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NOTES OF RECENT CASES.

Burn and Stodart, JJ. C. M. A. No. 157 of 1938.
29th April, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Order returning an execution petition for compliance with some conditions—If a 'final' order—Later execution petition, within three years of order—If in time.

An earlier execution petition was returned for compliance with certain conditions but the conditions were not complied with. A fresh execution petition was filed within three years of the order returning the earlier petition and the earlier execution petition was also re-presented with the fresh execution petition.

Held, an order merely returning an execution petition could not be construed as a 'final' order within the meaning of Art. 182 (5) of the Limitation Act and an execution petition filed within three years of such order is not saved from bar of limitation.

Meaning of 'final order' in Art. 182, cl. (5), discussed.

I.L.R. 36 All. 350 (P.C.), relied on.

71 M.L.J. 366, followed.

The decision in *Shanmuga Pathar* v. *Swaminatha Pathar*, 1936 M.W.N. 547, not correct.

Rao Bahadur S. T. Srinivasagopalachariar, K. Rangaswami Aiyangar, T. R. Srinivasa Aiyangar and *E. A. Viswanathan* for Appellants.

K. G. Srinivasa Aiyar for Respondents.

K.S.

The Chief Justice and Somayya, J. L. P. A. No. 26 of 1927.
1st May, 1939.

Madras Irrigation Cess Act (VII of 1865), S. 1 and proviso 3 to S. 1—Ryotwari land registered as single crop wet—Use of

water for second crop from authorised sources—Levy of water cess—Legality of—Rules framed by Government on footing that such cess could be levied—Ultra vires.

A reading of S. 1 and proviso 3 to S. 1 of the Madras Irrigation Cess Act shows that when a ryotwari holder takes water for a second crop (though the land was registered as single crop wet) from authorised sources, water cess should not be levied at all. The rules under the Act framed on the footing that such cess could be levied are *ultra vires*.

K. S. Sankara Aiyar for Appellant.

The Advocate-General (*Sir A. Krishnaswami Aiyar*) and *The Government Pleader* (*B. Sitarama Rao*) for the Crown.

K.S.

Newsam, J. C. R. P. No. 789 of 1939.
2nd May, 1939.

Court-Fees Act (*VII of 1870*), *Sch. II, Art. 11 and Art. 17—Madras Town Planning Act* (*VII of 1920*)—*Appeal under S. 29 against decision of arbitrator—Proper court-fee.*

The decision of an arbitrator under Madras Town Planning Act is not a decree and the proceedings are not initiated by a suit and for an appeal under S. 29 (1) of the Town Planning Act to the District Judge Art. 11 and not Art. 17, Sch. II of the Court-Fees Act is applicable and a court-fee of Re. 1 is sufficient.

S. Ramachandran and *P. S. Ramachandran* for Petitioners.

T. Krishna Rao for *The Government Pleader* on behalf of the Crown.

K. S.

Patanjali Sastri, J. S. A. No. 663 of 1936.
3rd August, 1939.

Co-owners—Encroachment by strangers on a common lane—Co-owners all of them not parties to suit—Suit whether in the form maintainable—Injunction.

The plaintiff (appellant) filed a suit for injunction against defendants 1 to 4 alleging that they were encroaching upon a lane belonging exclusively to himself. The main defence was that the lane was a municipal lane. The trial Court dismissed the suit holding that the plaintiff had not made out his exclusive title to the lane. The lower appellate Court in appeal found that the suit lane belonged to the plaintiff and certain other owners on the eastern side, and the defendants who were owners of plots on the western side of the lane had no right to encroach on the suit lane. Nevertheless that Court dismissed the suit because the plaintiff based the suit on his exclusive title and the other co-owners were not made parties to the suit and observed that the plaintiff could succeed only in a properly framed suit.

Held, that an injunction could be issued against the defendants.

Held, further, that a co-owner has got a right to restrain strangers from encroaching on the common land even in the absence of the other co-owners as parties to the suit and the direction of the lower Court to the plaintiff to come again with a properly framed suit would only lead to multiplicity of actions.

I.L.R. 39 Mad. 501 and 3 L.W. 542, followed.

V. Ramaswami Aiyar and *V. Meenakshisundaram* for Appellants.

K. Swaminatha Aiyar and *C. Natarajan* for Respondents.

K. C.

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Pandrang Row, J. C. R. P. No. 1609 of 1938.
11th August, 1939.

Madras Agriculturists Relief Act (IV of 1938)—Decree against father, manager of a joint Hindu family—Subsequent partition with sons—Liability of father under decree—Father insolvent—Dividend declared in insolvency—Execution against properties in the hands of the sons—Application by son under S. 20 to stay execution—Son, if entitled to apply—Son, if a debtor.

The receiver appointed in execution of a decree applied for execution of the decree against properties in the hands of the son of the 29th defendant in the suit. In the suit, the first Court by its preliminary decree decreed a particular share to the 29th defendant but on appeal the share was reduced. Pending the

appeal, certain amounts in Court were permitted to be drawn by the 29th defendant on furnishing security. In passing the final decree the Court ordered that the excess amount drawn out by the 29th defendant should be repaid by him and created a charge therefor on the properties allotted to him. The 29th defendant in 1925 had pending the suit entered into a partition. The charge was also made on the properties in the hands of the sons. In 1926 the 29th defendant became an insolvent and on 30th November, 1937, a dividend had also been declared in the insolvency before the Madras Agriculturists ReliefAct had come into force. One of the sons of the 29th defendant applied under S. 20 of the Agriculturists Relief Act, 1938, to stay execution of the decree to enable him to apply under S. 19. The District Judge dismissed the application on the grounds (*i*) that this is not a debt of the son but of the father and (*ii*) that as a dividend had been declared in the father's insolvency, the son cannot hereafter apply.

Held in revision (*i*) that this is a debt within the meaning of S. 3 (*iii*) of the Act as under the Act any liability in cash or kind, whether secured or unsecured whether payable under a decree or order of a Civil or Revenue Court is a debt and it does not say by whom it should be payable. The Act is not confined to personal liability but applies to any person who becomes liable by virtue of his possession of property.

(1938) 2 M.L.J. 1068, followed.

I.L.R. (1939) Mad. 525: (1939) 1 M.L.J. 528, distinguished as a case where it was held that liability of a co-heir in management to pay excess collected by him is not a debt by virtue of S. 4 (1) of the Act;

(*ii*) that the father's insolvency and declaration of dividend therein does not affect the son's right as to the extent of his property he is the debtor and he is not insolvent;

(*iii*) that with regard to the contention that S. 20 applies only to a decree passed against a person entitled to the benefits of this Act and that it is only the 29th defendant that is such a person as the decree is passed only against him, held that the son is virtually a party to the suit as the father as manager represented his share as well.

S. V. Venugopalachariar for Petitioner.

A. V. Viswanatha Sastri for Respondent.

K. C.

Gentle, J. Appl. Nos. 841 and 815 of 1939
in
11th August, 1939. O. P. Nos. 163 and 164 of 1938.

Company—Winding up—Creditor of company—Debtor in another transaction with others jointly and severally—If entitled to set-off his claim against the liability.

Application by Official Liquidator of the Travancore National Bank Subsidiary Company for directions as to whether a set-off should or should not be allowed,

(*a*) where a creditor of the company is also a debtor in respect of another transaction but liable jointly and severally along with other persons who are his sureties; and

(*b*) where the creditor of the company is a debtor in respect of another transaction in which he is a surety for another.

Held, that on a consideration of the bonds executed by such parties they are jointly and severally liable;

and, that a set-off ought to be allowed in both cases.

I.L.R. 45 Bom. 1219 and I.L.R. 8 Lah. 105, not followed.

12 Ves. J. 346: 33 E.R. 131, followed.

Hals. Vol. 2, p. 377 relied upon.

11 Ves. J. 29: 32 E.R. 996 and 20 Eq. 515 at 519, explained and distinguished.

R. Narasimhachariar Official Liquidator.

A. K. Sreeraman and *R. Krishnaswami* and *others* for Creditors.

S.V.V.

The Chief Justice and
Kunhi Raman, JJ. O. S. A. No. 72 of 1938.
16th August, 1939.

Torts—Malicious prosecution—What plaintiff must prove—Absence of reasonable and probable cause and malice—Defendant honestly believing plaintiff to be party to fraud—Malice negatived.

In an action for malicious prosecution the plaintiff must prove absence of reasonable and probable cause and also malice. Absence of reasonable and probable cause does not necessarily mean malice. Where it is found that defendant honestly believed that plaintiff was a party to a fraud on him there is no malice, even though it is found that he had no reasonable grounds to launch the prosecution.

8 Q. B. D. 167, relied on.

S. Ramaswami Aiyar and *I. Chakrapani* for Appellants.

T. V. Ramanatha Aiyar for Respondent.

B. V. V.

N R C

Patanjali Sastri, J. C. M. A. No. 252 of 1936 and
22nd August, 1939. S. A. No. 508 of 1936.

Civil Procedure Code (V of 1908), Ss. 146, 151 and O. 22, r. 10 —Addition of parties—Suit in ejectment by a Hindu father after a suit for partition against him by his sons—Suit property allotted to the son's share pending the father's suit in ejectment—Appeal by the defendant in the ejectment suit—Application by one of the sons to be joined as respondent in the appeal—Application does not lie under O. 22, r. 10 or S. 146—S. 151 does not apply when there is a specific provision of the Code applicable to the case.

Pending a suit in ejectment by a Hindu father, the suit property fell to the shares of his sons. Subsequently the father's suit was decreed. Pending an appeal by the defendant in the ejectment suit, one of the sons to whom the property fell under the partition decree applied under O. 22, r. 10 of the Civil Procedure Code to be added as a party respondent.

Held, O. 22, r. 10 has no application to the case as the son's right was created pending the ejectment suit in the first Court and the application should have been made pending the suit and it ought not to be made pending an appeal in the suit.

A.I.R. 1934 All. 442 and A.I.R. 1935 Lah. 119, followed.

S. 146 has no application to the case, as the sons do not claim under their father under the Hindu Law.

S. 151 has no application as there is a specific procedure prescribed under the Code, namely, to apply when the suit was pending in the first Court and it was not followed by the petitioner.

K. S. Sankara Iyer for Appellant.

C. A. Seshagiri Sastri for Respondent.

K. C.

Leach, C. J.
and Kunhi Raman, J. C. M. P. 2506 and 2507 of 1939.
31st July, 1939.

Madras District Municipalities Act (V of 1920), S. 36—Power of Provincial Government to control the action of Municipal Councils —If Courts have power to issue writ of certiorari *against the Government exercising the power.*

A Municipal Council decided to reduce the size of a tank opposite a temple which they considered insanitary; the trustees of the temple moved the Provincial Government to interfere under S. 36 of the Madras District Municipalities Act and direct the tank to be restored to its original size. The Government varied the order of the Municipal Council and directed the reduction of the tank to a smaller extent. Then the Government after hearing the Municipality cancelled its previous order. In an application for the issue of *certiorari* against the Government to quash the order cancelling the first order,

Held, the Provincial Government has full power under S. 36 of the Madras District Municipalities Act to control the action of a Municipal Council. It is impossible to differentiate between the Governor and the Provincial Government and the Court has no power to issue a writ of *certiorari.*

L. S. Veeraraghava Ayyar and *N. Srinivasa Ayyangar* for Petitioner.

The Government Pleader, (B. Sitarama Rao), K. Bhashyam Ayyangar and *V. P. Chakravarthi Ayyangar* for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 674 of 1936.
8th August, 1939.

Suit for recovery of property—Suit based on title—If relief can be granted on the strength of possession alone of plaintiff.

Though a plaintiff bases his suit on title, relief can be given on the strength of his possession alone. In certain circumstances a decree can be passed on the strength of plaintiff's possession though it is not specifically made a ground of relief.

Case-law reviewed.

K. Rajah Ayyar for Appellant.

P. S. Narayanaswami Ayyar for Respondent.

K. S.

Venkataramana Rao and Abdur Rahman, JJ.
8th August, 1939.

Appeal No. 11 of 1936.

Mortgage—Want of proof of execution—Unsustainability of decree on mortgage—If money decree can be passed on the personal covenant in the document.

Where a mortgage deed has not been duly proved to be executed and a decree on the mortgage cannot be sustained it is open to the Court to pass a money decree on the strength of a personal covenant in the document.

I.L.R. 32 Mad. 410, followed.

Y. Satyanarayana for Appellant.

M. S. Ramachandra Rao, D. R. Krishna Rao and *C. V. Dikshitulu* for Respondents.

K. S.

Leach, C.J.
and Pattanjali Sastri, J.
9th August, 1939.

O. S. A. 78 of 1937.

Civil Procedure Code (V of 1908), S. 92—Trust for making advances to Anglo-Indian students for higher studies—If a public trust—Application for deviation of trust—If can be ordered in the absence of sanction under S. 92, C.P.Code.

A trust of a fund from the income of which advances were to be made to Anglo-Indian students for purposes of higher studies, repayable by them on certain terms (and secured by Insurance policies to be taken by the recipients of the advances and to be assigned to the trustees) was a public trust and an application by originating summons for an order permitting a deviation of the trust must be dismissed as the sanction of the Advocate-General under S. 92 of the Civil Procedure Code, had not been obtained.

V. Sundararajan for Appellant.

V. C. Viraraghavachari for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 481 of 1936.
26th July, 1939.

Civil Procedure Code (V of 1908), S. 34—Interest after suit —Discretion of Court—Carriage of goods—Damage to goods— Liability of carrier to pay interest on amount found due.

A plaintiff who though he refused to take delivery of the goods from the carriers on arrival at the destination because of the damage to them, is entitled to interest at the Court rate of 6 per cent. on the amount found due to him. The Court has always a discretion in awarding interest after suit under S. 34, Civil Procedure Code.

King and *Partridge* for Appellant.

T. V. Ramanatha Aiyar and *M. Seshachalapathi* for Respondents.

K. S.

Abdur Rahman, J. S. A. No. 144 of 1936.
2nd August, 1939.

Mortgage—Defendant absent at final hearing—Compromise decree—Term that the absent defendant's share should be proceeded against first—Such defendant compelled to pay whole decrec amount—Suit for contribution against the other judgment-debtors —If barred.

In a suit on a mortgage against *N's* father, *N* and *V*, *N's* father was absent and *V* pleaded that the mortgage was not binding on him. When the suit came on for trial *V* was not present and the plaintiff and *N* entered into a compromise under which a decree was passed for the whole amount due to the mortgagee who had however agreed to realise the decrees from *V's* share in the first instance and proceed against *N's* share only for the balance if any. When *V's* share was brought to sale by the decree-holder, *V* was compelled to pay the whole amount to save his property from sale. In *V's* suit for contribution,

Held, the prior decree based on the compromise was no bar to the suit for contribution by *V* as the Court never applied its mind to the question of the extent of the liability of *N* and *N's* father and it was not necessary in the earlier suit to decide the question of contribution *inter se*.

W. Kothandaramayya and *A. Sahasranaman* for Appellant.

T. K. Srinivasathathachari and *A. Subramaniyam* for Respondent.

K. S.

N R Ç

Abdur Rahman, J. S. A. No. 457 of 1936.
2nd August, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 87—Alteration of dates in promissory note—Plaintiff's minority enabling suit to be maintained even without the alteration—If makes the alteration immaterial—Plaintiff not guilty of any complicity—If S. 87 still applicable—Right of plaintiff to fall back on original consideration—Indian Contract Act, S. 65—Applicability.

The suit pronote was executed in favour of the minor plaintiff's deceased father and the next friend of the plaintiff was the mother an ignorant woman. The natural father appeared to have tampered with the pronote by altering the date of the pronote from 5th October, 1928 to 15th October, 1928 and the date of payment of interest from 2nd October, 1931 to 12th October, 1931. The plaintiff's claim was resisted on the ground that there was a material alteration under S. 87 of the Negotiable Instruments Act.

Held, if integrity of a contract has been broken and its identity changed either by a party to the contract or by one who is entitled to sue on it or with their connivance and possibly even when their negligence has contributed to the alteration, the instrument incorporating such a contract must be held to have been vitiated. In order to decide the material character of the alteration one will have to confine himself to the alteration and the effect it is shown to have produced on the document itself. If the legal identity of the character of the instrument have been affected or if the liability has been attempted to have been extended by the alteration it must be held to be material and this would be so irrespective of the fact whether the alteration is to the prejudice of the promisor or the executant of the instrument or not. The rule is intended to prevent persons from tampering with valuable securities under the penalty of not being able to found the claims on them if the alterations are found to be material.

But S. 87 of the Negotiable Instruments Act refers to a deliberate alteration by a party to the instrument or by one on whom his interest had devolved and not by a stranger particularly when no conduct can be imputed to the party in whose interest the alteration has been effected or from which either his complicity laches or negligence may be inferred. (Corresponding provision of English Bills of Exchange Act and case-law reviewed.)

Even though the pronote may be declared to be void under S. 87 it is not inadmissible in evidence as would have been the case if the document were not duly stamped. Whatever the effect may have been if the alteration had been fraudulently made by the

plaintiff himself, the plaintiff in this case could fall back on the original consideration as the pronote was originally valid. The Court can act on the principle embodied in S. 65 of the Indian Contract Act. The plaintiff was allowed to amend his claim and get a decree.

