The Madras Law Journal.

PART V.] JULY. [VOL. XLVII.

NOTES OF INDIAN CASES.

BOARD OF REVENUE *v.* THE MYLAPORE HINDU PERMANENT FUND, I. L. R. 47 Mad. 1.

This case shows how incomplete is still the ascription of personality to corporations. Their Lordships hold in this case following the decision of the House of Lords in *New York Life Assurance Company* v. *Styles* (1) that interest recovered by the Corporation from its members to whom alone it lends its money, *i. e.*, money contributed by the share-holders is not profit or income while interest recovered from transactions with outsiders is profit or income and is assessable. Such a view seems to be inconsistent with the assumption of a complete and distinct personality in the Corporation. The case in *New York Life Assurance Company* v. *Styles* (1) was not a case of interest but of distribution of premia among share-holders. But so far as each individual member is concerned the payment of the share in other people's premia is consideration for his paying his premium and from the ordinary man's point of view such a share does not differ in nature from interest, or at any rate, from dividend, though much stress seems to be laid by the Law Lords on the fact that it was a return of amounts contributed by the members as premia.

TADEPALLI SUBBA RAO *v.* SARVARAYUDU, I. L. R. 47 Mad. 7 : 44 M. L. J. 534.

This decision has the merit of arriving at an equitable solution of the difficulties presented by the somewhat careless language of S. 76 of the Transfer of Property Act. After tender, under S. 76, cl. (*i*), the mortgagee is bound to account for his gross receipts notwithstanding the provisions in the

1. 14 A C 381.

other clauses of the section. Does it mean that he is not entitled to deductions even in respect of public revenue ? S. 76, it will be found, imposes mostly duties, and deductions are referred to only in cl. (*h*) and those are (1) payment in respect of Government revenue, and (2) cost of repairs. Provisions of S. 72 are not excluded. Therefore, if he makes payment for the purpose of protecting the property from forfeiture or sale, (this would cover cases of Government revenue) or " for the due management of property " he can add it to the principal. In the case of usufructuary mortgages, the latter item would be regarded as excluded by a contract to the contrary and would not be available to the mortgagee. What the learned Judges say is that he is bound to account for, that is to say, bring into account the gross receipts, but such deductions may be allowed to him as may be allowed to a trespasser. The result is as we said equitable but the construction seems to be violent. Gross receipts would not include amounts uncollected, even though by negligence. In the case of mortgagees other than usufructuary mortgagees covered by S. 77, there is provision for liability for non-collection in S. 76. But there is no such provision in cases covered by S. 77. Their Lordships say that S. 77 ceases to apply when there is a tender. The section does not say that. It has been held however that a usufructuary mortgagee is liable for not making ordinary repairs under cl. (*a*) though cl. (*c*) does not apply to him. If so, under cl. (*a*) he would be bound to use reasonable diligence to collect rents when the Statute disallows him the right to appropriate the profits towards interest. The section is defective.

The further question that arose was as to the right of the owner of a part of the mortgaged properties to redeem the whole. It was not a case of the splitting up of the mortgage as pointed out by Mr. Justice Krishnan at page 19 of the report. The opinion of the learned Chief Justice is that even in cases coming within S. 60, the part-owner is entitled if he so choses, to redeem the whole. That is a doubtful point [*Munshi* v. *Daulat and others* (1), *Kudhai* v. *Sheo Dayal* (2), *Ariyaputri* v. *Alamelu* (3), *Huthasanan Nambudri* v. *Parameswaran Nambudri* (4) and *Yadalli*

1. (1907) I L R 29 A 262.
2. I L R 10 A 570.
3. (1888) I L R 11 M 304.
4. (1898) I L R 22 M 209.

Beg v. *Tukaram* (5)]. If the case is one in which there has been no disintegration of the mortgage then the rest of the conclusion would seem to follow as a matter of course. The plaintiff was entitled to redeem the mortgage, was entitled to make a deposit and if the deposit was good, the mortgagee was liable to account for gross profits without interest. What has been forgotten in the case, however, seems to be—whether the plaintiff is entitled to retain the profits when an account is to be taken under S. 95 of the Transfer of Property Act which was practically what was done in the case. The accounting ought to have been on the footing of a co-owner plaintiff being entitled only to fair interest on the money advanced by him [see *Aiyathurai Aiyar* v. *Kuppumuthu Padayachi* (6)]. Though the case was not one coming within S. 60, last clause, their Lordships directed accounts to be taken to fix the proportionate amount chargeable on the property purchased by some of the mortgagees. In so doing, their Lordships dissent from 6 M. 61, a case of doubtful authority even when it was passed as the learned Chief Justice observes. It is much to be desired that Courts should, as far as possible, adjust rights between parties instead of sending them to fresh litigation especially in these mortgage actions. We are glad that even in Allahabad, a change of heart is noticeable.

DORAISWAMI *v.* CHIDAMBARAM PILLAI, I. L. R. 47 Mad. 63 : 45 M. L. J. 413.

This case is, as pointed out by Mr. Justice Ramesam in *Rajagopala Iyer* v. *Ramanujachariar* (1), is not necessarily inconsistent with the opinion of the Full Bench in that case as in this case the death of the judgment-debtor occurred after attachment, order for sale and even settlement of proclamation. The reasoning of Spencer, J. is that there is no rule that proceedings in execution should abate by reason of the death of the judgment-debtor. No doubt, where an original application is to be made after the death, one ought to issue notice to the legal representative (O. 41, R. 22). Where any step is required to be taken after notice to the judgment-debtor, then also, absence of notice to the legal representative of the

---

5. (1920) I L R 48 C 22 (P C).
6. (1918) 9 L W 120.
1. (1923) I L R 47 M 288 : 46 M L J 104.

judgment-debtor might jeopardise the sale but why should his death do so when there is nothing to be done by him. There is much force in the reasoning arguing merely on the sections of the Code. But the reasoning ignores the effect of death apart from the Code. The difficulty is as observed by Cotton, L. J.—how can you sell property "which formerly belonged to a dead man but which, as he is dead, is no longer his ?" An order must be got against the heir or devisee and under such circumstances that the Court has jurisdiction over the heir or devisee [In re *Shephard* (2)]. It is against all principles to proceed against him until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually. That is the effect of S. 50 and O. 21, R. 22. Attachment even accompanied by order for sale does not confer a charge on the decree-holder. A notice to the legal representative is regarded by their Lordships of the Privy Council as a condition precedent to the jurisdiction to sell property by way of execution. Though *Gopal Chunder* v. *Gunamoni* (3) which had the approval of the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (4) was a case in which the judgment-debtor died before execution, their Lordships applied the rule to a case where the insolvency took place after attachment, recognising no difference between the two cases. In *Mallikarjun* v. *Narhari* (5) such a notice had been served and the Court had determined as it had power to do for the purpose of execution proceedings, that the party served with notice was in fact the legal representative. It had therefore jurisdiction to sell though the decision as to who was the legal representative was erroneous. [*Raghunath Das* v. *Sundar Das Khetri* (4)].

In re SELLAMUTHU SERVAI, I. L. R. 47 Mad. 87 : 46 M. L. J. 86 (F. B.).

The whole discussion has become unnecessary having regard to the judgment of the Privy Council in *Brij Narain* v. *Mangal Prasad* (1) which definitely lays down that the son is under a pious obligation even during the lifetime of the father to pay the debts of the latter.

---

2. 43 Ch D 136.
3. (1892) I L R 20 C 370.
4. (1914) I L R 42 C 72 : 27 M L J 150 (P C).
5. (1900) I L R 25 Bom 337.
1. (1923) I L R 46 M L J 23.

SANKARANARAYANA PILLAI *v.* RAMASWAMIAH PILLAI, I. L. R. 47 Mad. 39 : 44 M. L. J. 258.

We think this case lays down the correct principle. A Judge as an arbitrator is neither a Judge nor an arbitrator. You cannot appeal which you could have done if he was a Judge. You cannot impeach the award on certain grounds which you could have done if he was an arbitrator. Before such a position is reached, it is but right that Courts should be satisfied that the party has agreed to part with his valuable right of appeal. As the learned Chief Justice points out mere agreeing to deviate from the ordinary course of procedure as regards admission of evidence or restriction of the species of evidence need not have this result. Again, it may be a partial restriction of the right of impeachment, that is to say when the Court is constituted a final arbiter as to facts. The parties may of course in clear terms agree that there shall be no appeal. Such an agreement will be given effect to (14 M. I. A. 207). If the matter was wholly outside the jurisdiction of the Court but the parties agreed that the Court should decide the matter, the decision would be binding the Court, being in the position of a *quasi*-arbitrator and no appeal would lie. *Robert Murray Burgess* v. *Andrew Morton* (1). The caution applied by this case is that an agreement to give up the right of appeal should not in the absence of the clearest words or absolute necessity be inferred. We agree.

MANYAM SUBBARAYA *v.* VENKATARATNAM, I. L. R. 47 Mad. 176 45 M. L. J. 822.

Now that the fetish that Art. 182 is the article that is to apply to all execution is dead we do not think that there is any legal impediment to the Court holding that Art. 181 applies to a case where attachment before judgment has become ineffectual by reason of an intermediate claim proceeding provided the application for execution is put within three years of the judgment restoring attachment.

---

1. (1896) A C 136.

SUNDARA•RAMANUJAM *v.* SIVALINGAM, I. L. R. 47 Mad. 150 : 45 M. L. J. 431.

The right to possession on the basis of the contract as distinguished from title is the foundation of the judgment in *Vizagapatam Sugar Company* v. *Muthurama Reddi* (1) and fully justifies the conclusion in the present case. But from this it does not follow that I. L. R. 38 Mad. 698 is wrong.

Under the contract you are entitled to possession, you are also entitled to possession under your title. The two are distinct causes of action. The one right starts earlier than the other and the failure to assert the one does not bar the asserting of the other.

DAULAT RAM *v.* BHARAT NATIONAL BANK, I. L. R. 5 L. 27.

We are not sure whether it is an accurate statement of the law to say that it is a question of fact in each case as to whether a director of a company is a trustee, a partner or an agent of the company or the body of shareholders. The legal position of a director is left in no doubt by the authorities and there is no real contradiction when it is said that a director of a company is its agent and that he holds the assets of the company that have come into his hands as trustee. The company is a legal entity which can only act and transact its business with third persons through the medium of the directors who are for this purpose its agents. This aspect of a director's position was emphasised by James, L. J. in *Smith* v. *Anderson* (1) when he said " the director never enters into contracts for himself, but he enters into contracts for his principal, that is for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority." *See* also Palmer's Company Law, 10th Edn., p. 180 on the authority of the dictum. At the same time it cannot be overlooked that though the properties of the company are not vested in the director as in the case of a trustee of a settlement or a will, they are entrusted to his control and he is bound to use them for the specified purposes of the company. He stands in a fiduciary position to the company with regard to the properties of the company in his hands or under his control and is answerable to the company as for a

---

1. (1923) I L R 46 M 919 : 45 M L J 528 (F B). 1. 15 Ch D 276.

breach of trust for his wrongful dealings with them. This double aspect of the legal position of a director was put tersely by Lord Selborne in the following words "The directors are the mere trustees or agents of the company—trustees of the company's money and property ; agents in the transactions which they enter into on behalf of the company." *Great Eastern Railway Company* v. *Turner* (2). *See* also *Ferguson* v. *Wilson* (3). The position of directors has been so much likened to that of trustees in their dealings with the company's properties in their control, that directors were not allowed to take advantage of the plea of limitation in claims by the company against them, for wrongful dealings with its properties. *Flitcroft's case* (4), *Masonic General Life Assurance Company* v. *Sharpe* (5). After the Trustee Act of 1888 in England directors are allowed to plead limitation only in cases of what may be called innocent breaches of trust, *In re Lands Allotment Company* (6) and they are treated as constructive trustees of the company's properties.

This view that a director is a constructive trustee and liable as such for the misapplication of the company's moneys would not have made any material difference in the decision of the case in *Daulat Ram* v. *Bharat National Bank* (7). No doubt on the question of limitation, S. 10 of the Limitation Act would not be applicable as the property of the company is not vested in the director as required by the terms of that section. *Kathiawar Trading Company* v. *Virchand Dipchand* (8). There is however authority that for a breach of trust by a director Art. 120 would be applicable and the suit in the case under review, being within 6 years from the misapplication by the director it would not be barred against him. *Kathiawar Trading Company* v. *Virchand Dipchand* (8).

PHULLI *v.* DEBI PARSHAD, I. L. R. 5 L. 38.

The weight of authority is certainly in favour of the view held in this case that the absence of notice to the minor under O. 32, R. 3(4) before the appointment of a guardian *ad litem* is merely an irregularity and does not of its own force avoid the

2. 8 Ch Ap 149 at p. 152.
3. 2 Ch Ap 90 per Lord Cairns.
4. 21 Ch D 519.
5. (1892) 1 Ch 154.
6. (1894) 1 Ch 616.
7. (1923) I L R 5 Lah 87
8. (1923) I L R 18 Bom 119.

decree in the suit without proof of prejudice to the minor. In addition to the cases referred to in the judgment, we would only invite attention to the decision of the Patna High Court in *Pande Satdeo Narain* v. *Ramayan Tewari* (1), where the subject has been very fully considered and the learned Judges came to the same conclusion. Reference may also be made in this connection to 45 M. L. J. (N. I. C.), pp. 51, 52 where this question is discussed.

RAGHAVACHARIAR *v.* MURUGESA MUDALI, I. L. R. 46 Mad. 583.

This case lays down that the Court has an inherent power to refuse to confirm an auction sale held under its order. if it is satisfied that it has been misled either in giving leave to bid or in fixing the reserve price, though no application was made by the parties concerned. We must confess that this is a somewhat large order. The Court has, undoubtedly, power to cancel a sale on the grounds other than those set out in O. 21, Rr. 89, 90 and 91. [*See,* for instance, 36 Cal. 323 (P. C.), where a sale was set aside on the ground that the purchaser was misled by representations made by officers of Court,] see also O. 21, R. 72 and S. 47 (for fraud or irregularity unconnected with the conduct or publication of the sale). In cases coming within O. 21, R. 90, it is difficult to see how the Court can have power to set aside the sale except in the manner provided in O. 21, R. 90. If the application contemplated by Ss. 89, 90 and 91 are not made the Court is bound to confirm the sale. "Shall" is the word. The Privy Council had recently to consider a similar question in connection with O. 21, R. 72. There, the decree-holder had applied for leave to bid and had been refused but he managed to purchase the property *benami* in the name of another and the question was whether it was open to the Court to treat the purchase as a nullity on the ground that the conduct of the decree-holder was contumacious and in fraud of the Court. Their Lordships held that contumacy was quite immaterial and further held that the sale was only voidable and ought to be set aside by an application as required by the rule and could not be treated as a nullity but could be set aside only if the sale was found to be disadvantageous. I. L. R. 1 Pat. 733.

---

1. (1923) I L R 2 Pat 335.

CHANDANMULL KANORIA *v.* DEBICHAND, (1923) I. L. R. 51 Cal. 62.

