co-parcerner is represented by the mother as guardian would not make any difference, for, the family being joint and the property dealt with being joint-family property, the mother could not be the legal guardian of the minor in respect of that property. It has been so laid down by the Privy Council in *Gharib-ul-lah* v. *Khalak Singh*[2]. In that case one of the three brothers (who were the morgagors) was a minor and the mother had obtained a certificate of guardianship in respect of that minor and in one of the mortgages in suit the mother had joined as guardian of that minor son. The validity of the mortgage was attacked on the ground that the mother as guardian could not by reason of section 18 of Act XL of 1858 and sections 29 and 30 of Act VIII of 1890, make a valid mortgage of the minor's property without the sanction of the Court, which admittedly had not been obtained. The Privy Council observe that it has been settled by a long series of decisions in India that a guardian cannot properly be appointed in respect of an infant's interest in the property of an undivided family, that the interest of a member of such a family is not individual property at all, and therefore a guardian if appointed, would have nothing to do with the family property and they accordingly hold that the mortgages were not mortgages by the guardian, assuming the mother to be the guardian, but mortgages by the family entered into by the Kartha of the family with the concurrence of the second brother, the only other adult member of the family. As his Lordship Mr. Justice Venktaramana Rao puts it in *Adinarayana* v. *Venkatasubbayya*[3], "The family owns and possesses the property and there is no minor's estate as such." The principle seems to be that where there is an adult co-parcener in the joint family, he would be the Kartha or manager of the family and the legal guardianship of the minor co-parceners in the family will vest in him only and that adult co-parcener as the Kartha of the family is competent to transact with reference to the entire joint-family properties (including the interest of the minor co-parceners) on behalf of the joint family, the true test of the validity of such transactions being whether they are justified by family necessity or benefit.

In respect of the second class of cases mentioned above, it has been held in the case in *Kaja Ankamma* v. *Kameswaramma*[4], that Article 44 of the Limitation Act is the proper Article applicable in such cases, notwithstanding that the property transferred by the guardian is joint-family property. In that case the co-parcenery consisted of two minor cousins and their mothers acting as their guardians alienated certain properties belonging to the minors and one of the minors having died later on, the surviving brother sued after three years of his attaining majority, but within 12 years of the alienation, to recover the properties from the alienee on the ground that the alienation was beyond the power of the guardian to make. It was held

1. (1923) 46 M.L.J. 340.
2. (1903) L.R. 30 I.A. 165 : I.L.R. 25 All. 407 (P.C.).
3. (1937) 2 M.L.J. 653.
4. (1934) 68 M.L.J. 87.

that the case was governed by Article 44 and not Article 144 of the Limitation Act. His Lordship Mr. Justice Varadachariar expresses the view that the application of the dictum laid down by the Privy Council in *Gharib-ul-lah* v. *Khalak Singh*[1] should be restricted to cases where there are adult co-parceners in the family at the time of the alienation, notwithstanding that the property alienated is joint-family property. If the proper condition for the applicability of Article 144 of the Limitation Act and for excluding Article 44—is that the property dealt with by the guardian is joint-family property *ex-hypothesi* it would seem that there can be no warrant for denying to the quondam minor the benefit of the longer period of twelve years prescribed by Article 144 of the Limitation Act on account of the mere accident of there being no adult co-parcener in the family at the time of the alienation, unless you are obliged to regard the joint-family property as the separate property of the minor co-parceners on account of the non-existence of any adult co-parcener in the family. The latter assumption seems to underlie the decision of Mr. Justice Varadachariar in *Kaja Ankamma* v. *Kameswaramma*[2] although the learned Judge does not say so in so many words. In the judgment in the Letters Patent Appeal against that decision reported in *Ankamma* v. *Kameswaramma*[3] the learned Chief Justice (Beasley C.J.,) affirms the view expressed by Mr. Justice Varadachariar and observes that as there were no other co-parceners in the family and the minors were alone interested in the property, the property is the separate property of the minors and the case was therefore governed by Article 44 of the Limitation Act.

We now come to third class of cases—cases of alienation of the minor's separate property by the guardian. These fall under Article 44 of the Limitation Act and the ex-minor must initiate proceedings challenging the transfer effected by his guardian within three years of his attaining majority and if he omits to do so, the title of the alienee from the guardian will become unassailable by virtue of section 28 of the Limitation Act. As observed by His Lordship, Mr. Justice Varadachariar in *Kaja Ankamma* v. *Kameswaramma*[2], the Limitation Act draws a distinction between voidable transactions and void transactions and while a longer period is allowed for remedies arising out of void transactions, a shorter period is prescribed for all actions that seek to avoid voidable transactions.

A transfer of the minor's property by the guardian, though unauthorised, vests the title to the property in the alienee and is operating against the minor, though the transfer is liable to be avoided at the instance of the minor for due cause. A transfer of the minor's property by the guardian is not void ; it is only voidable. It is open to the ex-minor to accept it as valid and binding on him. Filing a suit in terms to set aside the alienation is not the only method of repudiation. In Trevelyan's Law of Minors (5th Edition) at page 202, the learned author says :

> " A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor by which he intends to communicate the repudiation or which has the effect of repudiating it. It is not necessary that he should bring a suit. . . . . ."

The decisions in *Kamaraju* v. *Gunnayya*[4], *Veera Raghavalu* v. *Sriramulu*[5], *Sivanmalai Goundan* v. *Arunachala Goundan*[6], *Kuppuswami Goundan* v. *Mariappa Goundan*[7], proceed upon the view of the law propounded in the passage extracted above. In the case in *Kamaraju* v. *Gunnayya*[4], the mother of the minor acting as his guardian sold the minor's property. After the minor attained majority, ignoring the sale-deed executed by his mother and on the footing that no valid title was conveyed by it to the vendee, he sold the property to the plaintiff, who (the transferee from the ex-minor) sued to recover the property from the alienee. The alienee from the guardian contended that the suit was bad for want of a prayer to set aside the sale. It was held that such a prayer was unnecessary. The learned Judges (Ramesam and Coleridge, JJ.) observed as follows :

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1. (1903) L.R. 30 I.A. 105 : I.L.R. 25 All. 407 (P.C.).
2. (1934) 68 M.L.J. 87.
3. (1935) 70 M.L.J. 352.
4. (1923) 45 M.L.J. 240.
5. A.I.R. 1928 Mad. 816.
6. (1938) 2 M.L.J. 428.
7. (1943) 1 M.L.J. 249.

"The first defendant (the ex-minor) has got the right of avoiding it (the transfer from the guardian). By selling the property to the plaintiff on the footing that the sale by the guardian was not binding on him, he has chosen to avoid it and the result of it is, that from his point of view he has got a complete title. The title will no doubt be effective only if the Court ultimately finds that the sale by the mother is not binding on him. But contingent on that event he has got a complete title."

Towards the end of the penultimate paragraph of the judgment, His Lordship Mr. Justice Ramesam says :

"If it is necessary, I would even allow the plaint to be amended by adding the necessary prayer." But, adds the learned Judge, "I do not think it necessary."