B. V. Ramanarasu for Appellant.

B. Jagannadha Das for Respondent.

K. S.

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

C. R. P. No. 761 of 1937.

Insolvency—Debts of deceased father—Eldest son asking for and obtaining time for collecting outstandings and payment—If personally liable for the debts—Adjudication on such debts—Propriety.

The mere asking for and obtaining of time for payment of his deceased father's debts would not make the eldest son personally liable and if he was not personally liable he could not be adjudicated for his father's debts.

K. S. Desikan for Petitioner.

P. Govinda Menon for Respondent.

K. S.

Mockett and Krishnaswami Aiyangar, JJ.
9th August, 1939.

Appeal Nos. 123 and 124 of 1936.

Defamation—Libel—Proof that words complained of were only ill-suited to the dignified position of plaintiff—Reputation of plaintiff in no way damaged—Court's view that suit ought not to have been brought—Award of one pie as damages—Absence of plaintiff from witness-box—Effect.

An untrue assertion in a pamphlet issued by a councillor criticising the administration in a municipal council ran as follows:—"A party bound to one or two individuals has taken a vow to oppose my propositions solidly". The pleading contained no innuendo and the plaintiffs did not go into the witness-box.

Though the statement is defamatory of the President and Vice-President of the Council the evidence only showed that witnesses thought those words were ill-suited to the dignified position of the plaintiff. When the leaflets were published nobody paid any attention to them and no action was taken to stop the distribution of the leaflets.

Held, in an action for libel when a plaintiff claims damages for loss of character the Court is entitled to attach the greatest

importance to the absence of the plaintiff from the witness-box. As the plaintiffs' reputation has in no way been damaged, the action ought not to have been brought at all and the damages can safely be valued at one pie as indicating the Courts view that the suit ought not to have been brought at all and each party should bear his own costs.

T. R. Venkatarama Sastri and *S. K. Ahmed Meeran* for Appellant.

K. Rajah Aiyar for Respondent.

K. S.

Pandrang Row, J. C. R. P. No. 596 of 1939.
10th August, 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Petitioner seeking to prove promissory note was in renewal of an earlier one—If Negotiable Instruments Act, Ss. 120 and 121 a bar.

A decree of 2nd May, 1936, was obtained on a pronote dated 19th February, 1933. The judgment-debtor sought to prove that the note was in renewal of a note of 1930 and as such one executed before 1st October, 1932, to which S. 8 of Act IV of 1938 was applicable.

Held, the Negotiable Instruments Act, Ss. 120 and 121 make it clear that the exclusion or estoppel is only in suits on the Negotiable Instrument, the material words being "No maker of the promissory note shall in a suit thereon be permitted to deny". It is not a general exclusion or estoppel applicable to all circumstances and to all proceedings whether based on the negotiable instrument or not.

The rule cannot apply to proceeding under Agriculturists' Relief Act, and the debt should be scaled down in accordance with S. 8.

V. T. Rangaswami Aiyangar and *S. Krishnaswami* for Petitioner.

M. S. Venkatarama Aiyar for Respondent.

K. S.

Venkataramana Rao
and Abdur Rahman, JJ. Appeal No. 218 of 1936.
10th August, 1939.

Suit for possession and mesne profits—Plaintiff deliberately letting in false evidence on question of possession—If can be deprived of mesne profits though he got a decree for possession—Discretion as to costs.

In a suit for possession and mesne profits the Subordinate Judge though he decreed possession dismissed the claim for mesne profits

and costs on the ground that plaintiff had deliberately let in false evidence on the question of possession. So far as letting in of false evidence was concerned both the plaintiff and the defendant were equally to blame. On appeal,

Held, the learned Judge was not right in disallowing the claim for mesne profits or costs though he can exercise his discretion so far as costs are concerned by disallowing a portion of the costs claimed by him.

Ch. Raghava Rao for Appellants.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

K. S.

Wadsworth, J. C. M. A. Nos. 404 and 405 of 1936.
14th August, 1939.

Civil Procedure Code (V of 1908), S. 95—Application for compensation for wrongful attachment—If setting aside order of attachment essential before such application—If averment and proof of special damages necessary for granting of compensation.

Setting aside an order of attachment is not an essential preliminary to the grant of compensation under S. 95, Civil Procedure Code. Decision in 67 M.L.J. 448 is based on *Lees* v. *Patterson*, 7 Ch. D. 866 and rules of common law. No such preliminary step is prescribed in S. 95, which alone governs the procedure in a summary application for compensation for wrongful attachment. To succeed in a claim by application under S. 95, Civil Procedure Code, special damages need not be averred or proved. On the merits no case was made out for the award of any compensation.

S. T. Srinivasagopalachari for Appellant.

N. Somasundaram for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 494 of 1936.
15th August, 1939.

Civil Procedure Code (V of 1908), O. 47, R. 1—Misapprehension of counsel in not urging all his arguments in support of a finding and consequent erroneous decision of Subordinate Judge that there were no arguments to meet points urged on other side—If error apparent on the face of the record—Review.

The misapprehension owing to which respondent's counsel did not urge all his arguments in support of the finding recorded in favour of his clients by the first Court and the consequent erroneous decision on the part of the Subordinate Judge that the counsel had no arguments to urge to meet the points raised by the appel-

lant's counsel are analogous enough to an error apparent, on the face of the record to be a sufficient reason for review under O. 47, r. 1, Civil Procedure Code.

I.L.R. 3 Rang. 261 and 49 M.L.J. 671, applied.

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

K. S. Sundaram for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 505 of 1936.
16th August, 1939.

Madras Act III of 1895, S. 13—Order of Collector purporting to be in exercise of appellate powers under Madras Act II of 1894—No appellate power under Act II of 1894—If order valid under general powers of revision.

An order of the Collector in a suit under Madras Act III of 1895, S. 13, though it purported to have been made in exercise of appellate powers under Madras Act II of 1894, is still valid as one made in the exercise of his general powers of revision with an order made by a Revenue Divisional Officer.

48 L. W. 289 and I.L.R. 55 Mad. 453, applied.

T. R. Arunachalam and *V. Sivaprasad* for Appellant.

N. K. Thirumalachari for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 526 of 1936.
17th August, 1939.

Civil Procedure Code (V of 1908), S. 92—Mortgage of temple properties by poojaries—Suit by villagers to set aside the alienations—Maintainability apart from S. 92—Limitation Act (IX of 1908), Art. 134-A—Knowledge of plaintiff—If refers only to plaintiffs eo nomine *on record in representative suit.*

In a representative suit by (mahajans) the villagers to set aside certain *othis* created by the poojaries,

Held, a suit against the alienee of temple property from the trustees or manager thereof can be maintained apart from the provisions of S. 92, Civil Procedure Code.

"Plaintiff" in col. 3 of Art. 134-A must in the case of a representative suit be understood to refer only to the plaintiffs *eo nomine* on record and a suit brought within 12 years of their knowledge of the alienation is not barred.

T. S. Vaithianatha Aiyar for Appellant.

G. S. Venkatarama Aiyar for Respondents.

K. S.

The Chief Justice and
Kunhi Raman, J. O. S. A. No. 73 of 1938.
17th August, 1939.

Master and servant—Dismissal—Right to dismiss servant on conviction—Dismissal on conviction—If wrongful dismissal—Setting aside of conviction on revision—If master can be compelled to take back the servant.

If a company had under the terms of employment the right to dismiss its employee when he was convicted, it could not be compelled to take the servant back into its employment when the conviction was set aside at some later date by the High Court in revision and the servant is not entitled to damages for wrongful dismissal.

King and Partridge for Appellant.

T. S. Srinivasan for Respondent.

K. S.

Kunhi Raman, J. C. R. P. Nos. 1381 of 1936 and 947 of 1937.
18th August, 1939.

Decree against father and son—Insolvency of father pending attachment—Son's share sought to be sold in execution—Interim receiver objecting that properties were self-acquisitions of insolvent—Jurisdiction to order sale of son's interest.

A obtained a decree against *B* and *C* who were father and son. In execution he attached their properties and sought to bring them to sale. After the attachment *B*, the father put in a petition to declare himself an insolvent and an interim receiver was appointed. Thereupon *A* put in a petition to bring the half-share of *C* in the family properties, to sale. The interim receiver objected saying that the properties were the self-acquisitions of the father and that the proper Court to determine the question was the Insolvency Court. The Munsif held that he had no jurisdiction and stayed execution and directed the creditor *A* to have the question settled in the Insolvency Court. On appeal to the District Court, it was held that no appeal lay and that the Munsif was right in deciding that he had no jurisdiction.

Held, that the lower Courts were wrong in staying execution, that the District Munsif's Court had jurisdiction to proceed with the execution and that it should have directed that such right, title and interest as the son had in the properties should be sold, since the attachment put an end to the rights of the father over the son's interests in the properties.

P. N. Appuswami Aiyar for Petitioner.

S. Ramachandra Aiyar and *P. S. Ramachandran* for Respondent.

K. C.

Burn and Stodart, JJ. C. M. A. No. 31 of 1938.
1st September 1939.

Civil Procedure Code (V of 1908), O. 21, r. 16—Decree in favour of a Hindu father—Joint Hindu family governed by the Mitakshara Law—Death of the father—Sons claiming by survivorship applying to execute the decree—Sons are transferees of the decree by operation of law, within the meaning of O. 21, r. 16.

Where a father in a joint Hindu family obtained a decree and after his death his sons claiming by right of survivorship applied to execute the decree, they are transferees of the decree by the operation of law within the meaning of O. 21, r. 16 of the Civil Procedure Code, and should therefore apply to the Court which passed the decree for executing it. They are not holders of the decree along with their father within the meaning of O. 21, r. 10 of the Civil Procedure Code.

A. I. R. 1937 Pat. 607, not followed.

T. R. Venkatarama Sastri and *C. A. Seshagiri Sastri* for Appellants.

N. Sivaramakrishna Aiyar for Respondents.

K. C.

Somayya, J. C. R. P. No. 671 of 1939.
4th September, 1939.

The Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—Renewal—Explanation applies only to cases of renewal by the same debtor—Explanation does not apply to cases where a person agreed to pay the debt of another and executed a bond to the same creditor.

Where a purchaser of the equity of redemption and another executed a pronote to the creditor agreeing to pay the mortgage debt, the pronote is not liable to be scaled down as a renewal of the original mortgage debt, within the meaning of the Explanation of S. 8 of the Madras Agriculturists' Relief Act. To fall within the meaning of the Explanation to S. 8 of the Madras Agriculturists' Relief Act, the document or renewal must be by the same debtor as in the case of the original debt.

C. A. Seshagiri Sastri for Petitioner.

K. C.

Wadsworth, J. A. A. O. No. 52 of 1938.
2nd August, 1939.

Conflicting decrees—Suit for partition and a suit by creditor on promissory note by some members of family—Issue as to binding nature of debt on members who were not parties to it—Common to both suits—Common trial and separate decrees—Partition suit decree as to pronote liability reversed on appeal—Pronote decree not appealed against—If executable without regard to appellate decree in connected suit.

There were two suits, an earlier suit for partition and a later suit on a promissory note filed by a creditor against the members of the family which was to be partitioned. In both suits there was a common issue as to the binding nature of the promissory note debt upon members of the family who were not parties to the note. The two suits were by consent tried together, the creditor being a party also to the partition suit and it was found in the trial Court that the promissory note debt was binding on all the coparceners. An appeal was filed only against the decision in the partition suit and the decree of the trial Court was reversed in so far as it declared that certain debts including that on the promissory note were binding on the family and the appellate decree was confirmed on second appeal. The creditor sought to execute his decree against all the members of the family including those who had been exonerated in the partition suit. The Courts below held that the decree could be executed in spite of the appellate decree in the connected suit. On appeal,

Held:—To allow the creditor whose rights have been restricted by the partition decree to which he was a party, to execute the connected decree without regard to those restrictions is to acquiesce in the perversion of justice and in spite of the absence of an appeal in the promissory note suit the creditor should be allowed to execute only to the extent decided in the appeal in the partition suit.

K. Kameswara Rao for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

The Chief Justice and O. S. A. No. 48 of 1938.
Kunhi Raman, J.
8th August, 1939.

Letters Patent (Madras), cl. 12—Offer by despatch of telegram by buyer from Madras accepted by telegram by seller from Hyderabad for sale of goods F. O. R. Hyderabad—Rejection notified by

N R C

letter despatched from Madras—If "part of cause of action" has arisen in Madras—Leave to sue at Madras for breach of contract —If to be granted.

A contract for sale of goods (skins) F. O. R. Hyderabad was entered into by the acceptance by telegram from Hyderabad by defendant (sellers) of a counter-offer by telegram from Madras by the plaintiff (buyers) in reply to an offer by telegram by sellers despatched from Hyderabad. The plaintiffs for their convenience arranged for the forwarding of the goods *via* Karachi to Madras and on arrival at Madras rejected them as of inferior quality. The defendants denied that the goods were of inferior quality and refused to take them back. The plaintiff obtained leave to sue and filed a suit for damages for breach of contract on the original side of the Madras High Court. In an application by the defendant for revocation of the leave,

Held, that the posting of an offer or the despatch of a telegram of an offer from a particular place cannot be regarded as part of the cause of action. An offer is made at the place where it is received and the place of despatch of an offer by letter or telegram is not a material factor.

I.L.R. 58 Cal. 539, dissented. 65 M.L.J. 455, followed.

The rejection does undoubtedly form part of the cause of action but if the place of rejection is material (but it is not) it was not at Madras. It was at Madhavaram where the goods were sent for examination. Posting the letter of rejection at Madras did not make Madras the place of rejection. In this case notice of rejection must be taken to have been given in Hyderabad where the letter was received.

(1918) 1 K.B. 128, applied.

As the cause of action did not arise even in part in Madras "leave to sue" must be revoked.

B. Pocker for Appellant.

K. N. Viswanathan for Respondent.

K. S.

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The Chief Justice and Patanjali Sastri, J.

C. M. P. No. 1781 of 1939.

9th August, 1939.

Civil Procedure Code (V of 1908), Ss. 152 and 34 (2)—Decree silent as to further interest from date of decree to date of realisation—Decree in accordance with judgment—If can be amended under S. 152 as accidental slip or omission—S. 34 (2)—Applicability.

Where a decree which has been drafted in accordance with a judgment contains no reference to further interest from date of decree to date of payment the Court must be deemed to have refused it. The provisions of Civil Procedure Code, S. 34 (2) govern the matter. The Court cannot under S. 152 amend the decree by allowing further interest on the decretal amount from the date of decree to payment or realization.

T. E. Ramabhadrachariar for Petitioner.

J. R. Gundappa Rao for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 6 of 1937.
15th August, 1939.

Practice—Sale by Official Receiver—Failure to mention amount of mortgage existence of which is announced—If sufficient to justify interference with sale—Provisions of Civil Procedure Code—If applicable.

The provisions of the Civil Procedure Code have no application to sales by Official Receiver and the mere omission to mention the amount of a mortgage on the property the existence of which is announced is not sufficient to justify interference with the sale.

P. Chandra Reddy for Appellant.

P. Basi Reddy for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 47 of 1937.
16th August, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—Execution against judgment-debtor barred—If execution against his surety (who had given a bond when the judgment-debtor was arrested in prior execution) a step in aid of execution which will save limitation against principal debtor.

In a previous execution against the judgment-debtor a surety gave a bond binding himself that if judgment-debtor did not file an insolvency petition within a specified time he would produce the debtor before the Court or failing that he would render himself liable for the amount of the decree; and there was default and execution petition against the surety. Subsequently execution proceedings were taken against the judgment-debtor who pleaded that it was barred by limitation.

Held, in substance there is only one decree against the judgment-debtor. Under that decree the surety has by his bond fastened on himself a liability. Therefore an execution petition against the surety should be treated under the strict terms of

Art. 182 (5) as an application to take some step in aid of execution of the decree.

(1939) A.L.J. 415, I.L.R. 13 Luck. 353, I.L.R. 43 All. 152, and I.L.R. 58 Mad. 276, discussed and followed.

M. S. Venkatarama Aiyar for Appellant.

B. Govindan for Respondent.

K. S.

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Patanjali Sastri, J.. S. A. No. 516 of 1936.
17th August, 1939.

Limitation—Acknowledgment—Deposition by debtor in former proceedings—When acknowledgment of subsisting liability on a promissory note.

Where a deposition by the debtor in previous proceedings stating that he offered to set off the amount he was claiming against the sum due on the promissory note now sued on, as an acknowledgment saving from the bar of limitation,

Held, the surrounding circumstances should be taken into consideration in drawing any inference as to whether the debtor was acknowledging a subsisting liability when the writing relied on does not contain an express acknowledgment of such liability.

I.L.R. 50 Mad. 548, I.L.R. 45 Mad. 443 and 46 M.L.J. 1, followed.

C. A. Seshagiri Sastri for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K. S.

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Wadsworth, J. A. A. O. No. 130 of 1937 and
17th August, 1939. C. R. P. No. 808 of 1937.

Civil Procedure Code (V of 1908), O. 40, r. 4 (as amended in Madras)—Referring party to suit against Receiver—Necessity for Court stating reasons in writing.

