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NOTES OF RECENT CASES

Abdur Rahman, J.
15th November, 1939.

S. A. No. 876 of 1936

Transfer of Property Act (IV of 1882), S. 53—Alienation with intent to defeat or delay transferors creditors—Relief to the extent of small portion of consideration proved to have been paid by alienee—If can be granted.

Where it is found that an alienation is made with intent to defeat or delay creditors, the alienee being a party to the fraud cannot be permitted to urge that a relief to the extent of the consideration proved to have been paid by him, should be granted to him. The alienation being bad, the whole of it has to be avoided at the option of any defeated or delayed creditor and not a portion merely.

K. Kuttirishna Menon for Appellant.

Respondents not represented.

K.S.

Lakshmana Rao, J.
16th November, 1939.

Crl. R. C. No. 422 of 1939.

Criminal Procedure Code (V of 1898), Ss. 517 and 523—Confiscation of properties seized by Police during investigation and sent to the Magistrate—When proper.

Petitioner made a complaint that he was robbed of jewels and documents while asleep in his house by the several accused. The police came to the house of the petitioner for investigation whereupon petitioner reported that there was no theft nor robbery and produced all the articles and handed them over to the police stating that his complaint was not true. The police sent up the goods to the Magistrate and recommended the throwing out of the complaint as false. An order was accordingly passed and further the articles were confiscated to Government. In revision, the Sessions Judge held that the order of confiscation was proper within the meaning of the ruling in 24 M.L.J. 1 in as much as they were found by the police under circumstances which create suspicions of the commission of the offence of false charge. On revision held, that the articles were not used by the petitioner

for foisting a case against the accused but for showing that his own complaint was not true. In the result the confiscation order was set aside.

K. G. Srinivasa Aiyar for Petitioner.

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

K.C.

Leach C. J. and Kris'naswami Aiyangar, J. Appeal No. 251 of 1939.
21st November, 1939.

Court-Fees Act (VII of 1870), Sch. II, Art. 17 (A)—Suit filed in Munsif's Court transferred to Subordinate Judge's Court to be tried along with a suit in latter Court—Dismissal of both suits by a common judgment—Appeal to District Judge in suit originally filed in Munsif's Court—Court-fee—If to be as on appeal from decree of Court of Subordinate Judge (Rs. 100) or decree of Munsif's Court (Rs. 15)—Power of appellate Court to correct mistake of lower appellate Court as to Court-Fees.

A suit originally filed in a Munsif's Court was transferred to a Subordinate Judge's Court for trial along with a suit in latter Court. Both the suits were dismissed by a common judgment. In the suit transferred from the Munsif's Court an appeal was filed to the District Judge's Court, with a Court-fee of Rs. 15 (as an appeal from Munsif's decree).

Held, the decree was passed by the Court of the Subordinate Judge and must be declared to be a decree of that Court and under Art. 17 (A) the Court-fee shall be Rs 100. S. 12 (11) gives an appellate Court power when an appeal comes before it to correct a mistake by a lower appellate Court.

K. V. Ramachandra Aiyar for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

K.S.

Abdur Rahman, J. S. A. No. 949 of 1936,
24th November, 1939.

Plaintiff asking for injunction restraining interference with his individual right of worship by restraining persons other than Brahmins going further than certain limits in temple—Locus standi—Madras Hindu Religious Endowments Act (II of 1927), S. 73—How far a bar.

A plaintiff asking for the relief that he should be allowed to exercise his right to worship in the manner in which he has been doing it heretofore and that his deity and temple should not be defiled by allowing caste Hindus other than Brahmins to proceed beyond a particular portion of the temple in contravention of Sastras, Agamas and longstanding usage, has an individual right and since right of worship is a civil right he has a *locus standi* to maintain an action for injunction restraining interference with his rights.

S. 73 of Hindu Religious Endowments Act is not applicable to cases of individual rights.

N. Sivaramakrishna Aiyar for Appellant.

M. Balasubramania Mudaliar for Respondent.

K.S.

Horwill, J., S. A. No. 843 of 1936,
28th November, 1939.

Civil Procedure Code (V of 1908), S. 11, (Expln. IV)—Res judicata—Might and ought—Paramount title—Mortgage of undivided 1/3rd share of co-

parcener—Allotment of mortgaged properties to other co-parceners at a subsequent partition—Non-mortgagor impleaded as defendants—Ex parte decree against mortgagor and in respect of the original mortgaged properties—Symbolical delivery inspite of objections of defendants in execution—Mortgagee decree-holder auction-purchaser—Subsequent suit for general partition—Contention of non-mortgagor Defendants that property in their hands not liable for the mortgage debt—Whether ex parte decree operates as res judicata.

Subsequent to a mortgage of his undivided 1/3rd share by one of the co-parceners a partition was entered into whereby the mortgaged properties were allotted to the other co parceners. In a suit on the mortgage there was no specific allegation in respect of the partition and the non-mortgagors were also impleaded as defendants who were *ex parte*. An *ex parte* decree was passed against the mortgagor and in respect of the undivided 1/3rd share of the mortgaged properties. In spite of objections by the other defendants in execution symbolical delivery was ordered.

In a suit for general partition by the mortgagor-decree-holder auction purchaser the other defendants raised the plea that their share could not be proceeded against. As against the decree-holder's contention that the other defendants might and ought to have raised the present contention in the mortgage suit and that the *ex parte* decree operated as *res judicata* in the present suit,

Held, that it was not barred by *res judicata* and that the question of paramount title could not have been decided in the mortgage suit.

1937 A.L.J. 536, I.L.R. 24 All. 423, 52 M.L.J. 52, A.I.R. 1927 Mad. 945 referred to.

Held further, the contention that the order in execution negating defendant's objections was binding upon the defendants, could not be raised for the first time in Second Appeal.

R. Krishnaswami Aiyangar for Appellant.

S. Panchapakesa Sastri and K. Venkateswaran for Respondents.

K.S.

The Chief Justice and Krishnaswamy
Aiyangar, J.,
5th December, 1939.

L. P. A. No. 11 of 1939

Civil Procedure Code (V of 1908), O. 22, r. 10—Agreement between financier and an unsuccessful plaintiff in a partition suit to provide funds to file and prosecute appeal—Condition for financier reimbursing himself from properties which may be got in the event of success in appeal and for a half share therein—Death of appellant—If financier entitled to come on record as legal representative of appellant and continue appeal.

On the dismissal of his suit for partition, *A* the plaintiff entered into an agreement with *N* a financier whereby the latter agreed to provide funds for filing and prosecuting the appeal; the agreement further provided that *N* was to reimburse himself from out of the properties which may be got by *A* in the event of the success in the appeal and *N* was to get half of *A*'s share in the properties. The agreement further empowered *N* to get himself impleaded as a party to the appeal. *A* died after the filing of the appeal and his son declined to prosecute the appeal. On *N*'s application to bring himself on record as legal representative under O. 22, r. 10, Civil Procedure Code and continue the appeal,

Held, that there was no assignment of present interest and *N* could not come on record and continue the appeal.

I.L.R. 35 All. 273 (P.C.) referred to.

K. Rajah, Aiyar and *N. Somasundaram* for Appellant.

T. V. Mutukrishna Aiyar and *K. Venkateswaran* for Respondents.

K.C.

Lakshmana Rao, J.

Cr. R. C. No. 977 of 1939.

13th December, 1939.

(Case Refd. No. 48 of 1939).

Madras Borstal Schools Act—If applicable to persons other than adolescent males.

Madras Borstal Schools Act have been applied only to adolescent offenders of the male sex.

K. Venkataraghavachari for the Crown.

Accused not represented.

K.S.

Burn, J.

C. R. P. No. 159 of 1937.

14th December, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Petition for attachment without giving particulars required by Civil Procedure Code, O. 21, r. 13—If in accordance with law to save limitation under Art. 182, cl. (5) of Limitation Act in another execution petition.

An execution petition containing a prayer for attaching immoveable properties, but in which no particulars of the properties to be attached were given as required by O 21, r. 13, Civil Procedure Code, is not one in accordance with law within the meaning of Art. 182, cl. (5) so as to save limitation in respect of another execution application.

T. E. Ramabhadrachari for Petitioner.

T. R. Srinivasan for Respondent.

K.S.

Pandrang Row and Abdur Rahman, JJ. Appeals Nos. 156, 166, 179 and
16th October, 1939. 191 of 1936.

Hindu Law—Widow—Maintenance—Widow's private means or Stridhana—If to be taken into consideration in fixing rate of maintenance.

On principle there seems to be no reason why a widow's stridhanam property or private income should be taken into consideration, if her right to maintenance is absolute and the duty of persons who are in possession of her husband's estate unqualified and unconditional.

P. V. Rajamannar and K. Subba Rao for Appellants in Appeal No. 156 of 1936 and Respondents in Appeal Nos. 166 and 179 of 1936.

K. Umamaheswaram for Appellant in Appeal No. 179 of 1936.

D. R. Krishna Rao for Appellant in Appeal No. 191 of 1936.

P. S. Raghavarama Sastri for Appellants in Appeal Nos. 166 and 179 of 1936 and Respondent in Appeal No. 156 of 1936.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. No. 29 of 1937.
8th November, 1939.

Hindu Law—Stridhana—Illegitimate daughters of Hindu woman who was not a dancing girl—If entitled to succeed to stridhana of her mother's mother.

The fact that Courts had recognised as between a mother and her illegitimate daughter the right of inheritance was no warrant for the extension of sapindaship to other relations. The illegitimate daughters of a daughter are not entitled to succeed to the stridhana of their maternal-grandmother.

Decision of *Varadachariar, J.*, affirmed.

K. S. Desikan for Appellant.

S. Muthiah Mudaliar for Respondent.

K. S.

Venkataramana Rao and Kunhi Raman, JJ. Appeal No. 318 of 1936.
15th November, 1939.

Madras Impartible Estates Land Act (II of 1904), S. 4—Amounts borrowed by the late holder for maintaining himself—If "necessary purpose"—Borrowing after surrendering the whole estate to son—Debt how far binding on estate.

Where a Zamindar by his own act deprives himself of the income of the Zamindari which he is legitimately entitled to enjoy and out of which he was obliged to defray his maintenance expenses it is not competent for him to incur any debt for his maintenance so as to bind the Zamindari under S. 4 of the Impartible Estates Act.

S. Ramaswami Aiyar and C. K. Venkatanarasimham for Appellant.

T. R. Venkatarama Sastri, A. Swaminatha Aiyar and S. Thyagaraja Aiyar for Respondents.

K. S.

[F. B.],
The Chief Justice, Wadsworth and Patanjali Sastri, JJ. C. R. P. Nos. 572 etc., of 1936
15th November, 1939.
N R Ç

Provincial Insolvency Act (V of 1920), S. 35—Adjudication based on alleged fraudulent preference of one creditor—Finding in proceedings under S. 54 of the Provincial Insolvency Act, that there was no preference—Annulment of adjudication under S. 35—Jurisdiction to make—Failure of debtor to object to adjudication—If bar to application for annulment—S 37—Disposal of assets realised on annulment.

When it is shown that no act of insolvency has in fact been committed the Court can set aside the adjudication on the ground that the debtor ought not to have been adjudged insolvent. The fact that the debtor does not object to an order of adjudication being passed against him is no bar to granting of an application for an order setting aside the adjudication under the provisions of S. 35. When an adjudication has taken place under the Provincial Insolvency Act and it has been shown that no act of insolvency has been committed the Court has no discretion in the matter. It must annul the adjudication. The word used is "shall" and differs from S. 21 of the Presidency Towns Insolvency Act where the word "may" is used.

(1939) 2 M.L.J. 753, overruled.

Under the powers under S. 37 money fraudulently paid by the insolvents after his adjudication but before annulment to an individual having been found to be the result of a fraud were allowed to be distributed rateably between the creditors who had proved in the insolvency. The other assets realised were directed to be delivered to the debtors.

K. Rajah Aiyar M. Krishna Bharati, S. Ramachandra Aiyar for Petitioners.

T. M. Krishnaswami Aiyar, N. Sivaramakrishna Aiyar, K. Kuttikrishna Menon, P. Anandan Nair and A. C. Sampath Aiyangar for Respondents.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ. S. A. No. 174 of 1936.
16th November, 1939.

Hindu Law—Adoption by widow—Consent of sapindas—Want of consent of daughter's son—If invalidates adoption.

Practice—Division Bench not accepting as correct a decision on a question of law of another Division Bench of same High Court—Necessity to refer to Full Bench.

The only ground on which a daughter's son can really claim to be consulted in an adoption by a widow, is his interest in the property. He is not a member of the family and is only regarded as a sapinda for purposes of succession. Where the widow has received the consent of her husband's nearest agnates the fact that the major son of her daughter did not consent does not invalidate the adoption.

Texts and authorities fully examined.

I.L.R. 43 Mad. 876, 20 L.W. 503 view of Jackson, J., I.L.R. 57 Mad. 41 and Mayne 10th Edn pp. 223-5, followed.

20 L.W. 503 (Ramesam, J.'s view) and I.L.R. 49 Mad. 652, overruled

The division bench is a final Court of appeal in an Indian High Court, unless the case is referred to a Full Bench and one Division Bench should regard itself bound by the decision of another Division Bench on a question of law. If a Division Bench does not accept as correct the decision on a question of law of another Division Bench, the only right and proper course to adopt is to refer the matter to a Full Bench.

V. Govindarajachari and *M. Harisarvothama Rao* for Appellant.
P. Satyanarayana Rao, *V. Subramaniam* and *V. Satyanarayana* for Respondent.

K. S. ———

Stodart, J.
 17th November, 1939.

S. A. No. 787 of 1936.

Hereditary office of archaka—If immoveable property which can only be conveyed by a registered instrument—Inalienability of right.

A turn of worship by an archaka in a temple is the right to exercise the duties of the office at a stated time and in a certain order. The right is not immovable property which can only be conveyed by a registered instrument. The right is also inalienable except under custom.

P. Somasundaram for Appellants.
Jiddu Lakshmayya for Respondents.

K. S. ———

Kunhi Raman, J.
 21st November, 1939.

A. A. O. No. 176 of 1938.

Civil Procedure Code (V of 1908), O. 21, rr. 2 and 53 (3)—Person who attaches a decree—If can exercise the power under O. 21, r. 2 (1) of certifying a payment or adjustment of the decree.

A person who attaches a decree and who comes within the scope of O. 21, r. 53 (3) cannot exercise the power that is vested in the decree-holder himself under O. 21, r. 2 (1) of certifying a payment or adjustment of the decree.

41 C.W.N. 880 and C.M.S.A. No. 136 of 1937 (Madras unreported) followed.

V. Govindarajachari for Appellant.
V. Suryanarayana for Respondent.

K. S. ———

The Chief Justice and Krishnaswami Aiyangar, J.
 21st November, 1939.

L. P. A. No. 9 of 1938.

Indian Contract Act (IX of 1872), S. 19, Exception—Vendor deliberately making false statement—If vendee put upon inquiry

A vendor deliberately concealed from a purchaser the fact that he had already granted a lease of the property sold, but the buyer if he had been diligent could have ascertained this.

Held, the absence of exercise of diligence by the buyer was not a defence open to the vendor who had concealed the fact of the execution of the lease in order to deceive the plaintiff and had induced him to enter into the contract.

I.L.R. 52 Bom. 883, disapproved.

I.L.R. 53 All. 374, 43 C.W.N. 347 and I.L.R. 11 Mad. 419, followed.

Decision of *Horwill, J.*, affirmed.

A. Bhujanga Rao and *D. R. Krishna Rao* for Appellant.

Ch. Raghava Rao and *T. Satyanarayana* for Respondent,

K. S. ———

*The Chief Justice and
Krishnaswami Aiyangar, J.
22nd November, 1939.*

L. P. A. No. 75 of 1938.

Madras Hindu Religious Endowments Act (II of 1927), S. 43—If ousts the jurisdiction of Civil Courts to entertain a suit by a dismissed archaka challenging the correctness of the trustee's action.

In a suit by a hereditary *archaka* challenging the correctness of the action of the trustees in dismissing him, ostensibly on the ground of his suffering from leucoderma but really owing to ill will on the part of the trustees.

Held [affirming the decision of *Wadsworth, J.*, reported in (1938) 2 M.L.J. 516.], when the scheme of the Act and the provisions of Ss. 43, 53 and 54 are considered no reasonable doubt can exist that the legislature has used language which is intended to have the effect of ousting the jurisdiction of the Courts. The remedy of the dismissed *archaka* is to appeal to the Temple Committee.

T. V. Muthukrishna Aiyar for Appellant.

M Subbaroya Aiyar for Respondent.

K. S.

*Horwill, J.
23rd November, 1939.*

S. A. No. 833 of 1936.

Civil Procedure Code (V of 1908), S. 64—Debtor undertaking to mortgage specified properties in default of payment of his debt within one month—Subsequent attachment by a decree-holder—Mortgage on default of payment, in pursuance of prior agreement—Priorities.

Where on the date of the attachment there was an enforceable contract to execute a mortgage and the mortgage is executed subsequent to the attachment, the attachment is subject to the mortgage which was executed in pursuance of the contract.

8 M.L.J. 266, I.L.R. 59 Mad. 1 and 21 M.L.J. 82, followed.

V. Govindarajachari for Appellant.

Ch. Raghava Rao and K. Subramaniam for Respondent.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
23rd November, 1939.*

L. P. A. No. 74 of 1938.

Madras Co-operative Societies Act (VI of 1932), S. 51—Award under—Application for execution—Limitation—Article applicable.

By r. 15 (7) (c) of the rules framed under the Madras Co-operative Societies Act, the Court shall enforce the award as if it were a final decree of the Court and Art. 182 and not Art. 181 of the Limitation Act applied to execution of an award.

71 M.L.J. 759; I.L.R. (1937) Mad. 495, overruled.

I.L.R. 58 Mad. 760 and I.L.R. 55 Cal. 499, applied.

Decision of *Venkataramana Rao, J.*, affirmed.

N. R. Sesha Aiyar for Appellant.

K. Kuttikrishna Menon for Respondent.

K, S.

Horwill, J.
24th November, 1939.

S. A. No. 172 of 1938.

Agricultural lease—Tenant temporarily deprived of the use of the leased land for some time on account of flooding by sea water—Tenant if entitled to abatement of rent.

Where the tenants claimed abatement on the ground that they were temporarily deprived of the use of the leased agricultural land because of flooding by the sea.

Held, an abatement could only be granted where the loss is of a permanent nature.

K. Kuttikrishna Menon for Appellant.
P. Govinda Menon (amicus curiae).
K. S.

Kunhi Raman, J.
24th November, 1939.

A. A. A. O. No. 49 of 1938.

Indian Contract Act (IX of 1872), S.135—Scope—Extension of time given to judgment-debtor by District Munsif—If discharges the surety.

The extensions of time given to the judgment-debtor on two occasions by the District Munsif cannot have the legal consequence of discharging the surety under S. 135 of the Indian Contract Act.

I.L.R. 58 Mad. 625, explained and (1938) M.W.N. 1131, referred.

B. S. Ramachandra Rao for Appellant.
A. Venkatasubbiah Chetty for Respondents.
K. S.

Kunhi Raman, J.
27th November, 1939.

A. A. A. O. No. 57 of 1937.

Civil Procedure Code (V of 1908), S. 144—Archaka dispossessed in execution of a decree succeeding in appeal—Meantime dismissal of archaka by a competent authority—Restitution—If can be granted.

An archaka of a temple who was dispossessed in execution of the decree of the Court of first instance of lands annexed to the office though he succeeded in the appeal was meantime dismissed by a competent authority.

Held, that the archaka was not entitled to restitution of the lands annexed to the office.

V. T. Rangaswami Aiyangar for Appellant.
K. Kuttikrishna Menon for Respondent.
K. S.

The Chief Justice and Krishnaswami Aiyangar, J. L. P. A. No. 86 of 1938.
28th November, 1939.

Madras Estates Land Act (I of 1908), S. 26 (3)—Applicability—Landholder's predecessors in title fixing rent (which was lower than lawful rent) under compromise decree—Patta and muchilika fixing the prevailing rate—Distraint for rent—Applicability of S. 26 (3)—Validity of distraint.

The fact that in 1922 the rent was fixed by a compromise decree of the Court would not in itself prevent S. 26 (3) operating. If the rate of rent granted under compromise decree by the predecessors in title was lower than the rent ruling on such or similar land in the neighbourhood, S. 26 (3) must come into operation. The holders of the land are not bound by their

predecessors' contract and are entitled to distrain for rent which was payable under the patta and muchilika and which represented the lawful rate and the tenant is not entitled to bring a suit to set aside the distraint.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari for Respondent.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
28th November, 1939.*

L. P. A. No. 82 of 1938.

Madras District Municipalities Act (V of 1920), S. 93 (1)—Licensed distiller having one of his depots in charge of an agent within a municipality selling arrack to licensed retail dealers—If transacts business within municipality and if liable to pay profession tax.