This decision was followed in another Bench decision *Veera Raghavalu* v. *Sriramulu*[1], where the learned Judges (Ramesam and Jackson, JJ.) after referring to the decisions which lay down that a minor has not got to set aside the transaction by a guardian in suing to recover the property, say, that the minor can ignore the transaction and merely pray for possession and need not pray for cancellation of the instrument, unlike an adult who has executed the instrument himself. In this view the learned Judges held that section 7, clause (iv) (*a*) of the Court Fees Act was not applicable to the case before them. Their Lordships point out that in such cases it is proper that the plaintiff should not add unnecessary prayers to confuse the Court and himself and if the plaint should contain such prayers it is best to expunge them. In the case in *Sivanmalai Goundan* v. *Arunachala Goundan*[2], the assignee from the guardian (appointed under the Guardian and Wards Act) of a mortgage debt due to a minor filed a suit for recovery of the mortgage money. The guardian had made the assignment without obtaining sanction of the Court as provided by the statute and the assignment was therefore voidable at the instance of the minor. When the assignee's suit was pending the ward attained majority, but he did not file a suit to set aside the assignment by the guardian. Instead, ignoring the assignment by the guardian, he filed a suit himself for recovery of the mortgage money. The learned Judges (Venkatasubba Rao and Abdur Rahman, JJ.) observed that :

"the ward in question has avoided the transaction in the most unequivocal way by filing a suit himself for recovery of the mortgage money."

Filing a suit by the ex-minor claiming the mortgage amount himself was a very unequivocal method of repudiating the guardian's act. The learned Judges say that it is far from correct to say that a minor cannot repudiate a transfer effected by the guardian except by filing a suit under Article 44 of the Limitation Act to set aside the transfer. In the recent case in *Kuppuswami Goundan* v. *Mariappa Goundan and Others*[3] there was a partition in 1938 between the plaintiff and his brothers. The plaintiff was then a minor represented by his father. The plaintiff on attaining majority filed a suit for the partition of the family properties and for possession of his 1/3 share ignoring the partition of 1938 as null and void on the ground that the 1st defendant was given very much more than what he was entitled to. It was contended that the plaintiff was bound to get the partition deed of 1938 set aside or cancelled as he was a party to it through his father as guardian. His Lordship Mr. Justice Kuppuswami Iyer following the Bench decision in *Kamaraju* v. *Gunnayya*[4] held that it was not necessary for the plaintiff to get the partition deed of 1938 set aside and that it was open to the ex-minor to ignore the same.

The correct principle deducible from the decisions seems to be that an ex-minor is entitled to repudiate the alienation by the guardian and if he repudiates the transaction in an unequivocal manner by doing an act which is inconsistent with the acceptance by him of the transaction as valid and binding on him and if his act of repudiation receives the imprimatur of the Court in the proceedings that he or his transferee may initiate for recovery of possession or partition of the properties transferred by the guardian, then the transaction stands in effect cancelled or set aside and the ex-minor or his transferee is given a decree for possession or partition as the case may be. The cancellation or setting aside of the document

1. A.I.R. 1928 Mad. 816.
2. (1938) 2 M.L.J. 428.
3. (1943) 1 M.L.J. 249.
4. (1923) 45 M.L.J. 240.

is implicit in the finding of the Court that the document is not valid and binding on the minor. The repudiation of the guardian's act may take the form of a sale of the property by the ex-minor to a third party on the footing that the alienation by the guardian is not valid or it may take the form of a suit by the ex-minor himself —ignoring the alienation or impugning it—for recovery of possession or for partition. The plaint need not contain a prayer for setting aside the alienation in question. All that is necessary is that the suit which the ex-minor or his transferee files for possession or partition—ignoring or impugning the alienation—must be filed within three years of the minor attaining majority. If the suit is not filed within the period of three years prescribed by Article 44 of the Limitation Act, the title of the ex-minor will be extinguished by virtue of section 28 of the Limitation Act and the title of the alienee from the guardian will become unassailable and indefeasible.

This is the principle underlying the decisions in *Raja Ramaswami* v. *Govindammal*[1], and *Ghulam Hussain Sahib* v. *Ayesha Beebi*[2]. In the case in *Raja Ramaswami* v. *Govindammal*[1], there was an unauthorised alienation of the minor's property by his guardian. The minor was born in February, 1903. He attained majority therefore in February 1921. In 1923 the ex-minor conveyed the property to the plaintiff ignoring the sale by the guardian and the plaintiff—the transferee from the ex-minor—filed a suit on 1st December, 1924, against the alienee from the guardian for recovery of possession and mesne profits. It was argued on behalf of the plaintiff that Article 44 of the Limitation Act did not apply and that the case was governed by Article 144. In rejecting that argument, their Lordships observe that it is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under what Article of the Limitation Act the suit falls and that though the relief claimed was possession of immoveable property, yet if the property sued for is held by the contesting defendants under a sale or other transfer which is not void, but only voidable and if the plaintiff cannot obtain possession without the transfer being set aside, the suit must be regarded as one brought to set aside the transfer, though no relief in those terms is prayed for and the prayer is only for possession of the property. It was held that Article 44 applied to the case and the suit, not having been instituted within three years from the date of the minor attaining majority was held to be barred under Article 44. In the Full Bench case, *Ghulam Hussain Sahib* v. *Ayesha Beebi*[2], a Muhammadan mother who was appointed guardian of her three minor sons under the Guardian and Wards Act acting on her own behalf and as guardian of the minor sons sold a house belonging to her late husband without obtaining sanction of the Court as provided in section 29 of the Guardian and Wards Act. The omission to obtain the necessary sanction did not render the transaction void. The transaction was only voidable at the instance of the minors. In January 1932, the three sons who claimed to have become majors by that time sold their shares in the property to one Ghulam Hussain Sahib who in January, 1933, filed the suit to recover from the mother's transferee the shares of his vendors in the property. It was found that one of the three vendors attained majority more than three years before suit and it was held that the plaintiff's claim for recovery of that person's share in the suit property was barred by Article 44 of the Limitation Act. It is to be observed that in this Full Bench case also, there was no prayer in terms to set aside the transfer effected by the guardian and that the transferee from the ex-minor filed the suit for partition on the footing that the sale by the guardian was invalid, and was not binding on the minor. The claim for partition of the share of one of three vendors was disallowed on the ground that the suit was filed more that three years after he had attained majority.