Under O. 40, r. 4 as amended in Madras it is obligatory upon the Court referring a party to a suit against a receiver to state in writing its reasons for the reference.

D. Ramaswami Aiyangar for Appellants.

S. S. Ramachandra Aiyar and *C. V. Ramanujachariar* for Respondents.

K. S.

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Patanjali Sastri, J. S. A. No. 261 of 1938.
15th August, 1939.

Malabar Tenancy Act (XIV of 1930), S. 20—Disability to sue for eviction unless right of obtaining renewal not availed of—If can be controlled by a contract made before the Act.

Reading Ss 16, 17, 18 and 22 with S. 20, cls. (3), (5) and (6) it is clear that no eviction can take place unless the statutory right of obtaining a renewal had not been availed of on the expiry of the term and if *ex concesso* the right to obtain such renewal cannot be controlled by a contract made before the Act, the disability to sue for eviction if such renewal is obtained, cannot also be controlled by such contract.

23 M.L.J. 353, distinguished. I.L.R. 33 Cal. 136, referred to.

P. Govinda Menon for Appellant.

The Government Pleader (B. Sitarama Rao), S. R. Subramania Aiyar and *K. Raghuramayya* for Respondents.

K. S.

Wadsworth, J. C. M. S. A. No. 42 of 1937.
15th August, 1939.

Civil Procedure Code (V of 1908), Ss. 40 and 67 (2)—Rule promulgated in Coorg province embodying restrictions on sale of land in execution—If applicable to Coorg decree transferred to Court in Madras Presidency for execution.

Under S. 67 (2) of the Civil Procedure Code the Chief Commissioner of Coorg has promulgated a rule to the effect that "lands, houses and other buildings and all immovable property shall not be liable to attachment or sale in execution of decrees of Civil Courts in Coorg with the execution of such immovable property as shall have been mortgaged or otherwise specifically pledged as security for the debt which is the subject-matter of the decree sought to be executed".

Where a decree from Coorg was transferred to the Court of the District Munsif of Cannanore for execution, the question arose if the Coorg rule was applicable.

Held, the Local Government of Coorg had not the power nor is it likely to have intended to frame rules to restrict the execution of its decrees when transferred to a Court in the Madras Presidency. The rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the Local Government of Coorg. Therefore a decree-holder can execute his decree in the Madras Presidency by the sale of land situated there in spite of the restrictions under the special rule upon its execution within the province of Coorg.

O. T. G. Nambiyar and *C. K. Kerala Varma* for Appellant.

B. Sitarama Rao for Respondent.

K. S.

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Wadsworth, J. A. A. A. O. No. 100 of 1938
17th August, 1939. and C. M. P. No. 2492 of 1939.

Civil Procedure Code (V of 1908), S. 47—Settlement of terms of proclamation—When an order, on which an appeal lies under S. 47—Madras Act IV of 1938, Agriculturists Relief Act, S. 4 (d)—Vacant ground in the compound of house mortgaged—If prevents application of S. 4 (d).

It is well established that the mere settlement of the terms of a proclamation when no dispute between the parties as to their rights or liabilities is decided judicially cannot be deemed to be an order under S. 47, Civil Procedure Code, from which an appeal would lie. But it is equally well settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution and this matter is heard and decided that decision, is a judicial decision and the parties will not be allowed in the Court of execution to canvass the same matter again.

Vedaviasa Aiyar v. *The Madura Hindu Labha Nidhi,* (1923) 45 M.L.J. 478, followed.

When the vacant ground included in the mortgage is a part of the compound of the house property which the mortgage covers and there is a compound wall round the vacant ground and the well serving the houses included in the mortgage, the mortgage is a debt contracted on the security of house property alone. The mere fact that the land originally bore two *paimash* numbers does not suffice to separate the compound from the house to which it is attached.

(1939) 2 M.L.J. 233, distinguished.

P. R. Ganapathi Aiyar and *K. S. Ramabhadra Aiyar* for Appellant.

K. E. Rajagopalachariar for Respondent.

K. S.

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Wadsworth, J. A. A. O. No. 114 of 1937.
17th August, 1939.

Hindu Law—Joint family—Property acquired by manager—When presumption that it is family property arises—Mortgage of such property along with item proved to be family property—If raises presumption that it is family land.

In the absence of evidence that the family possessed property with the income of which the new acquisition might have been made there is no presumption that the property acquired by the manager is family property. 48 L.W. 628, followed.

The fact that an item the character of which is in dispute is mortgaged along with another item proved to be family land will not raise a presumption that the disputed item was also family land unless it be shown that the mortgage itself was a borrowing for the benefit of the family.

K. Kuttikrishna Menon for Appellant.

Respondent not represented.

K. S.

Wadsworth, J. A. A. O. No. 5 of 1937.
18th August, 1939.

Mortgage—Rival purchasers under decrees on consecutive mortgages—Decree-holder in second suit not impleaded in first suit —Rights of purchasers.

The purchaser under a decree on an earlier mortgage is entitled to retain possession as against the purchaser under the decree on a second mortgage, the holder of which had not been impleaded in the earlier suit, until the first mortgage is redeemed.

I.L.R. 24 Mad. 171, followed; I.L.R. 56 Mad. 846, referred to.

R. Viswanathan for Appellant.

C. Narasimhachariar for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 1567 of 1938.
18th August, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 78—If a beneficial owner of amount due on promissory note entitled to decree on the promissory note.

Where the plaintiff claimed to be the beneficial owner of the amount for which a promissory note was executed by the second defendant in favour of the first defendant (the trial Court found that the first defendant was not a trustee in respect of the promissory note and not liable for the amount due on the promissory note) and the plaintiff claimed a decree against the second defendant,

Held, S. 78 of the Negotiable Instruments Act should be strictly construed and a valid discharge can be given only by the payee of the promissory note or the holder thereof, there being no such thing as a *benami* promissory note taken in the name of one person but really meant for the other. The plaintiff cannot have a decree.

I.L.R. 30 Mad. 88, and A.I.R. 1935 Mad. 312, followed.

V. Parthasarathy for Petitioner.

V. Viyyanna and *J. Lakshmayya* for Respondents.

K. S.

Kunhi Raman, J. C. R. P. No. 1442 of 1936.

18th August, 1939.

Civil Procedure Code (V of 1908), O. 13, rr. 1 and 2—Production of documents at a late stage—If to be allowed in the absence of reasonable explanation for non-production at proper time.

In the case of account books which are not disclosed for more than a year after the date of the first hearing, it will be unsafe to lay down a peremptory rule that they must also be permitted to be made use of by the parties concerned at a belated stage of the proceedings although there is no reasonable explanation for their non-production at the proper time.

I.L.R. 51 Mad. 472, explained and distinguished as referring mainly to certified copies of public documents which are produced at a late stage.

S. Ramaswami Aiyar for Petitioner.

T. L. Venkatarama Aiyar, S. Ramachandra Aiyar and *G. N. Rajagopalan* for Respondents.

K. S.

Abdur Rahman, J. S. A. No. 250 of 1936.

18th August, 1939.

Civil Procedure Code (V of 1908), O. 1, r. 9—Suit on mortgage by one of the two joint tenants—If suit maintainable and if decree can be passed in the absence of the other—Death of the other pending suit and plaintiff becoming solely entitled—If decree for whole amount can be passed.

Where one of the two daughters (joint tenants) and heirs of a deceased mortgagee sued on the mortgage, objection was taken that she was not entitled to sue solely and exclusively on the mortgage bond. Pending the suit the other daughter died.

Held, the provisions contained in O. 1, r. 9 are clear enough and made it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. In exceptional cases Court would refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded. But because of the death of the sister pending suit, plaintiff was the only person entitled to recover the whole amount at the time of passing the decree and a decree for the full amount ought to be passed, as the Court was justified in taking

notice of subsequent events (death of sister). (A compromise in a partition suit by which the other sister authorised the plaintiff to sue for the whole amount was also found valid.)

K. Rajah Aiyar, Arumugam and *Arunachalam* for Appellant.

T. V. Muthukrishna Aiyar for Respondent.

K. S.

Somayya, J. A. A. A. O. No. 95 of 1936.
19th August, 1939.

Civil Procedure Code (V of 1908), S. 144—Restitution—Reversal of decree—Right of successful appellant to mesne profits by way of restitution—If successful party in trial Court can defeat right by saying that he had leased out the property.

Whether a successful plaintiff in the trial Court remained in possession himself or whether he leased the properties to third parties, he is liable on reversal of the decree of the trial Court to put the defendants from whom he took possession in the same position which they would have occupied but for the wrongful decree of the trial Court. One of the incidental liabilities which he incurs is certainly to pay the income which the defendants in the suit were deprived of during the period during which they were kept out of possession.

T. Ramamurthi for Appellant.

K. R. Vepa for Respondent.

K. S.

Kunhiraman, J. C. R. P. No. 986 of 1937,
21st August, 1939.

Madras Estates Land Act (I of 1908), Ss. 90 (2) and 192 (3)—Petition by landlord to get back goods alleged to have been wrongfully taken away—If proceedings to recover rent under S. 192 (3) or if tenant's resistance can be proceeding to contest distraint.

Proceedings started by a petition filed by a landowner under S. 90 (2) of the Act (to get back goods alleged to have been wrongfully taken away) cannot be described as proceedings to recover rent within the meaning of S. 192 (3), nor can such proceedings be described as proceedings to contest distraint merely because the tenant tries to resist the landlord's application by stating that the distraint was not lawful.

L. A. Gopalakrishna Aiyar for Petitioner.

K. Desikachari for Respondent.

K. S.

Wadsworth, J. A.A.A.O. Nos. 27, 28 and 39 of 1937.

21st August, 1939.

Limitation Act (IX of 1908), Art. 182 (5)—"Final order" on a previous execution application—Meaning of "final"—If can cover the eventual result of possible appeals.

The natural interpretation of the word "final" in sub-cl. (5) of Art. 182 is as referring to the order which terminates the application as contrasted with a mere partial or interlocutory order. In the absence of any explicit provision similar to that in sub-cl. (2) of Art. 182 it is extending the meaning of the word "final" too far to make it cover the result of possible appeals.

157 I.C. 604, doubted. I.L.R. 61 Cal. 945 and I.L.R. 6 Pat. 24, referred.

A. Swaminatha Aiyar and *S. Thayagaraja Aiyar* for Appellant.

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

K. S.

The Chief Justice and Kunhi Raman, J. O. S. A. No. 10 of 1938.

23rd August, 1939.

Civil Procedure Code (V of 1908), O. 6, r. 17—Amendment—Suit for possession of a share based on title by conveyance—Case falling to ground as conveyance unregistered and therefore inadmissible in evidence—Vendors not parties to suit—Suit for specific performance would be barred by limitation—Amendment of plaint as one for specific performance—If to be allowed.

Where the plaintiff sued for possession of a share of properties and mesne profits basing his claim on a conveyance which not being registered could not be put in evidence and his case therefore fell to the ground, an application for leave to amend the plaint by the insertion of a plea for specific performance of the agreement embodied in the unregistered conveyance, should not be granted as it will permit the suit to be converted into a suit of a different character especially as a suit for specific performance was then barred by the law of limitation.

I.L.R. 48 Cal. 110, distinguished.

V. Natesan for Appellants.

K. Venugopala Aiyangar, Srinivasa Raghavan, Thiagarajan and *Kulandaivelu Mudaliar* for Respondents.

K. S.

Wadsworth, J. A. A. O. No. 175 of 1937.
23rd August, 1939.

Provincial Insolvency Act (V of 1920), S. 51—'Benefit of execution'—If costs of suit in which there was execution in addition to costs of the execution to be retained by the executing creditor.

The analogy of S. 52 affords no justification for importing the special provision of that section which is not found in the general law relating to rateable distribution into the terms of S. 51 which has really no connection with the following section and is silent on the point. There is no reason to deduct also the costs of prosecuting the suit which has resulted in the execution, for other creditors may have incurred similar expenses in other suits.

I.L.R. 57 Mad. 330: 65 M.L.J. 402 and A.I.R. 1939 Mad. 291: (1939) 1 M.L.J. 205, discussed.

Executing creditor is entitled to a charge over the sale proceeds merely in respect of costs of execution but not in respect of the costs of the suit.

Kasturi Seshagiri Rao for Appellant.

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

K. S.

Patanjali Sastri, J. Crl. Appeal No. 88 of 1939.
24th August, 1939.

Indian Penal Code (XLV of 1860), Ss. 304 and 334—Accused causing simple hurt under grave and sudden provocation—Death by wound turning septic—If knowledge that injury was likely to cause death can be imputed to accused by knowledge of dirt in weapon.

The accused under grave and sudden provocation struck the deceased and caused a simple injury which but for the wound turning septic later on would not have been fatal.

Held, it is somewhat far fetched to say that the accused had knowledge that by reason of the dirt on the weapon, the injury which he was likely to cause was likely to prove fatal. Conviction under S. 304, Indian Penal Code, ought to be set aside and the accused should be convicted under S. 334.

A. Bhujanga Rao for Appellant.

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

K. S.

N R C

Wadsworth, J. A. A. O. No. 237 of 1937.
24th August, 1939.

Civil Procedure Code (V of 1908), S. 47—Execution proceedings—Order settling terms of sale proclamation—If res judicata *to prevent parties contending in later proceedings that amount has been wrongly calculated—Question as to overpayment in satisfaction of decree—If matter arising in execution under S. 47.*

It is impossible to contend that an order settling the terms of sale proclamation passed after notice but without any contest operates as *res judicata* to prevent parties from contending at a subsequent stage of the execution proceedings that the amount in the proclamation has been wrongly calculated.

I.L.R. 37 All. 589 and A.I.R. 1929 Mad. 903, followed.

It is well settled that a question as to an alleged overpayment in satisfaction of a decree is a matter arising in execution between parties governed by S. 47, Civil Procedure Code and no separate suit would lie.

The order of an executing Court which is a substantially just order is also one to which no technical objection can be taken.

T. S. Nagaswami Aiyar for Appellant.

V. Govindarajachari and *N. Vasudeva Rao* for Respondents.

K. S.

Wadsworth, J. A. A. A. O. No. 60 of 1937.
24th August, 1939.

Provincial Insolvency Act (V of 1920), S. 37—Attachment pending on date of adjudication—Annulment of adjudication—Effect on attachment—Dismissal of execution petition on adjudication—If raises attachment.

When there is an attachment at the time of the adjudication and the insolvency is not prosecuted with the result that an order of annulment is passed, the effect of the order of annulment will be that which is laid down in S. 37 of the Provincial Insolvency Act, that is, subject to the contingencies contemplated by S. 37 the property will go back to the debtor with any burdens which existed upon it at the time of the adjudication. His interests in the property is still bound by the attachment at the date of the annulment. An order of dismissal of an execution petition did not raise the attachment.

K. Kameswara Rao for Appellant.

A. Lakshmayya for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 68 of 1937.
25th August, 1939.

Civil Procedure Code (V of 1908), O. 9, r. 13—If optional—Constructive res judicata *in execution matters—If applicable in the absence of proper notice to person affected.*

Action under O. 9, r. 13 is optional. There can be no constructive *res judicata* in execution matters also, in the absence of a proper service on the party adversely affected.

T. L. Venkatarama Aiyar for Appellant.

D. R. Krishna Rao for Respondents.

K. S.

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Patanjali Sastri, J. Crl. R. C. No. 54 of 1939.
25th August, 1939.

Madras Gaming Act (III of 1930), S. 4 (ii)—Presence at particular place for purpose of gaming—If offence.

There is a wide difference between a person being present at a particular place for the purpose of gaming and his gaming at the place. It is only the latter that is constituted an offence under S. 4 (ii) of the Act and S. 6 cannot be invoked to sustain a conviction.

K. S. Jayarama Aiyar, G. Gopalaswami and *M. C. Rajagopalan* for Petitioner.

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

K. S.

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Kunhi Raman, J. C. R. P. No. 1495 of 1936.
25th August, 1939.

Civil Procedure Code (V of 1908), O. 1, r. 10—Adding parties—Suit for declaration that plaintiffs were solely entitled to hereditary right to perform archaka *service in a temple—Stranger claiming to be entitled to joint interest in those rights—If to be added as party.*

In a suit for a declaration that the three plaintiffs are solely entitled to a hereditary right to perform *archaka* service in the suit temple and to enjoy the service *inam* lands a stranger sought to be added as a party as she claimed a joint interest in those rights and contended that her presence as party was therefore necessary to avoid multiplicity of suits.

Held, this was a case in which in view of the relief claimed by the three plaintiffs the presence of the new defendant is necessary within the meaning of O. 1, r. 10, Civil Procedure Code, to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit;

I.L.R. 5 Mad. 52 and A.I.R. 1929 Mad. 443, followed.

V. Govindarajachari for Petitioner.

P. Satyanarayana Rao for Respondent.

K. S.

Kunhi Raman, J. C. R. P. Nos. 737, 738 and 1024 of 1937 and 212 of 1938.

25th August, 1939.