In this case a single Judge of the Calcutta High Court has held that where a suit is brought on the Original Side of the High Court for an amount beyond the pecuniary jurisdiction of the Presidency Small Causes Court but the plaintiff recovers judgment for an amount less than Rs. 1,000, S. 22 of the Presidency Small Causes Courts Act, 1882, as amended by S. 11 of Act I of 1895 does not apply to the case and that he cannot be disallowed his costs under the provisions of that section. The reasoning of the learned Judge is based on the view that the cognizability of a suit by the Presidency Small Causes Court depends as much upon the value of the subject-matter of the suit as laid in the plaint as on its nature. He has also excluded from his consideration the class of cases in England which have held that where an action is brought in the High Court for a larger sum than the Country Court can entertain but the plaintiff recovers judgment for a small sum as specified in S. 116 of the Country Courts Act of 1888, the restriction as to costs mentioned in that section apply although the action as laid could not have been commenced in the Country Court as the amount claimed exceeded its pecuniary jurisdiction. The learned Judge has dealt with the question on principle and as one of first impression. It is somewhat strange that in the whole course of the discussion, no reference is made to a direct decision on the question of Sir Lawrence Jenkins, C. J. and Russel, J. in *Shridan* v. *Gordhandas* (1). It is probable that reference was not made to this decision owing to an oversight, as there is a slight mistake in the judgment which is perpetuated in the headnote of the Bombay case, whereby instead of S. 22 of the Presidency Small Causes Courts Act, it is referred to as S. 20 of the Act. In this case, Sir Lawrence Jenkins has come to a decision directly contrary to that of Mr. Justice Page in the case under notice and has relied on the English cases under the Country Courts Act in support of his conclusion. It cannot be suggested that the considerations which influenced Mr. Justice Page were not present to the minds of the learned Judges who decided the Bombay case. We therefore venture to think that when this question comes up for consideration hereafter, the decision in the case under notice will not have the same authority as it would other-

1. (1901) I L R 26 Bom 235.

wise have if the Bombay case had been brought to the notice of the learned Judge.

KRISHNASWAMI NAIDU *v.* CHENGALRAYA NAIDU, I. L. R. 47 Mad. 171 45 M. L. J. 813.

There is a difference between the language of O. 9, R. 8 and the language of O. 41, R. 17. Whereas under the former section, where there is default of appearance, the Court is bound to dismiss a suit, in the latter, it is not so bound. In *Muruga Chetty* v. *Rajasami* (1), Mr. Justice Sundara Aiyar makes considerable point of this distinction and the distinction between the language of the present Code and the old Code in this matter so far as appeals are concerned. This distinction is noted in *Venkatarama Aiyar* v. *Nataraja Aiyar* (2) by Mr. Justice Sankaran Nair and he distinguished the case before him as being one of dismissal of a *suit*. The Full Bench in *Neelaveni* v. *Narayana Reddi* (3) does not seem to advert to this difference in language which takes very much from its value as a decision on the present question. It is not a direct decision on the question, the reference being confined to O. 9, R. 13.

The present decision which extends the decision of the Full Bench to the case of appeals also does not advert to the distinction. If the Court was bound to dismiss and restoration is provided only under particular conditions, it may well be said that the Court has no general power to restore the appeal. But where the Court only may dismiss and is not bound to dismiss, why may it not restore when the circumstances are brought to its notice which may have led it, if made aware at the time of those circumstances, not to dismiss. Under O. 41, R. 19, the party may apply for re-admission and the Court shall re-admit under certain circumstances. It does not say that it may not re-admit under other circumstances. The fact that under R. 17 the Court has a discretion, gives this interpretation a certain amount of force. The question does require further consideration. In the case under review the point was not quite material because whether the interference was under the inherent powers or under the second

1. (1912) 22 M L J 284. 2. (1912) 24 M L J 235.
3. (1919) I L R 43 M 94 : 37 M L J 599.

part of O. 41, R. 19, the application would be one for the re-admission of an appeal dismissed for default of prosecution to which Art. 168 applied. Applying that Article, the application was clearly barred as it was presented more than 30 days after the dismissal.

USSAN KASIM *v.* THE SECRETARY OF STATE FOR INDIA, I. L. R. 47 Mad. 116 : 44 M. L. J. 638.

That the public cannot prescribe seems to be one of the elementary propositions of English Law, so also the further proposition that it cannot be the object of a grant. The two propositions are bound up with each other. For the same reason there cannot be either prescription by or grant to a part of the public or unless it has been or can be presumed to have been incorporated before the grant. The obvious inconvenience of the position especially of the impossibility of a grant is got over by several expedients. There can no doubt be no grant to the public but there can be a grant to a trustee for the public or a part of the public for any purpose known as charitable. There can also be a trust or dedication to the public or part of the public for a similar purpose. In the case of a highway the idea seems to be that though the mode of or time of user can be restricted, there can be no restriction as to the persons that can use it. This restriction does not seem to apply to other dedications which are charitable. There is great danger in applying these principles to India wholesale without an amount of caution. The point of view is likely to be obscured by reference to English authorities and by application of English doctrines more or less refined founded on legal conceptions not altogether in harmony with Eastern notions. [Cf. *Bholonath* v. *Midnapore Zemindari Company* (1)]. Grants to and prescriptions by *caste* are recognised in India. [See *Suppan Asari* v. *Vannia Konar* (2)]. In *Goodman* v. *Mayor of Saltash* (3), where there was immemorial usage of free fishing by the residents of a place, the House of Lords got over the difficulties presented by the above doctrines by presuming a grant to the corporation, burdened with a trust in favour of that section of the public which they regarded charitable. In India, Easements

---

1. (1904) I L R 31 C 503. 2. (1914) 27 M L J 110.
3. (1882) 7 A C 633.

by custom are recognised, the term 'Easement' including both easements and profits *a prendre.* [See *Shanmugam Pillai* v. *Venkateswara Aiyar* (4) and *Bholonath* v. *Midnapore Zemindari Company* (1)]. In England also customs are recognised provided they are reasonable. [*Harris* v. *Chesterfield* (5)]. It is doubtful if the Easements Act admits of this restriction on local custom. So far as acquisition by prescription is concerned, all the objections that are urged in England hold good in India also unless the usage can raise an inference in favour of customary easement.

KONDAMA *v.* KANDASWAMI, I. L. R. 47 Mad. 181 46 M. L. J. 172 (P. C.).

A compromise between a woman holding for a daughter's estate and a person who claimed to be the undivided co-parcener of the father was impeached by the daughter's sons as the next reversioners. The adverse claimant was aware of the unfounded nature of his claim. The compromise was accordingly held not to be binding as against the reversioner but it was further held that a purchaser in good faith from the daughter without notice of the friend was protected, the widow not being a party to the friend. The High Court relied upon S. 96 of the Trusts Act. The section had obviously no application. Their Lordships consider the plea of *bona fide* purchaser for value without notice. Their Lordships repel that plea on the ground that the purchaser had notice of her limited disposing power and that he had not satisfied himself as the existence of necessity or inquiry which were the essential conditions of the exercise of her power of disposition. Is it open to the purchaser to show that he made inquiries and was satisfied that there were circumstances justifying the disposition by the widow or rather can he succeed on such proof ? Their Lordships' discussion of the question might lead one to infer that if there was such proof, the plea would have barred the plaintiff's claim. The point is doubtful.

---

4. (1892) 2 M L J 290.

1. (1904) I L R 31 C 503.

5. (1911) A C 623.

MALE REDDI *v.* GOPALAKRISHNAYYA, I. L. R. 47 Mad. 190 46 M. L. J. 164 (P. C.).

Their Lordships treat the following propositions as settled law :—

(i) When there are several mortgages on a property, the purchaser of the property subject to those mortgages may, if he pays off an earlier mortgage, treat himself as buying it and stand in the same position as his vendor or, to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee.

(ii) This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt.

Their Lordships applied the rule where the purchaser paid off the second mortgagee in order to save the crops which along with the corpus formed his security as against the third mortgagee to whom the corpus alone was mortgaged. Their Lordships would not accept any difference in the legal position on this ground. Some question of contribution might possibly have arisen but that aspect of the question does not seem to have been pressed.

Another point decided by their Lordships is that if the payment was by the sale of the crops in execution the purchaser could not claim the benefit of such payment as apparently then, his claim would be purely one for contribution and not by way of subrogation.

SIVASUBRAMANIA PILLAI *v.* THEETHIAPPA, I. L. R. 47 Mad. 120 : 45 M. L. J. 166.

A debt not barred at the date of adjudication of the debtor as insolvent was sought to be proved in insolvency. Objection was taken that it was barred at the time of proof and therefore was not provable in insolvency. Their Lordships overruled the objection, we think rightly. Under S. 16 the debtor's estate vests in the Court or the Receiver and becomes divisible among creditors, the creditors being those described in S. 28 to whose claim the insolvent was subject at the date of adjudication and after the adjudication no creditor has any remedy against the person or property of the insolvent except as provided in the Act. A debt payable at a future time may be claimed immediately subject to a rebate. No legal proceed-

ings can be started without leave. The creditor is entitled to get only his rateable proportion. The Receiver is in fact the trustee for all creditors and one of the main objects of the Insolvency Proceedings is to prevent a scramble among creditors. In these circumstances and in the absence of any rule of limitation applicable to the tender of proof it seems obvious that the question whether in respect of the debt a suit would be barred at the time of proof is quite immaterial. There is no rule laid down in the Insolvency Act imposing the condition that the claim should not be barred at the date of proof. The rights created under the Act are new rights dependent upon but not identical with the original rights. A suit against the debtor is purposeless, the decree got being not available against the Official Assignee. Even the fact that a creditor may have got a decree before adjudication is not conclusive against the Official Receiver for the Court may go behind the decree and fix the liability at less. Obviously to claims which are so different from those available in suit or execution as by proof in insolvency cannot be governed by the same limitation. In addition, under the Limitation Act, the right is not extinguished but only becomes unenforceable by suit. The conclusion is in accordance with English precedent. Under the new Act, the remedy against the person is not necessarily taken away by reason of the adjudication though it may be taken away by a protection order. This fact cannot make any difference in the conclusion if the question arose under the new Act. A question may arise as to what is meant by " when he is adjudged an insolvent " in S. 28. Does adjudication relate back to and take effect from the date of presentation of the petition for this purpose? [Cf. *Sankaranarayana* v. *Alagiri* (1)] and a further question might arise as to whether when by reason of a rule like that enacted in S. 48, C. P. C., at the relevant time, the remedy of the decree-holder becomes limited to a particular relief, he should be limited to such relief in insolvency or be treated as an ordinary creditor.

APPANNA *v.* VENKATADRI, I. L. R. 47 Mad. 203 45 M. L. J. 667.

Once the old theory that an unregistered mortgage deed or sale deed cannot be looked into for the purpose of showing the

1. (1918) 35 M L J 296.

nature of the possession has been knocked on the head as it undoubtedly has been in *Varada Pillai* v. *Jeevaratnam* (1), it is difficult to see why it cannot be used not merely for the purpose of showing that it was a mortgage interest that the defendant was prescribing for but also that it was a mortgage interest for a particular amount. Apart from that, strictly speaking in such suits it is not a question of redemption. By prescription, the defendant does not acquire title but the plaintiff loses it *pro tanto*. The plaintiff being admittedly the owner, it is for the defendant to make out his title to retain possession. If he is unable to make out the specific right to retain, plaintiff would be entitled to recover possession.

MAHARANA KUNWAR *v.* DAVID, I. L. R. 46 All. 16.

In this case, the Official Receiver attached some property as the property of the insolvent. The plaintiff protested but did not apply to the Court to set aside the attachment ; on the other hand brought a suit in the ordinary Civil Court to declare his title. It was argued that his only remedy was to apply to the Insolvency Court. The Court overruled the contention holding that the Provincial Insolvency Act laid no such compulsion. S. 4, according to Mr. Justice Sulaiman, conferred power on the Court to investigate the question if moved in that behalf and a decision given when so moved, would bind the parties. That was the view taken by the Allahabad High Court of the scope of the Insolvency Act of 1907. [*Pita Ram* v. *Jujhar Singh* (1)]. The fact that S. 4 of the present Act expressly confers powers on Court to make such investigations can be no reason for holding that independent action is excluded. Considering the analogous provision of S. 7 of the Presidency Insolvency Act, the Bombay Court held that it was not excluded. [*Naginlal Chunilal* v. *The Official Assignee* (2)]. When an order is made by the Court on application, no suit would lie to set aside such adjudication. [*Abdul Lateeff* v *The Official Assignee of Madras* (3)]. The jurisdiction under S. 7 of the Presidency Insolvency Act, 1909, has also been held to be discretionary. [*Abdul Khader* v. *The Official Assignee of Madras* (4) ; *Jatindra Nath Bhatta-*

---

1. (1919) I L R 43 M 244 38 M L J 313 (P C).

1. (1917) I L R 39 All 626. 2. (1911) I L R 35 Bom 473.

3. (1912) I L R 40 Mad 1173. 4. (1916) I L R 40 M 810.

charjee v. *Fatteh Sing Nator* (5)] though the powers are very large. [*Ramaswami Chettiar* v. *Ramaswami Aiyangar* (6) ; *Doraiappa Aiyar* v. *Official Assignee, Madras* (7)]. Under the Act of 1907, there was a difference of opinion as to the powers of the Court to undertake such investigation so as to bind parties finally. The Madras and Calcutta High Courts held that it had not, the Allahabad High Court holding the contrary. [*Nilmoni Chowdhury* v. *Durga Charan Chowdhury* (8) ; *Narasimhaya* v. *Veeraraghavalu* (9) ; *Bansidhar* v. *Kharagjit* (10) *Pitaram* v. *Jujhar Singh* (1)]. The language of S. 4 is wider than the language of S. 7 of the Presidency Insolvency Act and has been framed on the lines suggested by *Naginlal Chunilal* v. *The Official Assignee* (2) so as to exclude doubts as to its generality by prefixing the word "title" to "priorities." The doubts of Mr. Justice Lindsay as to the powers of the Court to decide questions finally do not seem to be justified.

On the further question as to whether the leave of the Court was necessary before suing the Official Receiver, all the Courts seem to be agreed that no leave is necessary. [*Ramalinga Chetty* v. *Anantachariar* (11), *Sant Prasad* v. *Sheodut Singh* (12) and *Amrita* v. *Narain* (13)].

SARTAJI *v.* RAMJAS, I. L. R. 46 All. 59.

A gift of the entire estate to the next heir the daughter by the widow has the effect of accelerating the estate and the reversioner is bound to come in within 12 years of the death of the donee. The Privy Council has construed many transactions as surrenders though not purporting to be as such. A surrender by a widow is strictly speaking a unilateral act but even bilateral acts have been so regarded to give effect to transactions.

---

5. (1921) 26 C W N 921.
6. (1921) I L R 45 M 434.
7. (1921) 42 M L J 141.
8. (1918) 22 C W N 704.
9. (1917) 41 M 440.
10. (1914) 37 A 65.
11. (1913) 24 M L J 350.
12. (1923) 2 Pat 724.
13. (1919) 30 C L J 515.

HABI BAKSH *v.* BABU LAL, I. L. R. 5 Lah. 92 (P. C.).

The observations of the Judicial Committee in *Balabux* v. *Rukmabhai* (1) as to the result of the separation of one or some of the members of a joint Mitakshara family on the status of the other members of the family have not commanded the unqualified approval of eminent legal writers and Judges in this country. Mr. Mayne calls the presumption of the separation of the other members *inter se* by reason thereof as artificial and would prefer to leave the status of the other members, whether they are joint or separate, as a question of fact uncontrolled by any presumption of law. *See* Mayne's *Hindu Law*, S. 492 *see* also *Ram Pershad Singh* v. *Lakpati Koer* (2). The language of their Lordships in *Balabux's case* (1) is capable of the construction that the separation of one or some of the members causes a disruption of the joint family as between the other members when the shares of the other members have to be ascertained to fix the share of the outgoing member and that the other members should, if they want to prove non-division in such cases, prove, like any other fact, an agreement to remain united or to be re-united. This view has been urged before the Indian High Courts and has been generally rejected. *See* however *Balakrishna Mudaliar* v. *Raju Mudaliar* (3). It is a well-known fact that in numerous families some members go out taking their shares and the others continue just as before, without any fresh agreement to remain united or become reunited. To say in such cases that there was a separation of the other members *inter se* and a valid agreement to re-unite or be united would, in addition to being opposed to the fact, be in some measure impossible. In the first place, re-union is not possible with all co-parceners. Secondly, in most Hindu families, there would be minor members who could not themselves enforce a partition except on grounds such as malversation by the manager. *See* Mayne's *Hindu Law*, S. 476, and the cases referred to therein. That a state of separation has been created between the minor members and the manager by some one member going out of the family, a status which the minor members could not themselves bring about even if they wished seems to be anamolous. Again if such a division is effected between the minor members and the manager, the minor members being incompe-

1. (1903) I L R 30 C 725. 2. (1903) I L R 30 C 231 (P C).
3. (1915) 27 I C 736.

tent to contract, there can be no valid agreement to be united or to re-unite ; and the minor members will be left with none to manage their properties. These anamolous consequences have been pointed out in *Rangasami Naidu* v. *Sundarajulu Naidu* (4) and *Palaniammal* v. *Muthuvenkatachala Maniagarar* (5) when the question again came up before the Privy Council in *Musammat Jatti* v. *Banwari Lal* (6), their Lordships have not been more clear in their pronouncement and they observe that the other members who were the brothers of the outgoing member were not proved to have agreed to be re-united. The course which this case took in the lower Courts and the Privy Council does not tend to clear up the law on the subject and the decisions of the Madras High Court referred to do not seem to have been cited before the Privy Council. When the question again came up recently before the Madras High Court in *Shengoda Goundan* v. *Muthu Goundan* (7) the learned Judges held that the recent decision of the Privy Council did not enunciate anything contrary to what was laid down in *Rangasami Naidu* v. *Sundarajulu Naidu* (4) and *Palaniammal* v. *Muthuvenkatachala Maniagarar* (5). In this state of the authorities the decision of the Privy Council under notice which holds that there is no presumption as to separation between any one of the brothers and his own descendants when a brother separates and leaves the joint family is certainly in conformity with the practice and the accepted Hindu Law and defines clearly the limits of the rule laid down in *Balabux* v. *Rukmabhai* (1) and *Musammat Jatti* v. *Banwari Lal* (6).