The decisions in *Alagar Ayyangar* v. *Srinivasa Ayyangar*[3], *Doraiswami* v. *Thangavelu*[4], *Venkitakrishniah* v. *Sheik Ali Sahib*[5], which lay down that an ex-minor

1. (1928) 56 M.L.J. 332.
2. (1941) 1 M.L.J. 800 : I.L.R. 1941 Mad. 775 (F.B.).
3. (1925) 50 M.L.J. 406.
4. A.I.R. 1929 Mad. 668.
5. A.I.R. 1938 Mad. 921.

is bound to get the alienation by the guardian set aside cannot be regarded as correct. In the case in *Alagar Ayyangar* v. *Srinivasa Ayyangar*[1], the property that was transferred was not the separate property of the minors, but was joint-family property in which the minors were interested. The view taken by His Lordship Mr. Justice Odgers, in that case is opposed to the law laid down in the earlier decisions in *Ganesa Iyer* v. *Amirthasami Odayar*[2] and *Kanna Panickkar and others* v. *Nanchan and others*[3] already noticed. It is curious to observe that neither of these decisions appears to have been brought to the notice of the learned Judge. The decision in *Kamaraju* v. *Gunnayya*[4], does appear however to have been cited before his Lordship, but the learned Judge distinguished it as not being a case of Court-fee. It is not easy to appreciate the distinction drawn by His Lordship. The determination of the question of the appropriate Court-fee payable in such cases must obviously depend upon the view that you take on the question whether it is necessary for the ex-minor to pray for setting aside the alienation by the guardian. If the ex-minor is entitled to ignore the transaction by the guardian and to sue for possession or partition without praying in so many words for setting aside the alienation by the guardian, no question of paying Court-fee under section 7, clause (iv) (*a*) of the Court Fees Act can possibly arise. In *Doraisamy* v. *Thangavelu*[5], and *Venkitakrishniah* v. *Sheik Ali Sahib*[6], the suits were filed by the ex-minor to avoid alienations of the minor's separate property by the guardian. In *Doraiswamy* v. *Thangavelu*[5], it was held that the ex-minor was bound to set aside the release deed executed by the guardian and that Court-fee was payable under section 7, clause (iv) (*a*) of the Court Fees Act. This decision was followed by His Lordship. Mr. Justice Wadsworth, in *Venkitarkrishniah* v. *Sheik Ali Sahib*[6]. His Lordship observes that where the alienation document is an insuperable obstacle to a prayer for possession so long as it has not been declared void or cancelled, the cancellation or avoidance of that document is an essential part of the relief sought, and the case must come under section 7 clause (iv) (*a*) of the Court Fees Act. The Bench decision in *Kamaraju* v. *Gunnayya*[4], does not appear to have been brought to the notice of the learned Judge who decided *Doraiswami* v. *Thangavelu*[5], and *Venkitakrishniah* v. *Sheik Ali Sahib*[6], and it is interesting to notice that His Lordship, Mr. Justice Venkatasubba Rao, who decided the case in *Doraiswami* v. *Thangavelu*[5], is a member of the Bench which decided the case in *Sivanmalai Goundan* v. *Arunachala Goundan*[7].

To sum up, neither in the case of an alienation of joint-family property nor in the case of an alienation of the separate property of the minor is the ex-minor bound to pray for setting aside the alienation effected by the guardian. No question can therefore arise in such cases of paying Court fee under section 7, clause (iv) (*a*) of the Court Fees Act. The ex-minor is entitled to sue for possession or partition on the footing that the alienation is not binding on him without making a prayer for setting aside the alienation, but while the ex-minor is entitled to get the longer period of limitation prescribed by Article 144 of the Limitation Act in the case of suits in respect of alienations of joint-family properties he is bound to claim redress within the shorter period of three years after attaining majority in respect of alienations of his separate property made by the guardian. A suit filed by the ex-minor claiming possession or partition repudiating the transaction effected by the guardian on the footing that the alienation is not valid and binding on him should be regarded as virtually a suit to set aside the transfer made by the guardian, but it is not necessary in such a suit to pray for setting aside the alienation effected by the guardian. If the ex-minor omits to institute a suit claiming such relief within the period of three years prescribed by Article 44 of the Limitation Act, the title of the ex-minor to the property will be extinguished by virtue of section 28 of the Limitation Act and the title of the alienee from the guardian will become unassailable.

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1. (1925) 50 M.L.J. 406.
2. (1918) M.W.N. 892.
3. (1923) 46 M.L.J. 340.
4. (1923) 45 M.L.J. 240.
5. A.I.R. 1929 Mad. 668.
6. A.I.R. 1938 Mad. 921.
7. (1938) 2 M.L.J. 428.

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APPOINTMENT OF NEW JUDGES.

At no time before in the history of our High Court has there been such vacillation and delay in the appointment of Judges of the High Court in the vacancies caused by retirements or resignations giving rise to varied comments not only by irresponsible men in the street but even by most responsible persons on the floor of the Legislative Assembly. It is much to be regretted that the question of the appointment to such a high office should have become, at all, the centre of a controversy, be it political or communal or otherwise. But now that the appointments have been made, it is to be hoped that the almost unseemly controversy and discussions that have gone on these few weeks would not be repeated in future.

It is a matter of immense and sincere gratification to us that Mr. S. Panchapagesa Sastry, a member of our Editorial Committee, should have been chosen as one of the Judges of our High Court. He has been connected with the Madras Law Journal for several years and has been responsible for some of the best critical notes on decided cases. The Madras Law Journal would always gratefully remember his valuable services in editing Mitra's Limitation Act, a masterly work which has evoked the unstinted appreciation of Judges and practitioners alike throughout India.

It can be said without fear of contradiction that Mr. S. Panchapagesa Sastry has in the largest measure all the qualifications necessary for the making up of an eminent Judge. He has had a brilliant academic career and has been having for many years now, a very wide and lucrative practice at the Bar. His legal acumen and his thorough knowledge of the law in all its branches, had easily brought him up to the top of Bar. The way in which he prepared his cases and the manner in which he presented them in Court have always earned for him the respect of the Judges. His easy and pleasant manners have won for him a very wide circle of friends. It is rather surprising that with all these qualifications governmental recognition should have come to him only late in life. It is to be hoped that the present appointment is only the first of the honours yet to come.

BOOK REVIEW.

HINDU LAW in British India by S. V. Gupte, B.A., LL.B., published by N. M. Tripathi, Ltd., Princess Street, Bombay 2. Second edition, 1947. Price Rs. 25.

The first edition of this book was reviewed in (1946) 1 M.L.J. at page 4 (Journal). Since then a number of statutes have been passed cutting into the domestic law of the Hindus radically and in many directions. Of these the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, providing a right to separate residence and maintenance *inter alia* on second marriage by the husband, and the Hindu Marriage Disabilities Removal Act, 1946, recognising the validity of sagotra and samanapravara marriages are enactments of the Central Legislature. The Bombay Legislature has passed laws of an even more advanced character. The Bombay Prevention of Hindu Bigamous Marriages Act, 1946, makes illegal a second marriage contracted by a person while a previous valid marriage was subsisting and the Bombay Hindu Divorce Act, 1947, introduces for the first time the institution of divorce in respect of Hindu marriages which have been through the ages looked upon as a samskara. Mr. Gupte's book has embodied the provisions of these enactments bringing the law set out in his book up to date.

The omission of a table of cases from the first edition which to some extent had affected the usefulness of the book has now been made good.