Civil Procedure Code (V of 1908), O. 9, r. 13—Decree against minor who was not represented at all—If mere nullity or an ex parte *decree which can be set aside under O. 9, r. 13.*

Where the respondent was a minor not represented at all before the trial Court and could not therefore be said to have been a party to the proceedings, it cannot be said that the decree passed against him was an *ex parte* decree. The decree must be regarded as a mere nullity so far as the respondent is concerned. Such a decree cannot be set aside under O. 9, r. 13.

37 M.L.J. 399, followed. 34 L.W. 317 and 66 M.L.J. 683, referred.

R. Ramasubba Aiyar for Petitioners.

A. Viswanatha Aiyar and *V. Meenakshisundaram* for Respondents.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1426 of 1936.

25th August, 1939.

Promissory note by manager or karnavan—Suit on—Decree against family or tarwad—If to be passed.

In a suit on a promissory note executed by the defendant who had signed his name *simpliciter*, the plaintiff asked for a decree personally against the defendant and also as against the *tavashi* tarwad represented by him on the ground that the promissory note represented the value of goods supplied for the needs of the *tavashi*.

Held, where the personal law allows the members of a family or tarwad to be bound by a transaction entered into on its behalf by the manager or the karnavan a decree could be passed against the family or tarwad.

K. N. Kumaran for Petitioner.

K. K. Sreedharan for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 526 of 1937.

30th August, 1939.

Provincial Insolvency Act (V of 1920), S. 54—Mortgage by debtor within three months of adjudication—Alienation under

threat of legal proceedings and to escape liability for costs—If fraudulent preference.

In an application by the Official Receiver to annul a mortgage created by a debtor within three months of the adjudication in favour of a simple money creditor,

Held, if the dominant motive was not to prefer and if the alienation was made under threat of legal proceedings by the creditor which would saddle the debtor with costs the said alienation could not be impeached in law as a fraudulent preference.

Case-law discussed.

T. V. Muthukrishna Aiyar and *T. V. Ramiah* for Petitioner.

T. K. Sundara Raman for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 453 of 1936.
31st August, 1939.

Civil Procedure Code (V of 1908), O. 21, r. 89—Payment of money by judgment-debtor to have the sale of his property in execution set aside—Reversal or setting aside of decree—Claim for restitution—Sustainability—Indian Contract Act, S. 72—Relief under if can be awarded.

After a review of the case-law held:—None of the decisions goes the length of holding that, if a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, r. 89 to have a sale of his property held in execution set aside, the claim for restitution, made either under S. 144, Civil Procedure Code, or under the general law after the decree has been reversed in appeal or set aside in a suit brought for the purpose, is unsustainable. Such a case would clearly be one for awarding relief under S. 72 of the Indian Contract Act.

O. T. G. Nambiar for Appellant.

C. S. Krishnamurthi Aiyar for Respondent.

K. S.

Mockett and Krishnaswami Aiyangar, JJ. A. S. No. 189 of 1936.
31st August, 1939.

Indemnity—Covenant of—Partition deed—Clause to indemnify loss in case of deficiency of encumbered property—Onus of proof.

A covenant of indemnity may be absolute and is enforceable even if actual loss has not occurred. Where a partition deed provided that in respect of the properties allotted to one party, if any undisclosed encumbrances are discovered, then the other party

should make good the deficiency or loss in respect of which the properties allotted to the other party, were made a charge.

Held, on its being discovered that in respect of the items of the properties allotted in favour of one party there were incumbrances on the said items in favour of a third party, the party can receive from the other party the full amount of the incumbrances, even though no payment was yet made to the incumbrancer.

The onus of proving that the transferee was a transferee for value without notice of the charge was on the transferee.

I.L.R. 42 Cal. 625, followed.

Quaere, whether an execution purchaser can claim as a *bona fide* transferee for value without notice under S. 100, Transfer of Property Act.

I.L.R. 13 Luck. 746, referred to.

Ch. Raghava Rao and *K. P. Kuttisankara Menon* for Appellants.

P. S. Narayanaswami Aiyar for Respondent.

K. C.

Burn and Stodart, JJ. A. A. O. No. 6 of 1938.
31st August, 1939.

Civil Procedure Code (V of 1908), O. 41, r. 6, sub-r. 2—Appeal pending against order for sale of immovable property in execution of decree—Application for stay of sale—If Court has discretion to grant or refuse stay—Refusal of stay—If illegality—O. 21, r. 64—Sale to be of property sufficient to realise amount due under decree.

Sub-r. 2 of r. 6 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of.

A.I.R. 1932 All. 551, dissented from.

The Court has no discretion in the matter of granting or refusing stay, though it has discretion in the matter of imposing terms. Refusal of stay and sale thereafter is a clear illegality and the sale must be set aside. Executing Courts have to note that O. 21, r. 64 provides that no more of the judgment-debtor's property ought to be sold than is sufficient to realise the amount due under the decree. It is also desirable to sell the property in small parcels if that will fetch a better price.

B. Sitarama Rao, R. Gopalaswami Aiyangar and *G. Thiagaraja Sastri* for Appellants.

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

K. S.

Gentle, J. Application No. 399 of 1939, O.P. No. 277
31st August, 1939. of 1936 and O. P. No. 248 of 1938.

Indian Companies Act (VII of 1913), S. 61 (4)—Share capital reduced by special resolution—Conditions—Shareholders to bring back moneys—Liquidation of Company — Liquidator's application for review of order—Amendment not correct.

Application by a Company for confirming the resolution of Company for reduction of subscribed Share Capital by paying off a portion of the Share Capital with condition that the amounts should be repaid by the shareholders whenever called upon by the Company was ordered on 11th February, 1937, by the High Court reducing the authorised capital; and on the Company being subsequently wound up on 20th October, 1938, the Liquidator of the Company moved for amendment or review of the order of 11th February, 1937, to make the shareholders to bring back the moneys refunded. On the shareholders objecting to the course on the ground that the High Court's order having been registered with the Assistant Registrar of Joint Stock Companies and the registration having been certified the same was conclusive under S. 61 (4) of the Indian Companies Act the order cannot be amended, *held* that the contention of the shareholders was right and the order could not be amended.

88 L.T. 702, followed.

V. Radhakrishnayya and *T. V. Ramayya* for Liquidator.

S. Panchapagesa Sastri, M. Krishna Bharati, S. Seshadri and *T. P. Kannabhiran* for Shareholders.

K. C.

Burn and Stodart, JJ. A. A. O. No. 49 of 1938.
5th September, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 5 and 8—If distinct and independent.

Rr. 5 and 8 of O. 21, C. P. Code, are distinct and independent.

56 M.L.J. 692, followed. I.L.R. 22 Cal. 764, dissented from.

N. Vasudeva Rao for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondent.

K. S.

The Chief Justice and Kunhi Raman, J.

O. S. App. No. 14 of 1938.

5th September, 1939.

Will—Codicil—Mahomedan testator—Intimation to solicitors of terms of codicil—Death of testatar before codicil was executed —Final instructions to solicitors—Effective codicil—Mahomedan Law—Mode of creating will or codicil.

The testator who was a Cutchi Memon executed a will by which after granting certain legacies he provided that the income of the properties should be devoted to the education and marriage expenses of his descendants by certain sons. Subsequently when he was ill he caused a telegram to be sent to his lawyers as follows: "Since my grandson *A* died I have decided to omit all schoolfees." He also wrote a letter to his solicitor stating that he had decided to cancel his allowances provided for schoolfees. The solicitors wired back and wrote asking for specific and clear instructions regarding the codicil. The testator however died without giving any further instructions.

Held, that the telegram and the letter forwarded by the testator to his solicitors were not mere instructions to submit a draft codicil for consideration and that they amounted to an effective codicil inasmuch as no particular form was necessary to the execution of a will or codicil under the Mahomedan Law.

I.L.R. 21 All. 91 and I.L.R. 43 Bom. 641, relied on.

P. K. Janakiraman for Appellant.

V. Radhakrishnayya Instructed by *King and Partridge* for 1st Respondent.

S. Panchapakesa Sastri instructed by *T. A. Rangachari* for 2nd Respondent.

V. Subramanyam, V. Satyanarayana and *D. Narasa Raju* for other Respondents.

B. V.V.

Venkataramana Rao and App. No. 230 of 1936.
Abdur Rahman, JJ.
28th August, 1939.

Government Securities Act (X of 1920), S. 5—Beneficial ownership of Government securities—If affected by S. 5.

The provisions of S. 5 of the Government Securities Act is only for the protection of the Government who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership of Government promissory notes and securities is not affected by S. 5.

P. Satyanarayana Rao for Appellant.
Ch. Raghava Rao for Respondent.
K. S.

Wadsworth, J. A. A. O. No. 339 of 1937.
4th September, 1939.

Mortgage—Receiver appointed in a suit on a single mortgage —Amount due to the government from mortgagor in respect of Kudimaramath—*Priorities.*

In a suit on a simple mortgage a receiver was appointed over the mortgaged properties. An amount was due from the mortgagor to the Government in respect of *Kudimaramath* which had accrued due before the appointment of the receiver. In a claim for directions to the receiver to pay the amount due to the Collector,

Held, in India at any rate a simple mortgage does not bind the rents and profits of the hypotheca. The appointment of a receiver in a suit on a simple mortgage does not really enlarge the scope of the mortgage. The mortgagee has no charge over the rents and profits in the hands of the receiver.

Case-law considered.

Though the Court recognises an equity over other simple creditors, the claim of the Crown is paramount. And quite apart from the fact that it is a debt due to the Crown, it is a legitimate expense which the receiver should pay as an incident of his management of the property.

S. Ramachandra Aiyar for Appellant.
The Government Pleader (B. Sitarama Rao) for Respondent.
K. S.

The Chief Justice and L. P. A. No. 24 of 1939.
Kunhi Raman, J.
5th September, 1939.

Transfer of Property Act (IV of 1882), S. 108, cls. (o) and (p)—Lease for a particular purpose—If diversion to another purpose allowable.

N. R. C.

A tenant executed a lease of a plot of land in the city of Madras, for the purpose of laying out a flower garden. The tenant began constructing buildings thereon for residential purposes. In a suit by the landlord for perpetual and mandatory injunctions,

Held, that under the terms of cls. (*o*) and (*p*) of S. 108 of the Transfer of Property Act the buildings could not be allowed to be constructed. The principles of the English Law as to negative covenants are not applicable where the Transfer of Property Act applied.

3 A. C. 709 and (1912) A. C. 623, distinguished.

K. Rajah Aiyar for Appellant.

A. S. Nataraja Aiyar for Respondent.

S. V. V.

Wadsworth, J. S. A. No. 93 of 1936.
6th September, 1939.

Mortgage—Clause that principal and interest was "payable by 10th September, 1928"—Meaning of—Notice on 29th June, 1927, offering payment—Mortgagee declining to receive payment under misapprehension as to effect of the clause—Effect.

A clause in a mortgage deed made the principal and interest "payable by 10th September, 1928". On 29th June, 1927, the mortgagor sent a registered notice to the mortgagee in which he recited his previous offers to discharge the debt by paying the amount left with him and repeated the offer. The mortgagee in his reply relied on the stipulation that the principal and interest due under the deed was "payable by 10th September, 1928" and declined to receive payment before the stipulated time.

Held, to the extent to which words are ambiguous they should be read so as not to be a clog on the equity of redemption. The meaning of "payable by a certain date" must be taken to be "payable on or before a certain date". The refusal to accept payment, though *bona fide* made under a misapprehension of the effect of the instrument, was wrongful. No formal tender is necessary. There has been a valid tender and the mortgagor is not liable to pay interest subsequent to the tender.

Case-law examined and principles as to "tender" enunciated.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

V. Govindarajachari for Respondents.

K. S.

Venkataramana Rao, J. S. A. No. 398 of 1938.
6th September, 1939.

Practice—Defendants objecting that relief cannot be claimed by application and remedy was by suit—Subsequent suit—Defendant if can object to maintenance of suit.

Where the defendants having raised the objection in prior proceedings that it was not competent to the plaintiff to claim the relief he did by way of an application to that Court and his proper remedy was by way of a regular suit and get the benefit of that judgment, it was not open to them to turn round and again object to the maintenance of the suit.

K. Rajah Aiyar for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 92 of 1937.
8th September, 1939.

Limitation Act (IX of 1908), Ss. 20 and 21 (2)—Decree debt—Payment by one of several joint judgment-debtors—If saves limitation as against the judgment-debtor who did not make the payment.

Where on a decree against the sons on a debt contracted by their deceased father one judgment-debtor makes payments,

Held, in this High Court at any rate, the rule is, that a joint judgment-debtor not a party to the original contract cannot be said to be included within the exception set forth in S. 21 (2) of the Limitation Act and that the general rule under S. 20 is that a payment towards a debt keeps that debt alive as against all the joint debtors unless it is covered by the exceptions set forth in S. 21 (2).

K. Srinivasa Rao for Appellant.

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

K. S.

Kunhi Raman, J. C. R. P. No. 898 of 1939.
8th September, 1939.

Evidence Act (I of 1872), S. 114—Letter duly posted—Presumption that it reached its destination.

The observations in *Ma Me Shin* v. *R. M. R. M. N. Chettyar Firm*, A.I.R. 1933 Rang. 76, have to be construed with reference to the context and the observations cannot override the general provision of law contained in S. 114 of the Evidence Act which

justifies a Court in presuming that a letter duly despatched by post reached its destination.

P. Govinda Menon for Petitioner.

K. S.

Wadsworth, J. A. A. O. No. 484 of 1937.
8th September, 1939.

Provincial Insolvency Act (V of 1920), Ss. 37 and 43—Death of insolvent—Annulment of adjudication subject to vesting of property in receiver till payment of a specified creditor—Later application by other creditors for modification of order so as to include their debts also—Jurisdiction of Court.

An insolvent died in jail and his son moved the Court for annulment of the adjudication on the ground (1) that no application had been made for discharge within time allowed and (2) that the debts had all been satisfied. After notice to one creditor an order was made annulling the adjudication under S. 43 and directing that the property should vest with Receiver until payment of the active creditor. Three years later two other creditors applied to the Receiver for directions to pay them dividends out of the estate. The applications were rejected. The creditors then applied for the modification of the order under S. 37 so that the properties might vest in the Receiver until all the unpaid creditors had been paid under the insolvency law.

Held, when the Court has passed a particular vesting order, restricted in a specific way, it does not retain the power on some future date to pass a fresh order removing those restrictions and providing for an entirely new scheme for the distribution of the assets.

I.L.R. 58 Mad. 908, referred.

The power of the Court must be taken to be confined to the power to give such directions as are necessary to carry out its intention. There was no jurisdiction to make the order asked for.

V. S. Narasimhachar for Appellant.

T. M. Venugopala Mudaliar for Respondents.

K. S.

Wadsworth, J. A. A. A. O. No. 93 of 1937.
11th September, 1939.

Child Marriage Restraint Act (XIX of 1929)—Celebration of child marriage outside British India—Amount payable under decree towards bride's marriage—Marriage if opposed to public policy and payment under decree if unenforceable.

Under a decree the appellant was required to pay a sum not exceeding Rs. 1,000 towards his share of the marriage expenses of each of his sisters. The youngest sister was married and the marriage celebrated within the Hyderabad State, because it would have been illegal under the Child Marriage Restraint Act (XIX of 1929) had it been performed in British India.

Held, there is no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India when that object was actually performed in a State where it was perfectly legal.

I.L.R. 63 Cal. 1153, distinguished.

K. Kotayya for Appellant.

P. Satyanarayana Rao for Respondent.

K. S.

Venkataramana Rao and Kunhi Raman, JJ. A. S. No. 429 of 1935.
11th September, 1939.

Will—Disposition in favour of widow—When absolute—Powers to give the properties to whomsoever the widow liked "at the time of her death"—Exercise of power by deed inter vivos*—Validity.*

A testator provided that 2/3rd of the remainder of his estate should be taken by the son to be adopted by his widow and 1/3rd to be taken by the widow. The provision in favour of the widow was as follows: "The remaining 1/3rd share shall be taken by you after the adopted boy ceases to be a minor and the same shall be enjoyed during your lifetime. Whenever necessary you shall take a sum of Rs. 2,000 for your share out of the common funds and spend the same according to your pleasure. Out of the share of the property you might get for your share a sum of Rs. 5,000 shall be utilised by the executors. Excluding these amounts the property remaining out of your share of property has been given away to you with powers of alienation by way of gift, exchange, sale, etc., so that you might give it to whomsoever you like *at the time of your death*".

N. R. C.

Held, in the circumstances the testator intended to confer on his widow an absolute estate and not a mere life estate with a power of appointment. Assuming the will confers a mere life estate with a power of appointment, it is open to the widow to exercise the power of appointment by a deed *inter vivos*.

Sugden on Powers, 8th Edition, page 210; 70 E.R. 517 and 47 L.J. 62, followed.

The expression "at the time of the death" must be given a reasonable interpretation and means "on apprehension of death". So where the widow aged 70 in apprehension of death by a settlement exercises the power of appointment in favour of her daughter it is valid and also as transfer *eo instanti* of the life estate.

V. Govindarajachari and *D. R. Krishna Rao* for Appellant.

V. Rangachari for Respondents.

K. S.

Venkataramana Rao and Kunhi Raman, JJ.
12th September, 1939.