PITAMBAR LAL *v.* DODI SINGH, I. L. R. 46 All. 319.

It is not easy to follow the statement that the Judges prefer to follow the Calcutta view. The Calcutta view as expressed in *Bepin Behari Shaha* v. *Abdul Barik* (1) seems to be that the application to restore the application will be governed by O. 9, R. 9 by force of S. 141. Their view is that the application to set aside the order of dismissal of the suit is an independent proceeding to which O. 9, Rr. 4 and 9 will

1. (1903) I L R 30 C 725. 4. (1916) 31 M L J 472.
5. (1917) 33 M L J 759. 6. (1923) I L R 4 Lah. 350 : 45 M L J 355.
7. (1924) I L R 47 M 567 : 46 M L J 404.
1. (1916) I L R 44 Cal. 950.

apply. The view of the Court in the case under review apparently is that to the original application O. 9, R. 9. did not apply and therefore a fresh application could be made to restore the suit irrespective of the dismissal for default. We think on the view of the Privy Council in *Thakur Prasad* v. *Fakir-ullah* (2) like execution proceedings these proceedings are proceedings in suits to which O. 9, R. 9 cannot apply but it does not follow therefrom that the Court has no power to set aside dismissal for default in a proper case. There is S. 151 which preserves all inherent jurisdiction in the matter and the Court can in the exercise of that jurisdiction set aside the dismissal for default. The view of the Patna High Court is that there is no such inherent power. Has it a power to dismiss for default either ? For that power also, you must go to the inherent powers. The order dealing with review at any rate would be applicable for there, there is no restriction as to the nature of the order or judgment that can be reviewed.

MOHAN *v.* BISHAMBAR, I. L .R. 46 All. 68.

Placing heavier and more numerous beams on a wall is held in this case not to amount to " perverting to other uses " within the meaning of Art. 32, Limitation Act.

SURAJMAN *v.* ANJORE SHUKAL, I. L. R. 46 All. 73.

An application to execute a decree which was not executable at the date of the passing of the decree is governed by Art. 181 and the limitation commences from the date when it becomes executable. *Maharaja Sir Rameshwar Singh* v. *Homeshwar Singh* (1). But it is somewhat difficult to understand how the Court's failure to appreciate this plain point which many a Judge had failed to realise in his time could be a question of jurisdiction.

BRIJ NARAIN *v.* MANGAL PRASAD, I. L. R. 46 All. 95 (P. C.) : 46 M. L. J. 23.

The doubt cast by *Sahu Ramachandra* v. *Bhup Singh* (1) on the doctrine of pious obligation of the son for the debt of the father during the latter's lifetime is dispelled by this case and the law is restored to its condition it was before that case.

---

2. (1894) I L R 17 All 106 (P C).

1. (1920) 40 M L J 1 L R 48 I A 17.

1. (1917) I L R 39 All 437 (P C).

SOMADU *v.* KING-EMPEROR, I. L. R. 47 Mad. 232 : 45 M. L. J. 602.

S. 288 of the Criminal Procedure Code gives discretion to the presiding Judge to use evidence given before the committing Magistrate as substantive evidence. All decisions on this section are attempts to define and regulate that discretion. As Mr. Justice Wallace says the discretion must be a judicial discretion and, we may add, ought to be exercised with great caution. It is obvious common sense, that when a man makes two contradictory statements in the course of the same proceedings, *prima facie,* he is not a person on whose word a conviction can be based. In other words, you must have other evidence probablising one or other of his statements. That is to say, his statement must have corroboration in material particulars. In this case, they go a little further and say that when there is reason to apprehend conspiracy to suppress the truth in respect of material details that implicate individuals while speaking to the general details, the statement may be believed.

AISHA BIBI *v.* MAHFUZ-UN-NISSA BIBI, I. L. R. 46 All. 310.

In this case, the suit was upon a mortgage executed by the husband of a *pardanashin* Mahomedan lady under a power of attorney executed by her. The first Court dismissed the suit on the ground that the execution of the power of attorney by the lady was not proved. On appeal, it was held that the execution was proved but that it was not proved that the contents were explained to and were understood by the lady, mere admission of execution before the Sub-Registrar not being sufficient for the purpose.

The next question was, the lady having died pending the appeal leaving the husband as one of the heirs, whether under S. 43, Transfer of Property Act, the mortgagee was not entitled to proceed at least as against the husband's share. Their Lordships held he could and we think rightly. In *Ajijuddin Sahib* v. *Sheikh Budan Sahib* (1) the Madras High Court went so far as to hold that S. 43 could be given effect to even in execution.

---

1. (1895) I L R 18 M 492.

ANANTA KALWAR *v.* RAMA PRASAD TIWARI, I. L. R. 46 All. 295.

Here is a curious conclusion reached. Sons are liable to pay the debts of the father but the elder of them cannot alienate any portion of the joint family estate to meet such a debt. If he cannot do it, how can he sell his own share for the purpose on the view prevailing in Allahabad ? [*Lachman Prasad* v. *Sarnam Singh* (1), *Madho Prasad* v. *Mehrban Singh* (2)]. In *Hari Prasad Singh* v. *Sourendra Mohan Sinha* (3), where two brothers mortgaged their family property for their antecedent debts, it was argued that the mortgage was not binding as the debt was not a necessity so far as the family was concerned and neither could deal with his share and therefore the whole mortgage was void. Their Lordships held that the two brothers being the only adult members of the family and the rest (their descendants) were minors, they could sell the property for the purpose. The legal basis of the judgment is difficult to perceive unless the case is treated as an exception to the general rule. This case is a much stronger case. The transferors are the brother and another brother's son. The debts were the antecedent debts of the two brothers. It is held that the alienation is not binding so far as the share of the minor brother's son is concerned. If it was not binding on one, we cannot see any justification for holding that the mortgage was binding against any. But we think antecedent debt is an item of necessity and the two brothers being jointly liable for the debts, the whole family was jointly under an obligation to discharge the debt and the alienation ought to have been upheld. In *Hanooman Persad Pandey's Case* (4) their Lordships regard the discharge of ancestral debts as necessity justifying alienation by a guardian. It is difficult to see why a manager should stand on a different footing. Confusion of ideas on the subject of antecedent debts and necessity seems to be immense some cases going so far as to hold that when there are antecedent debts, no question of necessity arises and that a sale for antecedent debts cannot be impeached on the ground that the price was inadequate. One could understand some reason for the difference when the view prevailed that a debt of the father imposed during the lifetime of the father no

1. (1917) I L R 39 A 500 : 33 M L J 39 (P C). 2. (1890) I L R. 18 C 157 (P C)
3. (1922) I L R 1 Pat. 506.
4. 6 M I A 393.

pious obligation on him to discharge the debt. There is no justification whatever for the distinction when the obligation to pay the debt even during the lifetime of the father is recognised or when the father is dead and the debt remains undischarged. As the cases stand at present, so far as a man's descendants are concerned, an antecedent debt is an item of necessity just as a debt incurred by all the co-parceners is. The source of obligation might be joint incurring of the debt or a commitment of the law or the fact that it was incurred for the benefit of the family. A statutory debt or a decree debt would be as much necessity as any debt incurred for the benefit of the family. It would not be necessity for the collateral branch. If a member alienates his share for his antecedent debts, the collateral branch can successfully impeach the sale.

ALKHU RAI *v.* LACHCHMAN UPADHYA, I. L. R. 46 A. 274 (F. B.).

The *wajib-ul-arz* in this case provided for right of pre-emption in the case of conditional sale as well as sale. The question was whether the party had a right of pre-emption on foreclosure of the conditional mortgage as on a sale. It was held that he was not. Sale in the context, they held, could mean only a sale by the party or by his act and did not include an involuntary judicial proceeding like foreclosure on a suit. On somewhat analogous reasoning it will be observed a Full Bench in Madras held that the right of pre-emption in Malabar did not extend to Court sales. [*Vasudevan* v. *Itti Raricha* (1)].

ABID HUSAIN KHAN *v.* KANIZ FATIMA, I. L. R. 46 All. 269 (P. C.).

In this case, first there was a usufructuary mortgage in 1869 under which the mortgagee was to be in possession, with his name entered in the records of the Government. In 1878, a further mortgage was executed by which the property was made liable for further sum and it was further provided that the property should be redeemed in five years on payment

1. I L R 41 M 582 : 34 M L J 412 (F B).

of the amount of his mortgage as well as of the old mortgage—if not so paid, the deed should stand a saledeed for the amount of the two mortgages. The effect of the later document, their Lordships held, was that the position of the mortgagee was of a mortgagee by conditional sale in possession from the date of the original mortgage and that the mortgagee was not entitled to charge the mortgagor either with the enhanced revenue of the land or the cesses levied from him as registered proprietor. Apart from S. 72 of the Transfer of Property Act, which did not apply to the case, their Lordships held that it was the mortgagee that was liable to pay the revenue and cesses and not the mortgagor.

A mortgagee in possession under a mortgage made before the Transfer of Property Act came into force was, under the ordinary law then in force, liable to manage it as a person with ordinary prudence would manage it if it were his own and unless there was an agreement to the contrary with the mortgagor he was bound to pay the revenue and such other charges of a public nature as were payable by the person in possession out of the income and could not charge the mortgagor with such payments.

MUHAMMAD JAN *v.* SHIAM LAL, I. L. R. 46 All. 328 (F. B.)

In this case a Full Bench of the Allahabad High Court overrules the earlier case in *Hirde Narain* v. *Alam Singh* (1) which held that when the Court is closed on the last day of the time allowed by a decree for pre-emption the payment cannot be made on the re-opening day. "The act of Court can hurt nobody" is a well-known maxim and it has been applied by both the Calcutta and Madras Courts to save payments on the re-opening day apart from the General Clauses Act and the Limitation Act. The distinction made by the Allahabad High Court in *Hirde Narain* v. *Alam Singh* (1) between cases of pre-emption and other cases was a distinction without difference.

---

1. (1918) I L R 41 All 47.

JACKS AND CO. *v.* JOOSAB MAHOMED, I. L. R. 48 Bom. 38.

Sir Lawrence Jenkins, C. J., observed in *Narasingdas* v. *Rahimanbai* (1) that to give rise to an estoppel it would be insufficient to say that it is doubtful that the person relying on an estoppel would have acted in the way he did but for the representation or conduct of the other party but that it must be found as a fact that the person pleading the estoppel would not have acted as he did. Those observations have been followed in the case under notice. It is no doubt an elementary rule that to give rise to an estoppel the representation must have been acted upon to his prejudice by the other party. But it is often a nice question, though one of fact, whether or not the action was taken on the faith of the misrepresentation. In a great many cases, it would be difficult to ascertain whether the conduct of the person deceived would have been the same, if he had known the truth. In such cases, it is perhaps possible to consider that the circumstance that his action was to some extent swayed by the representation made to him and induced his action to some degree, would seem to be a sufficient change of position to give rise to an estoppel, although one cannot be sure that but for the representation he would not have acted as he did. This view which is opposed to that of Sir Lawrence Jenkins in the case cited, seems to have been entertained by Ewart in his *Law of Estoppel,* 1900 edition, pp. 144, 145. The observations of Turner, L. J. in *Traill* v. *Baring* (2) cited therein also lend some support to this view.

SECRETARY OF STATE FOR INDIA *v.* NARSIBHAI DHADHABAI, I. L. R. 48 Bom. 43.

When once an error on the question of jurisdiction is established or an illegal or a materially irregular exercise of jurisdiction is pointed out on the part of a Subordinate Court from which there is no appeal, the power of the High Court to entertain a revision against the adjudication under S. 115 of the Civil Procedure Code seems to be clear on the language of the section. The question of the discretion of the High Court to interfere or not in such cases is altogether distinct and the High Court as a rule does not interfere in the exercise of its discretion when there is another remedy open to the party seeking to invoke the extraordinary powers of the High Court under S. 115. A narrow majority of three learned Judges against two held in *Buddhu Lal* v. *Mewa Ram* (1) that when on an issue as to jurisdiction a Subordinate Court held that it had jurisdiction, it was not competent to the High Court to entertain a revision against such an adjudication, when the suit itself was pending in the lower Court and not disposed of. The judgment of Walsh, J. in the case brings out forcibly the contrary view. The Madras High Court in *Arunachellam Chettiar* v. *Arunachellam Chettiar* (2) and *Velappa Nadar* v. *Chidambara Nadar* (3) refused to follow the Full Bench ruling of the Allahabad High Court. The Bombay High Court has in the case under notice declined to follow the majority view in *Buddhu Lal* v. *Mewa Ram* (1) and held that the High Court has power to call for the record of a case in which the question of jurisdiction is involved even at an interlocutory stage.

NAINA PILLAI *v.* RAMANATHAN CHETTIAR, I. L. R. 47 Mad. 337 46 M. L. J. 546 (P. C.).

In this case, there was long occupation, payment of uniform rent as well as alienations. Nevertheless, their Lordships declined to draw the inference that the tenants had a permanent occupancy right. From the same facts, in

1. (1921) I L R 43 A 564. 2. (1922) 43 M L J 218.
3. (1921) 43 M L J 277.

Sethuratnam Aiyar v. *Venkatachala Goundan* (1), an inference of permanent occupancy was drawn by the High Court and the Privy Council confirmed the finding. The point of distinction between that case and this was that here the landlord was a temple. In the case of temple lands, the presumption should not be applied, their Lordships say, because it would be breach of trust on the part of the trustee to make a permanent grant. What their Lordships say is that these facts are not sufficient to raise the inference of permanent tenancy in the case of a temple. There was no evidence in this case from which it could certainly be inferred that the original grant was of permanent occupancy right. If there was as in the case in *Bawa Magniram Sitaram* v. *Seth Kasturbhai Manibhai* (2) their Lordships might have as in that case "followed the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate to assume that the grant was lawfully and not unlawfully made. Although the manager for the time being has no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in the exercise of that extended power." There was the word *kudimiras* employed in connection with the tenancies in this case but the High Court was not prepared to attach to it any significance such as that the Bombay High Court was disposed to attach in that case to the word *sadarmat*. The only presumption that their Lordships were prepared to make from the fact of sales and mortgages by tenants was that it was to the interests of the temple that ordinary cultivators of the temple lands should be solvent persons and not persons who were compelled to sell or mortgage such interest as they had in temple lands in order to raise money.