The statement of law while generally sound is at places either contradictory or somewhat loose. Some of these to which attention was drawn in the review of the previous edition still stand unmodified. It is stated at page 67 that the possession of a nucleus is not necessary for the existence of a coparcenary. This overlooks the fact that coparcenary is really a tenure in which property is held. The observation of the Privy Council in (1946) 2 M.L.J. 138, 140 pointedly mentions that "it is of the *essence* of *any* coparcenary governed by the Mitakshara school of law that the *interest* of any individual coparcener is liable at any time to be increased or diminished by deaths or births" (*italics ours*). At page 131 in regard to the meaning of "separate property" in section 3 (1) of the Hindu Women's Rights to Property Act, 1937, the decision of the Federal Court in (1945) F.C.R. 1 is cited to show that the term does not include "joint family property in the hands of a sole surviving coparcener." In that very para an earlier decision of the Patna High Court—I.L.R. 1944 Pat. 508—to the contrary is cited without comment. In view of the Federal Court's observation the latter view cannot hold the field. At page 898 of the book in regard to the share of an adopted son in competition with an after-born aurasa son, it is stated that in Bengal he takes a fourth of what the aurasa son takes, while at page 1007 it is stated that he takes half the share of an aurasa son. Again at page 903 the decision in 58 Cal. 1392 is relied on to show that an anuloma marriage in Bengal is not valid but as pointed out in our review on the last occasion in that very case occurs the statement: "a marriage between a Brahmin and a Sudra women . . . . though not an approved type of marriage is still a marriage and the children are legitimate." A leading text book should try to avoid errors of this kind. Despite these the book is a welcome publication and is bound to be a *vade mecum* for both practitioners as well as students. The printing and get up are quite commendable.

S.V.

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IS THE MANU SMRITI A BRAHMANICAL COMPOSITION?

The Manu dharmasastra "is regarded as supreme by the unanimous verdict of both the lay and legal literatures of Hindu India, and as such it occupies a unique position in the legal history of the land"[1]. Albeit, it is not a little remarkable that very little should be known about the composer of the dharmasastra and that considerable divergence should exist in regard to almost everything concerning the work. No book for instance has had so many dates attached to it as the Manu Smriti. Sir W. Jones placed its age at 1280 B.C.; Schlegal at 1000 B.C.; Elphinstone at 900 B.C.; Monier Williams at about the 5th century B.C. The authority of Dr. Burnell has been cited for so late an age for the original work as 400 A.D. and Nelson has placed it in its present form to a period between the 11th and 14th century A.D.[2] Sir Henry Maine has repeatedly affirmed that the Manu dharmasastra was a relatively recent composition. He observes: 'The probable antiquity of Manu's law book was much exaggerated . . . . . but it is now believed to be relatively modern—almost the most modern of a large family of Sanskrit writings more or less treating of law"[3]. At another place he states: "Manu according to Hindoo mythology is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindu jurisprudence, a recent production"[4]. Jayaswal has suggested that the Smriti was the work of a historical person composed between 150 B.C. and 100 A.D. during the time of the Sunga rule[5]. Mahamahopadhyaya P.V. Kane has expressed the view that the Manu Smriti had existed certainly long before the 4th century B.C.[6] The present writer has suggested that the composition of the dharmasastra should be attributed to before 2000 B.C.[7]

Again it is a matter of dispute as to how far the precepts of the Manu Smriti were ever actually in force. Maine has remarked: "The Hindoo Code, called the Laws of Manu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmin ought to be the law"[8]. Jayaswal on the other hand has expressed a contrary view. According to him Manu's Code was "the mirror reflecting the national sentiment of the time. His absurd claims for Brahminism were admitted at the time, for they were based on the facts

1. Jayaswal, Manu & Yajnavalkya, T.L.L., p. xix.
2. *See* Nelson, Scientific Study of Hindu Law.
3. Early Law and Custom, p. 9.
4. Ancient Law, p. 16.
5. Manu & Yajnavalkya, T.L.L., pp. 25-26.
6. History of Dharmasastra, Vol. I, pp. 155-156.
7. *See* An Inquiry into the Source and Authorship of the Manu Smriti, (1947) 1 M.L.J. 27 (Jour.).
8. Ancient Law, p. 15.

of the time. . . . . At the end of the first century, Manu's Code is *the* Dharmasastra. . . . .Very probably the Manava Dharma Code became the approved Code of the Sungan regime"[1]. In passing, though one may not agree with Jayaswal's theory as to the age or authorship of the Manu dharmasastra, it may be said that there can be little doubt of the Manava Code being in actual force for a long time.

Likewise in regard to the mode of composition of the Manu Smriti there is again a difference of opinion. Maine has argued that the Code is not the production of a single man but of a school modelled on a family, real or artificial, analogous to the Homeridae which according to Grote was responsible for the Homeric poetry.[2] The Hindu tradition concerning the matter is only that the original Code had undergone some abridgements but that it was not a contribution by diverse hands nor made up of materials introduced at different times. One version of the tradition is that Prajapati promulgated the laws which were abridged by Manu. The prose introduction to the Narada Smriti states :

नारदश्च स्मरति । शतसाहस्रो ग्रन्थः प्रजापतिना कृतः समन्वादिभिः क्रमेण संक्षिप्त इति ॥

Another version is that Manu composed a dharmasastra in one hundred thousand verses which was successively abridged by Narada, Markandeya and Sumati. A text of the Bhavishya Purana cited by Hemadri states :

भार्गवी नारदीया च बार्हस्पत्याङ्गिरस्यपि ।
स्वायंभुवस्य शास्त्रस्य चतस्रः संहिता मताः ॥

As P.V. Kane has justly remarked there is neither sufficient nor reliable evidence to show that the Manu Smriti had suffered numerous recasts. According to that scholar the occurrence of conflicting passages could be explained on the theory of a single recast by Bhrigu who has compressed the older work in some cases and expanded it in others.

A more intriguing question is as to the caste of the composers of the dharmasastra and of its present version. The common assumption is that it is a Brahmanical compilation. Maine has espoused that view[3]. It has already been stated how according to Jayaswal the dharmasastra was composed to consolidate, maintain and give a legal basis for the ascendancy of the Brahmins in all departments of public and private life achieved during the Sunga period. The conclusion is rested chiefly on three grounds. Firstly, the Manu Smriti exalts the Brahmin and urges for him a paramount position ; secondly, it advocates royal absolutism keeping the Brahmin however free from control by the King, and lastly, it advocates for the Brahmin immunities in criminal law comparable to what has been called " the benefit of the clergy " in western jurisprudence. The Brahmin is referred to as *Isa*[4], *Isvara*[5], and *Adhipati*[6]. The Code states : " Whatever exists in the world is the property of the Brahmin ; on account of the excellence of his origin, the Brahmin is indeed entitled to it"[7]. The next verse adds : " The Brahmin eats but his own food, wears but his own apparel, bestows but his own in alms, other men subsist through the benevolence of the Brahmin." Supremacy in every walk of life is declared in his favour. The Code states :

सेनापत्यं च राज्यं च दण्डनेतृत्वमेव च ।
सर्वलोकाधिपत्यं च वेदशास्त्रविदर्हति ॥

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1. Manu & Yajnavalkya, T.L.L., pp. 43-44.
2. Early Law and Custom, pp. 12-16.
3. Ancient Law, p. 15.
4. Manu, IX, 205.
5. *Ibid.* I, 99.
6. *Ibid.* VIII, 37.
7. *Ibid.* I, 100.