A. S. No. 96 of 1937.

Land acquisition—Award of compensation—Reference to Court—Right of claimant to adduce evidence as to market value.

On a reference to the Court the claimant is entitled to adduce evidence in regard to the market value and the Court cannot reject the evidence tendered on his behalf on this point, provided the claimant in making the application for reference has disputed the market value fixed by the Land Acquisition Officer.

K. Umamaheswaram for Appellant.

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

K. S.

Venkataramana Rao and Abdur Rahman, JJ.
15th September, 1939.

App. No. 229 of 1936.

Civil Procedure Code (V of 1908), O. 21, r. 63—Suit by claimant based on title, whose petition objecting to attachment under r. 58 has been decided against—Burden of proof as to genuineness of sale to claimant.

The general rule that would apply to cases where the plaintiff sues on the basis of his title and the defendant raises a plea of *benami* would not apply where the question has been gone into once by an execution Court on a petition of objections under O. 21, r. 58 and directed against the claimant. If the claimant brings a suit later under O. 21, r. 63 he will have to establish that he was in possession of the property on his own behalf and not on the

judgment-debtors and that the consideration for the sale had emanated from him. Once this is established it would then be for the defendants to rebut the evidence and to show that the plaintiff's name was *benami* or the sale in his favour was fraudulent.

Case-law discussed.

Mulla's Civil Procedure Code (1st Edition), page 789 and I.L.R. 55 All. 266 and I.L.R. 5 Rang. 552, disapproved.

A.I.R. 1927 P.C. 237, explained.

35 C.W.N. 324, held to be not overruled and followed.

K. Rajah Aiyar and *S. Nagaraja Aiyar* for Appellants.

The Government Pleader (*B. Sitarama Rao*) and *K. S. Venkatarama Aiyar* for Respondents.

K. S.

Wadsworth, J. A. A. O. No. 51 of 1938.

15th September, 1939.

Civil Procedure Code (V of 1908), O. 11, r. 21—Discovery—Suspicion that relevant documents were concealed—Proper course.

Normally when a Court suspects that an affidavit of discovery conceals documents really in the possession of the person who makes the affidavit, it will not reject the affidavit or treat it as insufficient unless there are materials either in the affidavits or in documents referred to therein or in the pleadings from which the presumption may be drawn that the defendant has relevant documents in his possession which he has not disclosed. Where there is merely a suspicion as to existence of relevant documents in the hands of a party the proper course is to accept the affidavit and to allow proof in the trial of the suit that there has been a suppression of documents by the deponent and to draw an inference adverse to the deponent from such suppression if proved. The matter should not be followed up any further in the process of discovery and certainly the drastic step of striking off the defence should not be taken on mere suspicion.

V. Ramaswami Aiyar for Appellants.

S. Venkatesa Aiyangar for Respondents.

K. S.

Kunhi Raman, J. A. A. O. No. 184 of 1938.

15th September, 1939.

Provincial Insolvency Act (V of 1920), S. 35—Petitioning creditor's debt alleged to be bogus—When adjudication to be annulled.

Where a creditor applied to have an order of adjudication annulled on the ground that the petitioning creditor's debt was a bogus one,

Held, unless it is shown that the debtor did not owe any other debts or that the debtor was not really insolvent at the time the order of adjudication was made by the lower Court the order of adjudication cannot be annulled.

Case-law discussed.

N. Vasudeva Rao for Appellant.

V. Govindarajachari and *V. Parthasarathi* for Respondent

K. S.

Kunhi Raman, J. C. R. P. No. 1285 of 1937.

15th September, 1939.

Transfer of Property Act (IV of 1882), S. 83—Deposit in Court of money due on mortgage—Mortgage deed not deposited in Court—Proper order.

Where it is not possible for any of the respondents to deposit the mortgage deed in Court and the petitioner has paid the mortgage money into Court, the Court should not hold that the deposit is not valid and that the petition does not lie. As it is not desirable to determine the respective rights of the respondents in a summary manner the petition is to be dismissed and the petitioner referred to a separate suit and the order shall not bar the petitioner's right to claim that interest must be deemed to have ceased from the date of the deposit.

B. Lakshminarayana for Petitioner.

Respondent not represented.

K. S.

Kunhi Raman, J. C. R. P. Nos. 1658 and 1689 of 1937.

18th September, 1939.

Court-fees—Sub-mortgagee impleading his own mortgagor and also owner of property—Proper court-fee.

When a sub-mortgagee sues impleading his own mortgagor and also the owner of the property the court-fee should be paid on the amount due on the original mortgage and not merely on the amount due to himself as sub-mortgagee.

(1938) 1 M.L.J. 171, followed.

K. Desikachari for Petitioner in C.R.P. No. 1658 of 1937.

V. C. Viraraghavan for Respondent in C.R.P. No. 1658 of 1937.

M. Krishna Bharathi for Petitioner in C.R.P. No. 1689 of 1937.

The Government Pleader (B. Sitarama Rao) for Respondent in C.R.P. No. 1689 of 1937.

K. S.

[F. B.]

The Chief Justice, Krishnaswami Aiyangar and Patanjali Sastri, JJ. Crl. R. C. Nos. 245, 246, 298 and 340 of 1939.

19th September, 1939.

Criminal Procedure Code (V of 1898), Ss. 107 and 112—Notice under S. 107 and order under S. 112—Essentials.

It must be remembered that the issue of the notice is merely a preliminary step and no order can be passed under S. 107 unless the inquiry which follows the issue of the notice shows that the laying of the information was justified. The High Court can always interfere when the inquiry has not been held in accordance with the law or a wrong conclusion arrived at.

There must be information of a nature which convinces the Magistrate that there is a likelihood of a breach of the peace. It is impossible to formulate a hard and fast rule with regard to the nature of the information on which a Magistrate should act. If the information is reliable the Magistrate has jurisdiction to make the order required by S. 112.

K. S. Jayarama Aiyar, G. Gopalaswami, S. R. Subramanian and *N. Somasundaram* for respective Petitioners.

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

K. S.

Kunhi Raman, J. C. R. P. No. 1673 of 1937.

19th September, 1939.

Civil Procedure Code (V of 1908), O. 47, r. 1—Advocate not arguing some issue as a result of not remembering certain facts—Review if to be allowed.

It is obvious there will be no finality to the decision of a Court if after judgment is pronounced the parties or advocates are allowed to come forward and say that a certain argument was addressed or given up in the course of the trial as the result of their not remembering certain material facts. So long as the case does not fall within the purview of O. 47, r. 1 it will not be correct to allow an application for review.

M. S. Ramachandra Rao for Petitioner.

V. Rangachari for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 159 of 1938.

20th September, 1939.

Provincial Insolvency Act (V of 1920), Ss. 53 and 54—Mortgage by insolvent and his minor brother—Insolent's share alone liable to be set aside.

On the adjudication of a person as insolvent, the Official Receiver applied under Ss. 53 and 54 of the Provincial Insolvency Act to set aside *in toto*, a mortgage executed by the insolvent for himself and for his minor brother and the document being set aside *in toto*,

Held, that the Official Receiver was entitled to have a document set aside only to the extent of the insolvent's share and not in respect of the share of the insolvent's minor brother.

M. Krishna Bharati and *S. Seshadri* for Petitioner.

Respondent not represented.

K. C.

Kunhi Raman, J. C. R. P. No. 1304 of 1938.
20th September, 1939.

Civil Procedure Code (V of 1908), O. 1, r. 8—Representative suit—Compromise signed by one of the plaintiffs—No proof of consent of other plaintiffs—If binding on the entire community.

There is no principle of law according to which parties to a private compromise out of Court can bind their entire community without express authority. Where one of the plaintiffs to a representative suit has signed the compromise and there is absolutely no proof that the other plaintiffs consented to the arrangement settled at the meeting of certain other members of the community, the compromise is not binding on the entire community.

A.I.R. 1936 All. 1, followed.

B. Pocker for Petitioner.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Respondent.

K. S.

Kunhi Raman, J. C. R. P. Nos. 293 and 294 of 1938.
21st September, 1939.

Civil Procedure Code (V of 1908), O. 17, rr. 2 and 3—Defendants appearing and filing written statements, and issues framed, suit part heard and adjourned for further evidence—Failure of defendants to appear on the adjourned date—Finding on all issues and decree in favour of plaintiff—Whether decree ex parte *and falls under r. 3 or r. 2 of O. 17.*

Where in a suit the defendants appeared and filed written statements and issues were framed, the suit part heard and then adjourned for further evidence and on the defendants failing to appear on the adjourned date the Court considered the merits of the case and decided all the issues that were framed for determina-

tion in the suit, the case is one falling under O. 17, r. 3 and not r. 2.

N. D. Varadachariar and *R. Viswanatha Aiyar* for Petitioner.

Respondent not represented.

K. S.

Patanjali Sastri, J. S. A. No. 538 of 1936.
22nd September, 1939.

Madras Estates Land Act (IX of 1908), S. 112—Rent sale without service of notice personally on the pattadar—Effect.

Want of personal service on the defaulter renders the rent sale null and void unless there is proof that such service was not practicable.

I.L.R. 57 Mad. 255, followed.

K. V. Sesha Aiyangar for Appellant.

T. S. Venkatesa Aiyar and *K. Venguswami Aiyar* for Respondent.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. M. P. No. 2543 of 1939.
27th September, 1939.

Madras Debt Conciliation Act (XI of 1936)—Order of Debt Conciliation Board without jurisdiction—Quashing by writ of certiorari.

Respondent claiming to be an agriculturist filed an application under S. 4 (1) of the Madras Debt Conciliation Act, 1936, before the Debt Conciliation Board. Three debts were shown all of them due to the petitioner. The board decided that the debts should be scaled down under Madras Agriculturists Relief Act though the petitioner objected. In an application for issue of a writ of *certiorari* against the Debt Conciliation Board for quashing the order,

Held, S. 4 provides that a debtor may make an application for the "settlement of his debts". But if creditors representing more than 50 per cent. of the applicant's debts do not agree the board is bound under S. 17 of the Act to dismiss his application. The order of the board is without jurisdiction and must be quashed.

Ramanujam and *Venkateshayya* for Petitioner.

D. R. Krishna Rao for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 328 of 1938.
28th September, 1939.

Jaina Succession Act (V of 1928), S. 4, explanation—If excludes property held in tenancy in common.

The explanation to S. 4 of the Jaina Succession Act, 1928, does not exclude property held in tenancy in common. So where a person held an undivided moiety of an item of property as the sole member of his branch of the family, without any one else being interested in it as a member of his family, that moiety falls within the purview of S. 4 of the Act.

K. Y. Adiga and *S. Ramayya Nayak* for Appellants.

M. K. Devaraj for Respondents.

K. S.

Kunhi Raman, J. C. R. P. No. 549 of 1936.

29th September, 1939.

Contract—Obligation to pay for benefit conferred by plaintiff —When arises on an implied contract.

It is only if the person alleged to have been benefitted had the option of accepting or rejecting that benefit and chose to adopt the former course that he can be made to pay for that benefit on the basis of an implied contract.

33 L.W. 284 and I.L.R. 33 Mad. 41: 19 M.L.J. 627, followed.

A. V. Narayanaswami Aiyar for Petitioner.

L. A. Gopalakrishna Aiyar and *M. S. Vaidyanatha Aiyar* for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 316 of 1939.

4th October, 1939.

Regulation XI of 1816, S. 10—Order of village headman under—If subject to appeal or revision by High Court.

The order of the village headman under S. 10 of Regulation XI of 1816 was not subject to appeal or revision except under S. 107 of the Government of India Act, 1915, and cl. (2) of S. 224 of the Government of India Act of 1935 excludes the jurisdiction of the High Court in such cases

A. V. Narayanaswami Aiyar for Petitioner.

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

K. S.

Venkataramana Rao and Abdur Rahman, JJ. — A. S. No. 62 of 1936.
23rd August, 1939.

Negotiable instruments—Letter of guarantee not stamped—When a negotiable instrument—Admissibility in evidence.

A and *B* executed a promissory note in favour of a firm *X* on 28th January, 1930, agreeing to pay compound interest at Re. 1-0-6 per cent. per month. On the same day they also wrote a letter to the firm *X* agreeing to pay an enhanced interest at Re. 1-14-6 per cent. per month from 27th October, 1930, if the money borrowed on the security of the promissory note remained unpaid by the 26th October, 1930. In addition *C* also wrote to firm *X* an unstamped letter headed "Letter of guarantee written and given in favour of firm *X* by *C*, which after reciting the borrowing by *A* and *B* said "I shall pay the said amount of principal and interest inclusive of the chit interest wherever and whenever you demand without reference to the said *A* and *B*. This is the letter of guarantee written and given with consent". The promissory note was endorsed in favour of the plaintiff and the letter of guarantee was also assigned by a separate document to the plaintiff who sued *A*, *B* and *C*. As to *C's* liability,

Held, the letter of guarantee cannot be held to have been intended by the parties or regarded by businessmen in general to operate as a promissory note. It was a letter of guarantee and could be admitted in evidence on payment of a penalty and *C* was liable under it.

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

The Advocate-General (Sir A. Krishnaswami Aiyar) and *A. Lakshmayya* for Respondent.

K. S.

Abdur Rahman, J. — S. A. No. 209 of 1936.
25th August, 1939.

Registration Act (XVI of 1908), S. 17, cl. 2—Receipt by original mortgagee accepting a lesser amount in full satisfaction (portion of it paid immediately and a small portion to be paid shortly) and "waiving" the claim for the balance due—Want of registration—Effect on admissibility in evidence.

A mortgagee entered into an agreement with the purchaser of the mortgaged properties to the effect that he would accept a certain amount (portion of which was to be paid shortly after) in full satisfaction and "waived" the balance of the sum due "out of grace", and executed a receipt incorporating the terms of the agreement. The receipt was not registered. The portion of the amount

was not paid as agreed and the mortgagee assigned the rights to a third person who assigned it over to the plaintiff. In a suit on the mortgage the purchaser of the properties relied on the receipt relinquishing the balance due under the mortgage.

Held, when a document is not a receipt of money but something more and does not come within the ambit of exception (*xi*) to cl. 2 of S. 17 of the Registration Act, it would require registration to be admissible in evidence for the simple reason that it is a document which purports or operates to limit or extinguish either in present or in future a right, title or interest of the value of more than Rs. 100 to or in the mortgaged property. There is a distinction between a receipt of money and relinquishment of a claim by a creditor.

I. L. R. 35 All. 202 and 34 M. L. J. 79, followed.

I. L. R. 43 Mad. 803 (806), distinguished.

D. Ramaswami Aiyangar for Appellant.

V. T. Rangaswami Aiyangar, K. Ramaswami Aiyangar and *P. S. Kodandapani* for Respondents.

K. S.

Mockett and Krishnaswami Aiyangar, JJ.

A. S. Nos. 10 and 205 of 1937 and C. M. P. Nos. 944 and 2595 of 1937.

30th August, 1939.

Evidence Act (I of 1872), S. 13—Prior proceedings on the question of existence of right to office or property—Relevancy of transaction by which right was recognised—Practice—Official records—Late production—Propriety of rejection.

Previous proceedings on the question of the existence of the plaintiff's right to the office and property are very relevant as being transactions by which the right was recognised. When documents are official records of undoubted authority which may assist the Court to decide rightly the issues before it, leave should not ordinarily be refused even though they are produced late.

I. L. R. 56 Cal. 1003 at 1011, referred.

P. Somasundaram, S. Ramamurti and *V. Govindarajachari* for Appellant in App. Nos. 10 of 1937 and 205 of 1937.

J. Krishnamurthi for Respondent in both Appeals.

K. S.

The Chief Justice and Kunhi Raman, J.

O. S. A. No. 19 of 1938.

4th September, 1939.

Private International Law—Foreign adjudication—Vesting of movables—Attaching creditors—Rights of—Civil Procedure Code (V of 1908), Ss. 64 and 73—Effect.

In the case of a foreign adjudication, the receiver of the foreign Court is entitled to the free assets of the bankrupt. The free assets must include assets which are not required to meet a charge or an attachment in existence at the time of the adjudication. Ss. 64 and 73 of the Civil Procedure Code cannot override this rule of private international law. As the foreign receiver is entitled to all the movable assets of the insolvent which were free at the date of the adjudication and the free assets must be deemed to be the moneys left over after the satisfaction of the claim of the creditors who had attached before the adjudication appellants are not entitled to anything by reason of their attachment, after adjudication. The adjudication prevented the attachment having any validity and they were left merely with the right to prove in the insolvency.

Case-law examined.

K. Krishnaswami Aiyangar, A. Seshachariar, P. Chakrapani and *T. G. Raghavachari* for Appellant.

C. Vasudevan for Respondent.

K. S.

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Pandrang Row and Krishnaswami Aiyangar, JJ.

15th September, 1939.

C. M. P. Nos. 2793 and 3534 of 1939.

Practice—Review—Point raised for first time—Point not well settled and it cannot be said that the contentions would straightaway have been accepted if they had been put forward at the hearing—If ground for review.

Where the points sought to be raised for the first time by way of review are debatable, it is impossible to say that there is any error of law apparent on the face of the record which can be a ground for review.