The respondent, a licensed distiller owned an arrack distillery in Bellary. Under his license he was required to maintain depots for the sale of arrack at various places in the district. One of those places was Adoni. The depot at Adoni was in charge of an agent of the respondent and he sold arrack to licensed dealers. The money received in respect of arrack sold at Adoni depot was paid by the respondent's agent into the treasury the same evening,

Held [reversing the decision of *Wadsworth, J.*, reported in (1938) 2 M.L.J. 1035.], in the circumstances the respondent transacted business in Adoni within the meaning of S. 93 (1) of the Madras District Municipalities Act, 1920 and was liable to pay profession-tax.

M. S. Ramachandra Rao for Appellant.

P. Chandra Reddy for Respondent.

K. S.

*Horwill, J.
29th November, 1939.*

S. A. No 1004 of 1936.

Interest Act (XXXII of 1839), S. 1—Deposit held under contract to pay interest—Refusal to pay on demand—Wrongful retention of the money—Interest Act—If applicable.

Where money was originally held in deposit under a contract to pay interest at a certain rate, from date of refusal to pay the money it was no longer held as a deposit under the original contract but was held adversely. The fact that by the contract which had come to an end a lower rate of interest was payable does not prevent the application of Interest Act, S. 1 after the contract had ceased.

K. Kotayya for Appellants.

P. Satyanarayana Rao for Respondents.

K. S.

*Horwill, J.
1st December, 1939.*

S. A. No. 435 of 1935.

Civil Procedure Code (V of 1908) O. 22, r. 12—Suit filed by an uncle on behalf of his nephew to get a decree of the Panchayat Court against his nephew set aside on the ground that he was minor—Minor actually major on date of decree as well as suit—Suit if can be allowed to be continued by the nephew.

A suit was filed by an uncle in the name of his nephew for the purpose of making it appear that the nephew was a minor on the date of a decree of

the Panchayat Court against the nephew and to have the decree set aside. It was found that the plaintiff was a major on the date of the decree as well as suit and the suit was dismissed by the District Munsif. The Subordinate Judge however on appeal held that even if the plaintiff was a major the District Munsif ought to have given the nephew an opportunity of continuing the suit in his own name. On second appeal held, if the plaintiff was a major when the suit was filed, then clearly no other person had a right to file the suit on his behalf and the suit had to be dismissed. O. 22, r. 12, Civil Procedure Code, does not contemplate the giving of an opportunity to a person who is not on record to continue the suit. That rule applies to a case where a suit has been filed by a minor who becomes a major during the course of the trial.

A. Viswanatha Aiyar and A. Ramaswami Aiyar for Appellants.

V. T. Rangaswami Aiyangar and T. T. Vijayaraghavan for Respondents.

K. S.

Horwill, J.
4th December, 1939.

S. A. No. 1015 of 1936.

Insolvency—Sale of property by Official Receiver—If ordinary Civil Court has power or control over the acts of Official Receiver—Mere irregularity or inadequacy of price if ground for setting aside sale in a suit.

Where a suit is filed in the ordinary Civil Court for setting aside a sale of the insolvent's property by the Official Receiver a mere irregularity or inadequacy of price would be no ground for setting aside the sale. A sale can be set aside in a Civil Court only on grounds similar to those on which a contract could be set aside. An ordinary Civil Court has no power or control over the acts of the Official Receiver.

P. Satyanarayana Rao and S. Srinivasachari for Appellants.

A. Lakshmayya and S. Venugopala Rao for Respondents.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
4th December, 1939.

L. P. A. No. 75 of 1937.

Specific performance—Contract for sale of land—Vendee entering into possession—One of the vendors (member of a joint Hindu family) minor—Right of vendors to sue for specific performance.

Where the vendors were (three brothers forming a joint Hindu family) one of whom was a minor, and the vendee had entered into possession, a suit for specific performance at a time when the minor had attained majority is maintainable.

Hoggart v. Scott, 1 Russ & M. 293 and *Salisbury v. Hatcher*, 2 Y. & C.C. C. 54, applied.

[Decision of *Venkataramana Rao, J.*, affirmed.]

P. Somasundaram for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
6th December, 1939.

C. M. P. No. 5291 of 1939.

Civil Procedure Code (V of 1908), S. 109—Order on appeal deciding that a sale in execution of mortgage decree should be set aside—If a 'final order' within meaning of S. 109 on which an appeal can be preferred to His Majesty in Council.

The mortgagee decree-holders after obtaining leave to bid and set off; became the auction-purchasers in the execution. The mortgagor's application to have the sale set aside on the ground of material irregularity was dismissed. The High Court on appeal set aside the sale. The decree-holders application for leave to appeal to His Majesty in Council was opposed on the ground that the order on appeal did not constitute a final order within the meaning of S. 109, Civil Procedure Code.

Held, the order finally disposed of the question whether the sale should be set aside and the order is final within the meaning of S. 109, Civil Procedure Code, and the decree-holders are entitled to have leave to appeal to His Majesty in Council.

T. M. Krishnaswami Aiyar and A. Balasubramania Aiyar for Petitioners.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Kunhi Raman, J.

C. R. P. No. 673 of 1937.

7th December, 1939.

Civil Procedure Code (V of 1908), S. 115 and second schedule cl. 16—Award made into decree of Court under cl. 16—No appeal filed against decree—Interference with award by way of revision—If competent.

When a final judgment has been pronounced on an award under Civil Procedure Code, Sch. II, cl. 16 and no appeal has been filed against such decree, it is not open to a petitioner to attack the validity of the award itself in a Civil Revision Petition.

A. C. Sampath Aiyangar for Petitioner.

T. V. Ramanatha Aiyar for Respondent.

K. S.

Mockett, J.

C. R. P. No. 214 of 1938.

8th December, 1939.

Limitation Act (IX of 1908), S. 4—Madras Village Courts Act—Filing of suit for Rs. 20, in District Munsif's Court, on reopening day, period of limitation having expired when Court was closed—Cognisability of suit by Village Court under Madras Village Courts Act—Effect—Civil Procedure Code, S. 15—Court of lowest grade competent to try—Village Court if such a Court.

In a suit for Rs 20 balance due under a pronote, the limitation for filing which had expired when the Court was closed,

Held, the period of limitation allowed by S. 4 of the Limitation Act cannot be cut down by any implication. Plaintiff is entitled to sue in District Munsif's Court and there is no compulsion to go to the Village Munsif's Court and a plaintiff was entitled to wait until the reopening of the District Munsif's Court, though the Village Munsif's Court was open. The "Court of lowest grade competent to try in S. 15, Civil Procedure Code, is the District Munsif's Court and not the Village Munsif's Court.

N. Bapiraju for Petitioner.

M. S. Ramachandra Rao for Respondent.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
12th December, 1939.*

Q. S. A. No. 51 of 1939.

Indian Succession Act (XXXIX of 1925), S. 241—Letters of administration with will annexed—If can be granted to agent of executor resident abroad without requiring security.

A probate of the will was obtained in England where the testator died. The executrix was not able to come to India to take out letters of administration and granted a power of attorney to the petitioner to apply as her agent. The practice, since the Succession Act of 1865, has been to grant letters of administration with a copy of the will annexed in cases such as this without requiring security to be furnished. *Somayya, J.*, considered that the practice was in conflict with the wording of S. 241 and refused to follow it and held that the appropriate section was S. 228 under which security would have to be furnished. On appeal having regard to the long practice and the scheme of this Act held, letters of administration should be issued under S. 241 without security.

C. Krishnaswami Aiyar instructed by *King and Partridge* for Appellants.
The Advocate-General (Sir A. Krishnaswami Aiyar) and *The Government Solicitor* for the Government.

K. Rajah Aiyar, amicus curiae.

K. S.

*Krishnaswami Aiyangar, J.
13th December, 1939.*

C. R. P. No. 2192 of 1939.

Administration suit—Specific legatee—If can be put in possession of his legacy before the accounts are completely taken and final decree is passed.

Where necessary safeguards had been taken to avoid the possibility of prejudice to such rights as may ultimately be established by the final decree the Court can put the specific legatee in possession of the legacy before the accounts are completely taken and the final decree is passed.

I.L.R. 1 Pat. 667, followed.

T. V. Muthukrishna Aiyar and *K. G. Srinivasa Aiyar* for Petitioner.

A. C. Sampath Aiyangar for Respondent.

K. S.

*Krishnaswami Aiyangar, J.
15th December, 1939.*

C. R. P. Nos. 1420 and 1447 of 1937.

Court-fees—Execution application converted into suit under Civil Procedure Code, S. 47—Liability in the converted suit to pay court-fee.

It was contended that there was no liability cast upon a plaintiff, in a suit converted from an application, under Civil Procedure Code, S. 47, to pay the court-fee due in respect of such suit.

Held; the question whether a court-fee or a further court-fee is to be collected from the plaintiff must depend upon the nature of the suit and the relevant provisions of the Court-fees Act. The court-fee is payable.

K. Umamaheswaram for Petitioners.

Respondents not represented.

K. S.

*The Chief-Justice and
Krishnaswami Aiyangar, J.*
15th December, 1939.

C. M. P. No. 2270 of 1939.

Madras Debt Conciliation Act (XI of 1936), S. 4 (1)—Application for conciliation by undischarged insolvent without the leave of the Insolvency Court—Jurisdiction of the Board.

Where the applicant under S. 4 (1) of the Madras Debt Conciliation Act, 1936 was an undischarged insolvent and did not obtain the permission of the Insolvency Court for filing the petition,

Held, an insolvency takes away the jurisdiction of the Debt Conciliation Board and the Board has no jurisdiction to accept the petition.

(1938) 2 M. L. J. 93, applied.

P. Chandra Reddy for Appellant.

The Government Pleader (B. Siarama Rao) for Respondent.

K. S.

*Burn, Offg. C. J. and
Krishnaswami Aiyangar, J.*
2nd January, 1940.

L. P. A. No. 100 of 1938.

Civil Procedure Code (V of 1908), O. 34, r. 14—Mortgage to father—Promissory note executed in favour of undivided son for interest due thereon—Decree on the promissory note and execution against mortgaged properties—O. 34, r. 14, Civil Procedure Code, whether bar.

For interest due on a mortgage the mortgagor executed a promissory note in favour of the mortgagee's son who filed a suit thereon and obtained a decree. His execution application was resisted on the ground that (a) the son must be deemed to be a mortgagee and (b) the decree is in respect of a claim arising under the mortgage and hence the proper remedy of the decree-holder is as mentioned in O. 34, r. 14, Civil Procedure Code.

Held, That the amount due under the promissory note, since decreed was not a claim arising under the mortgage within the meaning of O. 34, r. 14 Civil Procedure Code, and the decree-holder was entitled to proceed against the mortgaged properties.

Decision of *King, J.*, reported in (1939) 1 M.L.J. 680, affirmed.

R. Desikan for Appellant.

K. Bhashyam Aiyangar and T. R. Srinivasan for Respondent.

K. C.

Gentle, J.
8th January, 1940.

C. S. No. 1 of 1937.

Madras Motor Vehicles Taxation Act (III of 1931), S. 2—Steam Roller—If a motor vehicles liable to taxation under Act.

In a suit by the Madras Corporation against the Government asking for a declaration that their steam rollers were not liable to taxation under the Madras Motor Vehicles Taxation Act,

Held, a heavy superstructure on wheels, such as a steam roller, was a vehicle and if it propelled itself by mechanical power, it was a motor vehicle. Whether the roller was used or kept by a private person, firm or company or by a local authority, there could be no difference as to its nature. It was liable to taxation under the Madras Motor Vehicles Taxation Act.

A. Suryanarayana for the Corporation.

The Advocate-General (Sir Alladi Krishnaswami Aiyar) and *R. Ramamurti* instructed by *The Government Solicitor* for the Government.

K. S.

Horwill, J.
27th November, 1939.

S. A. No. 691 of 1936.

Appeal—Official Receiver of the estate of one of the plaintiffs not added as respondent—Maintainability of appeal.

The non-joinder of the Official Receiver of one of the plaintiffs as respondent in the appeal is fatal to the maintainability of the appeal where he is one of the holders of a joint decree.

52 M.L.J. 460 and 19 C.W.N. 290, relied on.

I.L.R. 57 All. 445 and A.I.R. 1928 All. 172, referred to.

The Advocate-General (Sir A. Krishnaswami Aiyar) and M. S. Venkatarama Aiyar for Appellants.

T. E. Ramabhadrachariar and K. Rama Aiyangar for Respondents.

K. S.

Horwill, J.
30th November, 1939.

S. A. No 1024 of 1936.

Madras District Municipalities Act (V of 1920), S. 83—School buildings with lands round the building—Part of the land fenced off and rented to a shepherd—Lands how far exempt from assessment.

A school had a considerable area of land round it, a portion of which was fenced off and rented to a shepherd. The Municipal Council sought to assess the land claiming that only the building was exempt.

Held. if the building is exempt, the other parts of that unit, the sites and the adjacent premises occupied as an appurtenance would be exempt also. The portion rented out to the shepherd was not an appurtenance under S. 82 (1) and is not exempt from assessment.

V. Govindarajachari for Appellant.

Ch. Raghava Rao for Respondent.

K. S.

Horwill, J.
1st December, 1939.

S.A. No. 1052 of 1936.

Madras Revenue Recovery Act (II of 1864), S. 58—Dispute as to area of land and assessment—Civil Court if can consider the question.

Where revenue authorities wrongly estimated the assessment and objection was raised that the area of the land had been wrongly estimated and the revenue authorities therefore arrived at a wrong figure in regard to the assessment,

Held, even if S. 58 of the Revenue Recovery Act does not operate as a bar to the granting of a declaration as to the area it will be clearly improper for a Civil Court to exercise its discretion and give a declaration which will have the effect of circumventing the provisions of S. 58 of the Revenue Recovery Act.

D. Narasaraju and P. S. Sarma for Appellant.

The Government Pleader (B. Sitarama Rao) for Respondent.

K. S.

Pandrang Row and Abdur Rahman, JJ.
5th December, 1939.

L. P. A. Nos. 68 and
69 of 1938.

Arbitration and Award—Minor not properly represented in arbitration proceedings—Protection of minor's interests by declaration that proceedings not binding on minor—How to be given effect to.

N R C

Where for any reason a portion of the award cannot be upheld and where it is separable, a decree in terms of the rest of the award can be made. Where the guardian *ad litem* in the proceedings was incompetent to fill the capacity of next friend or guardian *ad litem* because of adverse interest to the minor, the minor should be treated as if she was not a party to the proceedings at all and she can have liberty to take steps to either affirm or set aside the award after attaining majority. As the portion of the award relating to the minor was separable, such an order could be made. The award is binding on the other parties.

I.L.R. 33 All. 326 (P.C.) and I.L.R. 53 Cal. 258, applied.

The Advocate-General (Sir A. Krishnaswami Aiyar) and P. Govinda Menon and B. K. B. Naidu for Appellant.

B. Lakkappa Rai and K. R. Subramania Aiyar for Respondent.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
6th December, 1939.*

C. R. P. No. 354 of 1938

Civil Procedure Code (V of 1908), S. 73—Money decree against grandfather, his son and son's son in favour of A—Previous decree against grandfather and son but not against grandson in favour of B—Adjudication of grandfather and son as insolvents—Execution, attachment and sale of grandson's interest by A—Right of B to rateable distribution—If decrees in favour of A and B, against same judgment-debtors.

A obtained a money decree against a grandfather, his son and son's son and *B* had previously obtained a decree against the grandfather and the son but not against the grandson. On the adjudication of the grandfather and son, *A* attached and sold the grandson's share in execution and *B* put in an application claiming rateable distribution

Held, where a father who is joint with his son becomes insolvent, the right of realising the son's share in the family estate under the pious obligation rule devolves upon the Official Assignee or Official Receiver as the case may be. But if before the Official Assignee or Official Receiver takes steps to enforce that right, a judgment creditor of the father attaches the son's interest in the estate, the power of the Official Assignee or Official Receiver to sell the son's share is lost, and as the result of the attachment and sale of the grandson's share by *A*, the share becomes available to the executing creditor and all persons who became entitled to rateable distribution under S. 73 of the Civil Procedure Code.

Where a money decree is passed against a grandfather who is joint with his son and grandson it must be taken to be a decree passed against the son and grandson to the extent of their interests in the family property, as they are liable to that extent for his lawful debts. The two decrees are against the same debtor within the meaning of S. 73, Civil Procedure Code and *B* is entitled to have rateable distribution.

Case-law discussed.

Arunachalam Chettiar v. Kalayappa Chettiar, (1937) 1 M.L.J. 180, overruled.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

K. S.

Burn and Mockett, JJ.
7th December, 1939.

C. C. C. App. No. 65 of 1938.

Principal and surety—Composition by principal debtor—If implied discharge of surety—Express contract by surety to be liable notwithstanding composition—Effect—Banker—If bound to disclose state of account of a constituent to his surety—Contract Act, S. 143—If applicable.

A surety bond provided that any contract between the borrower and lender by which the lender makes a composition with or promises to give time or not to sue the borrower will not discharge the surety or sureties. In a suit against the sureties after the principal debtor had entered into a composition with the lender,

Held as the surety had expressly contracted to remain liable notwithstanding the discharge of the principal, it cannot now be contended that the discharge of the principal is an implied discharge of the surety.

Cowper v. Smith, 4 M. & W. 519: 50 E.R. 1534 and *The Union Bank of Manchester v. Beach*, 3 H. & C. 672: 159 E.R. 685, followed

There is no general legal obligation on the part of a bank to volunteer to a surety particulars of one of its constituent's indebtedness for this is a matter on which the surety has to inform himself.

Imperial Bank of India v. Avnanashi Chettiar, I.L.R. 53 Mad. 826, followed.

S. 143 of the Contract Act is not applicable to the case as mere non-disclosure as distinguished from intentional concealment cannot amount to 'keeping silence' under S. 143.

S. Athmanathan for Appellants.

John and Row for Respondents.

K. S.

Abdur Rahman, J.
8th December, 1939.

C. R. P. No. 1328 of 1936.

Contract Act (IX of 1872), S. 72—Taxes and license fees paid under mistaken belief that properties and business were situated within jurisdiction of the Panchayat Board—Claim for refund—Sustainability.

A person who pays taxes and license fees under the mistaken belief that the properties and business were situated within the jurisdiction of the Panchayat Board, does so under a mistake of fact and is entitled to recover them as money had and received under S. 72 of the Contract Act.

K. V. Gopalaswami and G. Balaparameswari Rao for Petitioner.

Kasturi Seshagiri Rao for Respondent.

K. S.

Kunhi Raman, J.
12th December, 1939.

C. M. S. A. No. 31 of 1938.

Transfer of Property Act (IV of 1882, as amended by Act of 1929), S. 67-A—If retrospective and applicable to rights and remedies acquired prior to amendment.

The provisions of S. 67-A—(that in the absence of a contract to the contrary a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under S. 67 shall be bound to sue on all the mortgages in respect of which the mortgage money has become due) are not retrospective.

P. Sivaramakrishniah for Appellant.

V. Govindarajachari for Respondent.

K. S.

*The Chief Justice and Krishnaswami
Aiyangar, J.*

L. P. A. Nos. 97 and 98 of 1938.

12th December, 1939.

Suit on pronote executed by Hindu father—Sons who were made parties dismissed from suit—Sons if exonerated from liability under Hindu Law in respect of the decree.

In a suit on a promissory note executed by the father alone the sons were made parties and in the first appellate Court a decree was passed against the father alone and the sons were dismissed from the suit. In execution proceedings the decree-holder asked for the attachment and sale of the sons' interests in the family property. The sons objected on the ground that as they had been dismissed from the suit they could not be held liable for their father's debts.

Held, after examining the case law, the dismissal of the suit as against the sons did not prevent the decree-holder executing the decree against the sons' interests in the family property.

I.L.R. 27 Mad. 243 (F.B.), followed.

I.L.R. 13 Luck. 61 (P.C.), distinguished.

Decision of *King, J.*, reversed.

V. Govindarajachari for Appellants.

Y. Suryanarayana for Respondents.

K. S.

Horwill, J.

S. A. No. 801 of 1938.

15th December, 1939.

Court-Fees Act (VII of 1870), Ss. 10 (2) and 12—Order on plaintiff-respondent to pay deficit court-fee which ought to have been paid in the Court below—Default—Applicability of Ss. 12 and 10 (2).

In an appeal the respondent who was the plaintiff was directed to pay the deficit court-fees on the plaint and in default the suit was directed to be dismissed under S. 10 (2). It was contended that the provisions of S. 12 (2) applied only to cases where the plaintiff is the appellant.