In this case, their Lordships also re-affirm the principle laid down in *Madhavrao Waman* v. *Raghunath Venkatesh* (3) that a tenant cannot acquire an occupancy right by prescription.

---

1. (1919) I L R 43 M 567 38 M L J 476 (P C).
2. (1921) I L R 46 B 481 (P C).
(1923) I L R 47 B 798 · 47 M L J 248 (P C).

There was a further question in the case whether the village was an estate. In determining this question, the main circumstances relied upon by their Lordships are (1) that the village was described as *Rokkaguthagai* village in the grant; (2) that a part of the land was admittedly cultivated by the tenant; (3) that the waste lands admittedly belonged to the temple; and (4) that the village was known as *Ekabhogam* village. From these circumstances their Lordships infer that both the *kudivaram* and the *melvaram* rights were included in the grant.

ABDUL SATTAR SAHEB *v.* THE SPECIAL DEPUTY COLLECTOR OF VIZAGAPATAM, I. L. R. 47 Mad. 357 : 46 M. L. J. 209 (F. B.).

In reviewing *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat* (1), we indicated the difficulties in the way of accepting that case as correct. The Full Bench now overrules it. If the Collector declines to make a reference under S. 18, Land Acquisition Act, the High Court is powerless to interfere and direct him to refer under S. 115, Civil Procedure Code or S. 107, Government of India Act.

PARTHASARATHY NAIDU *v.* KOTESWARA RAO, I. L. R 47 Mad. 369 46 M. L. J. 201 (F. B.).

The first question raised in this case was whether the District Judge or Sub-Judge deciding an Election Petition is a Court or a *persona designata*. If the reference was to a *Court*, then an appeal or revision also would follow if there is a general right of appeal or revision from the orders of such Court. *National Telephone Company* v. *Postmaster-General* (2). There is no general right of appeal under the Indian Procedure but there is a right of revision under S. 115 applicable to orders of all subordinate Courts. In construing S. 588 of the old Civil Procedure Code which said that the decision on appeals under that section was final, the Courts uniformly held that the Courts' jurisdiction under S. 622 to interfere was not excluded and all that was meant by the word "final" was that there was no appeal.

---

1. (1918) I L R 42 M 231 36 M L J 95. 2. (1913) A C 546.

The Privy Council had to decide a similar question in *Balakrishna Udayar* v. *Vasudeva Aiyar* (1), i. e., to say whether the District Judge acting under certain sections of the Religious Endowments Act was a Court or a *persona designata*. Their Lordships held that the reference to District Judge meant only District Court. Pursuing a similar inquiry in this case the Court found that the reference in this case was to the Sub-Court or District Court.

The further question was as to whether the Election Court could consider disqualifications or disabilities not covered by S. 55 or S. 57 of the Local Boards Act. The jurisdiction being limited and one conferred by those sections of the Act, the Court could not travel outside them. If there was any such disqualification or disability, the matter was for contest by a regular suit in the nature of *quo warranto*. As in the case under review, the lower Court entertained and gave effect to objections not available under those two sections, the High Court held that it acted without jurisdiction.

PONNUSAMI AIYAR *v.* DAMODAR HUNSRAJ, I. L. R. 47 Mad. 403 46 M. L. J. 82.

Under the somewhat liberal view that now prevails as to the meaning of the word "cause of action" under S. 20. C. P. C., as including "all the allegations necessary to sustain the action," it is perfectly clear that when a claim is made in respect of an over-payment in Madras, part of the cause of action arises in Madras. Under the contract for sale of goods, payment was to be made either at Calcutta or on presentation of the hundis drawn on the purchaser at Madras. Payment was made in this case at Madras on presentation of the hundi. The argument was that the payment could not be regarded as having taken place in Madras, as the vendor had negotiated it before that event took place. The case of a hundi must necessarily stand on a different footing from a note. The note itself may be payment—a hundi drawn by the vendor cannot have that operation. Till payment by the drawee, there is no payment of any sort in respect of the original obligation.

---

1. (1917) I L R 40 M 793 : 33 M L J 69 (P C).

KADIRVELU *v.* THE EASTERN DEVELOPMENT CORPORATION, I. L. R. 47 Mad. 411 : 46 M. L. J. 261 (F. B.).

Two questions arose in this case—first, whether the legal representative is liable to pay the debts of the ancestor not only out of the *corpus* but also out of the income ; secondly, whether under S. 52, Civil Procedure Code, his remedy is confined only to attachment and sale or attachment or sale or attachment and sale as situation requires.

The answer given to the first question is that the son is liable to pay out of the income also. The Chief Justice cites an English case, we hope only for edification and not for the purpose of forming a guidance to the Indian Courts. One hardly knows where one will be if all the technicalities of English Law as to the payment of debts of a deceased man were introduced into this country. The question is one of Hindu Law, one should think where Hindus are concerned or a question of equity and good conscience or if the Civil Procedure Code is clear the Civil Procedure must govern. Under the Hindu Law, he who takes the assets must pay the debts. From equitable considerations, it is restricted to the benefit received. Why should not the benefit be taken to include the accretions ? Again, why is not income property of the deceased as much as the *corpus* ? If you give a man's estate a distinct *persona* as the Romans did, there is no difficulty. Even otherwise, the interest must go with the principal and the income with the land. The distinction is metaphysical.

As to the second question there is ample authority for reading the words distributively. [See *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam* (1)].

MEYAPPA CHETTIAR *v.* CHIDAMBARAM CHETTIAR, I. L. R. 47 Mad. 483 46 M. L. J. 415 (F. B.).

No doubt there is a very considerable amount of hardship that all the precautions taken by a creditor pending a suit to keep the property for the realisation of his debt should go for nothing because of some default in paying a batta or doing some such inconsiderable act. But truth to say, there is not

1. (1905) I L R 28 A 482 16 M L J 269 (P C).

much difference between his position and the position of a creditor attaching after the decree. The difference might be one of a few days or weeks. Why should it occur in one and not in the other ? O. 38, R. 9 provides for the withdrawal of attachment on the happening of certain contingencies and they are contingencies which must necessarily occur before the conversion, if any, of an attachment before judgment into an attachment in execution. It cannot be contended that the attachment survives a dismissal of the suit because the Court has not made a formal order withdrawing attachment. On the whole we think it is only a question of the language of the Statute. "Where any property has been attached in execution of the decree" is the language of O. 21, R. 57. In the case of attachment before judgment, the property is not attached in execution but by reason of O. 38, R. 11, attachment in execution is rendered unnecessary. The majority of the Full Bench hold that on passing of the decree and on an application for execution, it becomes in effect attachment in execution while the minority think that the property is attached—not in execution—but before decree. The Statute gives the decree-holder however all the benefits of *an attachment*. S. 64 does not require that the attachment should be attachment in execution to attract the consequenecs of that section. O. 21, R. 64 does not require either that there should be such a transformation. On the Civil Procedure Code, the decree-holder can be given all the reliefs on his attachment before judgment, even though it is held that his attachment is not attachment in execution. But the Full Bench has held that the attachment becomes attachment in execution after the passing of the order for sale. It is a necessary step from that to hold that after that dismissal for default raises attachment. It is difficult to see why the making of the order for sale should make any difference. It is also difficult to see why the attachment should be regarded so converted only after the order for sale and not after the execution petition. The *ratio decidendi* of the Full Bench case seems to be that the effect of O. 39, R. 11 is to give the attachment before judgment the same legal effect as attachment in execution after the execution application.

JELADI BURRAYYA *v.* PONDURI RAMAYYA, I. L. R. 47 Mad. 449 46 M. L. J. 49.

In *Ganesa Aiyar* v. *Amirthasami Odayar* (1) Wallis, C. J. and Kumaraswami Sastri, J. gave an alienee whose sale was set aside at the instance of a junior member on the ground that the consideration was not binding (being for the purchase of lands) a charge for the same on the lands purchased. That was a suit for partition and possibly the Court had jurisdiction to give a charge. In *Chinnaswami Reddi* v. *Krishnaswami Reddi* (2) it was held that unless the purchase of the new lands and the sale of the old were parts of the same transaction, the vendee will not have a right of recourse against the purchased lands. It is not quite clear on what legal basis a decree to the creditor can be given against the property. In the first place, the pro-note here was that of the guardian ; in the second place, if the heirs elected to keep the property, it is not clear why the debt should not be recoverable from them. If they did not elect to keep the property, then, the only right of the creditor is to proceed against the guardian and get it from the purchased property which would be his. It is difficult to follow the process of reasoning by which the plaintiff becomes a charge-holder.

DAS RAM CHOWDHURY *v.* TIRTHA NATH DAS, I. L. R. 51 Cal. 101.

In this case it has been held that when a certificated guardian of the properties of a female minor holding a limited estate alienates her properties for a necessary purpose but does not obtain the permission of the Court for such an alienation and the limited owner does not avoid it after attaining majority, it is open to the reversioners to sue thereafter for a declaration that it will not be binding on them after her lifetime. The learned Judges base their decision on the somewhat wide terms of S. 30 of the Guardians and Wards Act which entitles any other person affected by the alienation to avoid it, and not merely the ward. At first sight it seems to be open to doubt whether when the alienation is for a necessary

1. (1918) M W N 892. 2. (1918) I L R 42 M 36 : 35 M L J 653.

purpose, as was found in this case, the interest of the reversioners is affected by the transfer. The reversioner has only a *spes successionis, i. e.*, the possibility of succession, and he has no interest in the property during the life-time of the limited owner except that he can protect himself from any waste or unauthorised alienation by her, *Janaki Ammal* v. *Narayanaswami Iyer* (1); and as has been repeatedly pointed out by the Privy Council, the widow's estate cannot be aptly described as an estate in fee or an estate for life or as an estate tail. *Rangaswami Goundan* v. *Nachiappa Goundan* (2). Further, there is authority for the view that the expression " any other person affected " by the transfer in S. 30 of the Guardians and Wards Act ought not to be very widely understood, *Lalji Das* v. *Chet Ram* (3) and *Jagabandhu* v. *Haladhar* (4), where it was held that the creditors of the minor could not claim to avoid a transfer by the guardian effected without the leave of the Court. But the leave of the Court under S. 29 does not cure the incapacity of the ward and place the alienation on the same footing as an alienation by the ward after attaining majority, as it is well established that even though there is an alienation by the guardian with leave, it is open to the ward to set it aside on showing that it was not for a necessary or beneficial purpose. *Venkatasami* v. *Viranna* (5) and *Sikher Chund* v. *Dulputty Singh* (6). *A fortiori* when the alienation is by a guardian without leave, it might not stand on a higher footing than an alienation by an unauthorised person of the properties of the limited owner. The reasoning of the learned Judges in this case would seem to indicate that even though the limited owner may expressly ratify the alienation by the guardian after attaining majority, it would be open to the reversioners to sue for a declaration that it is not binding on them after her life-time. This can only be supported on the assumption that the reversioners have a statutory right under S. 30 of the Guardians and Wards Act to set aside the alienation though they may have no interest in the properties at the time. *Saudagar Singh* v. *Pardip*

---

1. (1916) L R 43 I A 207 · I L R 39 M 634 31 M L J 225 (P C).
2. (1918) I L R 42 M 523 at 531 36 M L J 493 (P C).
3. 22 I C 829.
4. (1917) 27 C L J 110.
5. (1921) I L R 45 M 429 : 42 M L J 333.
6. (1879) I L R 5 C 363.

Singh (7) does not go to show that a reversioner has any interest in the lifetime of the widow excepting for the purpose of protecting themselves against any unauthorised alienations by her. It may be a further question whether if in a case where a guardian alienates with the leave of the Court, it would be open to the reversioners to show that the alienations were not beneficial to the limited owner on the principle of the rulings in *Venkatasami* v. *Viranna* (5) and *Sikher Chund* v. *Dulputty Singh* (6) even though the limited owner might not have sued to set them aside on that ground.

On the question of limitation, the learned Judges have held that each reversioner gets a right to set aside the alienation on his birth and will have six years under Art. 120 of the Limitation Act. If the reversioner who brought the suit in this case died pending the suit, we are not sure whether the learned Judges would have held that the suit could be continued by the other reversioners or would abate as a personal action. If the suit could be continued by others, it could only be on the footing that it was one on behalf of the whole class of reversioners as pointed out in *Venkatanarayana Pillai* v. *Subbammal* (8). If this is the correct view, the cause of action is one and entire for the whole body of reversioners arising at the time of the alienation and we can see no escape from the conclusion arrived at by the Madras Full Bench in *Varamma* v. *Gopaladasayya* (9).

SAILAJA NATH ROY CHOWDHURY *v.* RISHEE CASE LAW, I. L. R. 51 Cal. 135.

The observations of B. B. Ghose, J. in this case that the possession of the common land by one or some of the co-sharers does not enure to the other co-sharers as well, relying on some dicta of the Privy Council in *Varada Pillai* v. *Jeevarathnammal* (1) do not seem to be consistent with principle or authority. In this country when we have no rule of Indian Law specifically applicable to the case, we resort to the English Common Law

---

5. (1921) I L R 45 M 429 : 42 M L J 333.
6. (1879) I L R 5 C 363.
(1917) L R 45 I A 21 : I L R 45 C 510 : 34 M L J 67 (P C).
8. (1915) I L R 39 M 107 29 M L J 851 (P C).
9. (1918) I L R 41 M 659 : 35 M L J 57.
1. (1919) I L R 43 M 244 : 38 M L J 313 (P C).

for guidance as an exposition of the rules of justice, equity and good conscience, unless for some special reasons the rules of common law on a particular subject are inapplicable to this country. At common law, it was clear that one tenant in common could not maintain an ejectment against another tenant in common because the possession of one tenant in common was the possession of the other and to enable the party complaining to maintain an ejectment there must be an ouster of the party complaining. This common law rule has however been altered in England by S. 12 of the Real Property Limitation Act of 1833, by which where one of several persons entitled to any land or rent as co-parceners, joint-tenants or tenants in common has been in possession of the entirety or more than his share, his possession is not deemed to be the possession of the others. *Culley* v. *Doe d. Taylerson* (2). But we are not concerned here with this alteration by the statute. In the well-known cases of *Corea* v. *Appuhamy* (3) and *Muttunayagam* v. *Brito* (4) which were cases from Ceylon, the Privy Council held under the Ceylon Limitation Ordnance of 1871, S. 3, corresponding to Art. 144 of the Indian Limitation Act, that in the absence of clear proof of ouster the possession of one co-tenant must be referred to all of them and that his possession should be referred to his lawful title as a co-tenant. That this view has been uniformly held in this country is clear from *Probhat Chandra Sen* v. *Hari Mohan Dhupi* (5) where Sir Ashutosh Mookerjee has collected all the recent cases bearing on the question. The observation of Viscount Cave in *Varada Pillai* v. *Jeevarathnammal* (1) cannot therefore be taken as casting any doubt upon such a well-settled rule especially as their Lordships of the Privy Council have made it plain in their latest pronouncement in *Midnapur Zamindari Co., Ltd.* v. *Kumar Naresh Narayan Roy* (6) that an exclusive user by a co-sharer does not amount to an ouster of the other co-sharers and that he cannot by letting the common land to tenants create any right in derogation of the interests of the others.

---

1. (1919) I L R 43 M 244 : 38 M L J 313 (P C).
2. (1840) 11 A & E 1008.
3. (1912) A C 230.
4. (1918) A C 895.
5. (1919) 24 C W N 206.
6. (1924) 47 M L J 23 (P C).

VELLAYAPPA CHETTIAR *v.* RAMANATHAN CHETTIAR, I. L. R. 47 Mad. 446 46 M. L. J. 80.

The Court rightly held in this case that the claim procedure has no application to a Receiver taking possession of property of the insolvent. There is a tendency to apply the procedure applicable to attachment and sale to proceedings by Receiver. Obviously, they can have no such application.

MIDNAPORE ZAMINDARY & CO., LTD. *v.* KUMAR NARESH NARAYAN ROY, 47 M. L. J. 23 I. L. R. 51 Cal. 631 (P. C.).