K. Krishnaswami Aiyangar for *R. Sundaralingam* for Petitioner.

K. S.

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Wadsworth, J.

22nd September, 1939.

A. A. O. No. 596 of 1938.

Civil Procedure Code (V of 1908), O. 38 and O. 40—Allegation that defendant has no property and is trying to alienate all the property he has and remove to Northern India—Appointment of such defendant as receiver and order for security—Propriety.

Where the basis for requiring a defendant, appointed to be a receiver, to give a security is an allegation that he has no property and is trying to alienate all the property which he has got and remove to Northern India, such allegations might justify an order

under O. 38, but have no real bearing on the question arising under O. 40. Where in the circumstances of the case there are no grounds for disturbing a party's possession it is improper even to make that party himself a receiver.

V. Rangachari fro Appellant.

K. Kameswara Rao for Respondent.

K. S. ———

Burn and Stodart, JJ. A. A. O. No. 69 of 1938.
28th September, 1939.

Hindu Law—Family business—Debts—Coparcener's liability —Nature and extent.

Provincial Insolvency Act (V of 1920), S. 6 (d) (ii) *and* (iii) *—Act of insolvency by managing member of Hindu family business —Adjudication of other coparceners—When valid.*

In the case of a family business those members only are personally liable for the debts of the business who are in control and management of it or who have acquiesced in the course of the business in which the particular contract was entered into, so as to warrant their being treated as parties to the contract. In the case of other members business debts are on exactly the same footing as other family debts. If they are lawfully incurred for the benefit of the family or for the necessary purposes of the family then to discharge them the family property may be sold without excluding the interest therein of the coparceners who were not parties to the contract. But they cannot be levied from the latter in any other way.

Case-law reviewed.

So where the only liability of the coparceners sought to be adjudicated insolvents arises out of the fact that the debt was contracted in the course of a family business and assuming property of the family may be sold to discharge it without excluding the coparcener's interest in that property.

Held, the relation of debtor and creditor did not exist between such coparcener and the petitioning creditor and he cannot be adjudicated insolvent. If for the debts lawfully incurred by a family manager in the ordinary course of business the other members are not personally liable much more are they exempt from the consequences of acts done by the manager which amounts to acts of insolvency.

Case-law reviewed.

V. S. Narasimhachar and *M. Guruswami Aiyar* for Appellant.

D. R. Krishna Rao and *Ch. Raghava Rao* for Respondents.

K. S. ———

Burn and Stodart, JJ. A. A. O. No. 449 of 1938.
4th October, 1939.

Madras Agriculturists' Relief Act (IV of 1938), S. 10—Order merely deciding that Act applicable—If appealable—Scaled down decree—Appealability.

An order which merely decided that S. 19 of Act IV of 1938 is applicable and does not apply it scaling down the decree, is not an appealable order. If the lower Court scales down the decree an appeal would lie from the new decree to be passed.

P. Satyanarayana Rao for Appellant.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K. S.

Lakshmana Rao, J. Crl. App. No. 293 of 1939.
6th October, 1939.

Criminal trial—Procedure—Prosecution story on the face of it improbable—Omission to put it to jury and ask them to give benefit of doubt to accused—If material misdirection.

Where the prosecution story is on the face of it improbable, it should have been put to the jury. Further the jury should have been told that if they felt any reasonable doubt as to the guilt of the accused or any of them they should give the benefit of the doubt to the accused concerned. An omission to do that amounts to a material misdirection.

1 M.L.T. 350, followed.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Appellants.

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

K. S.

Stodart, J. C. R. P. No. 273 of 1939.
6th October, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 25—Judgment-debtor filing successive applications for conciliation—If entitled to obtain stay under S. 25 more than once.

Though in the Debt Conciliation Act there is nothing to prevent a debtor filing one application after another and under S. 25 of the Act he can obtain stay of a suit or other proceedings so long as an application is pending before the board, a judgment-debtor is not entitled to obtain stay under S. 25 of any individual suit or proceedings more than once.

P. S. Ramachandran and *K. R. Krishnaswami* for Petitioner.

K. S.

Wadsworth, J. S. A. No. 332 of 1936.
9th October, 1939.

Civil Procedure Code (V of 1908), O. 7, r. 1 (h) and O. 2, r. 2—Suit on mortgage relinquishing a portion of the amount due —Plea of discharge as to a certain amount—Plaintiff if entitled to adjust the amount from amount so relinquished.

Plaintiff claiming Rs. 992-8-0 on a mortgage bond executed by defendant sued to recover only Rs. 500 relinquishing the balance. Defendants' plea of discharge for Rs. 230 with interest was accepted by both lower courts. Still a balance of Rs. 312-9-3 was left under the suit claim made up of Rs. 64-4-0 principal with interest thereon from date of bond. Both the lower courts negatived the right of plaintiff to adjust this amount of Rs. 312-9-3 from the amount relinquished by plaintiff and dismissed the suit.

Held, in modification, on appeal, that plaintiff was entitled to so adjust, but in as much as he specifically relinquished interest as such in plaint, he is entitled to a decree for the principal of Rs. 64-4-4 only and dismissed the rest of the plaintiff's claim.

8 I.C. 943: 8 M.L.T. 436, referred.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

K. Ramamurty and *K. Someswara Rao* for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 261 of 1939.
10th October, 1939. Crl. R. P. No. 241 of 1939.

Cattle Trespass Act (I of 1871)—Compensation to complainant deprived of the use of his cattle—If cannot be awarded unless claimed in the complaint.

Where the complainant was deprived of the use of his cattle there is no restriction in the Cattle Trespass Act that compensation cannot be awarded unless it is claimed in the complaint.

M. A. Krishnamachari for Petitioners.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

V. Rajagopalachari for Complainant.

K.S.

Wadsworth, J. C. R. P. No. 1077 of 1937.
15th September, 1939.

Civil Procedure Code (V of 1908), S. 152—Scope—Consent decree—Terms alleged to be omitted in—If can be corrected as accidental slip under S. 152—Amendment of decree—Error as to jurisdiction—Remedy by way of appeal available—Discretion to interfere in revision.

S. 152, Civil Procedure Code, does not empower a Court to rectify a decree merely because that decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under S. 152 relate only to arithmetical mistakes or errors arising from an accidental slip or omission. It is impossible to hold long after the event (18 years after the decree) that when there is an apparent omission of an important term from a judgment proceeding on the consent of parties this term has been omitted by an accidental slip. Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available but in very special circumstances if there is a clear error relating to jurisdiction it may at its discretion do so.

I.L.R. 24 Mad. 646, doubted.

31 M.L.J. 438, applied.

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

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

K. S.

Wadsworth, J. A. A. A. O. No. 124 of 1937.
18th September, 1939.

Partnership Act (IX of 1932), S. 69—Decree on promissory note passed without contest—Execution of decree—Objection that decree not valid as plaintiffs were members of unregistered firm—If can be taken in execution.

In bar of execution of a decree passed without contest on a promissory note (dated 15th March, 1933, the plaint in which was filed on 27th June, 1935) the defendant raised the objection that the suit was bad and the decree a nullity because the plaintiffs at the time of the filing of the suit constituted an unregistered partnership.

Held, the suit out of which the decree arose is not one barred under S. 69 of the Partnership Act as S. 74 excludes from the operation of the Act remedies accruing before the commencement of the Act. Any lack of jurisdiction which may have existed in the Court which passed the decree could only be ascertained with

an amount of research and investigation which would be beyond the functions of an executing Court. Where the executing Court had an apparently good decree to execute, it is not entitled to go into an elaborate enquiry into the legality of that decree,—an enquiry which demands the adducing of evidence which was not put before the trial Court before which the objection should have been raised.

Ch. Raghava Rao for Appellant.

E. Vinayaka Rao for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 10 of 1938.

20th September, 1939.

Civil Procedure Code (V of 1908), S. 47—Decree for maintenance—Execution sale of charged properties—Surplus after satisfying decree—Order for disposal—If appealable under S. 47, Civil Procedure Code.

There was a decree for maintenance declaring a charge as against judgment-debtors. The judgment-debtors subsequently created a mortgage upon which a suit was filed and the mortgagees purchased the property in execution of the mortgage decree. Thereafter the maintenance decree was executed by the sale of the same property and a balance was left over from the sale proceeds after satisfying the maintenance decree. The balance was claimed by an assignee from the original judgment-debtors and also by the mortgage decree-holders who had purchased the property. The latter was held entitled to the balance and the former appealed.

Held, the dispute is not one between parties arranged on opposite sides in the suit the decree of which was being executed. S. 47 therefore does not apply and no appeal lies.

K. Bhimasankaran for Appellant.

D. Narasaraju for Respondent.

K. S.

Pandrang Row and Abdur Rahman, JJ. C. R. Ps. Nos. 224 to 228, 372 to 375 and 588 of 1939.

20th September, 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 19 and 20—Decrees of Berhampore Court—Transfer of Berhampore to new Province—Execution continuing in Berhampore Court—Applicability of Madras Act IV of 1938—Jurisdiction of executing Court to hear applications under Ss. 19 and 20.

Petitions under Ss. 19 and 20 of the Madras Agriculturists Relief Act (IV of 1938) must be deemed to be petitions which raise questions relating to execution, discharge or satisfaction of the decree and therefore come with in matters covered by S. 47 of the

Civil Procedure Code and must be presented in the Court in which the execution petition was pending (here, the Berhampore Sub-Court) and not in the Court in whose jurisdiction some of the properties covered by the mortgage decree is situated.

Madras Agriculturists Relief Act has to be applied and its provisions enforced by the Berhampore Sub-Court (now in Orissa Province) in dealing with petitions under the Act so long as the execution application continues to be pending in the Court.

The Advocate-General (Sir Alladi Krishnaswami Aiyar) with *B. V. Ramanarasu* and *P. S. Raghava Rama Sastri* for Petitioners in C. R. P. Nos. 372 to 375 of 1939 and for Respondents in C. R. P. Nos. 224, 226 to 228 and 588 of 1939.

B. Jagannadha Das for Respondents in C.R.P. Nos. 372 to 375 and for Petitioners in C. R. P. Nos. 224, 226 to 228 and 588 of 1939.

K. Ramiah Pantulu for Respondent in C. R. P. No. 225 of 1939.

K. S.

Kunhi Raman, J. C. R. P. No. 704 of 1936.
22nd September, 1939.

Practice—Amendment—Suit on pronote by two defendants—Defence that one defendant did not affix his mark—Amendment of plaint as on original cause of action—Propriety.

In the course of the trial probably because the evidence showed that the second defendant's defence that he did not insert his mark to the suit promissory note was likely to be accepted by the trial Court, an application was made for amending the plaint to base the suit on the original cause of action. The application for amendment was allowed and subsequently the trial Court found that the suit promissory note was executed only by the first defendant and that the second defendant's mark was a forgery. A decree was passed against the first defendant.

Held, in the special circumstances the amendment that was allowed was not opposed to law.

L. A. Gopalakrishna Aiyar for Petitioner.

A. V. Narayanaswami Aiyar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 469 of 1937.
22nd September, 1939.

Transfer of Property Act (IV of 1882), S. 65 (A)—Lease by mortgagor for two years for advance payment of rent—If binding on mortgagee—Transfer of Property Act, S. 65 (A)—Effect and

applicability when mortgages anterior to amending Act but leases of 1936.

Leases granted by the mortgagor in return for an advance payment of two years' rent has the effect of diminishing the security, for, any attempt to enforce the right of the mortgagee by sale would if the lease were valid result in a lower sale price than would be realised if the purchaser could anticipate the enjoyment of all future income. Apart from S. 65 (A) of the Transfer of Property Act the leases do not bind the mortgagee. S. 65 (A) applies, the leases being dated 1936 though the mortgage itself was anterior.

S. Venkatesa Aiyangar for Appellant.

C. Srinivasan for Respondent.

K. S.

Burn and Stodart, JJ. A. A. O. No. 96 of 1936.

27th September, 1939.

Provincial Insolvency Act (V of 1920), Ss. 53 and 54—Fraudulent preference—What constitutes.

Under Ss. 53 and 54 of the Provincial Insolvency Act it is the absence of good faith on the part of the transferee that has to be proved and not the absence of good faith on the part of the transferor, the insolvent.

A.I.R. 1938 Mad. 285, approved.

So where there was nothing to show that the transferee was acting otherwise than in good faith, the application to set aside a transaction as fraudulent preference as voidable under S. 54 must be dismissed.

K. Rajah Aiyar and *R. Ekambaram* for Appellant.

R. Gopalaswami Aiyangar for Respondent.

K. S.

Wadsworth, J. S. A. No. 640 of 1935.

27th September, 1939.

Mortgage—Usufructuary mortgage—Covenant that "after the expiry of the period in any year, giving intimation in Panguni, I will pay the money in the month of Chitrai and redeem the properties"—Construction.

An othi contained the following sentence: "After expiry of the period in any year giving intimation in Panguni, I will pay the money in the month of Chitrai and redeem the properties".

Held, the proper construction of this clause is to read it as principally conveying a limitation upon the mortgagor's right of redemption after the expiry of the period fixed, the limitation

being that in any year in which he wishes to redeem he shall only do so by first giving notice in the month of Panguni and then tendering the money in the month of Chitrai. The clause was for the benefit of the mortgagor subject to a restriction in favour of the mortgagee limiting the right of redemption to a particular time of the year.

T. K. Sundararaman for Appellant.

T. E. Ramabadrachariar for Respondents.

K. S.

Wadsworth, J. S. A. No. 593 of 1935.

28th September, 1939.

Madras Estates Land Act (I of 1908)—Estate under—Accretion to holding by alluvion—Whether belongs to ryot *or landholder—Person in possession of accretion without title—If a* ryot *and if entitled to benefit of explanation to S. 6, sub-S. 2 of the Act—Ejectment of such person—If to be for grounds under S. 153—S. 163—Applicability.*

In an "estate under Madras Estates Land Act, accretion to land by alluvion will be an addition to the estate of the person who owns the soil and not to the estate of the person who has merely a right of occupancy in the soil. The owner of the occupancy right in respect of such accretion will not fall within the definition of a *ryot*. Nor can he have the benefit of the explanation to S. 6, sub-S. 2 of the Madras Estates Land Act, for they have not been admitted to possession nor has payment been recovered from them. They are liable to ejectment under S. 163 and the land must be held to be ryoti land situated within an estate and the tenants are not entitled to resist ejectment.

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

S. Muthiah Mudaliar for Respondent.

K. S.

Stodart, J. C. R. P. No. 1529 of 1938.

6th October, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 9—Debts incurred on or after 1st October—Interpretation.

The expression *'incurred'* must be held to apply to the inception of the debt, that is, it must refer to the time when the original obligation was created and not the principal amount as last found due plus interest on that from the date when it was found due.

K. Umamaheswaram for Petitioner.

K. S.

Patanjali Sastri, J. S. A. No. 491 of 1936.
6th October, 1939.

Trade name—Passing off—Name acquiring secondary significance denoting plaintiff's goods—Defendant trading under same name—Infringement—Dissimilarity in get up—How far a protection.

Where it is found that the appellant has been trading under a name which does not represent the truth and by marking his goods with a seal which is a colourable imitation of the seal which the respondent was using and by using the name "Shanmugham" (which has acquired a secondary significance as exclusively denoting the respondent's beedies) in the designation of the appellant's goods as "Shamugham seal beedies" he wants to deceive the public.

Held, where a name has acquired a secondary signification as exclusively denoting the goods of a particular trader, more dissimilarity in get up is immaterial and afford no protection, 83 L. T. 259 and (1913) 2 Ch. D. 545, followed; and an injunction must be ordered restraining the use of such name without taking reasonable precaution to clearly distinguish the business carried on or beedies manufactured or sold by the defendants from the business carried on and the beedies manufactured by the plaintiff.

K. R. Rangaswami Aiyangar for Appellant.

K. Venkateswaran for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 407 of 1939.
10th October, 1939. Crl. R. P. No. 376 of 1939.

Indian Penal Code (XLV of 1860), Ss. 323 and 352—Trial for offence under—If barred by conviction under S. 75 of the City Police Act (Madras Act III of 1888).

The conviction under S. 75 of the City Police Act is no bar to the trial for an offence under Ss. 323 and 352 of the Indian Penal Code.

K. V. Rajagopalan and *S. V. Rama Aiyangar* for Petitioners.

K. M. Balasubramanyam for Complainant.

The Crown Prosecutor on behalf of the Crown.

K.S.

Wadsworth, J. A. A. A. O. No. 136 of 1937
20th September, 1939. and C.R.P. No. 828 of 1937.

Civil Procedure Code (V of 1908), O. 21, r. 53 (3)—Attaching decree-holder—If entitled to make an adjustment of the attached decree and record satisfaction under O. 21, r. 2.

The attaching decree-holder is not the representative of the holder of the attached decree for all purposes. The only safe way of interpreting O. 21, r. 53 (3) is to treat the holder of the attaching decree as the representative of the holder of the attached decree only for the purpose contemplated by that sub-rule namely the purpose of execution and the attaching decree-holder cannot exercise the power conferred under O. 21, r. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a staisfaction of the decree.

A.I.R. 1937 Cal. 468, followed.