Held (dissenting from the Allahabad decisions), that in applying S. 10 (2) to appeals and reading it with S. 12 (2) the word "suit" should be deemed to include "appeal". Moreover the actual wording of S. 12 (2) shows that the appeal is considered as an extension of the suit.

V. Govindarajachari and V. V. Raghavan for Appellant.

A. Viswanatha Aiyar for Respondent.

K. S.

Krishnaswami Aiyangar, J.

C. R. P. No. 2264 of 1939.

15th December, 1939.

Indian Registration Act (XVI of 1908), S. 17 (2) (i)—Composition deed with trustees—If exempted from registration—Admissibility in evidence when unregistered.

In a composition deed two creditors were appointed trustees and through them all assets were to be realised and distributed among creditors. In a

suit by the trustees it was contended that the deed was inadmissible in evidence for want of registration.

Held (following the Bombay view in preference to the Allahabad view), the mere fact that a certain kind of trust enters into its constitution and character is not sufficient to take the deed out of the category of a composition deed within the meaning of S. 17 (2) (i) of the Indian Registration Act. Such a deed is not inadmissible in evidence for want of registration.

C. K. Viswanatha Aiyar for Petitioner.

N. R. Sesa Aiyar for Respondent.

K. S.

Burn, O. C. J., and Krishnaswami
Aiyangar, J.
4th January, 1940.

S. R. No. 27956 of 1939.

Presidency Towns Insolvency Act (III of 1909), S. 106 (1) (a)—Order for administration of an insolvent estate in a summary manner—Failure to obtain leave of Court to appeal—Appeal if can be entertained.

Under S. 106 (1) (a) of the Presidency Towns Insolvency Act it is quite clear that where an insolvent's estate has been ordered to be administered in a summary manner, no appeal lies from any order of the Court except by leave of Court, and so where no leave is obtained the appeal cannot be entertained.

T. P. Ramachandra Aiyar for Appellant.

K. S.

Lakshmana Rao, J.
10th January, 1940.

Cr. R. C. No. 955 of 1939

Criminal Procedure Code (V of 1898), S. 110—Security proceedings under—Scope of enquiry—If limited to the acts committed within the limits of jurisdiction of the Magistrate who heard the case.

Where the jurisdiction of the Magistrate to institute proceedings under S. 110, Criminal Procedure Code, in respect of acts (in connection with labour strikes, etc.) committed within the local limits of his jurisdiction was not disputed, the section in respect of the offence did not restrict enquiry to acts committed within such local limits: Further, S. 117, Cl. (4), Criminal Procedure Code, permitted proof of requisite facts under S. 110 by evidence of general repute or otherwise and the enquiry cannot be restricted to acts committed within the local limits of jurisdiction of the Magistrate who heard the case.

A. K. Pillai for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Stodart, J.
15th January, 1940.

S. A. No. 1081 of 1936.

Contract Act (IX of 1872), S. 153 and Civil Procedure Code (V of 1908), O. 20, r. 10 and O. 21, r. 31—Pawn—Repudiation by pawnee of pawnor's title—Cessation of right to interest.

The plaintiff borrowed Rs. 800 from defendant on a pledge of jewels, and when she offered to redeem, the defendant denied the contract with the plaintiff and repudiated her title and subsequently sold them away. In the

suit filed by plaintiff for redemption, the District Munsiff found as a fact that the plaintiff was the owner and had pledged with defendant,

Held, that under S 153 of the Indian Contract Act, repudiation of plaintiff's title terminated the contract and interest ceased to run for the amount lent from the date of the repudiation. The plaintiff was not bound to deposit even the principal amount in the first instance and defendant was bound to deposit the jewels in Court. A decree under O. 21, r. 31, Civil Procedure Code, was passed.

K. Someswara Rao for Kasturi Seshagiri Rao for Appellant.

Respondent not represented.

K. S. _____

Lakshmana Rao, J.
16th January, 1940.

CrI. App. No. 601 of 1939.

Madras City Police Act (III of 1888), S. 60 and S. 71 (9)—Seizure of cows found straying on the road under S. 60 and prosecution of owner under S. 71, cl. 9—Presence of owner at the time of seizure if necessary to constitute the offence—Redemption of the cattle by payment of pound fee—If an answer to the charge and ground for acquittal.

To bring a case under S. 71, cl. (9) of the Madras City Police Act, it is not necessary that the owner of the cattle should be present at the time of the seizure of the cattle. The redemption of the cattle by payment of the pound fee is no answer to the charge under cl. 9 of S. 71 of the Madras City Police Act and an acquittal on these grounds is unsustainable.

C. D. Venkataraman for the Crown Prosecutor for the Crown (Appellants).

Respondent not represented.

K. S. _____

King J.
16th January, 1940.

C. M. S. A. No. 94 of 1938

Limitation Act (IX of 1908), Art. 182 (5)—Execution petition by assignee of mortgage decree under unregistered deed—If in accordance with law, to save limitation

A person who claimed to be the assignee of the mortgage decree under an unregistered assignment deed applied for execution in 1934. The said application was dismissed for non-payment of batta.

He again applied in 1936 for execution after obtaining a fresh assignment deed duly registered and claimed that his application of 1934 saved limitation as an application in accordance with law.

Held, that the application of 1936 was rightly dismissed as barred by time as the unregistered document conferred no rights on the applicant and his mere assertion as transferee under O. 21. R. 16 would not give him a right to apply in 1934.

I.L.R. 37 Bom. 42; 6 M.L.J. 31; 47 Mad. 641, Distinguished.

S. Jagadisa Aiyar, for Appellant.

T. E. Ramabhadrachariar, for Respondent.

K. S. _____

*The Chief Justice and Krishnaswami
Aiyangar, J.*

S. A. No. 595 of 1936.

27th November, 1939.

Hindu Law—Inheritance—Brother's son's daughter—If entitled to inherit.

A brother's son's daughter is only four degrees removed from the common ancestor being less than seven degrees in ascent and descent from the last male owner and the test of mutuality also is satisfied. Female bandhus are not disqualified by reason of their sex only.

8 M.H.C.R. 88, relied on.

She is entitled to rank as heir under Hindu Law.

G. Lakshmanna and G. Chandrasekhara Sastri for Appellant.

B. Jagannadha Das for Respondent.

K. S.

Stodart, J.

S. A. No. 692 of 1936.

4th December, 1939.

Deposit of pronote as security—If transfer of pronote.

The deposit as security of a promissory note creates a pledge of the promissory note and the transfer is sufficiently effected by the recitals in the document of pledge.

I.L.R. 38 Mad. 297, followed.

V. S. Narasimhachar for Appellant.

A. Gopalachari for Respondent.

K. S.

*Burn, Offg. C. J. and Krishnaswami
Aiyangar, J.*

L. P. A. No. 13 of 1939.

2nd January, 1940.

Madras Court of Wards Act (I of 1902), S. 49—Notice as condition precedent to institution of suit against Court of Wards—Proper form.

A notice to the Court of Wards who were in management of an estate was issued on behalf of the deities and it was contended that the notice was invalid as it did not contain a proper description of the intending plaintiff. In the notice in question the names of the temples were mentioned as also the village in which they are situate.

Held, it is sufficient compliance with S. 49 even on a strict construction. Although the names of the managers are mentioned as the plaintiffs and although they have been described in the plaint as trustees, in the eye of law, they are merely the managers, the deities themselves being the true plaintiffs in fact.

S. V. Venugopalachari for Appellant.

M. E. Rajagopalachari for Respondent.

K. S.

Pandrang Row and Horwill, JJ.
4th January, 1940.

A. A. O. Nos. 303 and 304 of 1938.

Civil Procedure Code (V of 1908), O. 21, r. 90—"Person whose interests are affected by the sale"—Sale of property of person since adjudged insolvent—Insolvent if person affected by sale.

The words "whose interests are affected by the sale" must be construed in their ordinary sense and it is too much to say that merely because a person is

adjudicated insolvent his interests are not adversely affected by the sale of property that belonged to him before adjudication.

Case-law reviewed.

65 M.L.J. 719 (F.B.), followed.

Such a person is entitled to present an application to set aside the sale.

S. Thiagaraja Aiyar for Appellant.

V. C. Viraraghavachari for Respondent.

K. S.

Horwill, J.

S. A. No. 1027 of 1936.

5th January, 1940.

Malabar Law—Trespasser—If entitled to retain possession of the land trespassed on until the true owner pays for improvements effected.

It is of course true that Malabar law permits a person to claim compensation for improvements effected by him when he was in possession of the land *bona fide* believing that he was entitled to it. But if a person deliberately enters upon another's land and thereby excludes possession by the true owner, it is unreasonable that he should be entitled to any compensation for improvements.

I.L.R. 38 Mad. 710, explained and not followed.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondent.

K. S.

King, J.

A. A. O. No. 337 of 1938.

8th January, 1940.

Civil Procedure Code (V of 1908), O. 7, r. 10 and O. 41, r. 33 and S. 107—Suit over-valued and filed in Court of higher pecuniary jurisdiction—Powers of appellate Court to return plaint for presentation to proper Court—Suits Valuation Act, S. 11—Appellate Court's power to take cognisance of objection to jurisdiction of trial Courts.

The appellate Court has power to pass any order which the Court of first instance ought to have passed. The appellate Court's powers are not restricted by the mere fact that it is one party rather than another which has originally invoked its jurisdiction by filing the appeal. Even in a plaintiff's appeal, the appellate Court can return the plaint to be presented to the proper Court.

S. 11 of Suits Valuation Act permits the appellate Court to take cognizance of an objection to the jurisdiction of the lower Court in certain circumstances, *viz.*, (1) that an objection had already been taken in the Court of first instance, and (2) the appellate Court is satisfied that the suit or appeal was over-valued or under-valued, and (3) that the over-valuation or under-valuation has prejudicially affected the disposal of the suit or appeal on its merits.

D. Narasaraju for Appellant

K. Kameswara Rao for Respondent.

K. S.

Abdur Rahman, J.

C. R. P. No. 1216 of 1938.

11th January, 1940

Practice—Framing issues—Issues proposed by parties—Recording as matter of course—Propriety—Duty of Court.

There is absolutely no warrant for the procedure which appears to be prevailing in this Presidency that the issues are proposed by the parties and recorded invariably as a matter of course. It is the duty of Courts to frame issues after reading the pleadings and after such examination of the parties as may appear necessary. [*Vide* O. 14, r. 1 (5), Civil Procedure Code]. Not to say of the examination of the parties before the issues are framed—a thing which although common in other provinces is wholly unknown in this—the Courts do not think it as part of their duties to read the plaints and written statements in which issues are to be framed. This is entirely wrong and the sooner the practice of the issues being proposed by the parties is abandoned, the better for all concerned. It is the duty of the Courts to go through the pleadings themselves and then frame issues. They should also as far as possible, examine the parties before the issues are struck and particularly when they find the pleas to be vague or indefinite.

K. Bhimasankaram for Petitioners.

Respondents not represented.

K. S.

King, J.

A. A. O. No. 485 of 1938.

12th January, 1940.

Partnership suit—Final decree overlooking need for decision on question of liability of partners inter se—Suit if can be deemed to be pending and defective decree if can be amended under S. 151 or 152, Civil Procedure Code—Proper remedy.

At the time when the final decree was passed in a suit for dissolution of partnership the Court overlooked entirely the need for a decision, though an issue had been framed, on the question of the liability of the defendants *inter se*. In an application for amendment of the decree under S. 151 or 152,

Held, Ss. 151 and 152 do not apply to the case. When a defective decree has been passed, even though it fails to provide a final adjudication on points at issue between the parties the suit cannot be held to be pending and no remedy can be granted to any of the parties on the assumption that the suit is still pending. The only remedy is by way of an application for review.

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

A. Narayana Pai for Respondent.

K. S.

Lakshmana Rao, J.

C. R. P. No. 432 of 1938.

12th January, 1940.

Civil Procedure Code (V of 1908), Ss. 63 and 73—The two sections should be read together—Right to rateable distribution.

The assets were received after attachment of the property and Ss. 63 and 73 of the Code of Civil Procedure have to be read together and the person attaching would be entitled to rateable distribution.

1935 M.W.N. 1046 and I.L.R. 59 Mad. 1028, followed.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

K. S.

Burn, Offg. C. J. and Krishnaswami

Appeal No. 100 of 1937.

Aiyangar, J.

16th January, 1940.

Limitation Act (IX of 1908), Art. 23—Suit for damages for malicious prosecution—Starting point of limitation.

In a suit for damages for malicious prosecution the proper point of time for starting of limitation of one year is the date of disposal of the revision petition discharging the plaintiff and not from the date of the order of discharge by the Sub-Divisional Magistrate.

(1938) 1 M.L.J. 344=I.L.R. 1938 Mad. 675 (F.B.), followed.

D. Suryaprakasa Rao for Appellant.

V. Suryanarayana for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ.

A. S. No 269 of 1936.

17th January, 1940.

Practice—Joinder of causes of action—Suit by executors for partition of properties left under the will—Prayer for partition of other joint family property—Joinder if proper—Incompetency on account of adverse interest of next friend of minor—If involves dismissal of suit.

One G died leaving a will by which he directed two executors *M. V.*, and another to partition his half-share of the estate and deliver it to his sons' sons and directed his son to be the managing executor under the direction of the other two executors. *M. V.* sued for partition and possession on behalf of all the executors making all of them parties. He also joined in that suit a prayer for partition and possession of the joint family properties, *viz.*, the other half on behalf of the minor grandson then living.

Held, that the joinder of the two causes of action was improper and plaintiff should be put to his election.

Held also, that the incompetency of the next friend on the ground of adverse interest will not involve the dismissal of the suit.

1 L.W. 875, distinguished.

Held also, that the fact that the co-executors were not consulted especially having regard to their attitude will not involve the dismissal of the suit which was to enforce a duty cast by the will itself on them.

I.L.R. 26 Mad. 461 and I.L.R. 34 Mad. 406, referred to and considered.

S. T. Srinivasagopalachariar for Appellant.

K. Rajah Aiyar and *T. E. Ramabhadrachariar* for Respondents.

K. S.

Pandrang Row and Horwill, JJ.

Reference No. 8 of 1939.

18th January, 1940.

Criminal Law—Procedure—Prosecution formally admitting that case against accused not established—Judge also summing up for acquittal—Unanimous verdict of "guilty" by jury—Verdict to be set aside as perverse.

The accused was charged with the theft in the alternative of receipt or detention of stolen property namely, a bull knowing it to be stolen. After the evidence the prosecution in the address told the jury that the case had not been established and invited the jury to return the verdict of "not guilty." The Judge also summed up for acquittal. But the jury returned the unanimous verdict of guilty.

Held, the facts show that the jury must have acted in a perverse manner and the verdict cannot be said to be a reasonable one. The verdict must be set aside and the accused acquitted.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Patanjali Sastri, J.
19th January, 1940.

C. R. P. No. 1636 of 1938.

Madras Agriculturists Relief Act (IV of 1938)—Mortgage decree debt due by Hindu joint family—Application for scaling down by one member—Relief under Act if restricted to his share—Relief if restricted only to agricultural land included in mortgage.

Where one member of a joint Hindu family sought to have a debt due by the joint family scaled down,

Held, any member of a joint family can apply to have the decree debt of the family scaled down and it is the debt of the family as a whole that is to be scaled down, if the family is proved to be an agriculturist within the meaning of Act IV of 1938. The benefit under the Act is not to be restricted to the member of the family who makes the application. The entire scheme of the act has reference to the character of the debtor and not to the character of the property comprised in a security for the debt. So where there is a mortgage comprising of agricultural land and other properties, the scaling down cannot be restricted only to agricultural land comprised in the mortgage.

A. C. Sampath Ayyangar and S. Krishnamachariar for Petitioner.

T. S. Anantaraman for Respondent.

K. S.

Genile, J.
23rd January, 1940.

O. M. S. No. 8 of 1939.

Divorce—Pregnancy of wife—Evidence by husband as to non-access—Rule in Russel v. Russel—If applicable—European British Subject abandoning intention of returning to England—Domicile of residence—Indian Divorce Act applicable.

The rule in *Russel v. Russel* does not apply to petitions filed under the Indian Divorce Act—1931 M.W.N. 1278 purely based on provisions of Evidence Act followed.

Where the petitioner the husband gives up the intention of returning to his place of birth the domicile of origin is abandoned and the domicile of residence is acquired. The Indian Divorce Act, 1869, will apply to the case and the decision in *Russel v. Russel* does not apply.

Antony Lobo and A. Viswanathan for Petitioner.

Respondents not represented.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J.
23rd January, 1940.

CrI. M. P. No. 1361 of 1939

Contempt—Newspaper publishing article commenting on legal proceedings during their pendency—False defence of want of knowledge of pendency of proceedings—Gross contempt.

When comments are published with full knowledge that legal proceedings were pending, it amounts to gross contempt of Court. The person in contempt published no statement by way of apology and put forward a false defence that he was not aware of the pendency of the proceedings.

Held, the Court cannot allow comments to be made on cases pending before it or before the Subordinate Courts of the province and convicted the first respondent to simple imprisonment for one month.

P. Somasundaram and G. Balapameswari Rao for Petitioner.
 V. Viyanna for 1st Respondent.
 N. Bapiraju for 2nd Respondent.
 The Advocate-General (Sir A. Krishnaswami Aiyar) for the Crown.
 K. S.

Lakshmana Rao, J.
 25th January, 1940.

Crl. R. C. No. 22 of 1940 and
 Crl. R. P. No. 19 of 1940.

Criminal Procedure Code (V of 1898), Ss. 130 and 133 (1)—Order on respondent to remove a deity and chapram left in a public street—Jury finding that chapram should be allowed to be taken in procession—Order to take chapram and deity without paraphernalia of a regular procession—Sustainability.

The Sub-Divisional Magistrate passed a conditional order under S. 133 (1) of Criminal Procedure Code, directing the respondent to remove a deity and *chapram* left in a public street and the order was made absolute as the respondent refused to receive the notice and failed to appear. The respondent then applied for the appointment of a jury denying the alleged refusal of notice by him and a jury was appointed. The jury found that the *chapram* should be allowed to be taken in procession through a particular street, but their view was not accepted by the Sub-Divisional Magistrate. Further proceedings under Chapter X had therefore to be dropped as required by S. 130 (2), Criminal Procedure Code. But the Sub-Divisional Magistrate ordered that the *chapram* and deity should be allowed to be taken along the particular street without the paraphernalia of a regular procession with the required number of persons to drag the *chapram*.

Held, the order was unsustainable and must be set aside leaving the local authorities to take appropriate steps for removal of the obstruction.

K. S. Jayaram Aiyar for G. Gopalaswami and E. S. Subramaniam for Petitioner.

D. Israel for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Wadsworth and Patanjali Sastri, JJ.
 30th January, 1940.

C. R. P. No. 1112 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (h)—“Debt or Debts” meaning—Exemption of women creditors—If affected by existence of other property or other debts due by non-agriculturists.

The section is not happily worded. Construing the language actually used and considering the intention of the framers of the Act the word “debt or debts”, in S. 4 must be regarded as a whole provided of course the debt or debts were owed by agriculturists. Any debt owed by non-agriculturists to the woman plaintiff or any other property not in the shape of debt cannot be included, as it would deprive the woman of the benefit of the exemption.

K. Narasimha Ayyangar and D. Ramaswami Ayyangar for Petitioner.

T. M. Krishnaswami Ayyar and A. Balasubramania Ayyar for Respondent.

K. S.

Venkataramana Rao, J.
11th January, 1940.

S.A. No. 22 of 1937.

Indian Contract Act (IX of 1872), S. 43—Division of outstandings and liabilities between three partners and covenant to indemnify the other partners for loss due to default or delay—If excludes right to contribution under S. 43 of Contract Act.

Where partners divided outstandings and liabilities into three shares and each partner is made responsible for one-third share of every liability and on default there was covenant for indemnity for loss due to default or delay by any partner.

Held, the clause clearly excludes the right of contribution which will be available under S. 43 of the Indian Contract Act against the partners equally.

B. Sitarama Rao for Appellant.

K. S. Sankara Aiyar and S. Ramaswami Aiyar for Respondents.

K. S.

Venkataramana Rao, J.
12th January, 1940.

S. A. No. 980 of 1934.

Negotiable Instruments Act (XXVI of 1881), S. 70—City or village indicated as place for payment—"Presentment" how to be made—"Residence"—Meaning.

Where in a bill or note a city or a village is indicated as the place of payment without mentioning a particular place therein, it would be a valid presentment if the note is presented in the city or village at the place of business of the drawer or the maker or at his dwelling or to him personally at any place therein.