Their Lordships' observations in this case touch upon several aspects of the relations between co-sharers ; on some points, however, they seem to be rather too broadly expressed. For example, they say that no co-sharer can as against his co-sharers obtain any *jote* right or rights of permanent occupancy in the lands held in common. If this was restricted to a mere claim based on long or separate possession, the statement may be unexceptionable. But their Lordships go on to add that even if a co-sharer '*purchased jote* rights in lands held in common by the co-sharers such a purchase would in law be held to have been a purchase for the benefit of all the co-sharers.' This statement lays down the disability of the co-sharer without regard to the condition recognised in S. 90 of the Trusts Act, *viz.*, that the co-sharer should have gained the advantage 'by availing himself of his position as such and in derogation of the rights of the other persons' or 'as representing all persons interested in the property.' The section puts a co-owner, a mortgagee and a life-tenant on the same footing in this respect. With reference to a mortgagee the existence of this limitation was recognised by the Judicial Committee in *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* (1) where they say "Their Lordships are not prepared to affirm the broad proposition that every purchase by a mortgagee of a sub-tenure existing at the date of the mortgage must be taken to have been made for the benefit of the mortgagor" and instancing the purchase by a mortgagee of a *patni* or *mokurari* tenure, they observe "In such case the mortgagee can hardly be said to have derived

---

1. (1879) I L R 5 C 198 (P C).

from his mortgagor any peculiar means or facilities for making the purchase which would not be possessed by a stranger and may therefore be held entitled equally with a stranger to make it for his own benefit." Where, however, the purchase is made in exercise of the rights which the person has *as a limited owner or as a co-owner* the position is different and the decision in *Ganga Sahai v. Kesri* (2) and *Naba Kishore Mandal* v. *Upendra Kishore Mandal* (3) illustrate this aspect of the rule. In the former the purchase was made with the money belonging to the co-sharers and in the latter the tenant rights were bought in by the release of the arrears of rent. The legislature has also recognised the possibility of the occupancy right in land being transferred to one of several persons jointly interested in the land as landholder, in S. 8, cl. 2 of the Estates Land Act which provides that such transferee shall hold the land subject to the payment to his co-landholders of the shares of the rent which may from time to time be payable to them.

As to their respective rights of enjoyment of the common property, this judgment re-affirms the principles laid down in *Watson and Co.* v. *Ramchand Dutt* (4). It is true that the exclusive user of any portion of the common property by a co-sharer will not give rise to a claim for damages or mesne profits at the instance of the other co-sharers. But what is called the claim for *compensation* for such exclusive use is also stated in the present case in very general terms. To take a familiar illustration, suppose a co-owner cultivates a small portion of the common property while the other co-owner never evinced any desire to cultivate that portion or any other portion of the common property. Has the idle co-sharer a right to claim a portion of the income realised from the bit of land cultivated by the other ? In Watson's case it was observed by Sir Barnes Peacock that in such a situation it will be scarcely consistent with justice, equity and good conscience to restrain the cultivating co-sharer from proceeding with this work or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital. In the particular case, however, the Judicial Committee awarded compensation to the plaintiff co-sharer apparently

---

2. (1915) I L R 37 A 545. 3. (1920) 42 M L J 253 (P C).
4. (1889) I L R 18 C 10.

on the footing that he attempted to cultivate the lands in question but was excluded by the defendant [cf. *Sivanarasa Reddi* v. *Doraiswami Reddi*(5) and *Debendra Narayan* v. *Narendra Narayan* (6)].

One important consequence of holding that the claim as between co-tenants is one for compensation not akin to damages or mesne profits is that the rule of limitation applicable to such a case becomes different. In the Full Bench judgment of the Madras High Court in *Yerukola* v. *Yerukola* (7) this aspect of the matter has been noticed at some length. In the present case their Lordships have allowed compensation for about nine years prior to suit.

AMBU NAIR *v.* SECRETARY OF STATE FOR INDIA, (1924) I. L. R. 47 Mad. 572 : 47 M. L. J. 35 (P. C.).

The decision on the main question in this case has long ago been forestalled in this Presidency by the general declaration in favour of the State contained in S. 2 of the Land Encroachment Act. There are, however, one or two incidental observations in the course of their Lordships' judgment which call for notice. Dealing with the claim of prescriptive title to *kumri* lands, their Lordships observe that ' a licensee cannot claim title only from possession however long, unless it is proved that the possession was adverse to that of the licensor to his knowledge and with his acquiescence '. This appears to us to be a very laconic pronouncement on a difficult question. There are two conditions suggested as being necessary, *viz.*, the licensor's knowledge and his acquiescence. It is not easy to perceive the significance of the reference to acquiescence. As to the question of *knowledge*, it is by no means certain whether the mere fact of an adverse claim by the licensee to the knowledge of the licensor will suffice to convert the permissive possession into adverse possession, because the relationship of licensor and licensee is revocable only by the licensor and he is not *bound* to revoke it merely because the licensee sets up an adverse right ; but if such change in the character of the

---

5. (1918) I L R 41 M 861. 6. (1919) I L R 47 C 182.
7. (1922) I L R 45 M 648 (F B).

possession is possible, we fail to see where the question of acquiescence comes in. It may have a bearing on a claim of implied grant or estoppel, but it is difficult to realise its bearing on a question of prescription.

Dealing with the question of 'title by transfer,' their Lordships refer to the finding of the Courts in India 'that in no case has the knowledge been brought home to the officers of Government that any of these lands were sold or mortgaged with their consent' Here again, it is difficult to see the exact force of the observation. If, as between Government and the *kumri* cultivator, the position of the latter was only that of a licensee, the mere fact that the latter was alienating or encumbering his assumed interest even to the knowledge or with the consent of a Government officer cannot affect the rights of the Government either by way of estoppel or by an implication of a grant of a transferable right, unless the official was one who had the power to grant such a right. A similar argument has often been advanced in cases where tenants of temple lands in this Presidency claimed permanent rights of occupancy. In *Chidambaram Pillai* v. *Thiruvengadathan Aiyangar* (1) Muthuswami Aiyar, J. answered it by referring to the probable desire of the Government and the trustees after them not to interfere with the tenants or take note of their transactions so long as they regularly paid the rent due on the land. Quite recently in *Nainapillai Maracair* v. *Ramanathan Chettiar* (2) the Privy Council dealt with it not as an argument of estoppel but only as one lending some support to a presumption in favour of an original right in the tenants. But if the nature of the original right is otherwise determined, there is no place for any such presumption.

---

1. (1887) 7 M L J 1. 2. (1923) I L R 47 M 337 : 46 M L J 546 (PC).

BASDEO LAL *v.* JHAGRU LAL, I. L. R. 46 All. 333.

This case raises the point as to the applicability of the rule as to perpetuities to a contract for pre-emption. It may be a question whether the rule applies when the contract is for a definite period like 30 years. The point has not been discussed from that narrow point. It is a frontal attack delivered against the application of the rule to contracts of pre-emption generally. Opinion was sharply divided on this question in India in *Kolathu Aiyar* v. *Ranga Vadhyar* (1), *Charamudi* v. *Raghavulu* (2) and *Nabin Chandra Sarma* v. *Rajani Chandra Chakrabarti* (3) when came *Maharaj Bahadur Singh* v. *Balachand* (4), where there is a distinct expression of their Lordships' opinion that such a contract would be affected by the rule as to perpetuities. It was understood in that sense in *Dinkarrao Ganpatrao* v. *Narayan Vishwanath* (5). It is sought to be distinguished in this case on two grounds : first, that in that case the contract was entered into before the Transfer of Property Act ; secondly, that it was a contract unlimited in point of time. It is difficult to see how a contract unlimited in point of time becomes vague, indefinite, or uncertain so as to render the contract void or unenforceable. In fact, such a contract is not void under the English Law and damages can be obtained from the contracting party or his representatives if there is a means of having recourse against them. The fallacy in the first distinction is that in India equitable interests in land were never recognised. [*Sanyellappa Hosmani* v. *Channappa Somasagar* (6).] We may also bear in mind what their Lordships of the Privy Council say in this case, no doubt with reference to statutes regulating heirship or giving force to wills, *viz.*, that they should not be taken to affect paramount questions of public policy or to depart from well-settled principles of jurisprudence. We do not think that the question is disposed of by establishing that the contract does not create an interest in land. The doctrine of part performance that is being recognised all over India shows how unreal this distinction is. But even apart from that, can such a contract be specifically enforced ? To use the language of Mr. Justice Tyabji in *Sri Jagadamba Raju* v. *Sri Rajah Prasada*

---

1. (1912) I L R 38 M 144.
2. (1915) I L R 39 M 462.
3. (1920) 25 C W N 901.
4. (1921) M W N 157 : 48 I A 376.
5. (1922) I L R 47 B 191.
6. (1924) 47 M L J. 401 at 405 (P C).

Rao (7), which has been approved by the Privy Council in *Ananda Mohan Roy* v. *Gur Mohan Mullick* (8) *mutatis mutandis* "it would be defeating the provisions of the Act to hold that though such estates cannot be created under the law to arise in future, a person may bind himself to bring about the same result by giving to the agreement the form of a promise" to transfer the property when the contingency arises. As Lord Sumner says "it is impossible for them to admit the common sense of maintaining an enactment which would prevent the purpose of the contract while permitting the contract to stand as a contract."

MAHABIR PRASAD *v.* AMLA PRASAD RAI, I. L. R. 46 All. 364.

Is it open to all the adult members of a family to start a new business so as to bind the minor members? That a manager himself cannot start a trade is clear. [*Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1)]. That case would seem to be against any exception being made in favour of a trade carried on by the male adult members as well. [See *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (1)]. In *Sadasiva Mudaliar* v. *Hajee Fakeer Mahomed Sait and Sons* (2) all the adult members seem to have been acquiescing parties to the trade and yet the minors were held not liable. There are some *dicta* in *Tammi Reddi* v. *Gangi Reddi* (3) in favour of the adult members having the power to start a new trade. Abdur Rahim, J. leaves the question open in *Abdur Rehman Kutti Haji* v. *Husain Kunhi Haji* (4). It is difficult to see how the acquiescence or consent of the adult members can extend the power of the manager.

MEGHARAJ *v.* KRISHNA CHANDRA BHATTACHARJI. I L R 46 All. 286.

Both the points decided by this case seem to be covered by authority. The first point is that an executor represents the estate even before he takes out probate. The Privy Council in (1916) 1 A. C. 608 say: "The personal property of the testator including all rights

---

7. (1915) I L R 39 M 554. 8. (1923) I L R 50 C 929 at 936 (P C).
1. (1922) I L R 49 C 560 (P C). 2. (1922) 17 L W 288 (P C).
3. (1921) 45 M 281. 4. (1919) I L R 42 M 761 at 771.

of action vests in him upon the testator's death and the consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate but this is not because his title depends on probate but because the production of probate is the only way in which by the rules of the Court, he is allowed to prove his title." This is why it has been held sufficient if he produces the probate before decree in *Chandra Kishore Roy* v. *Prasanna Kumari Dasi* (1). In cases not governed by Succession Act and the Hindu Wills Act, a probate is altogether unnecessary. The rule enacted in S. 187 which requires the production of probate, it has been decided in some cases not to apply to defendants. *Caralapathi Chunna Cunniah* v. *Cota Nammalwariah* (2) and *Sadagopa Naidu* v. *Thirumalaswami Naidu* (3). The section does not take away the general rule as to representation in S. 179.

The next point was as to contribution under S. 82, Transfer of Property Act. Their Lordships hold following the case in *Emperor* v. *Hazari Lal* (4) that the value of the various properties should be calculated as at the date of the mortgage and not as at the date of the payment of the mortgage money. In America, a different view seems to prevail in some of the Courts.

KANHAIYA *v.* KANHAIYA LAL, I. L. R. 46 A 372.

The question in this case was whether in the course of the succession certificate proceedings the Court has power to appoint a Receiver in respect of the debt. Their Lordships think that the Receiver chapter cannot be worked into the scheme of the Succession Certificate Act. The argument was that S. 141 Civil Procedure Code, applied the procedure applicable to suits to all proceedings and therefore the sections relating to receivers also were applicable. Under the old Code, the Madras High Court held in *Abdul Rahiman Saheb and another* v. *Ganapathi Batta* (5) that the injunction and receiver sections did not apply to proceedings under the Guardians and Wards Act. A different view is taken in *In re, Bai Jamnabai* (6) and *Adadali Chowdhury* v. *Mahomed Hossain Chowdhuri* (7). It is a

---

1. (1910) I L R 38 C 327 (P C).
2. (1909) I L R 33 M 91.
3. (1915) 18 M L T 129.
4. (1914) I L R 36 All 372.
5. (1900) I L R 23 M 517 : 10 M L J 305.
6. (1911) 13 Bom. L R 487.
7. (1916) I L R 43 C 986.

a question whether these supplementary proceedings are included in the term "procedure" in S. 141. However that may be, as the learned Judges point out in a succession certificate proceeding, a proceeding where the object is merely to clothe a person with the authority to receive debts and similar claims and give acquittance in respect of them without finally deciding any question of title, the appointment of a Receiver is wholly inappropriate and purposeless. The appointment of a Receiver must be in aid of some ultimate relief to be given in the proceeding. In a proceeding of a summary character and with the object as set forth above, there is no ultimate relief that one can think of that can be given in the proceeding which can be aided by the appointment of a Receiver.

GAURI SHANKER *v.* SHEONANDAN MISRA, I. L. R. 46 All. 384.

Can a debt secured by a mortgage which as a mortgage cannot be enforced against the sons, being one not for antecedent debt or necessity, be the foundation of a subsequent mortgage by the father when at the time of such fresh mortgage the personal covenant on the previous mortgage is barred ?

Mr. Justice Lindsay holds that the debt though barred under the Statute of Limitation is not extinguished and can support the subsequent promise by the father so as to bind the son. Mr. Justice Sulaiman, while differing from Mr. Justice Lindsay on this point, holds that the approval by the Privy Council in Brij Narain's case of the judgment of Chief Justice Wallis in *Arumugham Chetty* v. *Muthu Goundan* (1) necessarily involved the conclusion that a mortgage debt as such apart from the question whether the personal remedy is barred or not, is an antecedent debt. This view of Justice Sulaiman seems to be right. Brij Narain's case, has, we think, made reliance on Sahu Ramachandra's case or Cheturam's case except on the sole point that the mortgage in order to be binding, must be supported by a debt antecedent impossible. It should be antecedent *in fact* and not merely bearing the semblance of antecedency.

---

1. (1919) I L R 42 M 711.

SAMAR BAHADUR SINGH *v.* JIT LAL, I. L. R. 46 All. 359.

In this case the question was whether a custom recorded in terms giving an option to co-sharers, etc., in the case of a sale or mortgage would extend to the case of an exchange. Their Lordships held not. It is obviously right for a custom cannot be extended by analogy. Outside the custom, the general law should prevail.

BHAGCHAND DAGADUSA *v.* THE SECRETARY OF STATE FOR INDIA, I. L. R. 48 Bom. 87.

In this case, the learned Judges discussed the necessity for notice of suit under S. 80 of the Civil Procedure Code in the cases of the Secretary of State for India in Council and a public officer as regards suits for injunction for a threatened injury in the future. There may be some difficulty in engrafting on the language of the section, the exception in cases where the Secretary of State is sued for an injunction where irreparable injury might ensue if notice for the requisite period is given as required by the section. No doubt as pointed out by Shah, J. in the case under review, the notice required by the section does not form part of the plaintiff's cause of action, but it is merely required as a matter of procedure ; this is clearly borne out by the terms of the section itself which requires the cause of action to be stated in the notice itself given two months before the suit. But the hardship involved by reading the language of the section in its absolute terms against the Secretary of State may well be avoided by instituting the suit for injunction against the public officer who threatens to commit the act which would cause the injury, instead of the Secretary of State, as indicated by Kemp, J. in this case and Sadasiva Aiyar, J. in *Secretary of State* v. *Kalekhan* (1).