P. S. Ramachandran and *S. Ramachandra Aiyar* for Appellant.

K. T. M. Ahmed Ibrahim for Respondent.

K. S.

Wadsworth, J. A. A. A. O. No. 21 of 1938
21st September, 1939. and C.R.P. No. 151 of 1938.

Limitation Act (IX of 1908), S. 18—Application under Civil Procedure Code, O. 21, r. 90 to set aside sale time barred—Limitation Act S. 18—Conditions for applicability.

It was found that the decree-holder did take part in a fraudulent conspiracy which had the effect of keeping the judgment-debtor from knowledge of the sale. In an application which was time barred to set aside the sale,

Held, the conditions which have to be proved for the purpose of Civil Procedure Code, O. 21, r. 90 cannot be taken as governing the conditions which have to be proved in order to attract the provisions of S. 18 of the Limitation Act. Limitation Act, S. 18 should be read as it stands and should not be modified or weakened by importing into it considerations taken from another provision of law with which it is entirely unconnected.

When a judgment-debtor seeks to save limitation (under S. 18, Limitation Act) for an application to set aside a sale, which application is directed not only against the decree-holder but also against the auction-purchaser, he must prove that he has been kept from knowledge of his right to apply by a fraud to which both the decree-holder and the auction-purchaser are either parties or accessories.

N. R. C.

V. Rangachari for Appellant.

N. Vasudeva Rao and *P. Satyanarayana Rao* for Respondent.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J.
27th September, 1939.

S. A. No. 1082 of 1934.

Madras District Municipalities Act (V of 1920), S. 61 (1)—Private drains—If vest in Municipal Council—Municipal Council if can sanction connection of drains of other persons to private drains.

S. 61 of the District Municipalities Act does not give the Municipal Council the right to connect or sanction the connection of a stranger's drainage system with that of a person whose own private property it is.

V. N. Venkatavaradachariar for Appellant.

K. Sankara Sastri for Respondent.

K. S.

Kunhi Raman, J.
29th September, 1939.

A. A. O. No. 219 of 1937.

Amendment—Suit for recovery of possession of property purchased at a court sale from defendant alleged to be trespasser—Defendant found to have purchased equity of redemption—Amendment converting suit into one for sale of the property—If to be allowed.

A suit was filed by plaintiff as purchaser in Court sale for recovery of property and mesne profits from defendant as trespasser. It was found that the defendant had purchased the equity of redemption in respect of the suit property. The lower appellate Court without going into the merits of the case gave leave to the plaintiff to amend the plaint in order that the suit might be converted into a suit for sale of the property in the possession of the defendant.

Held, that the order directing the amendment of the plaint to make it a suit for sale is not correct as it alters the cause of action in the suit.

I.L.R. 59 Mad. 312, distinguished.

A. Lakshmayya for Appellant.

V. Govindarajachari and *B. V. Ramanarasu* for Respondent.

K. S.

[F. B.].

The Chief Justice, Mockett and Krishnaswami Aiyangar, JJ.
2nd October, 1939.

S. A. No. 318 of 1935.

Limitation Act (IX of 1908), S. 21 (1)—Hindu Law—Paternal grandmother of minor—If "lawful guardian."

Neither by Hindu law or custom is the grandmother recognized as the lawful guardian of the minor. 53 M.L.J. 677, overruled and endorsements of payments by the paternal grandmother cannot bind the minor and save limitation.

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

K. Srinivasa Rao for Respondent.

K. S,

The Chief Justice and Krishnaswami Aiyangar, JJ.
3rd October, 1939.

S. A. No. 23 of 1936.

Madras Estates Land Act (I of 1908), S. 117—Provision whether obligatory or directory—Test—Disregard of provisions as to sale—Effect—Absence of injury as result of irregularity—Effect.

Whether the terms of a statute are to be regarded as imperative or directory only turns upon a correct application of the scope of the Act itself and is not to be controlled by the consideration whether substantial injury has or has not resulted.

Where the selling officer whose duty it was to fix the date of the sale, settle the proclamation and cause the sale to be proclaimed, disregarded the provisions of the statute and he did not pass a single order and the orders which the selling officer should have passed were passed by the Collector who had no authority it is not a mere irregularity and the sale cannot be regarded as a sale lawfully held under the Act. There is no provision in the Estates Land Act which is similar to O. 21, r. 90, Civil Procedure Code, which says that a sale shall not be set aside as the result of irregularity or fraud unless the applicant has sustained substantial injury as the result.

40 L.W. 535, referred to.

N. S. Rangaswami Aiyangar for Appellants.

K. Venkateswaran for Respondents.

K, S,

[F. B.]

The Chief Justice, Pandrang Row, Abdur Rahman, Krishnaswami Aiyangar and Patanjali Sastri, JJ.
6th October, 1939.

C. R. P. No. 267 of 1936.

Court-Fees Act (VII of 1870), Art. 17-B of Sch. II and S. 7 (iv) (b)—*Suit for partition under Hindu Law impugning debts and alienations—Proper court-fee.*

In a suit for partition by a member of a joint Hindu family the only provision in the Court-Fees Act which is applicable is Art. 17-B of Sch. II and not S. 7 (*iv*) (*b*).

21 M.L.J. 21 (majority view), overruled.

Case-law discussed.

Where in the suit the plaintiff is asking for possession of his share in the estate to be calculated after certain transactions have been set aside it is necessary for the plaintiff to stamp his relief in accordance with the provisions of S. 7 (*v*). In respect of decrees passed against the plaintiff in suits in which he had been *eo nomine* impleaded as a party it is plain he must pay the fee prescribed by S. 7 (*iv*) (*a*) ; where the plaintiff impleads several creditors asking for a declaration in respect of each of the transactions impugned and he was not *eo nomine* a party to them he cannot be called upon to pay any additional fee.

V. V. Srinivasa Aiyangar for *S. Ramanujachariar* and *V. R. Venugopalan* for Petitioners.

The Government Pleader (B. Sitarama Rao), T. S. Venkataramа Aiyar, K.R. Rangaswami Aiyangar, R. Rajagopala Aiyangar, S. Venkatesan and *R. Viswanathan* for Respondent.

K. S.

Wadsworth, J.
13th October, 1939.

S. A. No. 673 of 1936.

Hindu Law—Marriage with girl, not a virgin—Validity.

According to ordinary practice Hindus of the higher caste married virgins, but if a Hindu chose to marry a girl who was not a virgin or whom he knew not to be a virgin, he could not use that fact as a ground for treating the marriage null and void.

P. Govinda Menon for Appellant.

S. Venkatachala Sastri for Respondent.

K. S.

The Chief Justice and O. S. A. No. 30 of 1938.
Kunhi Raman, J.
4th September, 1939.

Equitable mortgage—Title deeds handed over 4 or 5 days before advance of loan—Letter of collateral security on date of loan evidencing deposit—When inadmissible for want of registration.

A memorandum of equitable mortgage by deposit of title deeds (title deeds having been handed over previously to mortgagee for inspection and retained by him as security for loan advanced later) stated:—"On executing a pronote to you this date, Rs. 1,900 has been received in cash from you. For this sum I have kept with you as security house . . . Madras, and the original title deeds relating to the property. At the time when I discharge the aforesaid bond, I shall take back this letter as well as the aforesaid title deeds. To this effect have I executed this collateral letter with consent."

Held, the memorandum constituted the bargain between the parties and operated to declare the rights of the mortgagees in the property. It falls within S. 17 of the Registration Act and not having been registered cannot be admitted in evidence.

N. K. Mohanarangam Pillai for Appellant.

K. Narasimha Aiyar, T. V. Subramania Aiyar, Official Assignee of Madras, Srinivasa Raghavan and *Thiyagarajan* for Respondents.

K. S.

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Kunhi Raman, J. C. R. P. No. 968 of 1938.
21st September, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Decree against assets of the husband in the hands of the widow—Application by the widow to scale down the debts—Competency of.

Where a widow applied under S. 19 of the Madras Agriculturists Relief Act for scaling down of the decree which was passed against the assets of the deceased husband in her hands, on objection that inasmuch as there was no personal decree against her she was not a judgment-debtor entitled to apply under the Act,

Held, she was a judgment-debtor within the meaning of the section and as such entitled to apply.

(1938) 2 M. L. J. 1068, relied on.

A. Lakshmayya for Petitioner,

K. Venkateswaran for *V. V. Chowdhury* for Respondent.

K. C.

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N. R. C.

Wadsworth, J. A. A. O. No. 199 of 1938.
22nd September, 1939.

Madras Estates Land Act (I of 1908), S. 151 (2) (as amended)—Suit for injunction against trespasser—If lies in Revenue Court.

The only type of injunction which the Revenue Court is empowered to grant under the Estates Land Act is that specified in S. 151(2), that is, an injunction restraining an occupancy ryot from impairing the agricultural value of the land. The section has no application to a suit for injunction against an alleged trespasser.

T. S. Narasinga Rao for Appellant.

Kasturi Seshagiri Rao for Respondent.

K. S.

Wadsworth, J. S. A. No. 70 of 1936.
28th September, 1939.

Transfer of Property Act (IV of 1882), S. 119 (as before the amendment)—Exchange of land—Part of the land subject to mortgage—Dispossession by purchaser in sale in execution of mortgage decree—Claim for return of original property from the other party.

Where a part of the properties given to the plaintiff in exchange (before amendment of Transfer of Property Act) were subject to a prior mortgage and in the sale in execution of the decree on the mortgage a third person who purchased the property dispossessed the plaintiff (after amendment) the plaintiff claimed the return of the property given by him expressing willingness to surrender the balance of the properties in his possession.

Held, the transferee from the defendant was bound to give back the land to the plaintiff if the property given in exchange was lost to the plaintiff.

I. L. R. 42 Mad. 690, followed.

I. L. R. 46 All. 359, A. I. R. 1934 Lah. 934 and A. I. R. 1934 Nag. 610, not approved.

The contract of exchange must be deemed to have as an implied term the provision of law governing the contract at that time and the plaintiff must be deemed to have acquired a right to work out his remedy of restoration as against the transferor and those claiming under him in the contingency of his being dispossessed at some future date. Transfer of Property Act, S. 119 (before the amendment) will govern the case.

V. Ramaswami Aiyar and *R. Sundaralingam* for Appellant.

V. V. Ramadurai for Respondent.

K. S.

Wadsworth, J. S. A. No. 207 of 1936.
29th September, 1939.

Madras Survey and Boundaries Act (VIII of 1923), S. 14—Suit by ryot—If precluded by prior decision between adjacent landlords.

Where the dispute regarding boundary has been determined only on a contest between the proprietors of the two adjacent villages, the ryots have a right to reopen the matter by means of a suit prescribed under S. 14.

K. Rajah Aiyar and *R. Krishnaswami Aiyangar* for Appellant.

V. Ramaswami Aiyar for Respondents.

K. S.

Wadsworth, J. S. A. No. 344 of 1936.
3rd October, 1939.

Madras Survey and Boundaries Act (VIII of 1923), S. 13—Notification in respect of Boundary laid before Act—Effect.

In a suit to establish plaintiffs, right to a piece of land in the possession of her neighbour the defendant, objection was taken that the matter was concluded by the demarcation of the boundary under the Madras Survey and Boundaries Act of 1923 which was notified on 28th February, 1929,

Held, the final notification under S. 13 of the Act of 1923 would be valid and would bring into operation that limitation provisions of S. 14 and the plaintiff not having filed the suit within 3 years to dispute the correctness of the boundary so laid down is barred from bringing her suit thereafter.

K. Bhimasankaram for Appellant.

Ch. Raghava Rao for Respondent.

K. S.

Wadsworth, J. S. A. No. 915 of 1935.
10th October, 1939.

Civil Procedure Code (V of 1908), S. 92 and O. 1, r. 8—Suit against trustees by some members of community for declaration that property is trust property and for injunction restraining trustees from treating it otherwise—If suit falls within S. 92, Civil Procedure Code—Failure to adopt procedure under O. 1, r. 8—Effect.

Where all that the plaintiffs seek is a declaration that the suit property is trust property and for the consequential injunction to prevent the trustees from treating it otherwise, the suit cannot be said to fall within S. 92 of the Civil Procedure Code.

Where the plaintiffs seek to assert no personal or individual rights which they share with others and they are seeking to assert for the community as a whole rights enjoyed jointly by that community, the proper procedure is laid down in O. 1, r. 8, Civil Procedure Code. If the plaintiffs in spite of objection taken took the risk of refusing to adopt that procedure they cannot complain, if the Court rejects the suit for failure to implead all those on whose behalf the relief is sought. The fact that one plaintiff is the son of a deceased trustee gives him no special rights in the absence of evidence that the trusteeship is hereditary. The fact that some of the other plaintiffs were amongst the members of the community who established the trust will not put them in any better position than those others who may be numerous who shared in the foundation.

K. V. Sesha Aiyangar for Appellants.

J. Subbuswami for Respondents.

K. S.

Wadsworth, J. S. A. No. 612 of 1936.

11th October, 1939.

Estoppel—Mortgagee orally representing that he has released property from mortgage—Purchase on faith of represenitation—Mortgagee estopped from saying release inadmissible for lack of registration.

Where a purchaser who is a stranger to the mortgage seeks to prove that there was a representation made by the mortgagee to the effect that the properties had been released and that by virtue of that representation he was induced to take the sale, the person who made the representation is barred from enforcing the mortgage which he represented to have been rescinded, the estoppel does not depend upon the fact or validity of the release and the case is not one of estoppel against the statute. The estoppel against the mortgagee is valid.

K. Rajah Aiyar and *K. Subramaniam* for Appellant.

T. K. Sundararaman for Respondent.

K. S.

Wadsworth, J. S. A. No. 1041 of 1937.

11th October, 1939.

Madras Estates Land Act (I of 1908), S. 112—Sale under—Person interested in land but not registered pattadar—Right to bring suit in Civil Court to declare sale invalid.

There is nothing either in the Estates Land Act or under the general law to prevent any person who has an interest in the land

which is adversely affected by a sale (under S. 112 of the Madras Estates Land Act) from challenging that sale in the ordinary Civil Courts and protecting his interest.

23 L.W. 149, relied on.

T. R. Venkatarama Sastri, K. Rajah Aiyar and *K. Muthuswami Aiyar* for Appellants.

V. Ramaswami Aiyar and *K. S. Ramamurthi* for Respondent.

K. S.

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Mockett, J. C. R. P. No. 44 of 1939.
13th October, 1939.

Civil Procedure Code (V of 1908), S. 151—Suit and decree on first mortgage only when there were other mortgages in favour of plaintiff—Contravention of Transfer of Property Act, S. 67-A—Decree if can be set aside and suit if can be resuscitated and remodelled under S. 151, Civil Procedure Code.

A bank filed a suit against a mortgagor on the first mortgage only and obtained a decree in ignorance of the introduction of S. 67-A by the amendment of Transfer of Property Act. In an application under S. 151 of the Civil Procedure Code to set aside the decree and amend the suit in the ends of justice,

Held, S. 151, Civil Procedure Code, cannot be used for the purpose of setting aside a decree and resuscitating and remodelling a suit because those advising the parties had been unaware of the law.

T. K. Subramania Pillai for Petitioner.

V. Rajagopalachari and *S. A. P. Alvaras* for Respondent.

K. S.

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Burn and Stodart, JJ. A. A. O. Nos. 100 and 101 of 1939.
13th October, 1939.

Companies—Liquidation—Court giving permission to liquidator to sell properties and sanctioning a contract of sale and compromise of two suits in another Court—If sanction can be revoked.

In liquidation proceedings the District Court gave the Official Liquidator a general permission to sell the properties (provided that a certain price was obtained) and also expressly sanctioned the contract of sale entered into by the Official Liquidator, for a sum considerably in excess of the stipulated price. The Court further sanctioned the compromise of two suits in another Court between the purchaser and the company. The creditor on whose petition the winding up was ordered applied for the revocation of these orders and the District Judge granted the application.

Held, the District Judge had no power to revoke the sanction he had given for the sale of the properties and compromise of the suits.

24 L.W. 35, distinguished and on the merits also held the sanction ought not to have been revoked.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *D. R. Krishna Rao* for Appellant.

K. Rajah Aiyar and *K. Kameswra Rao* for Respondent.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1427 of 1936.
16th October, 1939.

Small Cause Courts—Judgments—Necessity for setting out the points for determination and the decision arrived at.

Although a judgment of a Court of Small Causes may be summary (according to O. 20, r. 4 and O. 18, r. 13, Civil Procedure Code) still the statute insists upon the points for determination to be set forth and the decision arrived at thereon recorded. If a judgment falls short of even this minimum requirement it is no judgment at all.

K. V. Ramachandra Aiyar for Petitioner.

Respondent not represented.

K. S.

Wadsworth, J. S. A. No. 700 of 1936.
18th October, 1939.

Civil Procedure Code (V of 1908), O. 21, rr. 100, 103—Previous claim proceedings ending by abandonment by the claimant during investigation—Court ordering 'not pressed dismissed no costs'—If such an order would bar a suit filed to establish title.