A.I.R. 1937 Lah. 259 at 263, applied.

"Residence" is a word of wide connotation and may mean a city, town or village or a particular place therein.

V. Subramaniam and V. Satyanarayana for Appellant.

V. Rangachari for Respondent.

K. S.

Horwill, J.
12th January, 1940.

S. A. No. 809 of 1936.

Trust—Scheme prohibiting borrowing from or lending to trust fund—Person lending contrary to the provision—Rights.

Where a clause in a scheme prohibited borrowing from or lending to the trust fund on interest and plaintiff under power of attorney from trustees managed the trust and incurred expenses for provisions and necessaries, in a claim for the amount,

Held, the plaintiff cannot be heard to say that he was enabling the trustee to perform his duty to the trust and therefore entitled to be compensated for what he has supplied.

S. 65 of the Contract Act does not apply as the plaintiff deliberately incurred the expenses in express contravention of the restriction in the scheme. The trustee's promise to pay and pronotes by him on behalf of the trust cannot bind the trust either. As the pronote was not by the trustee for himself a decree against the trustee cannot be granted; with a proper plea and evidence of *quantum meruit* the plaintiff might get such amount.

K. Rajah Aiyar and R. Sundaralingam for Appellant.

B. S. Ramachandra Rao and K. Kameswara Rao for Respondents.

K. S.

N R C

Wadsworth and Patanjali Sastri, JJ.

Appeal No. 17 of 1937.

15th January, 1940.

Hindu Law—Joint family business—Liability of coparcener taking part in business—Nature and extent—Test.

The whole question, whether a coparcener who takes part in the conduct of the family business is personally liable and if so on what legal basis, is essentially one of fact depending for its decision upon the nature and extent of participation as disclosed by the evidence in the particular case. If what the junior member is shown to have done in relation to the business is nothing more than what can reasonably be attributed to his interest in the business as a member of the family, there will be no legitimate inference that he intended to undertake a greater liability as a partner in the business. If the part taken by such member in the management of the business goes beyond what can be sufficiently explained by his interest in it as an asset of the family, as for instance when he joins in borrowing for the purposes of the business, it may afford ground for the conclusion that he has become a partner so as to be personally answerable for all debts incurred in the course of the business including those which he did not join in borrowing. No partnership relation can be implied (from participation, however active in the conduct of the family business) in the absence of definite and unequivocal consensual acts on the part of the coparcener.

Case-law examined.

K. S. Sankara Aiyar for Appellant.

N. G. Krishna Aiyangar for Respondent.

K. S.

Burn, Offg. C. J. and Krishnaswami

App. No. 67 of 1937 and

Aiyangar, J.

C. R. P. No. 297 of 1937.

16th January, 1940.

Civil Procedure Code (V of 1908), Sch. II, Paragraph 16 (1)—Arbitration and award—Court's jurisdiction to pronounce judgment before expiry of ten days (provided for submission of application to set aside award under Art. 158 Limitation Act)—Consent of parties—Effect.

Sub-para. (1) of para. 16 of Sch. II, Civil Procedure Code, cannot be read as implying that (even where parties consent to immediate pronouncement of judgment) the Court has no jurisdiction to pronounce judgment until after expiry of ten days after receipt of the award. The rule lays upon the Court the duty of pronouncing judgment after the expiry of ten days prescribed by Limitation Act, Art 158, but it does not say that the Court has no jurisdiction to pronounce judgment earlier.

1912 M.W.N. 1232 and 67 M.L.J. 377 distinguished as cases where there was no consent of parties.

S. Venkatesa Aiyangar for Appellant in App. No. 67 of 1937 and Petitioner in C.R.P. No. 297 of 1937.

P. C. Parthasarathy Aiyangar for Respondent in App. No. 67 of 1937.

Respondent not represented in C.R.P. No. 297 of 1937.

K. S.

Patanjali Sastri, J.

C. R. P. No. 1570 of 1938.

19th January, 1940.

Provincial Small Cause Courts Act (IX of 1887), S. 25—Court deciding only that it has jurisdiction to proceed with the suit—Revision if lies at that stage.

Where in a small cause suit the Court below only held that it had jurisdiction to proceed with the suit and posted it for trial on the merits and a revision petition was preferred against the order,

Held, unlike under S. 115 of the Civil Procedure Code, S. 25 of the Provincial Small Cause Courts Act allows a revision for the purpose of this Court satisfying itself that a decree or order made in any case decided, was according to law. It is difficult to say that there is a decree or order and revision cannot lie at that stage.

ILL.R. 58 Mad. 771 is a case under S. 115, Civil Procedure Code, and is not applicable to cases under S. 25, Provincial Small Cause Courts Act.

E. R. Krishnan for Petitioner.

S. Annamalai for Respondent.

K. S. ———

Abdur Rahman, J.
19th January, 1940.

C. R. P. No. 481 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 15 and r. 6 (1)—Amount claimed by major inamdar against minor inamdar for water charges, land cess, etc., alleged to have been paid to Government by former—If "rent".

The relationship between major and minor inamdars is not that of landlord and tenant and S. 15 and r. 6 (1) of Act IV of 1938 would have no application.

K. Rajah Aiyar and *T. A. Ramaswami Reddiar* for Petitioner.

K. Rajasekharan for Respondent.

K. S. ———

Horwill, J.
19th January, 1940.

C. R. P. No. 490 of 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 20—Duty of Court to grant stay of execution.

The Court is bound if it is satisfied that the person making the application is entitled to the benefit of the Act, to stay the proceedings in order to give the judgment-debtor an opportunity to have the decree modified by the Court which passed the decree. If an application is not put in within 60 days or if an application under S. 19 is dismissed, the Court can proceed with the execution proceedings.

V. C. Viraraghavachari for Petitioner.

A. C. Sampath Ayyangar and *S. Krishnamachari* for Respondent,

K. S. ———

King, J.
23rd January, 1940.

S. A. No. 1221 of 1936.

Specific Relief Act (I of 1877), S. 42—Melvaramdar—Dispossession by prevention from collecting rents—Suit only for declaration and injunction without claiming possession—If "omissions to seek further relief"—Mandatory injunction sufficient to give all the relief—Effect.

A village blacksmith's right to receive the melvaram for service inam was refused. In a suit for declaration and injunction,

Held, the right of a landlord to receive rent is clearly capable of possession and therefore of dispossession and refusal to pay the rent amounts to a dispossession which is final and complete, though right to collect such rent can be exercised only once a year. A suit for declaration and injunction

without claiming possession offends Specific Relief Act, S. 42. But by claiming the mandatory injunction which gives the only possession of which plaintiff's right is capable, the plaintiff has not in the language of S. 42, Specific Relief Act, "omitted to seek for further relief".

K. V. Sesa Aiyangar for Appellant.

K. V. Srinivasa Aiyar for Respondent.

K. S.

King, J.
24th January, 1940.

A. A. A. O. No. 115 of 1938.

Right of performing pooja in a temple for one month in every year—If alienable and if can be sold in the insolvency of the poojari.

The right of performing *pooja* in a temple for one month in every year is a religious office and is inalienable; on the insolvency of the holder of the right the right cannot be sold by the Official Referee.

I.L.R. 15 Mad. 183, applied.

V. P. Chakravathi for Appellant.

S. Sitarama Aiyar and *S. Rajaram* for Respondent.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
24th January, 1940.

O. S. A. No. 64 of 1938.

Madras High Court Original Side Rules, O. 23—Official Referee—Powers—English practice—How far applicable.

Questions as to substantive rights are solely within the province of a Judge and matters of detail that is, the working out of those rights either by taking accounts or effecting a partition or selling properties are under the rules functions which the Judge may delegate to the Official Referee. The rules of practice in English Courts do not apply *en bloc* to the original side except so far as our own rules modify them.

W. S. Krishnaswami Naidu for Appellant.

A. Seshachariar for Respondent.

K. S.

Lakshmana Rao, J.
2nd February, 1940.

Cri. R. C. Nos. 1002 and 1003 of 1939 and
Cri. R. P. Nos. 942 and 943 of 1939.

Indian Companies Act (VII of 1913), S. 277-L—Default by directors in maintaining requisite cash reserve—Ordinary director not knowingly and wilfully a party to the default—Propriety of conviction under S. 277-L.

Where the evidence does not warrant the conclusion that an ordinary director was knowingly and wilfully a party to the default to maintain the requisite cash reserve, a conviction of such director under S. 277-L of the Indian Companies Act must be set aside.

P. Govinda Menon and *T. K. Raman Nambissan* for Petitioners.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Venkatarāmāna Rao, J. S. A. No. 1104 of 1938.
12th January, 1940.

Transfer of Property Act (IV of 1882), Ss. 65-A, cls. 2 (a) and 2 (c) and 65-A—Kushikanam lease—Malabar Tenancy Act, S. 18, entitling lessee to right of renewal—If lease binding on mortgagor.

Cl. 2 (a) is qualified by cl. 2 (c) and any lease which the mortgagors may execute in accordance with the local law or usage must not contain a covenant for renewal. By virtue of S. 18, Malabar Tenancy Act, a cultivating kuzhikanomdar is entitled to get a renewal though there is no covenant. Therefore such a lease materially impairs the value of the security of the mortgagee and cannot bind the mortgagee under S. 65-A of the Transfer of Property Act.

M. C. Sridharan for Appellant.

O. T. G. Nambiar for Respondent.

K. S.

King, J.
16th January, 1940.

C. R. P. No. 150 of 1936.

Promissory note insufficiently stamped—Suit on contract of loan—When maintainable.

Even where a promissory note contained "all the terms of the contract come to earlier in the day" plus one additional term, the plaintiff was incompetent to sue upon the contract of loan. It cannot be said that the promissory note does not carry out all the terms of the contract come to earlier in the day.

Perumal Chettiar v. Kamakshi Ammal, I.L.R. (1938) Mad. 933 (F.B.), followed.

P. S. Narayanaswami Aiyar for Petitioners.

C. K. Viswanatha Aiyar for Parakat Govinda Menon, A. S. Srinivasa Aiyar and S. Seshadri for Respondent.

K. S.

Burn, Offg. Chief Justice
and *Krishnaswami Aiyangar, J.*
16th January, 1940.

Appeal No. 71 of 1937.

Power-of-attorney—Power to discharge debts and to execute documents afresh if necessary—If carries with it power to agree to the payment of interest for the amount for which document was to be executed.

Where a power-of-attorney conferred the power to discharge the debts due by the principal and to execute documents afresh if necessary,

Held, the power carries with it a power to agree to the payment of interest for the amount for which the document was to be executed.

A. Lakshmayya for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

Burn and Lakshmana Rao, JJ.
24th January, 1940.

CrI. R. C. No. 966 of 1939 and
CrI. R. P. No. 913 of 1939.

Criminal Procedure Code (V of 1898), S. 488—Imprisonment for failure to pay wife's maintenance ordered under S. 488 without sufficient cause—

Filing of insolvency petition by husband and obtaining order for release under S. 23 (1) of Provincial Insolvency Act—If sentence of imprisonment to be cancelled.

A husband who was sentenced to simple imprisonment for failure to obey the order to pay his wife maintenance under S. 488 without sufficient cause later obtained an order under S. 23 (1) of the Provincial Insolvency Act for release. He applied to the magistrate for release from imprisonment,

Held, in every case it is the duty of the Magistrate to find out whether the person ordered to pay maintenance under S. 488 has or has not failed without sufficient cause to comply with the order. Neither the protection order nor the adjudication order could be conclusive on this point. The question is one of fact which the Magistrate has to decide himself and the Magistrate's hands are not tied down by the order of the Insolvency Court. The husband is not under imprisonment in execution of a decree of any Court for payment of money under S. 23 of Provincial Insolvency Act. Even discharge in the insolvency does not free the husband from liability to obey an order under S. 488, Criminal Procedure Code. *Vide* S. 44 (d) of the Provincial Insolvency Act.

N. Rangachariar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

King, J.
25th January, 1940.

A. A. O. No. 601 of 1938.

Specific performance—Decree containing clause for dismissal of suit or appeal on failure by plaintiff to make a deposit within a certain time—If "error apparent on the face of the record"—Review under Civil Procedure Code, O. 47, rr. 1 and 2 by succeeding presiding officer.

In suits for specific performance, no such clause, as the inevitable dismissal of a suit or appeal on failure to make a deposit within a certain time can be included. Such a decree is bad as containing an "error apparent on the face of the record" and the Court is competent to grant an application for review though the decree itself was passed by the predecessor of the presiding officer.

I.L.R. 46 Mad. 148 and 59 M.L.J. 351, applied.

V. Subramanyam for Appellant.

V. Viyanna for Respondent.

K. S.

Burn and Lakshmana Rao, JJ.

30th January, 1940.

C. M. A. No. 168 of 1939.

Civil Procedure Code (V of 1908), O. 9, r. 13—Ex parte decree on merits—If only remedy appeal or if it can be set aside under O. 9, r. 13.

There is nothing in I.L.R. 41 Mad. 286 to support the view that the only remedy is an appeal when the decision is 'on the merits'. All suits tried *ex parte* are decided on the merits and not otherwise and the defendant may apply to the Court for an order to set it aside.

V. Viyanna for Appellant.

Ch. Raghava Rao for Respondent.

K. S.

Burn, J. S. A. No. 1212 of 1936.
1st February, 1940.

Madras Hereditary Village Offices Act (III of 1895), S. 21—If bar to a suit for partition of inam land between persons where rights to the shares has been already established.

Where the suit is not a suit for recovery of the emoluments of a village office but a suit for partition of the land between two persons whose right to the inam in equal shares has already been established the suit is not barred by S. 21 of Madras Act III of 1895.

M. S. Ramachandra Rao for Appellant.

Challa Rama Rao for Respondent.

K. S.

Abdur Rahman, J.

C. R. P. No. 1370 of 1938.

2nd February, 1940.

Practice—Trial Court—Competence to implead necessary parties.

A plaintiff impleaded certain persons who, he alleged, were merely tenants in the property for the possession of which he was suing. They pleaded that they were paying rent to another person who claimed to have been acting on behalf of his brothers as well. He and his brothers were therefore impleaded.

Held, the trial Court was fully competent to implead any person considered necessary in order to enable the Court to adjudicate effectually and completely all questions involved in the suit.

Ch. Raghava Rao and S. Ramachandran for Petitioner.

W. S. Krishnaswami Naidu for Respondent.

K. S.

Abdur Rahman, J.

C. R. P. No. 269 of 1937.

2nd February, 1940.

Indian Contract Act (IX of 1872), S. 25 (3)—Promise to pay portion of barred debt—If provides good cause of action for whole debt.

If a person promises to pay only a portion of the debt which is barred by limitation he can only be sued for that portion alone and not for the whole debt. In the absence of an express promise to pay the portion of the debt sued for it cannot be recovered.

P. Govinda Menon for Petitioner.

N. R. Sessa Aiyar for Respondent.

K.S.

Burn and Lakshmana Rao, JJ.

R. T. No. 2 of 1940.

5th February, 1940.

Crimes—Confession—If to be rejected merely because medical evidence is clear that death was caused in different way.

In a case of murder where the accused had confessed to causing death by strangulation with the fingers the defence suggested that the confession ought to be entirely rejected because the evidence of the doctor makes it clear that the woman might very well have been killed by strangulation with a piece of rope.

Held, the mere fact that the accused in his confession has given a wrong or an incomplete description of the way in which he brought about the victim's death is not a reason for finding the accused not guilty.

T. R. Thyagarajan for the Accused.

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

K. S.

Burn and Lakshmana Rao, JJ.
6th February, 1940.

A. A. O. No. 7 of 1940

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (g)—"Maintenance"—
If possesses any technical meaning.

"Maintenance" in S. 4 (g) of Madras Act IV of 1938 is not defined and cannot be supposed to have any technical meaning. Where a payment is meant for the maintenance of a decree-holder it will come under "maintenance" in S. 4 (g) of the Act.

K. V. Ramachandra Aiyar for Appellant.

Respondent not represented.

K. S.

King, J.
9th January, 1940.

S. A. No. 915 of 1936.

Res judicata—Finding in prior litigation concerning another item of property acquired under same gift deed that property was tavazhi—Subsequent litigation as to the other items—Issue as to nature of acquisition—If barred by res judicata.

In an earlier suit (to which the parties in the later suit were co-defendants) relating to one of the items of property acquired under the same gift deed the decision was that the property was *tavashi*,

Held, the finding was *res judicata* in a later suit as to the nature of the properties acquired under the gift and even though the prior decision is erroneous in law, it is *res judicata* not only regarding the actual item involved in the prior litigation but also to the other items of property.

(1937) 1 M.L.J. at 233, distinguished.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondent.

K. S.

Burn and Lakshmana Rao, JJ.
6th February, 1940.

C. M. A. No. 460 of 1938.

Civil Procedure Code (V of 1908), O. 9, r. 13—Application under pending trial—Interim order on applicant to deposit costs of suit or furnish security for decree amount—Power to make.

Pending trial of an application under O. 9, r. 13 of the Civil Procedure Code, the Subordinate Judge had no power to order that the applicant should deposit the costs of the suit or furnish security for the decree amount. If he had dealt with the application on its merits and had decided to grant it merely prescribing conditions under O. 9, r. 13 no appeal would have been entertained. The Judge could not dismiss the application for not furnishing security.

T. L. Venkatarama Aiyar for Appellant.

G. N. Chari for Respondent.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami
Aiyangar, JJ.
6th February, 1940.

O. P. No. 255 of 1938

Income-tax Act (XI of 1922), S. 4 (2)—Money from outside British India—Investment in Mysore bonds—Assessment on the face value of bonds—Whether income coming within the meaning of "receipt of income within British India."

A merchant out of profits earned at Saigon, sent Rs. 69,000 to Mysore and bought Mysore Government bonds of the value of Rs. 60,000. They were later deposited with the Imperial Bank of India, Madras for safe custody. On their security Rs. 30,000 was borrowed on overdraft account and lands were purchased. The merchant was assessed income-tax on Rs. 60,000 the face value of the bonds, as income 'brought' into British India.

Held, that as the 'income' was capitalised when the bonds were purchased at Mysore and they were not brought to India to be converted and used as income, there was no receipt of income within the meaning of S. 4 (2) of

the Income-tax Act and the merchant was not liable to be assessed in respect of the face value of the bonds.

(1940) 1 M.L.J. 137 (P. C.) and 5 Tax Cases 502, followed.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for the Assessee.

K. V. Sessa Aiyangar for The Income-tax Commissioner.

K. C.

Burn and Lakshmana Rao, JJ.

A. A. O. No. 588 of 1938.

7th February, 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Appealability—Orders passed before new rules when execution petition pending—If come under Civil Procedure Code, S. 47.

In an appeal before the coming into force of the new rules,

Held, orders under S. 19 of Madras Act IV of 1938 cannot be deemed to be orders under S. 47, Civil Procedure Code, even when execution petitions are pending. The application under S. 19 has to be made to the Court which passed the decree and it is not a matter relating to the execution of the decree in any sense. If decree is scaled down an appeal will lie from the new decree, but if the application is dismissed no appeal can lie.

Observation in (1939) 2 M.L.J. 853 held to be *obiter dictum* and not followed.

(1939) 2 M.L.J. 109, referred to.

R. S. Srinivasacharya and *K. V. Rajagopalan* for Appellant.

S. Ramaswami Aiyar for Respondent.

K. S.

Pandrang Row and Horwill, JJ.

A. S. No. 7 of 1937.

8th February, 1940.

Transfer of Property Act (IV of 1882), S. 18—Dedication of lands for private charity—Public to be benefited by the private charity—Whether valid—Part of trust pooja at tomb—If bad for perpetuity.

One 'M', a Roman Catholic Christian, executed an agreement whereby he relinquished his interests in his properties in favour of his sons and directed them to pay off his debts. He set apart 47 acres of Nanja and Punja lands for a charity called 'Chinnayya Odayar Samathi Charity' for defraying the expenses of Pooja, etc., at the tomb of his father Chinnayya Odayar and of feeding pilgrims during the annual festival at Velanganni and for supplying oil to 1,000 persons during that time. A creditor of 'M' attached the charity properties and M's claim was allowed and the creditor sued for a declaration that the charity was an illusory one and otherwise invalid. The lower Court upheld the charity, though it was of the view that part of the dedication, namely, for Pooja at the tomb of Chinnayya Odayar was bad for perpetuity.

Held, that the entire trust was valid. A private charity for the benefit of the public can be created and it will be saved by S. 18 of the Transfer of Property Act.

I.L.R. 15 Mad. 424 may not be good law after (1919) A.C. 815.

(1937) 1 M.L.J. 166 (P. C.), followed.

V. Ramaswami Aiyar for Appellants.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K. C.

Burn and Lakshmana Rao, JJ.
13th February, 1940.