" The post of commander-in-chief, the kingdom, the very headship of government, the complete empire over everyone are deserved by the knower of the vedic science"[1]. It may be conceded that the dharmasastra extols Brahminism. This is intelligible purely as a tribute to the respect which learning secures. Verily knowledge is power. The Aryans promulgated the law as conquerors and the leaders were soldier priests. No wonder the community of learned men and the soldiery came in for special emphasis. The importance of the Kshatriya was not in any way minimised as will be shown later. The primacy claimed for the intellectual was one that had been allowed as against the purely military in every settled society enjoying peace. It is also significant that the last of the verses cited claims the supremacy not for the Brahmin only but to all who are learned in the vedas and sastras. As will be shown later on, *brahmavidya* was not the monopoly of the Brahmin. In fact it has been suggested that the Kshatriyas were the pioneers. Again as pointed out by Maine, " it would be altogether a mistake to regard the class whose ideas are reflected in the literature as a self-indulgent ecclesiastical aristocracy. . . . The life which they chalk out for themselves is certainly not a luxurious and scarcely a happy life. It is a life passed from first to last under the shadow of terrible possibilities. The Brahmin in youth is to beg for his teacher ; in maturity as a married householder he is hedged round with countless duties of which the involuntary breach may consign him in another world to millions of years of degradation or pain; in old age he is to become an ascetic or hermit "[2]. Also the extollation of the Brahmin's position was only with a view to persuade him to give up the pursuit of *artha* and *kama* and devote himself to the attainment of the other purusharthas, *dharma* and *moksha*. It is really an endeavour to secure social distinction for those who were denied worldly advantages.

Jayaswal cites Apastamba's prohibition of weapons to a Brahmin even for the sake of experiments[3]—परीक्षार्थोपि ब्राह्मण आयुधं नाददीत—and argues that Manu has deliberately revised the rule to provide justification for the actions of Pushyamitra. This is really a reversal of the correct picture. With great respect to the eminent researcher, it may be stated that it is his assumption that the Manava Code was composed during the times of the Sungas that makes the proper perspective elude him. Members of the priestly class like Vasishtha and Viswamitra are credited with perfect mastery of the dhanurveda. Parasurama and Drona though regarded as Brahmins were also great warriors. Gautama recognises that even a Brahmin should take up arms when in danger of life—प्राणसंशये ब्राह्मणोपि शस्त्रमाददीत—Manu's precept : " The twice-born should take up arms in the circumstances of the dharma being obstructed and of a revolution of the twice-born castes produced by time "[4], may be read no doubt as justifying armed rebellion against an internal, social and religious revolution. The rule in Manu would in fact seem to be the earlier rule. As the present writer has indicated elsewhere the extant version of the Manu dharmasastra was promulgated shortly after Parasurama's crusade against the Kshatriyas and the passage in question may be deemed to reflect the position then in vogue. Jayaswal's conclusion rests on his theory that the Manu Smriti was a composition of the Sunga times and that the sutras of Gautama, Apastamba and others were anterior to dharmasastra of Manu.

The second ground relied on to show that the Manu dharmasastra is a Brahmin compilation does not carry the position further. According to Manu, the King is verily a deity made by the gods out of their own portions, who could burn and consume any opposing him and whose laws none could question.[5] In the succeeding verses, however, Manu declares that *danda* was created by the Creator as his own son, it is law

1. Manu, XII, 100.
2. Early Law and Custom, pp. 47-48.
3. I, 10, 29, 6.
4. Manu, VIII, 348.
5. *Ibid.* VII, 3-13.

that is the true king, it could destroy the king himself if he violated dharma and the king must follow the opinion of the ministers and act in accordance with the sastras[1]. Jayaswal has remarked that Manu postulates two contradictory theories here, that the first was deliberately declared to justify what the Brahmin usurper of the throne, Pushyamitra, had done, but in view of such theory being contrary to the Hindu tradition the second theory was placed just below the divine theory[2]: The conclusion is not warranted. If the two passages are read together, as in fact they should be, the disharmony vanishes. Also what has been stated by Manu refers to all kings and cannot be read as a special plea in favour of a Brahmin king. Also the vedic state seems to have consisted of (*i*) a king elected at first and hereditary later, (*ii*) a priestly aristocracy independent of the king and exempt from tolls and taxes, and (*iii*) a state assembly[3]. If that be so the statement as to the king's position found in the Manu dharmasastra is not far different and cannot be charged as a vindication and legalising of the position of a particular king.

Another ground urged to support the theory of the Brahmanical origin of Manu's Code is its placing the Brahmin above criminal penalty in felony[4]. According to Manu the Brahmin offender should be permitted to leave the country, without a wound upon him and with all his property, even in the case of proved offences of capital punishment[5]. Two remarks fall to be made apropos of this. The immunity from capital punishment in favour of the Brahmin was not an innovation by Manu but has come down from the vedic period itself. It may be due to a presumption that it would be extremely unlikely that a learned Brahmin would ever voluntarily commit a crime, much less a capital offence. Secondly, the criminal jurisprudence of the Hindus recognised punishments both spiritual as well as secular and in the case of the Brahmin the spiritual penalty administered by the appropriate Brahmanical authority would be more severe than in other cases. In fact it was regarded as far more terrible than the secular punishment. The Hindu criminal law was in truth based on the principle that the offence would be deemed aggravated when committed by one who knows that the act has been prohibited—

निषेधदोषं ज्ञात्वापि प्रवर्तमानस्य दोषाधिक्यं भवति ॥

Manu was fully conscious of this principle[6]. If the Brahmin was placed outside the control of the Kshatriya ruler, that again was a privilege which existed from the vedic times and it is not as if Manu deliberately twisted the rules that way. He was only recording the vedic practice in the matter. It is observed in the Vedic Index[7]: " The (Vedic) texts regularly claim for them (Brahmins) a superiority to the Kshatriya. It is to be admitted that the king or the nobles might at times oppress the Brahmins, but it is indicated that ruin is then certain to follow. The Brahmin claimed to be exempt from the ordinary exercise of the royal power. The king censures all but the Brahmins." Thus none of the reasons adduced in support of the theory of the Manu dharmasastra being of Brahmanical origin is altogether convincing.

On the other hand it is possible to suggest that the original author of the Smriti was a Kshatriya. Manu has been referred to as a member of the solar dynasty, a descendant of Ikshvaku. The Vishnu Purana remarks that Devapi, descendant of Kuru, and Manu descendant of Ikshvaku, stay in Kalapagrama, are endowed with great yogic powers, will revive the Kshatriya race when the krita age will start again after the present kali age comes to an end[8]. This account would suggest that Manu was a Kshatriya. The Vayu and the Matsya Puranas give similar accounts. The tradition that Manu belonged to the solar dynasty is referred to by Kalidasa in the Raghuvamsa :

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1. Manu, VII, 14-31.
2. Manu & Yajnavalkya, T.L.L., p. 98.
3. Shama Sastri, Evolution of Indian Polity, p. 98.
4. Maine, Early Law and Custom, p. 47.
5. Manu, VIII, 378-381.
6. *Ibid.* VIII, 337-338.
7. *Ibid.* II, p. 81.
8. *Ibid.* IV, 24, 4.