But even on this question, the decisions are not uniform as to the necessity for notice in cases of suits for injunction against public officers. The Bombay High Court has held in this case rightly, if we may say so with respect, that such suits do not fall within the language of the section. There is the very high authority of Bowen, L. J. in *Chapman Morson and Co.* v. *Guardians of Auckland Union* (2) for the view that the words similar to those applied to public officers in S. 80 can have reference only to past acts of the public officers and not to future acts threatened to be done by them in the future. We venture to think that as against this, the observa-

1. (1912) I L R 37 M 113 : 23 M L J 181. 2. 23 Q B D 294 at 302, 303.

tions to the contrary of Pratt, J. in *Muradally Samji* v. *B. N. Lang* (3) are not entitled to much weight. It is unnecessary to say that the bulk of authority in Bombay is against the view of Pratt, J. and his Lordship felt bound to follow it in opposition to his own inclination. There is one decision in Madras in *The Superintending Engineer, II Circle; Bezwada* v. *Chituri Ramakrishna* (4), which it is necessary to advert to in this connection, where the learned Judges held that suits for injunction against public officers are not exempted from the statutory notice required by the section. Apart from the circumstances that the terms of the section do not relate to injunction as pointed out by Bowen, L. J. in *Chapman Morsons and Co.* v. *Guardians of Auckland Union* (2) referred to above, this ruling of the Madras High Court does not refer to a prior decision which is opposed to the view taken by the learned Judges in that case. [Vide *President of teh Taluq Board, Sivaganga* v. *Narayanan* (5)]. In answer to the observations in *The Superintending Engineer, II Circle; Bezwada* v. *Chituri Ramakrishna* (4) regarding the expression "in respect of an act, etc." and their true scope we would only point to the observations of Kemp, J. at page 153 of the case under notice. Indeed, on the authorities it is not yet quite settled whether the notice required by the section is necessary only in cases where the suit is based on a tort committed by the public officer in the course of his duty or whether it also extends to actions *ex contractu*. [See *Rajmal Manikchand* v. *Hanmant Anyaba* (6), *Cecil Gray* v. *The Cantonment Committee of Poona* (7) and *Shahebzadee Shahunshah Begum* v. *Fergusson* (8)].

In the end, we would only add, with respect, that when it is possible to distinguish the decision of the Court of Appeal in *Flower* v. *Local Board of Low Leyton* (9) in which Jessel, M. R. and James, L. J. took part and which was followed by Lords Esher, Bowen and Lindley in *Chapman Morsons and Co.* v. *Guardians of Auckland Union* (2), the attitude of Sadasiva Aiyar, J. in *Secretary of State* v. *Kalekhan* (1) in dissenting from those great Judges does not add to the weight of his Lordship's pronouncement.

---

1. I L R 37 Mad. 113.
2. 23 Q B D 294.
3. (1919) I L R 44 B 555.
4. (1920) 39 M L J 151.
5. (1892) I L R 16 M 317.
6. (1895) I L R 20 B 697.
7. (1910) I L R 34 B 583.
8. (1881) I L R 7 C 499.
9. (1877) 5 Ch. D 347.

PHIROZSHAH BOMANJI PETIT *v.* BAI GOOLBAI, 47 M. L. J. 79 (P. C.).

Unlike the English Apportionment Act of 1870 the Transfer of Property Act has provided for the application of the rule of apportionment to rents, annuities, etc., only as between transferor and transferee and by virtue of S. 2 (*d*) the operation of the rule is restricted to transfers by *act of parties*. Under the Succession Act, S. 300 and the Probate and Administration Act also the rule is applied only to the particular case of annuity therein dealt with. In cases not falling under these statutory provisions the Calcutta High Court had declined to apply the principle of apportionment. See *Satyendra Nath Thakur* v. *Nilkantha Singha* (1) and *Mathewson* v. *Shyam Sundar Sinha* (2). But it has been suggested in Madras that as the Courts in India are not bound to follow the English Common Law rule except as a principle of justice, equity and good conscience and as the Indian legislature has in certain cases clearly adopted the principle of apportionment our Courts will be justified in applying it as a rule of justice and equity in all cases. [Cf. *Lakshmi Naranappa* v. *Meloth Raman Nair* (3) and *Kunhi Sou* v. *Mulloli Chathu* (4)]. We are not sure if the case under review can properly be regarded as deciding this matter one way or the other because as their Lordships observe, the argument before them proceeded on the footing that the English Common Law rule would have applied to the case but for a contention based on the terms of the will in question. Why the assumption was made the report of the case does not enable us to say. The case was from the Town of Bombay and it may be that the course of proceedings was throughout coloured by the prevalent view that the English Common Law must be deemed to have been introduced into the island of Bombay. [Cf. *Naoroji Beramji* v. *Rojers* (5)].

SRI RAJA VATSAVAYA VENKATA SUBHADRAYAMMA *v.* SRI POOSAPATI VENKATAPATHI RAJU, 47 M. L. J. 93 (P. C.)

The tendency in India has been to give a liberal application to the doctrine of lien in favour of a person whose money

---

1. (1893) I L R 21 C 383.
2. (1906) I L R 33 C 786.
3. (1902) I L R 26 M 540.
4. (1912) I L R 38 M 86.
5. (1867) 4 Bom H C R O C J 1.

has been expended in the preservation of another's property. [*See* the collection and discussion of authorities in *Raja of Vizianagram* v. *Raja Setrucherla Somasekhara Raj* (1)]. But a note of dissent has from time to time been sounded on the authority of certain English decisions which were understood as limiting the principle of lien to certain defined classes of cases. In the decision under notice the question of lien arose with reference to funds borrowed for the conduct of litigation directed to secure and preserve trust property. It is of course well established that a trustee spending his own moneys for such a purpose will have a lien and a creditor lending moneys to the trustee for the purpose may also be entitled to a lien on the principle of subrogation, but it is noteworthy that their Lordships go on to add that even the settlor spending moneys or a third party advancing money to the settlor for that purpose would be similarly entitled to a lien on the property preserved for the trust by his outlay.

Their Lordships' observations on the question of the assignability of the fruits of a pending or a contemplated litigation also deserve to be noted. In *Annada Mohan Roy* v. *Gour Mohan Mullick* (2) their Lordships have declined to recognise a contract to transfer a *spes successionis* even to the extent of compelling specific performance *after* the succession had opened and the property had vested in the person who agreed to make the transfer. This is the logical result of the prohibition in cl. (*a*) of S. 6 of the Transfer of Property Act. The other clause in that section which has given rise to some difficulty is cl. (*e*) which after the amendment made in 1900 prohibits in general terms the transfer of a mere right to sue. The effect and operation of the clause was discussed at some length in the judgment of the High Court in *Narasingerji* v. *Penaganti Parthasarathi* (3). The judgment under review indicates that that clause should be interpreted in the light of the principles recognised in *Glegg* v. *Bromley* (4).

On the question of the interpretation of the contract, their Lordships disagree with the view of the High Court that the consent of the original lender was a 'condition precedent to a' compromise of the suit. "Having regard to the uncertainty of human life which contracting parties when providing for possible future events must be presumed to bear in mind," their

---

1. (1902) I L R 26 M 686 (F B). 2. (1923) I L R 50 C 929 (P C).
3. (1921) M W N 519. 4. (1912) 3 K B 479.

Lordships say, "it would be irrational if not absurd" for the parties to have entered into such a contract. But their Lordships' observations in *Hurnand Rai* v. *Pragdas* (5) must make one hesitate before dogmatising about what a reasonable man would have been likely to agree to.

JAGATPUT SINGH *v.* PURANCHAND NAHATTA, 47 M. L. J. 136. (P. C.)

JAMNABAI *v.* FAZALBHOY HEPTOOLA, 47 M L J 164. (P. C.)

SIR RAMESHWAR SINGH *v.* HITENDRA SINGH, 47 M. L. J. 286 (P. C.).

These three cases deal with one aspect or another of the law relating to consent decrees and orders. They emphasise the fact that such proceedings are in a sense in the nature of contracts but also have super-added to them some of the incidents governing regular judicial pronouncements. *Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited* (1), *Tiruvambala Desikar* v. *Manickavachaka Desikar* (2) and *Cowasji Temulji* v. *Kisandas Ticumdas* (3).

In the first case the attempt to insist on a decree in terms of an alleged agreement between the parties failed on a finding that the parties were not *ad idem* in connection with it. In the second, counsel had agreed to an order in particular terms under a mistake of fact but when the party sought to re-open the matter their Lordships proceeded on the view that before doing so it must be shown that serious and substantial injustice to the client will be the result of letting the consent order stand. This is in substance though not in form an application of the principle of S. 20 of the Contract Act. The two cases also raised the question of the authority of counsel to consent to an order or to enter into a compromise without the express permission of his client. Their Lordships seem to think that except in special cases counsel must be taken to have such authority.

In the third case the point arose with reference to a decree-holder's power to insist on execution sale in contravention of the terms of a receiver order made by consent. Their

---

5. (1922) I L R 47 B 344.
2. (1915) I L R 40 M 177.
1. (1895) 2 Ch 273.
3. (1911) I L R 35 B 371.

Lordships recognise that it will be open to a party to a consent order to challenge administration thereunder which is of such a character as either amounts to malfeasance and accordingly releases the consentor or secondly, had been proved by experience to be in substance so protracted and imperfect as to be futile. It is not quite clear whether these exceptions are derived from the consensual aspect of the order or its judicial aspect. Nor is it quite easy to follow the bearing of the reference in the course of the judgment to the decisions in *Ram Kirpal Shukul* v. *Mussumat Rup Kuari* (4) and *Hook* v. *Administrator-General of Bengal* (5).

MUBARAK HUSAIN v. AHMAD : I L R 46 All 489 (F B).

The question in this case was as to whether S. 60, Civil Procedure Code, prevents the sale of the house of an agriculturist in execution of a mortgage decree for sale. The two rival contentions that found favour with different Judges were (i) that having regard to the wording of the proviso—provided that the following particulars shall not be liable to such attachment or sale—not only attachment but also sale is prohibited by the section ; (ii) that having regard to the first clause which speaks of attachment and sale in execution of a decree to which the proviso is attached, the proviso can have reference only to attachment or sale on attachment and not to a sale in execution of a mortgage decree. If the section really prohibited sale, we agree with Mr. Justice Walsh that the objection might be taken in execution. But we also agree that the view taken of the section by the majority is the correct one. The section, we think, has nothing to do with cases where the decree directs the sale, specially, when we have regard to the fact that transfer of such properties is not prohibited—though the argument of want of symmetry or logical consistency is not always a sufficient ground in the case of Indian Legislature to exclude a wider construction. There are many reasons as pointed out by Mr. Justice Mukerjea why the language ' attachment or sale ' is substituted. It accentuates the intention of the section that it is not only the sale in pursuance of attachment that is prohibited but also attachment. For there are many things in which the object of the attaching party is attained without sale in fact the mode of execution provided is not sale.

---

4. (1883) L R 11 I A 37. 5. (1921) L R 48 I A 187 : 40 M L J 23.

BANK OF BENGAL *v.* LUCAS, I. L. R. 51 Cal. 185.

The question whether and when the creditor is entitled to the securities given by the principal debtor to the surety is not dealt with by any provision of the Contract Act nor has it been considered by any of the Indian decisions except the one under notice ; and although Sir Asutosh Mookerjee was not called upon to decide the question in the case, as it was found that the securities were expressly assigned by the surety to the creditor, the observations of that learned Judge where he reviews the English cases and comes to the conclusion that unless there is an express contract to that effect or there is a trust or both the surety and the principal debtor become bankrupts the creditor is not entitled to the benefit of the securities given by the principal debtor to the surety, are of special value. Even in England the question was not free from doubt till the decision of Stirling, J., in *In re, Walker, Sheffield Banking Company* v. *Clayton* (1), where that learned Judge considers all the decisions referred to by Mr. Justice Mookerjee and comes to the conclusion that the proposition that a principal creditor is entitled to the benefit of all counterbonds and collateral security given by the principal debtor to the surety cannot be supported.

It is worthy of note that in *In re, Walker, Sheffield Banking Company* v. *Clayton* (1), both the estates of the principal debtor and the surety become insolvent and still the learned Judge would not award the principal creditor full benefit of the securities given by the principal debtor to the surety but would only allow the creditor to prove in the administration of the estate of the surety on the amount of the securities realised. In view of this decision, it may be that the exception in favour of the creditor when both the principal debtor and the surety are bankrupts, as enunciated by Mr. Justice Mookerjee should only be understood to be restricted to the creditor's right of proving for the balance due to him against the amount realised by the surety's estate out of the security given by the principal debtor and not to extend to claiming the full value of the securities.

PRASANNA CHONGDAR *v.* NRISINGHA MOORARI PAL, I. L. R. 51 Cal. 216.

In this case, the learned Judges have held that a suit for setting aside a *putni* sale and for confirmation of possession

1. (1892) 1 Ch. 621.

is not a suit for a mere declaration with the Court-fees payable as such, but a suit for declaration and consequential relief for which Court-fees have to be paid under S. 7 (*iv*) (*c*) of the Court-Fees Act. In the course of the judgment, the learned Judges point out that even apart from the relief of confirmation of possession, the suit for setting aside the *putni* sale would fall under S. 7 (*iv*) (*c*) in cases where the sale would be binding on the plaintiff unless he avoids the same. Where however the sale is a nullity or void *ab initio*, in a suit for a declaration that the sale is not binding on the plaintiff, the Court-fee payable on the plaint would be as pointed out by the learned Judges as a mere suit for declaration under Art. 17 of the second schedule of the Court-Fees Act. Apart from the decisions of the Calcutta High Court referred to by the learned Judges in support of their conclusion, the Madras High Court has entertained the same view on these questions in the Full Bench decision in *Arunachalam Chetty* v. *Rangasamy Pillai* (1), though on the question whether the plaintiff can in a suit for a declaration and consequential relief, put a valuation on the plaint according to his own pleasure, the Madras High Court has taken a different view from what has been entertained in Calcutta.

The other question decided in the case is one of some interest. The Court-fee on the plaint was originally paid as for a mere declaration under the Court-Fees Act of 1870 and before the adjudication of the question of Court-fees by the Court, the Court-Fees Amendment Act of 1922 (Bengal) came into force and the question arose whether the excess Court-fee payable was to be on the basis of the Act of 1870 or the Amendment Act of 1922. The learned Judges have held that the question to be decided by the Court is what is the Court-fee payable on the original date of the plaint and the Amendment Act can have no application to the case, as otherwise it would be giving a retrospective operation to the Amendment Act. S. 149 of the Civil Procedure Code, referred to by the learned Judges also supports their conclusion. Of course, in such a case, where the appeal is preferred from the decree of the first Court after the coming into force of the Amending Act, Court-fee is payable on the memorandum of appeal under the Amending Act, as was apparently ordered by the learned Judges in the case under notice.

---

1. (1914) I L R 38 M 922 : 28 M L J 118 (F B).

RAGHUNANDAN PRASAD *v.* GHULAM ALAUDDIN, I. L. R. 46 All. 571.

The question in this case was as to whether the Court could relieve against a penalty in a compromise decree. Their Lordships hold they cannot, purporting to follow the case in *Kalipada Sarkar* v. *Hari Mohan Dalal* (1). But that case is no authority on the point that arose in this case, *viz.*, whether the Court has jurisdiction to relieve against a penalty provided in a compromise decree. That case is an authority for the position that an executing Court cannot ordinarily go behind a decree or enter into any question as to its legality or correctness. The decree in the case was not a compromise decree. The authority dealing with the question involved in this case is *Nagappa* v. *Venkatrao* (2).

NARAIN SINGH *v.* CHIRANJI LAL, I. L. R. 46 All. 568.