R. T. No. 177 of 1939.

Criminal trial—Failure to examine other persons who were present—If ground for discrediting clear evidence of eye-witnesses.

It was suggested that other witnesses who were present ought to have been examined though other eye witnesses had given evidence,

Held, the evidence of the eye-witnesses who were present cannot be discredited merely because other persons who were present did not give evidence.

V. T. Rangaswami Aiyangar and K. S. Sankara Aiyar for Appellants.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

King, J.
14th February, 1940.

C. R. P. Nos. 1208 of 1938 and 57 of 1939.

Civil Procedure Code (V of 1908), O. 21, r. 92 (1) and O. 43, r. 1 (g)—Order refusing to entertain an application to set aside a sale because applicant failed to make a deposit—Appealability under O. 43, r. 1 (g).

On the language both of O. 21, r. 92 (1) and of O. 43, r. 1 (g) there is a right of appeal from an order refusing to entertain an application (under O. 21, r. 90, Civil Procedure Code, to have a sale set aside) because the applicant failed to make a deposit.

I.L.R. 1939 Mad. 340, relied on.

P. Govinda Menon for Petitioner.

K. P. Raman Menon for Respondent.

K. S.

King, J.
15th February, 1940.

A. A. O. No. 123 of 1939.

Indian Oaths Act (X of 1873), S. 11—Evidence given on special oath—Whether conclusive for all purposes or only in proceedings in which such evidence was given—Civil Procedure Code—O. 21, rr. 100 and 103—Order in claim proceedings—If res judicata in suit under r 103.

In an application under O. 21, r. 100, Civil Procedure Code, to redeliver to the applicant a portion of the house to which he claimed title, against the decree-holder who had obtained possession in execution, the applicant who was challenged to swear on oath that the suit property belonged to him accepted the challenge and the property was delivered. In a subsequent suit under O. 21, r. 103, Civil Procedure Code,

Held, the only proper method of interpreting S. 11 is to interpret it in conjunction with Ss. 8 and 9 and its primary meaning must be that the evidence given in any proceeding in which a challenge has been made and an oath has been taken shall be in that proceeding conclusive proof of the matter stated. It cannot automatically be evidence at all except in the proceeding in which it is actually being received. If there is a subsequent proceeding, then until that statement made on oath is brought into that subsequent proceeding it cannot even be considered.

Unless it is clearly present to the minds of the parties that the evidence which is going to be given in the claim petition is in no manner to be challenged in or by a subsequent suit an oath in those claim proceedings must relate to the claim proceedings themselves and to them alone.

The doctrine of *res judicata* cannot apply because the order on claim petition is specifically made subject by provisions of Civil Procedure Code itself to the result of a suit under r. 103.

K. V. Ramachandra Aiyar for Appellant.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

K. S.

Lakshmana Rao, J.
15th February, 1940.

CrI. R. C. No. 1100 of 1939
(CrI R. P. No. 1035 of 1939).

Criminal trial—Marking of irrelevant document in evidence—If ground for ordering retrial.

The marking of an irrelevant document in evidence is not a ground for ordering a retrial.

V. T. Rangaswami Aiyangar and *K. Kalyanasundaram Aiyar* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
20th February, 1940.

C. M. P. No. 539 of 1939.

Madras Debt Conciliation Act (XI of 1936)—If Debt Conciliation Board has power to scale down debts under Madras Agriculturists' Relief Act.

The Board is merely concerned with the settlement of the debts in accordance with the Madras Debt Conciliation Act. Scaling down of debts under Madras Act IV of 1938 is for the Courts and not for a Debt Conciliation Board. The Board has no power to scale down debts.

(1939) 2 M. L. J. 789, followed.

T. S. Narasinga Rao for Petitioner.

N. Appu Rao for Respondent.

K. S.

King and Lakshmana Rao, JJ.
21st February, 1940

C. C. A. No. 28 of 1939,

Hindu Law—Husband and wife—Receipt of separate maintenance by wife—If "judicial separation" from husband—Effect on right to deceased husband's Government Provident Fund amount.

A Government servant in respect of his Provident Fund amount had nominated his concubine excluding his wife on the ground that she was judicially separated from him as she was in receipt of separate maintenance. On his death the widow filed a suit for a declaration that the nomination of the concubine was invalid and that she alone was entitled to the amount.

Held, the widow was entitled to the amount and it could not be implied that she was judicially separated from her husband.

A. V. Viswanatha Sastri and *S. Amudachari* for Appellant.

A. Subramanyam and *C. Vedagirirama Sastri* for Respondent.

K. S.

Lakshmana Rao, J.
21st February, 1940.

CrI. R. C. No. 998 of 1939.
Taken up No. 10 of 1939.

Criminal Procedure Code (V of 1898), S. 182—Complainant cheated and parting with money at Trichinopoly—If case can be tried by Sub-divisional Magistrate, Trichinopoly.

Where the complainant was cheated and parted with the money at Trichinopoly the case can be tried by the Sub divisional Magistrate of Trichinopoly.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Accused not represented.

K. S.

Lakshmana Rao, J.
22nd February, 1940.

Crl. R. C. No. 158 of 1940.

Crl. R. P. No. 150 of 1940.

Madras Prohibition Act (X of 1937), S. 4 (1) (a)—Offence under—Ignorance of accused—If excuse.

The ignorance of the accused of the introduction of prohibition in the district is no excuse for an offence under the Madras Prohibition Act (X of 1937), S 4 (1) (a).

A. Nagarajan and *A. Viswanathan* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J.
22nd February, 1940.

Crl R C. No. 1051 of 1939.

Crl R.P No 987 of 1939.

Madras Local Boards Act (XIV of 1920), S. 164 (2)—Requisition order for land—Prosecution for failure to comply with—Board, if to establish its title to the land—Duty of Magistrate to decide legality of requisition.

The accused was prosecuted for failure to comply with a requisition under S. 164 (2) of the Madras Local Boards Act and he was acquitted on the ground that the Local Board should establish its title and possession of the land in the Civil Court before invoking the provisions of the Madras Local Boards Act.

Held, the acquittal was erroneous and it is incumbent on the Magistrate to decide the legality or otherwise of the requisition.

M. Raghupathy Reddy for Petitioner.

C. R. Krishna Rao for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J.
22nd February, 1940.

Crl R. C. No. 940 of 1939.

Crl. R. P. No. 888 of 1939.

Madras Local Boards Act (XIV of 1920), S. 159(1)—Encroachment in public street—Claim of Panchayat Board to alleged encroachment—Question—If of a civil or criminal nature.

The accused was prosecuted for failure to remove an encroachment in a public street and was acquitted on the ground that "the question of establishing the Panchayat Board's title or claim to the alleged encroachment is purely of a civil nature. On revision,

Held, the acquittal was erroneous and the Magistrate has to decide the legality or otherwise of the notice under S. 159(1) of the Madras Local Boards Act.

B Jagannadha Das for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Respondent not represented.

K. S.

Lakshmana Rao, J.
22nd February, 1940.

Crl. R. C. No. 1094 of 1939.

Indian Penal Code (XLV of 1860), S. 193—Allegation in plaint false—Offence under S. 193—Necessity for complaint by Court—If can be evaded by party filing a complaint of defamation.

A complaint was founded on an allegation in a plaint in a suit for partition and recovery of the share of the vendor of the accused in the family properties,

Held, if the allegation was false the offence would be one under S. 193, Indian Penal Code. A complaint by the Court is necessary for a prosecution for an offence under S. 193, Indian Penal Code, and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation.

A. Bhujanga Rao for Petitioner.

A. Gopalacharlu for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

[F. B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ.

O. P. No. 220 of 1937.

23rd February, 1940.

Indian Income-tax Act (XI of 1922), S. 4 (2)—Foreign income—Remittance from borrowing under overdraft—Whether remittance of capital or income—Availability of sufficient foreign income in the year—Effect.

Where there was income available in Saigon during the accounting year the remittance to British India must be deemed to be a remittance of income and the continued existence of an overdraft did not prevent the inference that the remittance was one of income.

T. R. Venkatarama Sastriar with *M. Subbaroya Aiyar* for Assessee.

K. V. Sessa Aiyangar for the Commissioner of Income-tax.

K. S.

Lakshmana Rao, J.
23rd February, 1940.

Cr. R. C No. 652 of 1939 and

Cr. R. P. No. 610 of 1939.

Indian Penal Code (XLV of 1860), S. 504—Saying during discussion "shameless fellow. I will shoe you"—If offence under S. 504.

When the petitioner, a Bill Collector, went to the complainant for collection, the complainant stated that he would pay in a week and during the discussion that followed the petitioner shouted "shameless fellow. I will shoe you."

Held, this did not amount to an offence under S. 504, Indian Penal Code,

V. T. Rangaswami Aiyangar for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

Respondent not represented.

K. S.

[F.B.]

The Chief Justice, King and Krishnaswami Aiyangar, JJ.
23rd February, 1940.

C. R. P. No. 729 of 1938.

Land Acquisition Act (I of 1894), S. 3 (d)—Decision of Subordinate Judge appointed under—Appealability under Civil Procedure Code.

The decision of the Subordinate Judge as a judicial officer appointed by the local Government under S. 3 (d) of the Land Acquisition Act to perform the functions of the Land Acquisition Court is a decree and is appealable under the Civil Procedure Code in the ordinary way.

43 M.L.J. 78: L.R. 49 I.A. 129: I.L.R. 45 Mad. 320 (P.C.) and A.I.R. 1939 All. 460, relied on.

66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.), discussed.

K. Narasimha Aiyangar and *D. Ramaswami Aiyangar* for Petitioner.

T.M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondent.

K. S.

King, J.
25th January, 1940.

Appeal No. 98 of 1938.

Costs—Suit on mortgage—False defence by puisne mortgagee of tender and refusal by mortgagee—If justifies order for costs against puisne mortgagee personally—Principles for awarding costs personally against persons other than mortgagor.

In a suit on a mortgage the puisne mortgagees raised a defence that there was a tender by them and refusal. This was found against and in the mortgage decree because of the false contention of tender the puisne mortgagees were made personally liable for plaintiff's costs. On appeal

Held: Though the Court has a discretion to order costs to be paid by persons other than the mortgagors themselves the discretion must be exercised judicially. But a person who is not himself a mortgagor should be made liable only for those costs which his own conduct has definitely necessitated.

D. Ramaswami Ayyangar for Appellants.

V. N. Venkatavaraduchariar for Respondents.

K. S.

King, J.
15th February, 1940.

C. M. A. No. 275 of 1938.

Deed—Construction of—'Heir', meaning of—Partition of joint family—Provision as to succession in the event of circumstances happening.

Four brothers divided themselves from their two step-brothers. In the partition deed, it was provided that if any of the brothers died without issues (santhathi), the heirs (varsugal) of the other brothers must get his properties. One of the brothers died without issues leaving two other brothers and a son of another brother who died previously. The son of the predeceased brother claimed the properties to the exclusion of the sons of the other two living brothers on the ground that there could be no heir to living persons and he alone answered the description "heir" of the other brothers. The lower Court held that the word "heir" need not necessarily mean 'heir' to deceased person and that in the deed in question it was used in a technical sense.

Held, the construction of the lower Court was correct.

M. S. Venkatarama Aiyar for Appellant.

K. V. Ramachandra Aiyar and *T. R. Srinivasan* for Respondents.

K. C.

The Chief Justice and
Krishnaswami Aiyangar, J.
28th February, 1940.

A. S. No. 188 of 1937.

Transfer of Property Act (IV of 1882), S. 53—Civil Procedure Code (V of 1908), O. 1, r. 8—Sale of property in fraud of creditor's—Suit on behalf of creditors—Represented by one—Conflict if any between S. 53 of Transfer of Property Act and O. 21, r. 63 of Civil Procedure Code.

The 1st respondent, an Association, obtained a simple money decree against a person (2nd respondent) for some amount on 1931. In 1934 the 1st respondent attached five items of properties alleged to belong to the 2nd res-

pondent. Consequent to the said attachment the wife of 2nd respondent the appellant herein, preferred a claim under O. 21, r. 58, Civil Procedure Code, and prayed for the raising of the attachment on the five items of property on the strength of a sale-deed dated 16th September, 1932, executed in her favour by the second respondent. The claim was allowed. Consequently the present suit was filed by the 1st respondent as plaintiff for a declaration that the sale-deed Ex. I in the case was a nominal document or in the alternative was in fraud of creditors which was executed in order to defeat and delay creditors. The 1st respondent had previous to the institution of the suit obtained the permission of the Official Receiver in whom the estate of the 2nd respondent had vested by the adjudication of the 2nd respondent as insolvent. The plaint was filed on 6th April, 1936. The lower Court held that the sale-deed, though not a nominal document, was a fraud on creditors and was not a *bona fide* transaction and so vacated the claim order.

Held, that as the suit fell within S. 53, Transfer of Property Act, the suit should have been brought in a representative character. The 1st respondent ought to have obtained permission under O. 1, r. 8, Civil Procedure Code.

The words 'on behalf of or for the benefit of' in S. 53 are taken from O. 1, r. 8. If a suit in a representative capacity is to be filed it can be brought only under O. 1, r. 8 [See 56 M. 657 (P.C.)].

Before the amendment of S. 53, Transfer of Property Act there was a conflict in India between the various High Courts on the question whether a suit under S. 53 ought to be filed in a representative capacity. The Madras High Court held that it was not necessary to do so in a suit under O. 21, r. 63.

I.L.R. 42 Mad. 143; I.L.R. 43 Mad. 760 (F.B.).

I.L.R. 34 C. 999; I.L.R. 16 Bom. 1; 27 B. 146, referred to.

S. 53, Transfer of Property Act and O. 21, r. 63 are not in conflict as S. 53 as amended does not take away the right to sue. When the decree-holder sues he must sue under S. 53 after getting permission under O. 1, r. 8. The respondent not having complied with the requirements of S. 53 the suit should be dismissed (See I.L.R. 12 Rang. 666; I.L.R. 12 Rang. 670; A.I.R. 1936 Cal. 783.)

M. S. Venkatarāma Aiyar and K. V. Srinivasa Aiyar for Appellants.

K. Bhashyam and V. Meenakshisundaram for Respondents.

K. C.

*Venkataramana Rao and
Abdur Rahman, JJ.
6th February, 1940.*

Appeal No. 21 of 1937.

Hindu Law—Gifts—Powers of father over immovables—Unreasonableness of gift—Effect—Dowry received by coparcener thrown into 'hotch pot'—Effect.

The plaintiff, a Hindu son, filed a suit against his father for partition, and sought to declare that the gift of immovable property made by the father in favour of his daughter was void as being unreasonable and excessive and also claimed the dowry (*katnams*) given to the plaintiff at the time of his marriage when he was a minor as his self-acquisition,

Held, that the gift *in toto* must fail when once it was found excessive and beyond the reasonable powers of a Hindu father, and there was no authority for the proposition that it could be reduced to a reasonable limit by a Court of law.

Held, further, that *katnams* given in Hindu families to bridegrooms at the time of marriage are normally thrown into the hotchpot and rarely separate claims are made and where the son after attaining majority does not claim this as his self-acquisition particularly at the time when disputes arose for partition between the parties it must be presumed that they are thrown into the common stock.

V. Govindarajachari and K. Someswara Rao for Appellants.

P. Vallabhacharyulu for Respondents

K. S. ———

*Pandrang Row and Horwill, JJ.
6th February, 1940.*

Appeal No. 328 of 1937.

Mortgage—Contract that mortgagors should sell some lands to mortgagee—How far discharge of mortgage—Suit on mortgage—Maintainability.

An executory contract can amount to a discharge of a mortgage-debt, but there is no presumption in law that it does so. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors (the defendants) that the defendants should sell their property to the mortgagee is not tantamount to an admission that the mortgage is no longer in existence. The suit on the mortgage is maintainable and a decree can be passed on the mortgage.

P. Satyanarayana Rao and M. V. Nagaramayya for Appellants.

B. Sitarama Rao and N. Vasudeva Rao for Respondents.

K. S. ———

[F. B.]

*The Chief Justice, King and Krishnaswami
Aiyangar, JJ.
7th February, 1940.*

A. A. A. No. 109 of 1937
and C. R. P. No. 1188 of 1937.

Civil Procedure Code (V of 1908), O. 21, r. 89—Judgment-debtor privately assigning a mortgage to decree-holder and depositing the balance in Court on the re-opening day (the 30th day after sale happening to be a day on which Court was closed)—Application on that day for setting aside the sale—If compliance with O. 21, r. 89—General Clauses Act (X of 1897), S. 10—Applicability.

A sale in execution of a decree took place on 2nd December, 1935. On the 2nd January, 1936, the judgment-debtor assigned to the decree-holder a

mortgage (which had been executed in their favour) in part satisfaction of the amount due under the decree. A small balance of Rs. 10 was due under the decree. Court closed for the Christmas vacation some days before 20th December, 1935 and did not reopen until the 3rd January, 1936. On that date the judgment-debtor paid into Court Rs. 10 with an application for setting aside the sale. It was contended by the decree-holder that the full amount ought to have been deposited in Court within 30 days of the sale and non-fulfilment of this condition vitiated the application and that the deposit must be in cash only.

Held, any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of O. 21, r. 89. Where the decree-holder was paid most of the amount due to him by assignment of a mortgage out of Court and the small balance was deposited into Court by the judgment-debtors when they made the application for setting aside the sale, it is sufficient compliance with O. 21, r. 89.

Per *Krishnaswami Aiyangar, J.*—O. 21, r. 89 of the Code does not contemplate payment in cash and in cash only.

Where the 30th day after the sale (within which the amount is to be deposited and the application made for setting aside the sale) was a day on which the Court was closed the balance of amount after adjustment by assignment of a mortgage can be deposited and the application made on the day the Court reopens. What is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. S. 10, General Clauses Act, applied and deposit on the reopening date was sufficient.

Srinivasaraghavan and Thyagarajan for Appellant-Petitioner.

T. R. Srinivasa Aiyangar and N. T. Raghunathan for Respondents.

K. S.

Burn, J.
16th February, 1940.

S. A. Nos. 149 and 185 of 1937.

Husband and wife—Husband found not entitled to restitution of conjugal rights—Right of wife to maintenance—Legal cruelty—If essential.

It is not necessary that the wife should prove actual cruelty in order to entitle her to a decree for separate maintenance. On the other hand it is logical that if the husband is found to be not entitled to a decree for restitution of conjugal rights (because he had virtually abandoned her) the wife should be held entitled to a decree for a separate maintenance.

71 M.L.J. 499, relied on.

M. S. Ramachandra Rao and D. R. Krishna Rao for Appellant in S. A. No. 149 of 1937 and Respondent in S. A. No. 185 of 1937.

S. Parthasarathi and V. K. Tiruvenkatachari for Respondent in S. A. No. 149 of 1937 and Appellant in S. A. No. 185 of 1937.

K. S.

Horwill, J.
21st February, 1940.

S. A. No. 214 of 1937.

Hindu Law—Maintenance—Husband marrying second wife and inviting his mother-in-law to live with him—If sufficient ground for awarding separate maintenance to first wife.

Neither a man's marrying a second wife nor his inviting his mother-in-law to live with him has ever been held to be a sufficient cause for awarding separate maintenance to his first wife.

P. V. Rajamannar and *K. Subba Rao* for Appellant.

K. Kottayya and *S. Sitharama Aiyar* for Respondents.

K. S.

Horwill, J.
21st February, 1940

S. A. Nos. 261 and 262 of 1937.

Survey and Boundaries Act (VIII of 1923), S 14—Suits under by private persons as to boundaries—Survey officers if represent the Government and Government if necessary or proper parties to such suits.

The decisions given under the Survey and Boundaries Act are by survey officers who, though appointed by the Government in no-sense represent them in their actions under the Survey and Boundaries Act. Their decisions are binding on the parties in the absence of a suit. The Government was not in the least interested in the result of the suits, for the survey officer in making his decisions acted not as an agent of the Government, but as a statutory officer specially empowered under the Act. The Government is neither a necessary nor a proper party to the suit and Government if impleaded is entitled to its costs from the plaintiff.

The Government Pleader (B. Sitarama Rao) for Appellant.

K. Kameswara Rao for Respondent.

K. S.

King, J.
23rd February, 1940.

A.A.A. O. Nos. 184 and 185 of 1935.

Hindu Law—Coparcener disqualified from claiming a share in joint family property—If can sever his legal connection with family by issuing a notice

A notice by a person who is disqualified from claiming a share in joint family property is inoperative to sever his legal connection with that family.

69 M.L.J. 410, distinguished.

B. Jagannadha Das for Appellant.

T. K. Srinivasa Thathachariar for Respondent.

K. S.

Venkataramana Rao, J.
23rd February, 1940.