वैवस्वतो मनुर्नाममाननीयो मनीषिणाम् ।
आसीन्महीक्षितामाद्यः प्रणवश्छन्दसामिव ॥

In Vedic literature, as for instance, in the Satapatha Brahmana and in the Upanishads, it is stated that certain Kshatriya kings had attained great eminence as devotees of *brahmavidya*, and that distinguished Brahmins went to them for instruction and light. It is said that Yajnavalkya learnt from Janaka, King of Mithila[1], Balaki Gargya from Ajatasatru, King of Kasi[2], Svetaketu Aruneya from Pravahana Jaivali[3], and five Brahmins from Asvapati, King of Kekaya[4]. Some scholars have even stated that the Kshatriyas were in fact the pioneers in *brahmavidya*. Deussen observes[5]: "the real cherisher of those thoughts was originally the caste of the Kshatriyas, rather than the caste of the priests. Over and over again we come across the situation that the Brahmana asks the Kshatriya for information." Dr. Sir R. Bhandarkar seems to have shared this view[6]. According to him the Kshatriyas engaged themselves in active speculation on religious matters about the time of the Upanishads and are mentioned as the original possessors of the new knowledge. It is thus quite conceivable that the original promulgator of the Code of Manu was a Kshatriya and not a Brahmin.

The present version of the Manu dharmasastra is attributed to Bhrigu. It narrates how from Brahma sprang Viraj who produced Manu from whom sprang a number of sages including Bhrigu[7], how Brahma taught the sastra to Manu who in his turn imparted it to ten sages[8], how some of the sages approached Manu with a request for instruction in the dharmas of the varnas and how Manu told them that his pupil Bhrigu would impart to them the sastra[9]. The Code preserves this appearance throughout. At the end of each chapter it is stated that it is a composition of Bhrigu :

इति मानवे धर्मशास्त्रे मनुप्रोक्तायां संहितायां प्रथमोऽध्यायः द्वितीयोऽध्यायः—

etc. Bhrigu is a family name. It is a priestly title of some of the rishis and priest kings. While the tradition recorded in the Bavishya Purana as quoted by Hemadri states that Bhrigu's was the first version of the Manu dharmasastra, according to Narada the person that abridged the laws of Manu was Bhrigu's son Sumati. The difference is hardly material. Which of the members of the Bhrigu family actually did the abridgment, what was the occasion for such abridgment, and what precisely was his caste are matters in regard to which it is now possible to have clear ideas. The definition of *aryavarta* in Manu suggests that at the time of the compilation of the extant version of the Smriti the western frontier was a sea. The latter has generally been taken to refer to the Arabian sea. Because of this scholars have felt puzzled inasmuch as Baudhayana, Vasishtha and others have stated the western frontier to be the river Sarasvati. The difficulty will vanish if the Manu dharmasastra was in fact an earlier compilation made at a time when the Aryans had knowledge of the tracts to the west of the Indus valley as far as Asia Minor. The recent deciphering of the Indo-Sumerian seals and those discovered at Mohenjodaro and Harappa probablise the existence of such knowledge. According to Manu, *aryavarta* extended from sea to sea from east to west and from mountain to mountain from North to South[10].

आसमुद्रात्तुवै पूर्वादासमुद्राच्च पश्चिमात् ।
तयोरेवान्तरं गिर्योरार्यावर्तं विदुर्बुधाः ॥

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1. Sat. Brah. XI, 6, 21, 5.
2. Brih. Up. II, 1.
3. Chan. Up. V, 3.
4. *Ibid.* V, 11.
5. Das System des Vedanta, 1883, p. 18.
6. Vaishnavism and Saivism, p. 9.
7. Manu, I, 32-33.
8. *Ibid.* I, 58.
9. *Ibid.* I, 59-60.
10. *Ibid.* II, 22-23.

कृष्णसारस्तु चरति मृगो यत्र स्वभावतः ।
संज्ञेयो यज्ञियो देशो म्लेच्छदेशस्त्वतः परः ॥

If the mountains spoken of are the Himalayas and the Vindhyas the reference to the sea in the west can hardly be to the Arabian sea, as that would be a western frontier to a very small part only of *aryavarta*. Jayaswal in trying to reconcile Manu's definition of *aryavarta* with his theory that the dharmasastra was composed during the Sunga regime, charges Manu with vagueness in his western limit and states that Manu was not sure of the Punjab. The fact that Baudhayana fixes the western limit as the Vinasana[1] (the river that disappears, *i.e.*, the river Sarasvati supposed to have been lost in the desert of Patiala) would be consistent with his being a relatively later author. The description given in the Manu dharmasastra is not incompatible with the frontiers of *aryavarta* extending up to the Mediterranean Sea. It is not as if the composer of the Manu Smriti was not aware of the river Sarasvati. Express reference is made by him to the river[2]. Yet he sets the western boundary at the sea. This fits in with the hypothesis that at the time when the composition of the dharmasastra was undertaken the Aryans were in occupation of all the territories spreading east from the Mediterranean Sea. The archaeological discoveries in the Punjab valley and Mesopotamia afford strong support to this theory. Two of the Indo-Sumerian Seals deciphered by Dr. Waddell are of considerable significance[3]. Seal No. 5 has been identified as the official signet of King Sushena who ruled about 2350 B.C. He was the brother of Parasurama. Seal No. 11 has been held to be that of Galava Rishi Bhrigu, a close companion of Parasurama. Parasurama himself is identified as Prince Bura Sin of the Ur dynasty of Lagash who then held sway over the Sumerian colony in the Indus valley. At that period the distinction between the Brahmins and the Kshatriyas seems to have been not a distinction based on birth but one resting on functions merely ; so much so, by a change of function one could change one's social order. Viswamitra was in that wise at one time a Kshatriya and at another time a Brahmin. Parasurama could equally be at one time a priest and teacher of vidya and at another time a warrior. King Gadhi identified by Dr. Waddell as King Gudea of Lagash had a son Viswamitra and a daughter Satyavati. The latter married a priest-king Richika who had a son Jamadhagni Bhrigu. The latter had four sons, of whom Sushena was the eldest and Parasurama the youngest. The former is identified as prince Sussain and the latter as Prince-Bura-Sin. The story runs that in a quarrel between the Kshatriya section headed by Viswamitra and the priestly section led by Vasishtha the priest-warrior Parasurama caused the discomfiture of the former and made them suffer a great eclipse. It was on that occasion and as its sequel that Parasurama who was a Bhrigu composed the extant version of the Code of Manu and incidentally emphasised the more lasting character of true Brahmanism, at the same time recognising the high place which the warrior or Kshatriya is entitled to occupy in social and political life. It would thus seem that the caste of the composer of the present Manu dharmasastra was one which gave him the colour of a Kshatriya or a Brahmin respectively at different occasions according to the occupation he had then adopted but that ultimately he took to Brahmanism and it was only thereafter that caste as fixed by birth probably took root.