The question in this case was as to whether advances made to a person while a minor can form consideration for a promissory note given after his coming of age. A point somewhat similar was considered in *Ramaswami Pandia Thalavar* v. *Anthappa Chettiar* (1). There a promissory note was given in settlement of a previous promissory note given while the promisor was a minor. The argument on behalf of the promisor was that the thing done, *viz.*; the advance having been made at the desire of the promisor while a minor could not form a valid consideration for the new promise. This argument, their Lordships refuse to accept, but they held that a promissory note having already been given, the legal effectiveness of the consideration was exhausted and it could no longer serve as consideration for a fresh note. In the case under review there was only an advance and no ineffective promise during minority. The case in *Ramasami Pandia* v. *Anthappa Chettiar* (1) is accordingly an authority for the view taken in this case. But with all respect, the question is not so clear. So far as S. 64 and S. 65, Indian Contract Act are concerned, the Privy Council are clear that those sections were intended to apply only to agreements and contracts by persons competent to contract.

1. (1916) I L R 44 C 627.
2. (1900) I L R 24 M 265.
1. (1906) 16 M L J 422.

By parity of reasoning, none of the implied obligations excepting that under S. 68 would attach to a minor. At any rate no action for money had to the use of the defendant will not lie against a minor. It would seem to be against principle to hold that a minor would be bound by a contract for which the condition precedent of consideration might be the advantage gained by the promisor while a minor or detriment suffered by the other party at his instance.

MUSTI RAM *v.* MUHAMMAD ABDUL JALIL, I. L. R. 46 All. 509.

A somewhat interesting point arose in this case and that was whether for purposes of S. 4 of the Companies Act, a person holding a share in his own name was a different person from himself holding another share as a trustee or guardian and similarly whether a joint family was one person or so many persons as the family is composed of. Their Lordships hold that the joint family is one person and that a person holding shares in different capacities is also only one person. The General Clauses Act defines a person as a body of persons and a joint family with individuals comprising it having ordinarily no individual rights or liabilities beyond the liability of the property is appropriately described, we think, as a body of persons. Similarly having regard to the definition of a trust in the Trusts Act, a trustee is the owner and in law is not a different person from himself in another capacity. It is doubtful if the same can be said of a guardian. Their Lordships take it that it is the guardian that is personally accountable or personally entitled as between himself and the company though, in his turn, he is personally liable to account to his ward. Seeing that it is not open to the guardian as such, to involve the minor in any personal liability in respect of the partnership transaction, it is the right view to take when a guardian becomes a partner with his ward's money and for his benefit even if the investment of the money in the trade is authorised. Even as regards a joint family, when a member of the family becomes partner with a stranger, the presumption is that he alone is the partner and not the family, though the family may have rights as against the partner and his death would put an end to the partnership. *Ramanathan Chetty* v. *Yegappa Chetty* (1).

---

1. (1915) 30 M L J 241.

VAIDYANATHA AIYAR *v.* SWAMINATHA AIYAR, 47 M L J 361 (P C.).

The test of "interest" under S. 92, Civil Procedure Code, was laid down by the majority of the Full Bench in *Ramachandra Aiyar* v. *Parameswaran Unni* (1) mainly with reference to what may be briefly described as the beneficiaries' interest. So far as the majority were influenced by the English cases under Lord Romilly's Act, it looks as if their Lordships differ from them as to the admissibility of that analogy in view of the fact that the original expression "direct interest" in the Code of 1877 was advisedly changed in the amending Act of 1888. But in substance they affirm the view that the requirements of the section will not be satisfied by the "bare possibility that a Hindu might desire to resort to a particular temple at some time or other."

In the present case, however, the interest of the plaintiffs was not of the same character ; nor was the institution in question similar to that in *Ramachandra Aiyar* v. *Parameswaran Unni* (1). The suit related to a chatram and it was not alleged that the plaintiffs were interested therein as persons likely to have the benefit of it in the sense of being fed there. Dealing with such an institution, it was broadly laid down in *Ganapathi Ayyan* v. *Savithri Ammal* (2) that a suit like the present "may be instituted by any member of the class intended to be benefited by the charity." It is doubtful whether this wide statement can be held to be good law after the Full Bench judgment in *Ramachandra Aiyar* v. *Parameswaran Unni* (1) and we find no reference to *Ganapathi Ayyan's case* (2) either in the judgment of the High Court or in the judgment of their Lordships in the present case. The plaintiff's interest was here upheld on the ground that as descendants of the founder they had an interest in the proper administration of the trust. The High Court relied in this connection on the judgment in *Gauranga Sahu* v. *Sudevi Mata* (3) according to which the heirs of the founder may in certain contingencies have a right to appoint a trustee. Their Lordships do not adopt this part of the High Court's reasoning and in another connection they refer in very guarded terms to the decision in *Gauranga Sahu's*

1. (1918) I L R 42 M 360 : 36 M L J 396.-(F B). 2. (1897) I L R 21 M 10.
3. (1917) I L R 40 M 612 : 32 M L J 597.

case (3). Their observation that the descendant of the founder *possibly* had a right to appoint a trustee indicates that they did not wish to commit themselves to any definite opinion on this matter.

We may also note that with reference to the validity of the appointment of certain trustees by the last trustee who was himself a descendant of the founder, the basis of their Lordships' judgment is somewhat different from that adopted by the High Court. The High Court set aside the appointment on the ground that by their status and antecedents, the persons appointed were not fit to be trustees. The Privy Council however seem to proceed on the footing that the appointment was not *bona fide* and the appointor in fact purported to put them in as managers of property which he falsely alleged to be his private property.

SANYELLAPPA HOSMANI *v.* CHANNAPPA SOMASAGAR, 47 M. L. J. 401.

Two questions of Hindu Law have been decided in this case and on both of them their Lordships have affirmed the view which has been almost unanimously held in the High Courts in India. On the first, namely, that as to the right of a murderer to succeed to the estate of his victim, the decision is rested on grounds of public policy. Their Lordships however reject the distinction suggested in the Madras case *Vedanayagam* v. *Vedammal* (1) between the legal estate and the beneficial interest, so that in the illustration put in the Madras case of the murderer transferring the property to a *bona fide* purchaser, no title can pass by the transfer. On the Madras view, there was this anomaly, that a person who would have no right of inheritance in the presence of another was nevertheless recognised as an heir to the extent of taking the beneficial interest. Their Lordships' view in the present case avoids this anomaly by holding that the murderer should be treated as non-existent.

A further question however arises on this view, as to how far persons who are related to the victim through the murderer are affected by the latter's exclusion. Their Lordships make

---

3. (1916) I L R 40 M 612 : 32 M L J 597.
1. (1904) I L R 27 M 591 : 14 M L J 297.

it clear that the murderer cannot become the stock for a fresh line of descent in respect of the victim's property, *i. e.*, it cannot even notionally be vested in the murderer so as to devolve on *his* heirs. But they seem to approve of the view expressed in *Gangu* v. *Chandrabhagabhai* (2) that the mere fact of relationship being traced through the murderer will be no ground of exclusion if a person so related happens to be the nearest sapinda of the victim. On this view the decision of the Lahore High Court in *Mussamat Jind Kaur* v. *Indar Singh* (3) will not be correct and we may note in passing that though *Gangu* v. *Chandrabhagabhai* (2) was cited before the Lahore High Court, the judgment makes no reference to the reasoning in the Bombay case. Looking at the matter from the point of view of public policy, there is no doubt great force in the argument of Broadway, J., against giving the estate to the son of a murderer if the object of the murderer was, that, if not himself, his son at least may get the property. But taking it that the son was not a party to the crime, it is difficult to justify the penalising of the son on the ground of the motive of his father's crime and it will be scarcely safe to *extend* rules of public policy beyond well-established limits.

There is however one class of cases which may present some difficulty even on the footing of the Bombay view, namely, those in which the question of the " right of representation " is involved. Take a father with two sons. If one of them kills the father, will the sons of the murderer take the grandfather's property along with the surviving son of the victim. So far as ancestral property in the hands of the grandfather is concerned, it may no doubt be said that the sons acquire a right by birth and that such right cannot be affected by their father's subsequent crime. In fact, the Hindu Law texts specifically provide that even if a person is disqualified to inherit, that circumstance will not affect the right of his sons if they are themselves free from disqualification. But in the case of the separate or divided property of the victim, his surviving son would be a *nearer* heir than the grandsons born of the murderer. But an equal right of inheritance is conceded to the grandsons on the ground of the *jus representationis*, *i. e.*, that the grandsons will take as standing in the shoes of their father. [See

---

2. (1907) I L R 32 B 275.

3. (1922) I L R 3 Lah 103.

Marudayi v. *Doraiswami Karambian* (4)]. On this footing it may well be contended that as the son himself would be excluded on the ground of his crime, his sons can be in no better position by claiming to stand in his shoes. Similarly where the legitimate son of an illegitimate son claims a share in his father's right in the properties of his grandfather as against the latter's legitimate son, it may well be suggested that if the grandfather's death has been caused by the illegitimate son, the latter's son can have no claim to share in the property as any such claim could be rested only on the *jus representationis*.

The other point dealt with by the Judicial Committee in the case under notice relates to the right of male *bandhus* to inherit in preference to female *bandhus* even though the latter may be nearer in degree to the propositus. It is, however, by no means clear how far their Lordships would be prepared to carry this preference, *i. e.*, whether it is to be confined to rival claimants who are both within the *same class* of *atma bandhus*, or *pitru bandhus*, or *matru bandhus* or even a male in a remoter class is to be preferred to a female in the nearer group. It need scarcely be pointed out that if a female is to be given a right of inheritance *as a bandhu*, it will be a departure from the express direction of the Mitakshara if a *bandhu* of a remoter class is on the ground of sex to be allowed to inherit in preference to a *bandhu* of a nearer class. And their Lordships' discussion in the present case would seem to proceed on the footing that a female may succeed as a *bandhu*. Their Lordships also seem to be against any claim of preference on the ground of relationship being *ex parte paterna* as against relationship *ex parte materna* where the claims are otherwise equal. We may note in passing that there appears to be some mistake in their Lordships' statement as to the effect of the decision in *Vedachala Mudaliar* v. *Subramania Mudaliar* (5). It related not to a question of preference as between *pitru bandhus* and *matru bandhus* but to the comparative claims of two persons both of whom were comprised in the class of *atma bandhus*.

---

4. (1907) I L R 30 M 348 : 17 M L J 275.

5. (1921) I L R 44 M 753 : 41 M L J 676.

LACHMI NARAIN MARWARI *v.* BALMAKUND MARWARI, 47 M.L.J. 441

It has sometimes been doubted whether a defendant can take steps in furtherance of a decree and the question generally arises in partition suits and mortgage actions. In this case, their Lordships recognise that after decree "it is open to any party to a suit, to whose interest it is that further proceedings be taken, to initiate the supplementary proceedings." The main point in the case related to the propriety of dismissing a suit for want of prosecution after a preliminary decree has been passed. Their Lordships lay down in general terms that after a decree has once been made, the suit cannot be dismissed unless the decree is reversed on appeal. This principle may have an important bearing upon a class of cases by no means infrequent in this country, where the plaintiff shows lack of diligence in taking the necessary steps towards the final decree. A common instance is the case where the plaintiff's application to appoint Commissioners to effect a partition or to ascertain mesne profits is struck off for his non-attendance on the appointed day or for non-payment of Commissioner's fees. Under the old Code, these steps were regarded as stages in execution and the dismissal of any such application was not regarded as involving the dismissal of the suit or as debarring a fresh application for the same purpose. But under the new Code, these applications are regarded as steps in the suit itself and it has been held that once an application of the above kind is dismissed, a further application for the same purpose cannot be entertained and in some cases, the dismissal of the petition has been held to involve the dismissal of the suit itself in respect of the relief which was sought to be worked out by that petition. We hope this class of cases may be reconsidered in the light of the principle on which the decision under notice rests.

SHANMUKHA PANDEY *v.* JAGARNATH PANDE, I. L. R. 46 All. 531.

A Hindu son sued to set aside a sale by his father and it was found that the sale was supported by necessity to the extent of Rs. 800 but not as regards the balance of Rs. 200. The question was as to what was the decree to be passed in such a

case. Their Lordships purporting to follow the earlier cases [*Gobind Singh* v. *Baldeo Singh* (1), *Emperor* v. *Narbadeshwar* (2), *Bachchan Singh* v. *Kamta Prasad* (3) and *Jai Narain Pande* v. *Bhagwan Pande* (4)] set aside the sale giving the purchaser a charge to the extent of the necessity. The attention of the Court does not seem to have been directed to the numerous cases in Madras in which the question has been considered and it has been held that where the bulk of the consideration has been found to be for valid necessity the sale ought to be upheld giving a charge to the family. There are three cases which one might think of in connection with this matter. The first case is where the bulk is proved to be for necessity and the balance an insignificant sum has not been accounted for. In this case, the sale would wholly bind.

The next case is where the amount necessary could not have been raised without the sale, that is to say the sale of a smaller portion adequate for the necessity was not a business proposition. In this case also the whole sale would be binding. If the balance amount has been applied for payment of debts not binding payable to the vendee himself or is incurred for the payment of debts not binding on the family to the knowledge of the purchaser, although the sale might be binding, the family would be entitled to a charge.

The third case is where the bulk of the consideration is good and the balance is not such as to be negligible but it is also not shown that a smaller part of the property could have been sold and the necessity met.

The Madras cases do not make the distinction which we have made as to the possibility of the need being met by the sale of a smaller portion. We do not think they exclude such consideration. We would take those cases to lay down only that in the absence of proof as to such possibility the Court would presume that the sale was necessary and give a charge to the family. If the bulk of the consideration is bad, they would presume the contrary and set aside the sale giving a charge to the purchaser. In *Banwari Lal* v. *Mahesh* (5) the Privy Council set aside a sale where a very small portion of the consideration alone was held not binding, without adverting to the principles above set forth.

---

1. (1903) I L R 25 A 330.
2. (1905) I L R 27 A 491.
3. (1910) I L R 32 A 392.
4. (1922) I L R 44 A 683.
5. (1918) I L R 41 A 63 (P C).

CHOTE LAL *v.* KEDAR NATH, I. L. R. 46 All. 565.

The point in this case was as to the power of an undischarged insolvent with respect to the after-acquired property as regards dealings and receipts. Their Lordships hold, following a long line of authorities both in England and India, that such dealings or receipts are good so long as the Official Trustee does not intervene. The case was one arising under the Insolvency Act of 1848. But there is no difference in the language of the various sections dealing with vesting in the Provincial Insolvency Act, 1920, or the Presidency Insolvency Act of this statute. The language was the same in the English statutes also, but it was pointed out by Lord Mansfield that it was necessary that a distinction should be made between the two sets of properties unless the fact of bankruptcy must be taken to reduce the insolvent to the position of a slave with an incapacity to do any act independantly. Though the rule was laid down in 25 Q. B. D. 262 in the widest terms, not making any exception in favour of immoveables, in (1892) 2 Ch. 139, it was held that that ruling did not apply to *title* in reality. This view was accepted in *Rowlandson* v. *Champion and another* (1). On the other hand, there are other decisions both in Bombay and Calcutta, notably a decision in *Ali Mahmad Abdul Hussein* v. *Vadilal Devchand* (2) where the whole law is discussed with the greatest fullness by Mr. Justice Shah who thinks that the distinction is unfounded ; in fact in England the legislature has discarded the distinction. In no view is the possession of the insolvent unlawful and his title is good as against all but the real owner. Even if his possession should be accounted as one of a trespasser, still he would be entitled to recover possession by reason of his possessory title against all persons other than the lawful owner, that is, the Official Trustee. The distinction is sought to be supported on the ground that moveables pass by delivery while immoveables pass by conveyance. Hindu Law, for the matter of that Indian Law, makes no distinction between the two kinds of property and even in England the distinction has been felt to be one without a difference and legislature has intervened and in this matter has set the two kinds of property on the same footing. The inconvenience in the rule so widely stated is—Suppose a man inherits vast immoveable property after adjudication and the assignee is

1. (1893) I L R 17 M 21. 2. (1919) I L R 43 B 890.

completely ignorant of that fact. Is the insolvent to be at liberty to alienate the property so long as the Official Assignee does not intervene? The rule may be reasonable enough where the property is money or goods consumed by use or goods employed in the trade which in fact is the source of acquisition or when the question is about the liability incurred in the course of and as a part of the acquisition itself. If the trade is with the assent, express or implied of the Official Assignee, S. 108 of the Contract Act itself may be sufficient to protect the transferee in good many cases. Seeing that there is some conflict in India and seeing also that in England, express legislation was deemed necessary, the legislature should have made the point clear.