C. R. P. No. 1348 of 1939.

Practice—Small Cause suit—Contentions raised under Agriculturists' Relief Act—Need to give a judgment dealing with the correctness of the figures in the petition with reasons therefor.

Though a suit is a small cause one, where there was a contention raised under the Agriculturists' Relief Act the trial judge ought to deal with it and give a decision as to the correctness of the figure giving his reasons therefor.

R. Krishnaswami Aiyangar for Petitioner.

T. P. Gopalakrishna Aiyar for Respondent.

K. S.

Krishnaswami Aiyangar, J.
23rd February, 1940.

C. R. P. No. 2121 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (4) and 15—Tree tax payable under the Madras Estates Land Act—If "rent" within S. 15 of the Madras Act (IV of 1938)—Madras Estates Land Act, S. 77—Decision of Collector in applications for relief under Act (IV of 1938)—If revisable by High Court.

"Tree tax" is not 'rent' under S. 15 of the Madras Agriculturists' Relief Act and a ryot in possession of trees in a holding is not entitled to relief under the Act in respect of tree tax. Interlocutory and other orders made by the Collector under S. 77 of the Estates Land Act are revisable by the High Court.

I.L.R. 42 Mad. 76, followed.

K. Bhashyam Aiyangar for Petitioner.

B. Sitarama Rao for Respondent.

K. S.

Horwill, J.
26th February, 1940.

C. R. P. No. 218 of 1940.

Village temple—Right to management—Allowing archakas to manage small property of the temple—If right of management of villagers lost.

By allowing the archakas for some years to manage the small property of the temple, the villagers did not lose their right of management of the institution or even its property.

K. Umamaheswaram for Petitioner.

K. S.

King and Lakshmana Rao, JJ.
27th February, 1940.

R. T. No. 7 of 1940.

Evidence Act (I of 1872), Ss. 26 and 27—Charge of murder—Confession by third accused followed by unsuccessful search by him for a spear said to have been hidden by him—Subsequent production of the spear by first accused—Admissibility of statement of third accused under S. 27, Evidence Act and sufficiency to sustain a conviction.

Three accused were charged with murder. The third accused made a statement to the police and in the search which followed he was unable to find the spear. The first accused afterwards took out and produced the spear.

Held, the discovery of the spear was not in the essential sense of the word due to the information given by the third accused and when the informant has tried unsuccessfully to recover such property the effect of his information has become completely exhausted. The statement does not fall within S. 27 but within S. 26 and is inadmissible in evidence.

P. Basi Reddi for the Accused.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Horwill, J.
26th February, 1940.

S. A. No. 523 of 1937.

Wills—Bequest to widow for her life and provision that after her death it should be enjoyed by daughter's son—Daughter's son predeceasing widow—Person entitled to estate.

A testator left the property to his widow for her life and made provision that after her death it should be enjoyed by his daughter's son. The daughter's son predeceased the widow who then mortgaged the property and subsequently sold the same.

Held, where there is a life estate given to a person, the remainder vests on the testator's death in the remainderman, unless there are very clear words to show that the testator had a contrary intention on the language used in the will. The daughter's son had a vested remainder which passed to his widow on his death.

T. L. Venkatarama Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K. S.

Venkataramana Rao and
Abdur Rahman, JJ.
28th February, 1940.

Appeal No. 343 of 1937.

Limitation Act (IX of 1908), S. 20—Joint Hindu family—Pronote by son—Payment of interest and endorsement on pronote by father—If acknowledged by "person duly authorised in that behalf."

A member of a Hindu joint family cannot, simply because he is a member of that family without specific authority, pay a debt on behalf of the other member so as to enlarge the period of limitation.

C. Rama Rao for Appellant.

Y. Suryanarayana for Respondent.

K. S.

Horwill, J.
29th February, 1940.

S. A. No. 70 of 1937.

Indian Contract Act (IX of 1872), S. 72—Person paying property tax to Municipality upon demand in a wrong belief that he was bound to pay—If entitled to recover it in Court of law.

A person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error.

Ch. Raghava Rao and V. V. Sastry for Appellant.

V. Govindarajachari for Respondent.

K. S.

King, J.
29th February, 1940.

A.A.A. O. No. 112 of 1938.

Surety bond—Undertaking liability for decree amount if judgment debtor failed to file an insolvency petition within one month and properly to conduct the proceedings in that insolvency petition etc.—Failure to apply for discharge within the time finally limited—Effect.

According to the terms of the bond a surety undertook liability for the decree amount if the judgment-debtor failed to file an insolvency petition within one month and properly to conduct the proceedings in that insolvency petition. The insolvent did not apply for discharge within the time finally limited and as a result the adjudication was annulled.

Held, the application for discharge was a proceeding in an insolvency petition. (A.I.R. 1933 Mad. 360 and C. M. S. A. No. 107 of 1929 (unreported) Decision of Curgenven J. followed) and the liability of the surety has arisen under the bond because of the failure of the insolvent to apply for his discharge.

S. T. Srinivasagopalachari for Appellant.

D. Ramaswami Aiyangar, T. P. Kannabhiran and M. V. Gopalaratnam for Respondent.

K. S.

*Venkataramana Rao and
Abdur Rahman, JJ.
29th February, 1940.*

Appeal No. 193 of 1937.

Hindu Law—Moiher—Right to residence—Non-existence of family dwelling house on the date of her husband's death—If bars right to residence in house constructed with family funds on ancestral land.

The mother is undoubtedly a member of the joint family with her son and she is entitled to claim a right of residence in a house which is owned by the family. Where the site is ancestral and a portion of the family fund is spent towards the construction of the house, the house must be treated as the joint family house of the joint family of both the mother and the son. The mother is entitled to claim a right of residence which can be only defeated by a decree obtained against the son on a debt incurred for family necessity.

I, L. R. 12 Mad. 260 followed.

Absence of family dwelling at the time of her husband's death cannot deprive the mother of her right of residence.

A. V. Narayanaswami Aiyar for Appellant.

T. R. Srinivasa Aiyar for Respondent.

K. S.

[F. B.]

*The Chief Justice, King and Krishnaswami
Aiyangar, JJ.
4th March, 1940.*

S. R. Nos. 32601, 32137
and 28253 of 1939.

*Code of Criminal Procedure (V of 1898), Ss. 195 and 476—Criminal Rules of Practice, R. 37—Validity of rule—Complaint in respect of offence alleged to have been committed in relation to a proceeding in Court—Revisi-
onal jurisdiction of High Court—Whether Civil or Criminal.*

In respect of complaints as to offences alleged to have been committed in relation to proceedings in Court,

Held, A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, Criminal Procedure Code and if for the purpose of that application it remains a Civil Court it must be governed by the provisions of the Code of Civil Procedure.

An application for revision arising out of proceedings in a civil suit must be dealt with as a Civil Revision Petition and a similar application arising out of Criminal proceedings as a Criminal Revision Petition.

Case-law discussed.

31 M.L.J. 440, followed.

N. Rajagopala Aiyangar for *P. S. Raghavarama Sastri* for Petitioner and *Advocate-General (Sir A. Krishnaswami Aiyar)* for Respondents in S. R. No. 32601 of 1939.

K. S. Rajagopalachari for *K. Rajah Aiyar* for Petitioner and the *Advocate-General (Sir A. Krishnaswami Aiyar)* for Respondent in S. R. No. 32137 of 1939.

S. Ramachandran for *R. Sundaralingam* for Petitioner in S. R. No. 28253 of 1939.

K. S.

King, J.

5th March, 1940.

C. M. S. A. No. 237 of 1938.

Civil Procedure Code (V of 1908), O. 21, rr. 58, 62—Attachment by simple money decree-holder—Claim by mortgagee—Refusal to hold sale subject to mortgage—Effect—Mortgage decree without impleading auction-purchaser—Right to possession of mortgagee decree-holder purchaser as against the simple money decree-holder purchaser—O. 21, r. 97.

A simple creditor obtained a decree against a debtor on 22nd January, 1934 and attached the property of the judgment-debtor on 18th June, 1934. An alleged holder of a simple mortgage on the same property from the same judgment-debtor dated 13th June, 1933 intervened with a claim petition requesting the Court to hold the auction sale subject to his mortgage. The executing Court passed the following order on 7th September, 1934. "In the absence of a note of this alleged mortgage in the encumbrance certificate, the sale cannot be held subject to any such mortgage. This order will be without prejudice to whatever rights petitioner may otherwise have. The petition is dismissed. No costs". The simple money decree-holder became the purchaser and got delivery of the properties on 22nd May, 1935. The mortgagee filed a suit on foot of his mortgage on 11th October, 1934 without impleading the attaching decree-holder and got a decree. He purchased the properties on 25th November, 1935 and was obstructed when he attempted to take possession by the prior purchaser in execution of his simple money decree. The mortgagee decree-holder purchaser applied under O. 21, r. 97 for removal of obstruction. The simple money decree-holder pleaded that the mortgagee was barred under O. 21, r. 63.

Held, the order on the claim petition was an order adverse to the mortgagee and rider added by the executing Court was a mere truism which could not operate to save his rights and the mortgagee was not entitled to claim possession from the simple money decree-holder purchaser.

43 M.L.J. 467; 46 M.L.J. 141; 49 M.L.J. 706 and A.I.R. 1935 Mad, 328 distinguished.

A. Lakshmayya for Appellant.

K. Raghuramayya for Respondent.

K. S.

King, J.
8th March, 1940.

A. A. A. O. No. 232 of 1938.

Surety bond—Judgment-debtor wishing to apply for adjudication as insolvent—Surety binding himself to be liable inter alia if debtor failed to file insolvency petition or fails to do the necessary things in the matter of that petition—Dismissal of petition for failure of debtor to make a deposit of Rs. 10 demanded by Court—Liability of surety.

A judgment-debtor against whom execution had been taken out expressed the intention of applying to be adjudicated insolvents. The respondent executed a surety bond in that connection, which provided *inter alia* as follows:—"I the surety do hereby bind myself to pay into Court after one month from this date the decree debt as well as future interest and costs that may be due to the decree-holder, if the defendant fails to file the insolvency petition or if the defendant fails to do the necessary things in the matter of that petition after he has filed it." The petition for adjudication was dismissed on account of the debtor's negligent failure to make an additional deposit of Rs. 10 demanded by the Court.

Held, the moment the insolvency petition was dismissed the liability of the surety arose and the liability once fastened cannot be shaken off by the subsequent conduct of the debtor in filing a second petition for adjudication,

Case-law reviewed.

K. Kuttikrishna Menon and *K. N. Kumaran* for Appellant.

A. Achuthan Nambiar and *K. Govindan* for Respondent.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
26th February, 1940.*

Appeal No. 266 of 1937.

Hindu Law—Adoption—Refusal of consent by nearest sapindas—Absence of any other sapindas of husband—Effect.

After an examination of the authorities, held that there is no residuary power in a widow to adopt when her husband's sapindas are all dead and the nearest sapinda has refused his consent.

I.L.R. 1938 Mad. 551 (P.C.), referred to.

K. Kamarawara Rao for Appellant.

P. V. Rajamannar and *K. Subba Rao* for Respondent.

K. S.

*Horwill, J.
27th February, 1940.*

S. A. No. 658 of 1936.

Tree patta granted in respect of trees on unoccupied land—Right of Government to resume them and grant them to another with the land.

The tree patta gives the person to whom it is issued, a right to enjoy the usufruct of the trees, the patta being liable to cancellation at the end of the year or at three months' notice. The Government have a right to resume them and grant them to others along with the land.

Evidentiary value of pattas discussed.

The Government Pleader (B. Sitarama Rao) for Appellant.

N. Viswanatha Aiyar and *N. V. Nagaraja Aiyar* for Respondent.

K. S.

*Venkataramana Rao and
Abdur Rahman, JJ.
28th February, 1940.*

Appeal No. 8 of 1937.

Hindu Law—Joint family—Debts—After-born son—Right to question validity of debt contracted by father before his birth—Share which will pass on alienation.

A coparcener born in the family subsequent to an alienation before the death of the other coparceners who could challenge it has a right to the property and therefore a right to challenge the alienation.

I.L.R. 47 All. 795 and L.R. 52 I.A. 433 (P.C.) held to be a direct decision and observation in Mayne's Hindu Law (10th Edition) pages 511 and 512, not followed.

At the date of the alienation the father was entitled to a half-share in the joint family with his one son then existing and that interest which was vested in him would pass to the mortgagee and the other half would still be the joint family property and it is only in that half and the equity of redemption of the other half the alienation being a mortgage, the after-born son would be entitled to participate with the other son. The alienee gets the interest which the father was entitled to on the date of the alienation.

I.L.R. 35 Mad. 47, followed.

Case-law discussed.

N R C

V. Govindarajachari and *K. Krishnamurthi* for Appellant.

A. Venkatachalam, *P. Somasundaram* and *P. Suryanarayana* for Respondents.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
29th February, 1940.*

Appeal No. 188 of 1937.

Transfer of Property Act (IV of 1882), S. 53—Suit for setting aside alienation made with intent to defeat or delay creditors—Necessity to file suit in representative capacity under Civil Procedure Code, O. 1, r. 8.

In a suit by a decree-holder (whose attachment had been raised on a successful claim petition) to avoid the alienation in favour of the claimant as one in fraud of creditors,

Held, as the suit is one contemplated by S. 53 of the Transfer of Property Act the provisions of that section must be applied especially as there is nothing in the section incompatible with O. 21, r. 63, Civil Procedure Code. It is necessary to sue under S. 53 of the Transfer of Property Act in a representative capacity and as that is not done the suit must fail.

Case-law reviewed.

K. V. Srinivasa Aiyar for Appellant.

K. Bashyam and *V. Minakshisundaram* for Respondent.

K. S.

*King, J.
4th March, 1940.*

S. A. No. 33 of 1937.

Indian Contract Act (IX of 1872), S. 72—Execution against property already sold to stranger—Registered notice by the purchaser and claim petition—Dismissal—Purchase of the property by decree-holder in sale in execution—Deposit of amount under Civil Procedure Code, O. 21, r. 89 and setting aside of execution sale—Liability of decree-holder.

A decree-holder attached property which had already been sold to a stranger. The stranger sent a notice protesting against this. The claim petition was however dismissed and the property was purchased by the decree-holder. Then, the purchaser deposited the amount in Court under O. 21, r. 89. No suit was filed to set aside the order dismissing the claim. In another execution against the same property by the same person the purchaser again filed a claim petition which was allowed. The purchaser then filed a suit to recover damages from the decree-holder or in the alternative to recover the amount deposited under O. 21, r. 89, Civil Procedure Code.

Held, the money was paid under legal coercion and the plaintiff is entitled to recover that money from the decree-holder. Failure to file a suit to set aside the order dismissing the claim does not affect the liability of the decree-holder.

34 L.W. 399, followed.

Y. Govindarajulu and *B. L. Narayana* for Appellant.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

K. S.

[F. B.]

*The Chief Justice, King and
Krishnaswami Aiyangar, JJ.
6th March, 1940.*

S. A. No. 665 of 1936.

Limitation Act (IX of 1908), Ss. 19 and 20—Mortgage—Purchase of equity of redemption in execution—Loss of personal remedy against mortgagor—Payment after that by mortgagor—Whether payment within S. 20 or acknowledgment within S. 19 to save limitation.

After the equity of redemption had been assigned and after the mortgagees had lost their personal remedy against the mortgagor, the mortgagor made a small payment. In a suit on the mortgage,

Held, the payment cannot save the suit from the bar of limitation.

S. S. Ramachandra Aiyar for Appellants.

M. Krishna Bharathi for Respondents.

K. S.

*Burn, J.
6th March, 1940.*

S. A. No. 40 of 1937.

Madras Hereditary Village Offices Act (III of 1895), Ss. 13 (1) and 21—Suit for declaration as to appointment of karnam—Absence of jurisdiction of Civil Courts.

Plaintiff sued for declaration that the defendant's appointment as karnam was illegal and for registry of his own name as holder of the office which was hereditary.

Held, that the Civil Courts had no jurisdiction in the case. The fact that the defendant was a stranger to the family did not make any difference.

63 M.L.J. 577.

G. Natarajan for Appellant.

The Government Pleader (B. Sitarama Rao) and V. C. Viraraghavan for Respondents.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
15th March, 1940.*

C. M. P. No. 262 of 1940.

Madras Debt Conciliation Act (XI of 1936), Ss. 10 and 12—Absence of creditor when petition for conciliation taken up—Order that debt considered to have been discharged—Propriety—Procedure.

A creditor who had submitted a statement under S. 10 of the Madras Debt Conciliation Act was fifteen minutes late for the hearing and the Board made an order purporting to act under sub-S. (2) of S. 10 that the debt was considered to have been discharged. When he applied the Board refused to reopen the matter as he did not offer any explanation for coming late. In a petition for issue of a writ of *certiorari* against the Board,

Held, as a statement had been submitted the Board had no jurisdiction to pass an order holding the debt to be discharged. In as much as the debt was not disputed by the debtors or any other creditor the Board should have dealt with the matter on the basis that the debt was due and owing.

K. Srinivasa Rao for Petitioner.

Respondent not represented.

K. S.

King, J.
19th March, 1940.

C. C. C. A. No: 49 of 1938.

Civil Procedure Code (V of 1908), O. 9, r. 13 and O. 23, r. 1—Ex parte decree against one defendant—Application by him to set aside the decree—Withdrawal of suit against him alone—Effect.

Plaintiff filed a suit against the defendants for declaring his right to the exclusion of the first defendant and restraining the second defendant from delivering the properties to the first defendant. First defendant set up exclusive title in himself, but became *ex parte*, whereon, a decree was passed against both the defendants. Then the first defendant filed an application to set aside the *ex parte* decree. The plaintiff withdrew his suit under O. 23, r. 1, Civil Procedure Code, against the first defendant.

Held, that the withdrawal of suit against the principal defendant must entail in its entire dismissal as the second defendant's interest is claimed only through the real owner.

Ch. Raghava Rao and V. V. Sastri for Appellant.

The Government Pleader (B. Sitarama Rao), K. Ramamurthi and K. Someswara Rao for Respondents.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
13th March, 1940.*

A. A. O. No. 98 of 1939.

*Indian Tea Control Act (VIII of 1938), Schedule, Cl. 1—Application to
Indian Tea Licensing Committee merely to change the year for determining
crop basis—If to be allowed.*

The yield of 1932 was selected by the owners of the tea estate for ascertaining its export quota. The Act of 1938 made a change. The company found its crop basis would be better if it selected the year 1929 instead of 1932 and applied to the committee merely claiming the right to change the year and did not apply for any investigation. The Committee rejected the application. On appeal,

Held, in view of the terms of Cl. 1 of the schedule to the new Act the Committee was perfectly right in rejecting the application.

O. T. G. Nambiar and T. M. Kasturi for Appellants.

King and Partridge for Respondent.

K. S.

*Burn, J.
14th March, 1940.*

S. A. No. 189 of 1937.

*Sale of land—Settlement register incorrectly showing an excess in extent
of land—Vendor if liable for actual deficiency.*

The area of a field was incorrectly shown as 2'22 acres instead of 2'135 acres. The vendor had not interfered with the ridge between his portion and the vendee's portion and the vendor was not shown to have moved the boundary between his land and the land purchased. Though the vendee thought he had bought 79 cents, actually he bought only 70 cents.

Held, there is no reason why the vendor should make this deficiency or any part of it, good.

K. V. Sesa Aiyangar for Appellant.

A. Sundaram Aiyar and K. S. Sankararaman for Respondent.

K. S.

*Horwill, J.
15th March, 1940.*

C. R. P. No. 1460 of 1939.

*Civil Procedure Code (V of 1908), O. 33, r. 1—Construction—Saleable
interest in some items of suit property—Effect on right to sue as pauper.*

The comma, after the word "suit" separates the first part of the explanation to R. (1) from the second part; it follows that the expression "other than his necessary wearing apparel and the subject-matter of the suit" qualifies only the second part of the explanation and not the first.

Mulla's Civil Procedure Code commentaries, and 50 M.L.J. 114, relied on. 67 M.L.J. 581 referred to.

Where both sides agree that the plaintiff has a saleable interest in certain items of suit property, it would be contrary to the spirit of O. 33, if the plaintiff could ignore that property on which money could be raised for deciding a petition for leave to sue as a pauper.

K. V. Srinivasa Aiyer for Petitioner.

R. Desikan for Respondent.

K. S.

*Burn, J.
20th March, 1940.*

S. A. No. 226 of 1937.

Civil Procedure Code (V of 1908), S. 11, Expl. IV and O. 2, r. 2—Mortgage—Suit for possession—Later suit for mortgage money—Maintainability.