A Manava.

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1. Bau. I, 1, 27. Cf. Vas. I, 8, 9.
2. Manu, II, 17-18.
3. Waddell, The Indo-Sumerian Seals deciphered, Preface.

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DISSOLUBILITY OF HINDU MARRIAGE THROUGH CONVERSION TO ISLAM.

By

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Most of the writers on private international law and the conflict of laws treat at length the question of the laws and principles on which the dissolubility or non-dissolubility of marriage depends. According to international law the domicile of the married pair for the time being affords the only true test of jurisdiction to dissolve their marriage, *Le Mesurier* v. *Le Mesurier*[1] and *Bater* v. *Bater*[2]. As to the law applicable, that is neither the *lex loci contractus*, nor the *lex loci celebrationis*, nor the *lex loci delicti* but the *lex fori* that governs. In England, the latter is the law of the domicile of the parties at the time of the suit and not the *lex patriae* as in the continental countries of Europe. According to English jurisprudence, the contract of marriage does not include the conditions of its defeasance and the dissolubility or the indissolubility of the marriage depends on the domicile of the parties at the time of seeking relief, *Nachimson* v. *Nachimson*[3]. The reason for the rule is simple. The Christian conception of marriage is that it is a voluntary union between one man and one woman for life to the exclusion of all others, *Hyde* v. *Hyde*[4]. The statement was so made in 1866 but by that time, already in 1857, the Matrimonial Causes Act had been passed providing for the relief of divorce being granted under certain circumstances. The latter provision would be inconsistent with the Christian conception of marriage as it was set out. By way of reconciling the two positions, it came to be recognised that dissolution was not of the essence but only an incident of marriage and was therefore independent of the marriage contract. It could therefore be governed by a separate law. Also such law may well be different from the law which governed the parties at the time of their marriage, as for instance, where the parties had subsequent to the marriage changed their domicile. All these principles however rested on the conception of law as territorial. Obviously they cannot apply where the law governing the parties is "personal" attaching to them as followers of a particular religion like Hinduism or Islam. Where one of the parties to a marriage brings about a conflict of personal laws by forsaking their common religion and adopting another the question has often arisen whether the new personal law of the converted spouse can prevail over the old personal law retained by the unconverted partner under which the marriage had been celebrated, so as to bring about a dissolution of such marriage. The Bombay High Court gave a negative answer in *Robasa Khanum* v. *Khodadad Bomanji Irani*[5]. In Calcutta, till recently, there was a conflict of judicial opinion. Observations in In re *Ram Kumari*[6], *Mussamat Ayesha Bibi* v. *Subodh Chakravarty*[7], *John Jiban Chandra Datta* v. *Abinash Chandra Sen*[8], *Haripada Roy* v. *Krishna Benode Roy*[9], inclined to a line of thought in favour

1. (1895) A.C. 517, 540.
2. (1906) Prob. 209.
3. (1930) Prob. 217.
4. (1866) 1 P. & M. 130.
5. A.I.R. 1947 Bom. 272.
6. (1891) I.L.R. 18 Cal. 264.
7. (1945) 49 Cal.W.N. 439.
8. I.L.R. (1939) 2 Cal. 12.
9. A.I.R. 1939 Cal. 430.

of the dissolubility of the antecedent marriage by conversion of one of the spouses to Islam. The rulings in *Nur Jehan Begum* v. *Eugene Tiscenko*[1] and *Sayeda Khatoon* v. *Obediah*[2] contained a contrary suggestion. The observations in these decisions were all either by way of *obiter* or casual in character or made by single Judges only. The matter came therefore to be authoritatively reviewed by a Bench of the Calcutta High Court in *Rekaya Bibi* v. *Anil Kumar*[3]. It was there held that the observations in favour of the dissolubility of a Hindu marriage by one of the spouses subsequently becoming a Muslim were unsound and should be rejected. In that case, finding that she had been married to one who by reason of impotency could not consummate the marriage, the wife became a convert to Islam, offered that faith to her husband and on his failure to adopt the same, sued for a declaration that her marriage under the Hindu law stood dissolved. Alternatively, it was contended that her marriage should be declared to be a nullity by reason of the fact that her husband was impotent. In view of the decision of the Court in her favour on this point, the observations of the Judges on the effect of the conversion of the wife to Islam on the antecedent Hindu marriage are really *obiter* but they are entitled to high authority by reason of the Judges having elaborately gone into the matter and given a considered pronouncement. The learned Judges give three reasons for their conclusion that the conversion could not be used to dissolve the earlier Hindu marriage. They are : (*i*) the rules of Islamic law providing for the dissolution of the marriage on one of the spouses becoming a convert to Islam will have operation only where both the parties were subjects of an Islamic State and both of them went abroad and one of them embraced Islam while sojourning there and returned to the native land the other having chosen to continue in the foreign country itself; (*ii*) even if the rules of Islamic law providing for dissolution of the marriage were not subject to any such limitation, they could be invoked only in a case of *bona fide* conversion and not where the latter was a colourable transaction ; and (*iii*) since matrimonial relief depends on the *lex fori* and inasmuch as in this case there is no law of domicile common to both parties, the rules of Islamic law can be applied at best only as principles of justice, equity and good conscience, but that in cases like the present the rules of Islamic law cannot be taken to be rules of justice and equity.

According to the Muslim law, conversion to Islam of a *Kitabia* does not dissolve his antecedent marriage with a woman belonging to his old creed. Thus if a Hebrew or a Christian husband adopted Islam but the wife continued in the old religion the marriage between the spouses will continue to remain lawful. If the parties were non-scripturalist, for instance, a Hindu, and one of them is converted to Islam in a country subject to the laws of Islam—Dar-ul-Islam—that religion should be offered to the other and if the latter accepts it the marriage will remain unaffected, otherwise the Judge should separate the couple. The Kazi must be moved to summon the other party to adopt the Moslem faith. In case of compliance the marriage remains valid *ab initio* and there will be no need for renewing the contract. In case of non-compliance the Kazi should dissolve the marriage and till he has done so the connection between the parties remains invalid and has all the consequence flowing from an invalid connection. If the conversion to Islam took place in a country where the laws of Islam are not in force—Dar-ul-hurb—the dissolution of the marriage is suspended until the wife has completed three of her terms (monthly courses) irrespective of whether cohabitation takes place or not. And on the completion of the terms the marriage is definitely dissolved. The reason is that in the latter case Islam cannot be formally presented for acceptance to the other spouse in a foreign country as the writ of the Kazi cannot run there. Where the parties are scripturalist and the wife becomes a Muslim the same procedure has to be followed, that is, if the conversion is in an Islamic country the faith must be offered for acceptance by the other spouse and on his refusal the marriage will be dissolved by the Kazi. But if the conversion of the wife was in a non-Islamic country and