BAIJ NATH *v.* PANNA LAL, I. L. R. 46 All. 635.

Can a payment certified by the decree-holder in his execution application be availed of to save limitation? The Allahabad High Court holds the view that a payment to be so available should have been certified and recorded in a prior proceeding. If O. 21, R. 2 should be read as prohibiting the taking notice of payments not recorded by the Court, there might be something in the argument but the rule does not say so. It only says "certified or recorded" obviously meaning thereby certified by the decree-holder or recorded as certified at the instance of the judgment-debtor. Cl. (1) says that the decree holder shall certify and the Court shall record; cl. (2) says that the judgment-debtor may inform and apply to the Court which shall issue a notice to show cause why the payment should not be recorded as certified and finally in the absence of cause shown, the Court shall record the same. Clause (3) says that no payment not certified or recorded as above shall be recognised by any Court executing the decree. If the view of the Allahabad High Court is right, there was no need for saying *certified* or *recorded*–it would have sufficed to say'recorded' The language is justifiable only on the assumption that certifying in the case of the creditor and recording where the party moving is the judgment-debtor is the condition for the recognition of the payment.

RAMASAMI REDDI *v.* MARUDAI REDDI, I. L. R. 47 M. 453 46 M. L. J. 198.

In this case, the question was whether the decision as to the occupancy right of the defendant against him in a previous suit operated as *res judicata* when the previous suit had been dismissed on the ground that the plaintiff had not given a proper notice to quit. Their Lordships held following the judgment of the Privy Council in *Midnapur Zamindary Company* v. *Naresh Narayan* (1), that it was not *res judicata*. The previous suit had been dismissed notwithstanding the decision and there were no special circumstances in the case to make the issue a material issue in the previous suit. Neither this case nor the decision of the Privy Council referred to is authority for the view that the decision on an issue against the defendant by reason of which the suit was dismissed would not be *res judicata*. The actual decision in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) goes only to that extent. In that conclusion it is supported by *Varada Aiyangar* v. *Krishnaswami* (3). Another point decided by their Lordships in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) is that an issue might become material by reason of the conduct of the parties and thus might operate as *res judicata*. Here again the view is supported by *Krishna Behari* v. *Bunwari Lal* (4) and *Tribhuvan Bahadur Singh* v. *Rameshar Baksh Singh* (5). A party might court the decision of the Court on a question as if that was the material issue. If the Court acts upon his view and gives a decision, it might become *res judicata*. The question in cases of *res judicata* is not what the Court in the subsequent suit thinks, was or was not material but substantially what the Court originally deciding thought. If the Court thought and expressly or impliedly decided that the point was material for the decision of the previous suit, the decision of the Court both on question of the materiality of the issue and on the issue would be *nes judicata*. What conduct of the party would make the issue a material issue is a somewhat difficult question. In *Krishna Behari* v. *Bunwari Lal* (4) to which we have already referred, a person claiming to be an adopted son, and seeking to set aside cer-

---

1. (1924) 47 M L J 23 (P C). 2. (1918) 36 M L J 641.
3. (1886) I L R 10 M 102. 4. (1875) I L R 1 C 144 (P C).
5. (1906) I L R 28 A 727.

tain alienations sued the alienees and the reversioner. His suit was dismissed on the ground that the alienation was for necessity though the finding on the question of adoption was in his favour. The reversioner appealed questioning the finding as to adoption. The decision on the question was held to be *res judicata* against the reversioner. In *Tribhuvan Bahadur* v. *Rameshar Baksh* (5) Lord MacNaughten was inclined to hold a decision against the plaintiff that he was not the adopted son on a remand, though at the original trial that question had been considered immaterial—and though it was really immaterial—adoption or no adoption the defendant being entitled to remain in possession, plaintiff's case of a trust declared by the defendant being found against. In *Konga Ramaswami* v. *Ponnuswami* (6) in a somewhat analogous case between co-defendants, the circumstance that the defendant had filed an appeal making the co-defendant a party questioning the correctness of the decision was considered to make the issue one substantially in issue between the defendants. In *Veeraswami Mudali* v. *Palaniyappan and others* (7) it was held on facts almost identical with those in the case under review but with this difference, viz., there the adverse decision on the question of occupancy had affected the decision as to costs that the decision operated as *res judicata*. Mr. Justice Sadasiva Aiyar in *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2) pointedly refers to that circumstance though he did not base his decision upon it. It is somewhat difficult to accept the view that circumstances that were taken to affect the Court's discretion as to costs should be regarded as questions substantially in issue. We should rather regard such decisions as only subsidiary or incidental to the suit.

NARAYANAN CHETTY *v.* MUTHIA CHETTY, I L R 47 M. 692 : 46 M. L. J. 575.

We think the distinction made in this case between an ordinary family owning immoveable properties and the manager agreeing to sell and a trading family purchasing in the course of money-lending business a bit of immoveable property and

2. (1918) 36 M L J 641.
5. (1906) I L R 28 A 727.
6. (1922) 16 L W 981.
7. (1924) 46 M L J 515.

subsequently selling it on advantageous terms is sound. Even in the case of a trading family, a distinction should be made, we think, between property marked out for family residence or property inherited ancestrally or looked upon as the permanent investment for the family and immoveable properties acquired in the course of the trade and more or less forming part of the assets of the trade. Certain cases in Madras have decided that in the case of trading families, the entire family property should be treated as embarked in the trade. Though this may in a sense be true, that is to say, in the sense that trade being authorised, debts incurred therein must be taken to have been validly incurred on the credit of the entire family property and that all the family property should be held liable for the debts incurred, it would be extravagant to hold on the authority of those rulings that the sale of family immoveable property whatever its nature would be supported as if it were an asset in the business without reference to any impending necessity—not even necessity as liberally interpreted—*i. e.*, trade necessity. It would, we think, be monstrous to hold for instance that because a promissory note passed in the course of such business would be suable without proof of necessity [see *Raghunathji Tarachand* v. *The Bank of Bombay* (1)] a sale of the family house would be similarly supported without inquiry as to necessity. The yaluable observations of Sir Bhashyam Aiyangar, J. in *Sudarsan Maistry's case* (2) as to the circumstances in which property acquired in the course of a partnership trade should be held to form part of the assets may be of assistance when a similar question arises in the case of a joint family. The power of the manager of the business in respect of assets actually employed in trade or acquired in the course of such trade and not transferred by the conduct of the family into the category of the permanent as distinguished from the fleeting assets of the family, would be much higher than that in respect of the latter kind of property. The subject can hardly be said to be free from doubt but the tendency seems to be in favour of recognising wide powers in the manager even in the latter kind of property.

In the case under review, the property had been purchased from a customer in settlement of accounts with him at a loss

---

1. (1909) I L R 34 B 72.

2. (1901) I L R 25 M 149.

and the manager agreed to sell the same some time after at a profit. The question was whether the contract could be enforced against the other members of the family including minor members. Their Lordships held that it could be, on the ground that the contract was binding on the family in the circumstances and that the minor members could not take advantage of the special rule laid down as to guardians of minors in respect of contracts for the purchase of immoveable property. The question as to the enforceability of guardian's contracts to sell seems to be quite unsettled but so far as the manager's contracts go, as pointed out in this case, the authorities seem to be in favour of enforcing them. The distinction is based upon the fact that the manager has himself an interest which entitles him to sell the family property independently without reference to the minor or his individual interest. But in this case, the manager was dead and the minor co-parceners were sued.

Their Lordships held that this circumstance made no difference. Still the liability would not be personal but liability *qua* family property and restricted to the family property and one that can be discharged by the next manager if there is one adult and competent.

PALANI *v.* SETHU, I. L. R. 47 M. 706 : 47 M. L. J. 155.

This case illustrates how by a side wind as it were, the presumption as to legitimacy under S. 112, Evidence Act, introduces a case of legitimation by marriage supervenient under the Indian Law, though the law does not recognise any such legitimation expressly. In this case a married woman had illicit relations with a man and apparently conceived a child by him and before the child was born, she was divorced by her husband and she married the paramour. The question was, whether in these circumstances, the child could be regarded as the legitimate child of the second husband. His Lordship Mr. Justice Krishnan holds it could be, and we think rightly. The section says "The fact that a person is born during the continuance of a valid marriage between his mother and a man shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten." The section would seem to require the application of the presumption unless possibility of access is negatived. Mere fact of the currency of marriage cannot exclude the possibility of access since access is a fact and may exist in spite of its illegality. The married relation with another might pre-dispose the Court in favour of finding non-access but cannot constrain it to so hold in the face of facts. In England there seems to be a lot of literature on the subject though in the peculiar conditions of Indian Society the question rarely arises.

As a question of Hindu Law, the point requires further consideration. Under the Hindu Law the point is not whether a son is legitimate or not legitimate but whether he is an *aurasa*. The definition of an *aurasa* as given in Manu is :— "*Sva kshetre samskritayam tu swayamuthpadayeth hi yam tam aurasam vijaniyat.*" The requisite seems to be—"the child must be begotten by one on his own wife," *i. e.*, she must have been the wife of the man at the time of procreation. Yajnavalkya is not so clear. "*Dharma patni thasyam jata aurasah putrah,*" *i. e.*, "born of *Dharma patni.*" The child of a pregnant woman married is given the name of *Sahoda* : "*Ya garbhini samskriyate jnantajnatapi va sati vodhuh sa garbho bhavati Sahoda iti uchyate.*"—MANU.

EMPEROR *v.* NABAB ALI, I. L. R. 51 Cal. 236.

Whatever may be the probative value attaching to depositions not taken in accordance with the provisions of O. 18, R. 5

of the Civil Procedure Code, or S. 360 of the Criminal Procedure Code, it is difficult to overlook the force of reasoning in *Elahi Baksh Kazi* v. *Emperor* (1), *Ramesh Chandra Das* v. *Emperor* (2) and *Meango* v. *Bavish* (3) which have held that depositions in recording which the requirements of those provisions have not been complied with are none the less admissible in evidence in a prosecution of the witness for perjury or for any other offence. As observed by the learned Judges in the case under notice, there is a very large body of judicial opinion in favour of the contrary view that the non-compliance of those provisions renders the deposition inadmissible in evidence in any prosecution of the witness. See also *Debi Dayal Panday* v. *Ram Sakal Pathak* (4) and *Iman Din* v. *Niamat Ullah* (5). It has also been sometimes said that slight non-compliance with those provisions does not render the deposition inadmissible in evidence while a serious non-compliance would render it inadmissible. Cf. *Chenchiah* v. *King-Emperor* (6). This last view has not the merit of definiteness about it and we are left with no guidance in the language of the provision as to what non-compliance is slight and what would be serious. Amidst such diversity of judicial opinion it is only the highest tribunal that can decide the question finally. But we are unable to see much of principle in the view that when the safeguards provided by the law are not observed their non-observance affects the admissibility of the deposition in evidence rather than the value to be attached to it as a correct record of what the witness said. No doubt in such a case, the presumption under S. 80 of the Evidence Act would not arise. Again it cannot be said that the depositions of witnesses in cases where no appeal lies, as for instance suits under S. 9 of the Specific Relief Act, to which the provisions of O. 18, R. 5, do not apply and are not therefore observed, cannot be given in evidence in prosecutions of the witnesses for perjury in the course of their examination. It would also be a question whether the notes of evidence taken by a Judge in the course of a Small Cause Trial cannot be given in evidence in the prosecution of a witness for an offence like perjury connected with it. These considerations seem to show that when the safeguards as to accuracy laid down in O. 18, R. 5, of the Civil

1. (1915) I L R 45 C 825.
2. (1919) I L R 46 C 895.
3. 7 L W 435.
4. (1921) Pat 139.
5. (1919) 1 Lah 361.
6. I L R 42 M 561.

Procedure Code, or S. 360 of the Criminal Procedure Code have not been observed, the deposition is not thereby rendered inadmissible in evidence in another proceeding. In this connection, it may be noticed that the class of cases where a judgment or conviction is based on evidence which has been taken in contravention of those provisions and the Appellate Court on that ground sets aside the judgment or conviction, stand on a different footing and have little bearing on the question we are considering as in those cases the judgment rests on the accuracy of the record of the witnesses' testimony of which there is no guarantee as the safeguards provided by law have not been duly observed. Reference may be made in this connection to this distinction being drawn by the learned Judges in *Hira Lal Ghosh* v. *The King-Emperor* (7).

SAREMAL PUNAMCHAND *v.* KAPURCHAND, I. L. R. 48 Bom. 176.

This decision only affirms the well-settled power of a partner in a trading partnership to bind the firm by his borrowings in the name of the partnership. The liability of the partnership for the bills or notes of a partner was clearly recognised in England even as early as the 17th century in *Lane* v. *Williams* (1) where it was held that even though there was no proof that the money for which one partner executed a pronote was used in the trade or brought into the partnership stock, all the partners were liable therefor. This rule has been treated by the Privy Council as well settled in an appeal from the Sudder Dewany Adaulat at Agra in *Bunarsee Dass* v. *Gholam Hossein* (2). The only requisite to be established before binding the other partners is that borrowing should be an incident to the nature of the business of the partnership ; and borrowing has been considered to be a necessary incident of a trading partnership, which has been defined in the case under notice following *Higgins* v. *Beauchamp* (3), as a partnership part of whose business consists in the purchase and sale of goods. Of course, where a partner borrows on his own individual responsibility and does not purport to pledge the credit of the firm, the firm would not be liable even though the money may be utilised for the purposes of the business. See Lindley on *Partnership*, (8th edition), pp. 232 to 234.

---

1. 2 Vern 277, 292.

2. 13 M I A 358 at 363. 3. (1914) 3 K B 1192.

7. (1914) 28 C W N 968 at 972, 973.

BAPUJI SORABJI *v.* LAKHMIDAS ROWJI, I. L. R. 48 Bom. 200.

A receiver being an officer of the Court appointing him and under its control, it seems clear that when he has to compromise an action in another Court in which he is a party as such, he can do so only with the sanction and approval of the Court which appointed him. The further question in this case is, whether when a receiver is appointed in an administration action pending before one Judge of the High Court, and a suit is brought against the receiver as such and the suit is proceeding before another Judge of the same Court, sanction for the compromise by the receiver of the latter suit should be applied for and got before the Judge in whose Court the first action is pending or before the Judge in whose file the action which has to be compromised is pending. The learned Judge in the case under notice has held, following a well-established practice in England that the application should be made for the purpose to the Judge who appointed the receiver or in whose Court the action in which he was appointed is pending.

Where a suit has to be commenced by a receiver appointed in an administration action, as for instance against a debtor to the estate being administered, the procedure is for the receiver to apply beforehand in the administration action for the leave of the Court to do so. The English practice in such cases is that an application for an order of this description is by summons in Chambers supported by an affidavit or other evidence of the facts from which the Judge can determine whether the proposed action is proper. In such cases, the opinion of a barrister in actual practice that there is a good ground of action is usually required. Daniel's *Chancery Practice,* 7th edition, p. 249. If this is the procedure in the case of leave to commence an action, it seems clear that a similar procedure will have to be adopted by the Receiver in the administration action itself and before the Judge before whom it is pending, when a suit against him as receiver has to be compromised. If the sanction of that Judge is not obtained in this manner, the receiver stands the risk of the Court under whose control he has to act not approving of the terms of the compromise and his having to make good to the estate the loss which the Court may consider reasonable, when his accounts have to be passed.

END OF VOLUME XLVII.