N R C

Though there is a separate covenant for payment of the mortgage money it gives only one cause of action. On failure of the mortgagor to deliver or procure possession, the mortgagee has a cause of action in which he may claim either of two alternative reliefs, possession or the money and not both. Where the mortgagee files a suit for possession only his later suit for the mortgage money is clearly barred under O. 2, r. 2 and S. 11, Expl. IV of the Civil Procedure Code.

V. Viyyanna for Appellant.

P. Satyaharayana Rao and *M. Balakrishnamurthi* for Respondent.

K. S.

Burn, J.
20th March, 1940.

S. A. No 201 of 1937.

Husband and wife—Refusal of claim of husband for restitution of conjugal rights—How far ground for claim for separate maintenance by wife.

It will no doubt generally be the case that a wife who is able to resist her husband's claim for restitution of conjugal rights, will be able on those very grounds to claim separate maintenance from him. But it is not a rule of law that the wife's suit for maintenance must succeed if the husband's suit for restitution of conjugal right fails. The right to maintenance depends on the circumstances of each case.

T. L. Venkatarama Aiyar for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

K. S.

Lakshmana Rao, J.
20th March, 1940.

CrI. Appeal No 239 of 1939.

Indian Emigration Act (VII of 1922), S. 30 (3) read with S. 25 (2) (b)—Assisting labourers to depart from British India—Gist of offence—Tests.

Where the accused assisted some labourers (by obtaining tickets for them) to depart by land out of British India so as to depart for the purpose of working for hire in a country beyond the sea,

Held, it is an offence made punishable under S. 30 (3) read with S. 25 (2) (b) of the Indian Emigration Act. The view that assistance means either financial assistance or entering into an agreement to work for hire is unwarranted.

The Public Prosecutor (V. L. Ethiraj) for Appellants.

T. R. Srinivasa Aiyar for Respondent.

K. S.

Lakshmana Rao, J.
21st March, 1940

CrI. R. C. No. 975 of 1939.

CrI. R. P. No. 920 of 1939

Madras Marumakkatayam Act (XXII of 1933), S. 4—Conjugal union of marumakkatayi female solemnized in accordance with customary ceremonies of her community—Whether legal marriage under S. 4 of the Act.

Where the conjugal union of a *marumakkatayi* female with a male was openly solemnized in accordance with the customary ceremonies of the community to which she belongs, it has to be deemed for all purposes to be a legal marriage under S. 4 of the Madras Marumakkatayam Act.

R. S. Srinivasachari for Petitioner.

R. Venkataramon and *V. Venkataraman* for Respondent.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

[F. B.]

*The Chief Justice, Mockett and
Krishnaswami Aiyangar, JJ.*
4th March, 1940.

S. A. No. 921 of 1936.

*Civil Procedure Code (V of 1908), O. 41, rr. 11 and 12 (1)—Appeal if can
be admitted in part only.*

By virtue of r. 11, the appellate Court may dismiss the appeal without serving notice on the respondent but if it does not dismiss the appeal summarily it must by virtue of r. 12 (1) fix a day for hearing "the appeal". There is nothing in either rule which suggests that the Court may admit the appeal in part.

Case-law discussed.

V. S. Narasimhachar for Appellant.*N. Appu Rao* and *Ch. Raghava Rao* for Respondent.

K. S.

Horwill, J.
21st March, 1940.

C. R. P. No. 2120 of 1939.

*Civil Procedure Code (V of 1908), S. 60 (k)—Allowances of Railway
guard—If exempt from attachment—Recoveries of advances made from Pro-
vident Fund—If to be deducted from attachable salary.*

The allowances of a Railway guard over and above his salary are not exempted from attachment. Where the guard had taken an advance from the Provident Fund and that amount was being recovered from him at the rate of Rs. 10 a month, such recoveries are not deposits although they may be compulsory deductions or recoveries and there can be no deduction of this amount from the salary available for attachment.

V. Ganapathi Ayyah and *R. Ramachandra Pant* for Petitioner.*A. Dorairaj* for Respondent.

K. S.

Wadsworth, J.
21st March, 1940.

C. R. P. No. 833 of 1938.

*Civil Procedure Code (V of 1908), Sch. II, Para. 20—Award as a whole
exceeding pecuniary jurisdiction though the portion of the award in which
applicants are personally interested is within jurisdiction—Jurisdiction.*

Where the relief claimed is a decree in terms of the award as a whole (a decree for a general partition of the tarwad properties) though the applicants ask for the confirmation of their possession of the share already handed over to them, which was within the pecuniary jurisdiction of the Court.

Held, "subject-matter of the award" in Para. 20 of Sch. II means the whole and not the whole or a portion of the subject-matter and the application must be returned by the Munsif's Court for presentation in a Court having jurisdiction.

I.L.R. 55 Mad. 689, applied.

10 L.W. 37; 5 M.H.C.R. 128 and I.L.R. 29 Mad. 44, relied on.

P. S. Narayanaswami Aiyar for Petitioner.*P. Govinda Menon* and *M. K. Sivarama Aiyar* for Respondent.

K. S.

N R C

King, J.
26th March, 1940.

C. C. C. A. No. 27 of 1938.

Husband and wife—Suit for restitution of conjugal rights—Suit by husband who had nothing to do with his wife for 20 years after marriage—Plaintiff rejecting prior offer by wife to join him—Discretion of Court to refuse decree for restitution.

Where the husband who sued for restitution of conjugal rights has had nothing to do with his wife for 20 years after his marriage, and at least 13 years after she attained puberty and had definitely rejected the last offer made by the wife through a family friend to join him,

Held, the Court was justified in refusing the plaintiff a decree for restitution in the exercise of its discretion.

Case-law examined.

T. K. Rangaswami Aiyangar for Appellant.

P. Krishnamachari for Respondent.

K. S.

King, J.
26th March, 1940.

C. C. C. A. Nos. 39 to 41 of 1938.

Madras City Tenants' Protection Act (III of 1922)—Land let with reservation to landlord of right to trees growing on it—If comes within definition of "land" in the Act—Decree for eviction not executed—Lessee in possession if "tenant" within definition in S. 2 (4) of the Act.

Though land is let out with a reservation to the landlord of the right to trees growing upon it, it still comes within the definition of "land" in the City Tenants' Protection Act. Where a decree for eviction was never executed though it put an end to the pre-existing tenancy, the lessees are clearly "tenants" within the definition in S. 2 (4) of the Act, as they have continued in possession after the determination of the tenancy.

V. S. Rangachari for Appellants.

S. B. Satyanadar and N. C. Rangaswami for Respondents.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J.
27th March, 1940.

C. M. P. No. 144 of 1940.

Madras Debt Conciliation Act (XI of 1936), R. 3—Quorum necessary under—Order passed by chairman sitting alone—Validity.

A father who formed a joint Hindu family with his 3 sons (2 of whom were minors) filed an application for settlement of his debts. A suit filed by the minor sons for partition was pending. The Board dismissed the application as "clearly dishonest" as he did not disclose the partition suit. Then the sons withdrew the partition suit and joined their father in an application to the Board for settlement of the family debts. The chairman sitting singly passed orders declining to reconsider the orders passed in the prior application by the father. R. 3 framed under the Act states the quorum necessary for the transaction of business shall be two of whom one shall be the chairman.

Held, the mere fact that the father omitted to mention the partition suit does not warrant the assertion that his application was dishonest and the order of the chairman sitting singly declining to reconsider the orders was in excess of his powers and even if it was passed by two members of the Board it would still have to be set aside because the board have not applied their minds to the application. As the petitioners were compelled to come to the High Court owing to the arbitrary action of the chairman, who did not offer any explanation, he must pay the petitioner's costs.

V. N. Venkataradachariar for Petitioner.

S. Pançhāpakesā Sastri for Respondent.

K. S.

The Chief Justice and C. M. P. Nos. 4928, 4929 and 453 of 1939.
Krishnaswami Aiyangar, J.
27th March, 1940.

Madras Debt Conciliation Act (XI of 1936)—Creditors representing more than 50 per cent. of the debts objecting to settlement—Proper procedure.

It is the duty of the Board to dispose of the application with reasonable promptitude and if it becomes apparent that there are creditors representing more than fifty per cent. of the debts who object to the settlement and there is no hope of an amicable settlement, it will be the duty of the Board to dismiss the application of the debtor for settlement of his debts.

V. V. Srinivasa Aiyangar, P. V. Subramanyam and P. Somasundaram for Petitioners.

C. A. Vaidyalingam for Respondent.

K. S.

Patanjali Sastri, J. C. R. P. No. 1581 of 1938.
29th March, 1940.

Madras Agriculturists' Relief Act (IV of 1938)—Usufructuary mortgage—Suit by mortgagee to recover possession—If a suit to enforce the debt to which scaling down provisions apply—Right of subsequent lessee to raise question as to scaling down of debt.

The petitioner claimed to be a lessee under the mortgagor the third defendant in the suit and sought to file an additional written statement raising the plea that the debt due to the plaintiff is liable to be scaled down under the provisions of Act IV of 1938. The Court below refused to grant leave to file the additional written statement on the ground that the suit by the plaintiff as usufructuary mortgagee to recover possession is not one to enforce the debt and no question of scaling it down could arise. In revision it was contended that the petitioner was entitled to redeem the plaintiff's usufructuary mortgage by virtue of the lease alleged to have been obtained by the petitioner from the mortgagor subsequent to the plaintiff's mortgage and he was thus interested in raising the question as to the true amount payable to the plaintiff.

Held, the petitioner was interested in raising the question as to the true amount payable to the plaintiff and he must be allowed to file the additional written statement.

P. Somasundaram for Petitioner.

V. Vidyanna for Respondent.

K. S.

The Chief Justice and C. M. P. No. 990 of 1940.
Krishnaswami Aiyangar, J.
2nd April, 1940.

Madras Hindu Religious Endowments Act (II of 1927), Ss. 44-B—Rejection by Revenue Divisional Officer of application for directing resumption of service inams—Right of appeal to Collector.

The District Collector is empowered by Cl. (d) (1) to make the order of resumption in a case where the Collector refuses to make it in the first instance. Not only are the words "confirming, modifying or cancelling" in the clause is of sufficient amplitude but it is an ordinary incident of the powers of an appellate tribunal to make the order which the tribunal of first instance failed to make.

I.L.R. 10 Mad. 179, applied.

V. V. Chowdary, M. Seshachalapathi, N. Kotiswara Rao and A. Venkata-swami for Petitioners.

The Government Pleader (B. Sitarama Rao) for Respondents.

K. S.

Lakshmana Rao, J.

Crl. R. C. No. 25 of 1940.

3rd April, 1940.

Indian Penal Code (XLV of 1860), S. 498—Charge of enticing away a married woman—Long course of living as husband and wife by complainant and woman—If raises presumption of marriage—Failure of complainant to pay woman's first husband the marriage expenses—Invalidity of divorce—Effect.

The complainant married P. W. 8 and both of them lived as husband and wife for nearly fourteen years, when the complainant prosecuted the accused successfully under S. 498, I. P. Code, for "having enticed away a married woman". It transpired that P. W. 8 married another before the complainant, and according to the custom of the caste the complainant did not pay the first husband the marriage expenses to obtain a valid divorce. In revision, the conviction was set aside on the ground that the marriage of the complainant himself cannot be held to be legal, and the presumption raised by a long course of living as husband and wife is inconclusive.

K. Ramamurty, K. Srinivasa Rao and K. Someswara Rao for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Wadsworth and Patanjali

A. S. No. 351 of 1937.

Sastri, JJ.

4th April, 1940.

Will—Recitals in—How far evidence of title.

A, alleging that the suit properties constituted his self-acquisitions bequeathed them to his grandson C. A's son B alienated the said properties during the minority of C as his guardian for the discharge of B's debts. A, B and C were members of a joint Hindu family. C filed a suit after attaining majority for recovery of the items after setting aside the alienations.

Held, that the recitals in a will though admissible in evidence under S. 32 (7) of the Indian Evidence Act are insufficient to create title in the absence of evidence *aliunde* and consequently, plaintiffs' suit must fail for want of strict proof of title and as the son is bound by his father's antecedent debts.

K. Ramamurty and K. Someswara Rao for Appellants.

K. Kameswara Rao and Inampudi Suryanarayanamurthi for Respondent.

K. S.

Pandrang Row, J.

C. R. P. Nos. 205 to 209, 246 to 249, 459 and

5th April, 1940.

460 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 15 and S. 3 (4)—"Jodi"—If rent within the meaning of the Act.

Jodi payable by whole village inamdard to a zamindar is not rent within S. 3, Cl. (4) of the Agriculturists' Relief Act and it is not liable to be relieved against under S. 15 of the Act.

T. R. Arunachalam and D. R. Krishna Rao for Petitioners.

K. S. Sankara Aiyar, A. K. Sreeraman and D. Ramaswami Aiyangar for Respondents.

K. S.

Venkataramana Rao, J.
15th March, 1940.

S. A. No. 196 of 1937.

Madras Revenue Recovery Act (II of 1864), Ss. 38 and 59—Person with agreement for sale of land—If person aggrieved who can sue for setting aside sale—Limitation for suit for setting aside sale—Revenue Divisional Officer—Jurisdiction to confirm sale.

By an agreement of sale dated 3rd September, 1927, the plaintiff agreed to purchase from S certain lands and got possession of the same and was in enjoyment thereof ever since. On 9th February, 1928, the fourth defendant obtained a sale deed of the said lands from S, with full knowledge of the agreement of sale in plaintiff's favour and his possession of the lands, and had the sale registered in his name in the revenue accounts. The patta issued in fourth defendant's name comprised those lands among others. Fourth defendant filed a suit to recover possession of the lands from the plaintiff and the suit was dismissed and dismissal confirmed on appeal on 22nd February, 1932. Till the end of 1931 the fourth defendant paid the taxes but after the decision in the appeal he committed default and the lands were put up for sale and purchased by fifth defendant on 18th July, 1932, and sale confirmed on 28th September, 1932, by the Revenue Divisional Officer. Plaintiff sued to set aside the sale.

Held, (i) the plaintiff is a person aggrieved within the meaning of S. 59, Revenue Recovery Act. (ii) The Revenue Divisional Officer can by virtue of Madras Regulation VII of 1928, exercise the power conferred on the Collector under S. 38, Revenue Recovery Act, to confirm a sale. (iii) The plaintiff became aware of the fraud on 15th November, 1932, and sale was on 18th July, 1932, and before the time for limitation would expire under S. 59 he has moved the Collector by an application to annul the sale. On 30th June, 1933, the Collector declined to interfere and the order of the Revenue Divisional Officer must be deemed to have been confirmed by him on that date and period of six months allowed for bringing the suit under S. 59 of the Act must be calculated from that date.

K. V. Srinivasachari and K. V. Rangachari for Appellants.

The Government Pleader (B. Sitarama Rao) and Y. Satyanarayana for Respondents.

K. S.

Burn, J.
15th March, 1940.

S. A. No. 121 of 1937.

Hindu Religious Endowments Act (II of 1927), S. 9 (11)—Provision for "Abishekam" to deity "Maheswara Puja" and "Samaradhana"—Whether religious endowment—If dedication for benefit of Hindu public.

A trust deed provided that abhishekam was to be done to Dandayudhapani Swami at Palni and that the pot in which Cauvery water was taken to Palni must be brought back and then "Maheswara Puja" was to be done in the house and "Samaradhana" to follow.

Held, it is a religious endowment. But it did not amount to a dedication of anything for the benefit of the "Hindu public" of the village or any specified person or class of persons. The only party for whom something definite is to be done is *Dandayudhapani* and he alone (or some one interested in his worship) could maintain a suit on the trust deed.

A. V. Narayanaswami Aiyar for Appellant.

C. D. Venkataraman for Respondents.

K. S.

King, J.
28th March, 1940.

C. M. A. No. 267 of 1939.

Will—Absolute rights given to daughter—After her to son's children—Final clause mentioning absolute rights to daughter in the stridhana property—How will to be given effect to.

A testatrix gave away her stridhana properties to her daughter with all her rights therein and absolutely. It was provided in the will that after the lifetime of the daughter, her son's children should get them and enjoy them from generation to generation without powers of alienation. At the end there was a clause that the daughter had full rights in the properties. The Lower Appellate Court held that the provision about the testatrix's grandchildren must be given effect to and hence the daughter, on the construction of the will, took only a life estate.

Held, when absolute rights are given to a person without any restriction and a gift over is made, the absolute rights are not affected and in this case the daughter took an absolute estate.

K. Bhashyam Aiyangar and T. R. Srinivasan for Appellant.

N. Visvanatha Aiyar and N. V. Nagaraja Aiyar for Respondent.

K. C.

Pandrang Row, J.
29th March, 1940.

C. R. P. No. 1168 of 1937

Surety for proper administration of property—When can be released from the bond.

A junior member of a tarwad, who had executed a surety bond for the proper administration of tarwad affairs and properties by the karnavan, applied to be discharged from the bond on the ground (1) that he is not prepared to continue to remain bound and that he wanted to dispose of some of his properties and (2) that he had lost faith in his karnavan.

Held, the surety cannot be allowed to free himself of his own sweet will but must obtain leave of the Court. 1926 M.W.N. 493, followed. And leave of Court can only be given for good cause, which would depend on the circumstances of each case. Leave can be given if another surety is found.

I.L.R. 54 All. 293 and I.L.R. (1939) 2 Cal. 1, referred.

A. Atchuthan Nambiar for Petitioner.

M. Govindan Nambiar and C. Govindan for Respondents.

K. S.

Pandrang Row and Horwill, JJ.
5th April, 1940.

A. S. Nos. 352 and 353 of 1937.

Co-operative Societies Act (VI of 1932), S. 48—Right of Civil Court to interfere—President of a Society resigning—Liquidation of the Society—Contribution order against resigned president—Notice under S. 80, C. P. Code to liquidator before suit by the aggrieved party whether necessary—Contribution order illegal.

G, a president of a Co-operative Society, resigned his presidentship and membership by a letter dated 4th June, 1930. Subsequently the Society went into liquidation and two years after his resignation, the liquidator of the Society made two contribution orders against G. G appealed to the Registrar of the Co-operative Societies without success. He applied for leave to institute suits against the liquidator which was refused. Then he filed two suits disputing the validity of the orders of the Liquidator. The trial Court found

all points in favour of *G* but dismissed the suits on the ground that the liquidator was a public officer and hence notice under S. 80 ought to have preceded them.

Held, (1) a liquidator was not a public officer within the meaning of S. 2 (7) of the Civil Procedure Code.

A.I.R. 1934 Nag. 201 and A.I.R. 1939 Nag. 232, not followed.

(2) That the resignation of *G* was complete when his letter was received by the Society.

(1896) 1 Ch. 409 (C.A.) and (1907) 2 Ch. 370, followed.

14 Q.B.D. 908, referred to.

45 M.L.J. 798 and (1932) M.W.N. 18, distinguished.

(3) Hence the liability of '*G*' ceased two years after his resignation and the orders for contribution were illegal.

I.L.R. 59 Mad. 895, followed.

(4) The Civil Courts have jurisdiction to decide whether such orders were legally passed and it is not taken away by the first part of S. 48 of the Co-operative Societies (Madras Act VI of 1932).

I.L.R. 59 Mad. 895, I.L.R. 18 Lah. 649; and I.L.R. 14 Lah. 703, followed.

I.L.R. (1937) Mad. 211, distinguished.

(5) The suits must however fail because of absence of leave under the latter part of S. 48 of the Co-operative Societies Act.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

K. C.

Patanjali Sastri, J.
5th April, 1940.

C. R. P. No. 256 of 1937.

Civil Procedure Code (V of 1908), S. 73—Funds in hands of garnishee—Attachment of and deposit in Court—Subsequent attachment before judgment and application for rateable distribution after obtaining decree.

The petitioner obtained a decree in 1932 and in execution thereof attached a fund belonging to the judgment-debtor in the hands of the President, District Board, Vizagapatam who deposited the amount into Court. Thereafter the respondent obtained an attachment before judgment of the said fund, and after subsequently obtaining a decree applied for rateable distribution in the said fund,

Held, in revision that, as soon as the garnishee deposited the amount into Court, it became assets realised in that particular decree, and no further order for appropriation is necessary, and the respondent is not entitled to have rateable distribution.

I.L.R. 19 Mad. 72, followed.

I.L.R. 44 Mad. 100 (F.B.); I.L.R. 46 Mad. 506 (F.B.) and A.I.R. 193 Mad. 4, distinguished.

Kasturi Seshagiri Rao and *K. Someswara Rao* for Petitioner.

Y. Suryanarayana for Respondent.

K. S.

Lakshmana Rao, J.
10th April, 1940.

Crl. R. C. No. 230 of 1940 and
Crl. R. P. No. 221 of 1940.