1. A.I.R. 1941 Cal. 582.
2. (1945) 49 Cal.W.N. 745.
3. (1948) 52 Cal.W.N. 142.

the husband also adopts the faith before the expiry of three of her terms the marriage will continue to subsist, otherwise, they would become separated on such completion without the Kazi's intervention[1]. The foregoing enunciation makes it clear that the difference in procedure really turns on whether the conversion was in an Islamic or non-Islamic country. In the former case recourse to the Kazi is needed. In the latter case dissolution is automatic. But in both cases there must be a rejection of the faith, in the one case after summons and in the other by efflux of time without change of faith. In *Rakeya Bibi* v. *Anil Kumar*[2], explaining the scope of these provisions, Chakravarty, J., observed : " In our opinion, the rule is intended to apply only to a case where both parties to a marriage are subjects of an Islamic country, both go abroad, one of them embraces Islam in the foreign country and returns to his or her native land but the other remains in the foreign country. In such a case the Islamic law relieves one of its followers, *i.e.*, the convert of his or her marriage with an unbeliever, by providing for its automatic dissolution, because the Islamic State under the protection of which the convert lives and which has a responsibility towards him or her as one of its Muslim subjects, cannot act in *personam* against the other spouse and tender Islam to that person. This appears to us to be the true scope and meaning of the rule, and so understood it will be found to have a special reason behind it and to be a rule of possible practical effect. The Muslim lawgivers could not have assumed that a rule laid down by them as regards a matter between a Muslim and a non-Muslim would be accepted and applied in a foreign country to which the authority of no Islamic State extended, and, as is shown by the reason given for the rule they did not in fact so assume. They were legislating for persons subject to the Islamic law under the authority of an Islamic State." It may with respect be pointed out that at least one passage in the Hedaya is against the conclusion. That passage runs : " If the wife embraces the faith in a foreign country and her husband be an infidel, or if a *foreigner* there becomes a Mussalman and his wife be a Moosajea, the separation between them does not take place until the lapse of three terms of the wife's courses, when it becomes completely repudiated " (italics ours). It is clear the passage covers the conversion of a *harbi* also in a non-Islamic State. The infidel is the *zimmi*. The foreigner distinguished from him could therefore be a *harbi* only. In this view, the conclusion of the learned Judges as to the scope of the Islamic rule does not seem to be justified. The Judges themselves frankly acknowledge that there is no previous ruling lending support to their construction. The opinion of the Judges that, even assuming that the rule of Islamic law would apply where the parties were *harbis*, the rule cannot be invoked in the case before them as the conversion was not *bona fide* rests on firmer ground. Chakravarty, J., observed : " It seems to us to be elementary that if a conversion is not inspired by religious feeling and undergone for its own sake, but is resorted to merely with the object of creating a ground for some claim of right a Court of law cannot recognise it as a good basis for such a claim but must hold that no lawful foundation of the claim has been proved. . . . . A decree for dissolution of marriage or a decree that a marriage stands dissolved cannot, in our opinion, be obtained on the basis of a pretended conversion just as divorce cannot be obtained on the basis of pretended adultery or on the basis of acts deliberately done with the object of avoiding marriage." It may, as against this view, be urged that religion is a matter between a man and his maker, that a convert to Islam is a Moslem in fact whatever be the motive inspiring the conversion, and as such the prohibition imposed by that religion of marital intercourse between a Moslem and an infidel would operate. This no doubt has force, but overlooks the fact that where the conversion has been inspired not by a desire to gain an advantage for one self but with a view to prejudicially affect rights already accrued to another the law cannot countenance the latter object. To permit the latter will be to allow the practice of fraud upon the law. In *Skinner* v. *Skinner*[3], Lord Watson observed : " Whether

1. Ameer Ali, Mahommedan Law, 5th edition, Vol. 2, pp. 384-385.
2. (1948) 52 Cal.W.N. 142.
3. (1897) L.R. 25 I.A. 34 : I.L.R. 25 Cal. 537 (P.C.).

a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law, will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and, it may be of nicety." The implication would at the highest be that if the change of faith is honest and both spouses consent thereto then the incidents of their marriage may be open to be affected. In *Skinner* v. *Orde*[1] the position seems to be more clearly expressed. In that case, the question was one relating to guardianship of the daughter by her mother. The parties were Christians. After the death of her husband, Mrs. Skinner the appellant was living with one John Thomas John. The latter was also a Christian having been married to a Christian wife who was alive and the marriage with whom was undissolved. Mrs. Skinner contended that she had become a Muslim and that John Thomas John had also become a Muslim and thereafter had married her according to Islamic rites. This argument was urged to show that by her living with John Thomas John she had not become unfit to continue as the guardian of her daughter. In repelling the contention, James, L.J., observed : "The house of the widow (Helen Skinner) became the house of one John Thomas John, a clerk of inferior grade in the Judge's Court, and they lived and cohabited together as husband and wife, John Thomas John being already the husband in Christian marriage of a living Christian wife. It is suggested that this union was sanctified and legalised in this way—that the widow became a Mohammedan, that John Thomas John became a Mohammedan, and that having thus qualified himself for the enjoyment of polygamous privileges, he contracted in Mohammedan form, a valid Mohammedan marriage with the widow, the appellant. The High Court expressed doubts about the legality of this marriage, which their Lordships think they were well warranted in entertaining."

The last of the grounds relied on by the learned Judges in *Rakya Bibi's case*[2] was that even assuming that the rule of Islamic law would apply to cases of colourable conversion, still it cannot govern the case before them inasmuch a suit for matrimonial relief is governed by the law of domicile of the parties at the time the relief is sought and there was no such common law of the parties as they were governed on that date by different personal laws. Nor can the rule of Islamic law be applied as rules of justice and equity because according to the learned Judges equity and justice demanded the rejection of the applicability of the Islamic rule to the case before them. The conflict which really arises in cases like the present is a conflict between the common personal law of the parties at the date of the marriage and their different personal laws at the date of the suit. Had the law of the domicile been territorial no such conflict would have arisen. The present was a case where there were two different laws for the two parties. As to invoking the law of the convert as principles of justice, etc., it is to be remembered that it is not merely the wife that is to have freedom of religion and the privileges of the religion chosen by her. The husband also has a right to the same freedom and to tell him that he cannot retain his wife unless he forsakes his religion is to subject him to outrageous treatment. The converted spouse no doubt becomes entitled to the benefits of Islamic law but the unconverted spouse also becomes entitled to the benefits of the old law under which the marriage may not be dissoluble at all or at any rate not dissoluble on the conversion of one of the spouses to an alien faith. That the principles of Islamic law cannot be invoked as principles of justice, equity and good conscience was also the view adopted by the Bombay High Court in *Robasa Khanum* v. *Khodadad Bomanji Irani*[3]. In the latter case Blagden, J., went to the length of indicating that if the prior marriage was a monogamous marriage and one of the spouses had since the marriage become a convert to Islam and proposed to marry again under the Islamic law, the spouse retaining the original faith could apply in time and have the second marriage restrained by injunction and that in any event there would be a remedy in damages available to such person.

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1. (1871) 14 Moo.I.A. 309 (P.C.).
2. (1948) 52 Cal.W.N. 142.
3. A.I.R. 1947 Bom. 272.