Criminal Procedure Code (V of 1898), Ch. XXI—Case converted into Preliminary Register Case—Need to give accused a further opportunity to cross-examine prosecution witnesses.

Where a case inquired into under Ch. XXI, Criminal Procedure Code is converted into a Preliminary Register Case the accused should be given a further opportunity to cross-examine the prosecution witnesses.

V. T. Rangaswamy Aiyangar and *K. S. Sankararaman* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

K. S.

Lakshmana Rao, J.
10th April, 1940.

Cr. A. No. 639 of 1939

Defence of India Rules, r 34, cl. 6—“Prejudicial acts”—Meaning.

The accused had exhorted the audience in two speeches to desist from enlisting in the army or assisting the prosecution of the war in any manner.

Held, the speeches were “prejudicial acts” as defined in sub-cl. (d) and (k) of r. 34, cl. (6) and he can be convicted under r. 38, cl. (5).

S. Suryaprakasam for Appellant (Accused).

C. V. Nagaraja Sastri for *The Crown Prosecutor* on behalf of the Crown.

K. S.

Lakshmana Rao, J.
11th April, 1940.

Crl. R. C. No. 59 of 1940 and
Crl. R. P. No. 56 of 1940.

Criminal Procedure Code (V of 1898), S. 145—Procedure.

It is incumbent on the Magistrate to determine who was in possession on the date of the preliminary order under S. 145 (b) and if he is unable to decide or satisfy himself as to which of the parties was in possession he has to proceed under S. 146 (1) of the Code of Criminal Procedure.

K. S. Jayarama Aiyar for Petitioner.

K. Suryanarayana for Respondent.

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

K. S.

Krishnaswami Aiyangar, J.
12th April, 1940.

C. R. P. Nos. 118 of 1938 and
129 of 1938.

Execution—Joint decree—Mamool arrangement to receive proportionate amount from each judgment-debtor—Whether can be pleaded in execution.

A zamindar obtained a joint decree against various people who held a village in shares for jodi. The whole decree was sought to be executed against one of them who contended that as there was a mamool arrangement to take a proportionate share from each judgment-debtor the whole decree could not be executed against one alone.

Held, that the mamool arrangement cannot be pleaded as a bar to execution.

I.L.R. 58 Mad. 994 (F.B.), referred to and distinguished.

D. R. Krishna Rao for Petitioner.

D. Ramaswami Aiyangar and *A. K. Sreeraman* for Respondents.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.
6th March, 1940.*

Appeal No. 229 of 1937.

*Madras Hindu Religious Endowments Act (II of 1927), S. 63 (4)—
Refusal of Board to hold inquiry or frame a scheme—Court if can frame a
scheme.*

Sec. 63 of the Madras Hindu Religious Endowments Act does not give authority to the Court to frame a scheme in the event of the Board refusing to do so. The only orders which the section refers to are: (1) an order settling a scheme, (2) an order modifying a scheme, and (3) an order cancelling a scheme. The words "institute a suit in the Court to modify or set aside such order" are intended only to refer to an order settling a scheme or modifying or cancelling one.

I.L.R. 10 Mad. 179, distinguished.

Sec. 65 is merely intended to give the Court power, after a scheme has been framed to modify or cancel it at any time. Nor is there any residuary power in the Court to frame a scheme. The powers under S. 92, Civil Procedure Code, have been replaced by the Madras Hindu Religious Endowments Act and that Act alone can be looked at for ascertaining the powers of a Court to frame a scheme.

K V. Sesa Aiyangar and R. Desikan for Appellant.

K E. Rajagopalachariar for Respondent.

K. S.

*Wadsworth, J.
29th March, 1940.*

C. R. P. No. 197 of 1937.

Civil Procedure Code (V of 1908), S. 73—Official Receiver authorised to sell non-insolvent son's shares also within three months—Sale after that time when Court had decided to withdraw the power—Receipt of amount by receiver and payment into Court executing against son's shares after confirmation of sale—Application for execution between date of receipt of amount and date of deposit into Court—Right to rateable distribution.

The Official Receiver was authorised to sell the non-insolvent son's share also within three months and pay the money into execution Court. The sale did not take place within the time and pending proceedings to withdraw the sale from the Official Receiver and for sale through Court, the Official Receiver actually sold the property on 28th October, 1935, the price being received by the Official Receiver in two instalments on 29th October, 1935 and 7th November, 1935. Two other creditors filed execution petitions on 30th November, 1935 and 20th December, 1935, respectively. Sale was drawn up on 30th March, 1936 and son's share of sale proceeds paid into Court by the Official Receiver. The sale was finally ratified by the Court on 8th April, 1936.

Held, the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. The two creditors who filed the subsequent execution petitions will be entitled to share rateably in the sale proceeds.

R. Rangaswami Aiyangar for Appellant.

K. Rajah Aiyar for Respondent.

K. S.

N R C

Pandurang Row and Horwill, JJ.
1st April, 1940.

Appeal No. 15 of 1937.

Tort—Premises used by tenant for storing combustible material—Accidental fire—Principle of res ipsa loquitar—Applicability—Liability of tenant to landlord for destruction of premises by the fire.

Having regard to the nature and quantity of the material stored in the premises (chemicals and mordanted yarn) it was clearly the duty of the person in occupation to take special care and precaution against fire and where no such precautions were taken and no attempt was made to rescue anything from the fire, nor even to get the water from the well hard by, the maxim of *res ipsa loquitar* would apply to the case. In the circumstances, of the case it was the negligence of the tenant which caused the fire which burnt down in part the house of the plaintiff and the plaintiff is entitled to damages for the loss.

S. Nagaraja Aiyar and J. R. Alwar Naidu for Appellant.

V. Mmaekshisundaram and O. V. Baluswami for Respondents.

K. S.

Mockett, J.
2nd April, 1940.

C. R. P. No. 60 of 1937.

Surety—Arrest of debtor in execution of small cause decree—Sureties making themselves responsible for filing insolvency petition within 30 days of bond—Filing of petition in wrong Court—Dismissal and subsequent filing of petition in proper Court beyond one month from date of surety bond—Enforcibility of bond against sureties.

When a debtor was arrested in execution of a small cause decree two sureties executed a bond making themselves responsible for filing the insolvency petition within 30 days of bond. A petition was filed in a wrong Court within time and was dismissed. Subsequently another petition was filed long out of time.

Held, that no proper insolvency petition was filed at all. The surety cannot rely on any insolvency petition having been filed at all. The condition in the suretybond not having been fulfilled the decree-holder is entitled to enforce the conditions of the bond.

52 M.L.J. 523 followed.

K. Kuttikrishna Menon for Appellants.

D. A. Krishna Wariar for Respondents.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.*
2nd April, 1940.

C. M. P. No. 5569 of 1939.

Madras Local Boards Act (XIV of 1920), S. 193—Power of President of Panchayat Board to grant or refuse a licence.

Under S. 193 of Madras Local Boards Act the President of a Local Board has in a proper case the power to refuse to renew a licence. His order can only be set aside if he has exercised that power in an arbitrary or illegal manner.

K. Bhashyam Aiyangar and T. M. Venugopal for Petitioner.

K. Rajah Aiyar for Respondent.

K. S.

King, J. C. C. C. A. Nos. 54 and 55 of 1938.
2nd April, 1940.

Religious Endowments Act (XX of 1863)—Trustees appointed by Hindu Devasthanam Committee—Dismissal by Committee—Whether can be at its own pleasure or must be only for good and sufficient cause—Power of Committee to appoint trustees for limited period.

Trustees to be in management of Thiruvatteeswaran Devasthanam in Madras, were appointed under Act (XX of 1863) by Madras Hindu Devasthanam Committee. When a vacancy occurred in 1934 the committee appointed a trustee for a period of 3 years. A previously appointed trustee objected to the new trustee taking charge on the ground that he could not be appointed for a limited period and could only be appointed for life. On the failure of the protesting trustee to appear before the Committee to consider his conduct in disobeying the Committee's orders, he was dismissed. That trustee then filed a suit for a declaration that his dismissal was illegal and he had also filed a suit for declaration that the new trustee was not lawfully appointed. The City Civil Judge dismissed both the suits and on appeal,

Held, (1) The status of a trustee is not that of a servant and he can be dismissed only on good and sufficient grounds and after an enquiry into the facts and that a dismissal which is not justified may be set aside by the Courts of law.

Case-law discussed.

(2) A temporary appointment cannot be held to be void in all circumstances and the appointment for three years in this case is valid.

V. Ganapathi Aiyar and A. Venkatasubba Mudaliar for Appellants.

T. R. Srinivasa Aiyar, S. G. Rangaramanujam and T. Pattabhirama Aiyar for Respondents.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1569 of 1936.
5th April, 1940.

Decision by competent Court based on oath—Conclusiveness in later suit on same point.

The decision of a competent Court though based on oath is conclusive on the point in controversy in a later suit.

I.L.R. 36 Mad. 287 and I.L.R. 24 Mad. 444, followed.

V. Subramaniam for Petitioner.

P. Satyanarayana for Respondent.

K. S.

The Chief Justice and Patanjali Sastri, J. C. M. P. No. 1909 of 1940.
18th April, 1940.

Practice—Appeal to Privy Council—Petition of appeal not lodged in Privy Council—Withdrawal of appeal—Procedure.

Where an appellant wants to withdraw his appeal, where a petition of appeal has not been lodged in the Privy Council, rule 32 of the Judicial Committee rules 1925 requires that the appellant shall give notice in writing to the Registrar of the Privy Council that he desires to withdraw his appeal. The Registrar of the Privy Council is then required to notify the Registrar

of the Court appealed from and the appeal shall thereupon stand dismissed as from the date of the letter of the Registrar of the Privy Council without further order.

S. Kothandarama Nainar for *Ch. Raghava Rao* for Petitioner.

V. V. Raghavan for *V. Govindarajachari* for Respondents.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar, S. A. No. 1152 of 1936.
and Somayya, JJ.

23rd April, 1940.

Hindu Law—Maintenance—Destitute widowed daughter—Legal right to be maintained out of father's estate in the hands of his heir.

A father is under a moral obligation during his lifetime to maintain out of his properties his widowed indigent daughter, who is unable to get support from her husband's estate. This moral obligation ripens into a legal obligation on the death of the father, when his property is inherited by his heir. The widowed daughter is entitled to a decree for maintenance against such heir, payable out of the properties inherited.

Hindu Law text and case-law reviewed.

Observations of *Ranade, J.* in 23 Bom. 291 dissented from.

Remarks of *Sadasiva Aiyar, J.*, in 23 M.L.J. 223, held to be somewhat wide.

I.L.R. 11 All. 194 and L.R. 61 I.A. 29, relied on.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Appellants.

E. Vinayaka Rao for Respondents.

K. C.

[F. B.]

The Chief Justice, Mockett S. A. No. 255 of 1937.
and Krishnaswami Aiyangar, JJ.

23rd April, 1940.

Limitation Act (IX of 1908) Arts. 142 and 144—Purchaser in sale in execution of mortgage decree—Suit for possession against person claiming to be in possession adversely to mortgagor—Burden of proof.

In a sale in execution of a mortgage decree plaintiff purchased the suit properties. In 1931 he filed a suit for possession against the first defendant who claimed to be in adverse possession from 1909 and impleaded the mortgagor also,

Held, The burden of proof was on the plaintiff to prove that he was in possession within twelve years prior to the suit. Mere proof of title was not enough to place the burden of proof on the defendant.

16 Cal. 473 (P.C.) followed.

21 L.W. 398 and 25 L.W. 127, overruled.

50 M.L.J. 183 distinguished.

K. R. Vepa for Appellant.

A. Lakshmayya for Respondent.

K. S.

Wadsworth and
Patanjali Sastri, JJ.
9th April, 1940.

C. R. P. No. 2543 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 and 8—Decree of 1936 on a pronote of 1928 in renewal of earlier-pronote of 1925—Debt which is to be scaled down.

A decree was passed on 21st August, 1936, on the basis of a promissory note of 1928 which promissory note was in renewal of an earlier promissory note of 1925. In an application by the debtor for scaling down the debt,

Held, as the decree merely enforces the payment of a pre-existing debt bearing interest, the pre-existing debt should be regarded as the liability to be scaled down and governed by S. 8 and not by S. 9.

Case-law examined.

A. Lakshmayya for Petitioner.

D. Narasaraju (*Amicus curiae*) for Respondent.

K. S.

Krishnaswami Aiyangar, J.
12th April, 1940.

C. R. P. No. 73 of 1937.

Civil Procedure Code (V of 1908), O. 5, r. 19—Declaration as to sufficiency of service—If could be implied or should be express—Constructive res judicata—If applicable when party sought to be bound had no knowledge of facts forming basis of his objections.

An assignee of a decree applied for recognition of the assignment and for execution. Notice was taken to the judgment-debtor. As he declined service, it was affixed. The Court noted "notice refused hence affixed, defendant absent" and then ordered the petition. In the next application by the assignee of the decree the judgment-debtor objected to the execution on several grounds and contended that the order recognising the assignment will not be *res judicata* for two reasons that,

(a) there was no declaration as to service sufficient under O. 5, r. 19, C. P. Code and,

(b) that he was not aware of the facts relating to the objections now raised and hence there could be no constructive *res judicata*.

Held, (1) that though there was no specific order declaring service sufficient still such an order could be implied from the language of the order.

(1939) 2 M.L.J. 926, followed;
64 M.L.J. 629 distinguished and,

(2) that the rule of constructive *res judicata* has no application where the party who is sought to be bound by it has no knowledge of the facts forming the basis of the objections.

42 C.W.N. 560, followed.

T. V. Muthukrishna Iyer for Petitioner.

A. Srirangachariar and T. R. Srinivasan for Respondent.

K. C.

King, J.
19th April, 1940.

A. A. O. No. 617 of 1938.

Evidence Act (I of 1872), S. 116—Tenant contending that lease deed was sham and nominal transaction never intended to be put into operation at all—Whether barred by S. 116.

Where a person who has executed the lease deed contends that the lease deed was never meant to be put into operation at all, it follows that if his plea is true, he was never a tenant. If a man is not a tenant, he cannot be estopped under S. 116 from proving his contention.

I.L.R. 19 Bom. 133 referred.

V. Govindarajachariar and *K. S. Narayana Aiyar* for Appellant

T. E. Ramabhadrachariar for Respondent.

K. S.

Wadsworth, J

C. R. P. No. 315 of 1937.

19th April, 1940.

Provincial Insolvency Act (V of 1920), Ss 53 and 54—Onus of proving want of consideration.

In a case under Ss. 53 and 54 of the Provincial Insolvency Act, the *onus* of proving want of consideration lies in the first instance on the Official Receiver. But when the alienee admits the truth of the Official Receiver's evidence that the money was not paid as recited in the document but was paid after registration before witnesses other than those who attested the document the burden shifts to the alienee to adduce at any rate *prima facie* evidence of the special circumstances alleged.

S. Venkatesa Aiyangar for Petitioner.

K.R. Vepa for Respondent.

K. S.

[F. B.]

The Chief Justice, King

Appeals Nos 234 and 235 of 1937

and *Somayya, JJ.*

and C. M. Ps. Nos. 980 and 981

26th April, 1940.

of 1940.

Evidence Act (I of 1872), Ss. 74 and 65 (e)—Returns under S. 22 of the Income-tax Act—If public documents within S. 74, Evidence Act—Admissibility of certified copies in evidence under S. 65 (e) of Evidence Act.

In a suit on lost pronotes a certified copy of the plaintiff's income-tax return was tendered in evidence to prove the notes.

Held, the returns would be public documents within the meaning of Evidence Act, S. 74 and secondary evidence of the same would be admissible in evidence under S. 65 (e) of the Evidence Act.

I.L.R. 2 Rang. 391; I.L.R. 56 Bom. 324 not followed.

50 L.W. 827; I.L.R. 1940 Mad 329 referred to.

P. V. Rajamannar, K. Subba Rao and *D. Suryaprakasa Rao* for Appellants.

Sir Alladi Krishnaswami Ayyar, Nugent Grant and *V. Suryanarayana* for Respondents.

K. S.

*Wadsworth and
Patanjali Sastri, JJ.
10th April, 1940.*

C. R. P. Nos. 1115 and 1106 of 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Original debt by non-agriculturist—Supersession by a fresh pronote by original debtor along with an agriculturist—Applicability of S. 9.

A promissory note by two brothers *A* and *B* on 8th October, 1934, was in supersession of an earlier promissory note executed on 28th May, 1930, by one of them alone, who was not an agriculturist within the purview of the Act. The other brother claimed the benefit of the Act on the basis that the debt upon which he has been sued was in renewal of a prior debt so far as he is concerned.

Held, as the original "debt" was not a debt due from an agriculturist as defined in S. 3, it is not open to the agriculturist brother to call in aid S. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt.

S. Ramachandra Aiyar for Petitioner.

N. Muthuswami Aiyar and *N. Ramanatha Aiyar* for Respondents.

K. S.

*The Chief Justice and
Krishnaswami Aiyangar, J.*

C. M. P. No. 4901 of 1939.

11th April, 1940.

Civil Procedure Code (V of 1908), S. 111 (a) as amended by Government of India (Adaptation of Indian Laws), Order, 1937—Appeal to Federal Court—Decision of single Judge of High Court—Certificate under Government of India Act 1935, S. 205 (1) that case involves important question as to the interpretation of Government of India Act—Leave to appeal to Federal Court.

At the time of dismissing a revision petition (against an order scaling down a debt under Madras Act IV of 1938) following the Full Bench decision that the Act was *intra vires* the Judge gave a certificate under the Government of India Act, S. 205 (1) that the case involved an important question on the interpretation of the constitution Act. The present application for leave to appeal to the Federal Court was opposed on the ground that no appeal lay from the order of a single Judge of a High Court and reliance was placed on S. 111 (a) of Civil Procedure Code as amended by the Government of India (Adaptation of Indian Laws), Order, 1937. After an examination of the relevant provisions of the Civil Procedure Code and Government of India Act.

Held, the order of the Judge was a final order and Cl. 15 of the Letters Patent prohibits an appeal from an order passed by the Court in the exercise of its revisional powers and the Judge having given the certificate under the Government of India Act, S. 205 (1) leave to appeal must be granted.

V. V. Srinivasa Aiyangar and *P. S. Sarangapani Aiyangar* for Petitioner

B. K. B. Naidu and *R. Muthiahswami* for Respondent.

K. S.

Krishnaswami Aiyangar, J.

C. R. P. No. 1116 of 1939.

12th April, 1940.

Madras Agriculturists' Relief Act (IV of 1938), S. 23, Proviso—Scope and effect.

N R C

The proviso only requires notice to go to the auction purchasers before an order is made under the section. This can be done after the period of 90 days provided the petition is filed within the period limited.

N. Srinivasa Aiyangar for Petitioner.

A. V. Viswanatha Sastri and *T. E. Gopalan* for Respondent.

K. S.

Wadsworth, J.

C. R. P. No. 20 of 1939.

23rd April, 1940.

Provincial Small Cause Courts Act (IX of 1887), Art. 31—Person claiming share of profits from other co-owner in possession between preliminary and final decree for partition—If suit falls under Art. 31 of Provincial Small Cause Courts Act.

The parties were co-owners during the interval between the preliminary and final decree in a partition suit and the plaintiff alleged a wrongful failure to give the plaintiff her share of those profits.

Held, such a suit does not come under Art. 31 of the Provincial Small Cause Courts Act.

A.I.R. 1930 Lah. 613 and I.L.R. 40 All. 666, followed.

P. R. Ramakrishna Aiyar for Petitioner.

G. N. Thirumalachariar for Respondent.

K. S.

Horwill, J.

C. R. P. No. 435 of 1937.

24th April, 1940.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Person merely attaching before judgment—If entitled to rateable distribution.

Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. So where a creditor merely gets an attachment before judgment he is not entitled to claim rateable distribution of assets realised in execution before he took out execution proceedings.

I.L.R. 47 Mad. 483 (F.B.), referred.

K. P. Ramakrishna and *P. Sridhara Rao* for Petitioner.

P. Govinda Menon for Respondent.

K. S.

Abdur Rahman, J.

C. R. P. No. 856 of 1940.

1st May, 1940.

Suits Valuation Act (VII of 1887), S. 8—Mortgage suit—Suit for redemption and recovery of surplus profits—If claim for distinct subjects—Jurisdictional valuation.

Where the main relief claimed by a plaintiff in a mortgage suit is for redemption and the prayers for surplus profits or for accounts are only subservient to the main relief claimed, the value placed on the relief for redemption would cover the relief in regard to surplus profits as well and the latter need not be valued separately.

60 M.L.J. 698 and I.L.R. 45 All. 154, followed.

M. Shania Das for Petitioner.

S. Narayana Aiyangar for Respondent.

K. S.

[END OF VOLUME]