Plaintiff on a former occasion intervened in delivery proceedings in a suit in the sub-Court and claimed redelivery under O. 21, r. 100, Civil Procedure Code. The application went on and some evidence taken for the claimant. Ultimately the claimant prayed for dismissal of the claim proceedings stating that the petition was not pressed and should be dismissed without costs. The Court dismissed it without costs. This was during the investigation of the claim. Within one year, plaintiff filed a regular suit in the District Munsiff's Court to set aside the order in the claim proceedings and to declare his title and give him possession. The suit was decreed, and on appeal the sub-judge held that the order in the claim proceedings was a consent adverse order and no suit would lie on the regular side to set aside a consent order and dismissed the suit.

Held, that a suit like this was not barred. Case-law considered. Scope of a suit under r. 103 discussed.

A.I.R. 1925 Mad. 265, 110 I.C. 511 and A.I.R. 1935 Mad. 544, referred to.

K. G. Srinivasa Aiyar for Appellant.

M. S. Vythianatha Aiyar for *A. V. Narayanaswami Aiyar* for Respondent.

K. C.

Horwill, J. C. R. P. No. 1180 of 1939.

19th October, 1939.

Fatal Accidents Act (XIII of 1855), S. 3—Frame of plaint for compensation by dependants.

Any suit under Fatal Accidents Act must be in a representative character on behalf of the persons dependant on the deceased. But it is not necessary that every person who may claim some right to compensation should be made a party to the plaint. It suffices if one person brings the suit provided that he or she states in the plaint the names of the persons on whose behalf the suit is brought.

V. T. Rangaswami Aiyangar for Petitioner.

S. Balasingam Satya Nadar and *N. C. Rangaswami* for Respondent.

K. S.

Horwill, J. C. R. P. No. 1069 of 1937.

19th October, 1939.

Madras Estates Land Act (amending Act XVIII of 1936)—Suit in Court having jurisdiction before the Act—Jurisdiction if lost by reason of the Act.

In a suit for rent in the Civil Court issues were framed and on a Civil Revision Petition which was allowed it was remanded for fresh disposal. The defendants then took the objection in an additional written statement that the Court had no jurisdiction by virtue of Act XVIII of 1936 under which the Court having jurisdiction would be a Revenue Court.

Held, the Civil Court ceased to have jurisdiction after the pssing of the Act and when it was brought to the notice of the Court it was bound to stop the case and return the plaint.

(1938) 1 M.L.J. 206 and (1937) 2 M.L.J. 573, followed.

C. Rama Rao for Petitioner.

K. Bhimasankaram for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 466 of 1939.

20th October, 1939. Crl. R. P. No. 433 of 1939.

Cattle Trespass Act (I of 1871), S. 20—Complaint under Act made out of time—If to be considered to have been made on previ-

ous day because it was a holiday—General Clauses Act, S. 10—If applicable.

Where the seizure of the cattle was on 15th September, 1938 and the complaint under Cattle Trespass Act (I of 1871), S. 20 was made on 26th September, 1938,

Held, S. 10 of the General Clauses Act, 1897, is not applicable to Acts passed before 1887 and the complaint cannot be considered to have been made on 25th September, 1938, because it was a holiday. The complaint was therefore out of time and it will stand dismissed against all the accused.

V. Rangachari for Petitioner.

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

K.S.

Patanjali Sastri, J. S. A. No. 232 of 1936.
3rd November, 1939.

Transfer of Property Act (IV of 1882), S. 108 (g)—*Sub-lease of remainder of term of lease—If an assignment of lease or a sub-lease—Payment by sub-lessee of a charge-holder—If entitled to deduction—Agricultural lease—If Transfer of Property Act applicable.*

A lessee *R* sued *N* his sub-lessee for arrears of rent due on the basis of the sub-lease granted by him.

N claimed deduction of the amount paid by him to a maintenance charge-holder whose amounts had fallen into arrears.

He also pleaded that the sub-lease being of the entire residue of the term the sub-lease was in the nature of an assignment of lease.

(*a*) *Held*, that the principle of English law regarding sub-lease of the residue of the term would not apply to India.

I.L.R. 57 Cal. 1176 (P.C.), followed;

(*b*) that under the covenant for quiet enjoyment the lessee was liable to see that the charge was paid and hence under S. 108 (*g*) of the Transfer of Property Act the sub-lessee would be entitled to the deduction claimed.

40 L.W. 545, followed.

(*c*) that though the Transfer of Property Act cannot in terms apply to agricultural leases its principle was applicable to the case.

I.L.R. 42 Mad. 654, followed.

T. E. Ramabhadracharlar for Appellant.

M. Murugappa Chettiar for Respondent.

S.V.V.

Wadsworth, J., on difference of opinion between Burn and Stodart, JJ.

15th September, 1939.

A. A. O. No. 275 of 1936.

Civil Procedure Code (V of 1908), S. 144—Reversal of decree for possession of immovable property—Amounts drawn by party in possession—Remedy of appellant by way of restitution—Proper procedure.

Plaintiff sued to recover an estate as the son of the last holder of the estate. Suit was decreed by the Subordinate Judge. But plaintiff's claim for mesne profits both before and after suit till the date of delivery was disallowed. Both plaintiff and defendant appealed to the High Court. Pending disposal of appeal a receiver was appointed and he took possession. The High Court allowed the defendant's appeal and dismissed the suit. Pending an appeal to Privy Council the defendant was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council was successful and judgment of the Subordinate Judge was restored and defendant was ordered to pay costs of the plaintiff both in the High Court and the Privy Council.

Plaintiff executed the decree restored by the Order in Council and got possession of the estate. Then the plaintiff put in a petition for restitution and impleaded the defendant's widow and legal representatives and also the sureties who had executed the security bonds in the High Court and claimed (1) the restoration of amounts drawn as allowances by the widow, (2) restoration of amounts wrongly appropriated by the defendants, (3) return of records and accounts from the receiver to the plaintiff, and (4) that the sureties might be ordered to pay the plaintiff the sums covered by their security bonds.

The appeal came on before *Burn* and *Stodart, JJ.*, and prayers 1 and 3 were not pressed. *Burn, J.*, was of opinion that in proceedings under S. 144 no order for restitution can be made against sureties, though there is no objection to their being made parties in such proceedings.

As to restoration of amounts drawn and for mesne profits *Burn, J.*, was of the opinion that the proper remedy lay in a suit for accounts and not in an application by way of restitution. *Stodart, J.*, however was of opinion that the plaintiff could recover

under S. 144, Civil Procedure Code, the sums which the defendant received as profits of the estate during the time she was in possession under the decree which has been reversed.

Owing to the difference of opinion on the question of applicability of S. 144, Civil Procedure Code, and the liability of defendant to make restitution the case was laid before *Wadsworth, J.*, who held agreeing with *Stodart, J.*, that S. 144, Civil Procedure Code, was applicable and the case is covered by the decision in I. L.R. 7 Pat. 319, and that the plaintiff is entitled to claim restitution of any profits realised by the defendant's legal representative which can be called properly consequential upon the wrong decree, unless the defendant's legal representative is entitled to resist the claim either by showing that she has a superior claim to those profits or by showing that the plaintiff's claim is barred by reason of the failure to establish his right to future profits in the trial Court.

As to the extent of the liability of the defendant's legal representatives, *held*, that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. The correct procedure is to award the successful party restitution in the shape of any profits wrongly received under the erroneous decree or as a direct consequence thereof. There is no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court.

No relief was granted against the sureties.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

K.S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1292 of 1936.

11th October, 1939.

Provincial Small Cause Courts Act (IX of 1887), Art. 31 of Sch. II—Suit by agent for recovery of balance due from principal —If suit for accounts—Jurisdiction of Small Cause Courts.

The agent of a *stanam* sued his principal for a balance of Rs. 189-9-9 as due to him. His case was that after taking into accounts what he had collected by way of rent and what he had expended and the salary due to him the defendant was liable for the

Wadsworth, J. A. A. O. No. 275 of 1936.
15th September, 1939.

Civil Procedure Code (V of 1908), S. 144—Reversal of decree for possession of immovable property—Amounts drawn by party in possession—Remedy of appellant—If by restitution or suit for accounts.

Plaintiff sued to recover an estate as the son of the last holder of the estate. Suit was decreed by Subordinate Judge. But plaintiff's claim for mesne profits both before and after suit till the date of delivery was disallowed. Both plaintiff and defendant appealed to the High Court. Pending disposal of appeal a receiver was appointed and he took possession. The High Court allowed the defendant's appeal and dismissed the suit. Pending an appeal to Privy Council the defendant was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council was successful and judgment of the Subordinate Judge was restored and defendant was ordered to pay costs of the plaintiff both in the High Court and the Privy Council.

Plaintiff executed the decree restored by the Order in Council and got possession of the estate. Then the plaintiff put in a petition for restitution and impleaded the defendant's widow and legal representatives and also the sureties who had executed the security bonds in the High Court and claimed restoration of amounts drawn as allowances by the respondent.

Held, that the remedy of the plaintiff lay in a suit for accounts and mesne profits and not in an application by way of restitution.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

K. S.

Wadsworth, J. S. A. Nos. 995 and 996 of 1932 and
25th September, 1939. C. M. Ps. Nos. 595 and 597 of 1939.

Transfer of Property Act (IV of 1882), S. 84—Case governed by act before amendment—Withdrawal of amount deposited by mortgagor—Liability for interest after withdrawal.

In a mortgage governed by the Act before amendment, there was a deposit, a refusal to accept that deposit, a withdrawal by the plaintiffs and attachment of part of this sum withdrawn by the creditors of the mortgagor plaintiffs. The mere fact that the plaintiffs withdrew the deposit when the mortgagees refused to accept it, will not raise a presumption that the plaintiffs ceased to be ready and willing to pay the amount due on the mortgage. In such circumstances interest ceases to run with reference to the terms of S. 84 of the Transfer of Property Act.

V. Ramadoss and *K. Subba Rao* for Appellants.

Ch. Raghava Rao, S. Ramamoorthy and *K. Someswara Rao* for Respondents.

K. S.

Wadsworth, J. A. A. O. No. 349 of 1936.
2nd October, 1939.

Hindu Law —Maintenance —Permanently kept concubine though childless—If entitled to maintenance.

A permanently kept concubine of a Hindu may be entitled to maintenance even though she is childless.

Spencer, J.'s *obiter dictum* in I.L.R. 48 Mad. 805, not followed.

10 B.H.C.R. 381, discussed.

I. L. R. 50 Bom. 604, referred.

K. Kameswara Rao and *B. S. Ramachandrudu* for Appellant.

P. Somasundaram for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 605 of 1936.
10th October, 1939.

Madras Estates Land Act (I of 1908), S. 125—Mortgage executed after passing of Act to pay off mortgage created before the Act—If mortgage created before Act by reason of right of subrogation.

It will be stretching the language of S. 125 far too much to hold that by reason of a right of subrogation arising out of it a mortgage should be deemed to be an encumbrance created before the passing of the Act, although in fact it was executed subsequent to the Act.

46 M.L.J. 380, applied.

Ch. Raghava Rao for Appellant.

K. Krishnamurthi for Respondent.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1292 of 1936.
11th October, 1939.

Provincial Small Cause Courts Act (IX of 1887), Art. 31 of Sch. II—Suit by agent for recovery of balance due from principal —If suit for accounts—Jurisdiction of Small Cause Courts.

The agent of a *stanam* sued his principal for a balance of Rs. 189-9-9 as due to him. His case was that after taking into accounts what he had collected by way of rent and what he had expended and the salary due to him the defendant was liable for the

amount. Defendant objected to the jurisdiction of the Small Cause Court on the ground that it was a suit for an account within the meaning of Art. 31 of the Second Schedule of the Provincial Small Cause Courts Act, 1887.

Held, it was not a suit for an account and the District Munsif had jurisdiction.

I.L.R. 28 Mad. 394, 24 M.L.J. 693 and (1938) 2 M.L.J. 112, relied on.

(1938) 2 M.L.J. 76, disapproved.

P. Govinda Menon for Petitioner.

D. A. Krishna Variar for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 696 of 1935.
13th October, 1939.

Partnership—Adjudication of all the partners insolvents—If dissolves partnership—Subsequent annulment—If revives the partnership—Borrowing by one partner after dissolution—How far binding on others.

When all the partners are adjudged insolvents the partnership must be deemed to have been dissolved and the managing partner had no authority to pledge the credit of other partners by executing promissory notes in the firm name so as to make them personally liable even though the borrowing was for the purpose of discharging a binding partnership debt. The annulment of the adjudication could not in law have the effect of reviving the partnership.

C. K. Viswanatha Aiyar for Appellants.

O. T. G. Nambiar and *A. Achuthan Nambiar* for Respondents.

K. S.

Krishnaswami Aiyangar, J. C. R. P. No. 1334 of 1936.
16th October, 1939.

Provincial Insolvency Act (V of 1920), S. 53—Sale set aside —Question as to payment of items of consideration—How determined.

When once the sale is set aside under S. 53 of the Act the question as to whether the alienee has or has not paid the items of consideration which he claims to have paid has to be determined independently of the validity of the alienation itself.

P. C. Parthasarathi Aiyangar, N. Ramaswami Aiyangar and *S. V. Venugopalachari* for Petitioner.

K. R. Vepa for Respondent.

K. S.

Horwill, J. C. R. P. No. 1570 of 1936.
17th October, 1939.

Madras Land Revenue Assessment Act (I of 1908)—Suit for contribution for peishcush *paid after the portion of estate has passed into other hands—Suit if lies in Civil Court.*

Though the Act deprives the parties from recourse to Civil Courts with regard to the amount fixed for *peishcush* there is nothing in this Act or Rent Recovery Act which prevents a party coming to a Civil Court for contribution for *peishcush* paid after a portion of the estate has passed into other hands. S. 41 of the Small Cause Courts Act is no bar to the suit either.

K. Raja Aiyar and *S. Rajagopalachari* for Petitioner.
K.S. Ramabhadra Aiyar for Respondent.
K. S.

Horwill, J. C. R. P. No. 1592 of 1938.
17th October, 1939.

Practice—Question as to court-fee—Decision by Court on admission of plaint—Defendant again raising question as to court-fee—If Court precluded from reconsidering the decision.

Where the Court has already decided the question of court-fee, the Court is precluded from reconsidering the matter on a preliminary issue raised by the defendant later.

69 M.L.J. 479 and I.L.R. 1937 Mad. 325, relied on.

The only reason why a Court should consider the valuation of a suit are (1) for the purpose of ascertaining the proper court-fee and (2) to determine whether it has jurisdiction to try the suit.

K. G. Srinivasa Aiyar for Petitioner.
T. V. Ramanatha Aiyar for Respondent.
K. S.

Patanjali Sastri, J. S. A. No. 550 of 1936.
17th October, 1939.

Transfer of Property Act (IV of 1882), Ss. 76 and 77—Usufructuary mortgage of kushikanom rights—Mortgagee not paying rents—Decree for rent unenforceable by lapse of time—Unpaid rent—How to be adjusted.

There was a usufructuary mortgage of kuzhikanom rights. The mortgage provided that out of the rents and profits the rent payable to the *jenmi* should be paid every year and the balance should be appropriated in lieu of interest on the principal. The rent fell into arrears and the *jenmi* obtained a decree for possession with rents due. The decree was not executed and became unenforceable owing to lapse of time. In a suit by the successor in interest of the mortgagor,

Held, that the mortgagor is entitled to claim an adjustment of the unpaid rents due to the *jenmi* against the mortgage amount.

57 M.L.J. 800, relied on.

Case-law discussed.

C. S. Krishnamurthi Aiyar for Appellant.

K. P. Ramakrishna Aiyar for Respondent.

K. S.

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Mockett, J. C. R. P. No. 246 of 1938.
20th October, 1939.

Civil Procedure Code (V of 1908) O. 21, r. 90 (proviso)—Power to call upon applicant to furnish security—When to be exercised.

The word "Admission" conveys that point of time when an application or suit as the case may be is received into Court and accepted for decision and that stage is when notice is given to the opposite side.

The Court is responsible for executing its decrees and the framers of the proviso had in mind the discretion in the Court to pass such orders as it thinks fit for the protection of the decree-holder but the wording of the proviso specifically excluded the right of a decree-holder to apply to the Court for such orders. The power of the Court to call upon the applicant to furnish security is confined to the time anterior to admitting the application to set aside the sale.

A.I.R. 1939 Pat. 248 (F.B.), referred to.

P. Somasundaram for Petitioner.

V. Govindarajachari for Respondent.

K. S.

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The Chief Justice and Krishnaswami Aiyangar, J. S. A. No. 23 of 1936.
20th October, 1939.

Madras Estates Land Act (I of 1908), Ss. 112, 116 and 117 and O. 21, r. 90, Civil Procedure Code—Sub-Collector drawing up proclamation of sale and causing it to be affixed—Appointment of selling officer and himself fixing date of sale—Irregularity or illegality—'Shall appoint'—Mandatory or directory—Sale illegal and void.

Where under the provisions of the Estates Land Act the Sub-Collector was required to appoint a selling officer for selling a holding for arrears of rent, whose duty it was to draw up the proclamation of sale, affix it and fix a date of sale, the Sub-Collector himself drew up the proclamation of sale, had it affixed by a

process-server but later appointed a selling officer and himself fixed the date of sale.

Held, that there had not been compliance with the mandatory provisions of the Act and as such the sale was null and void. The sale was not an irregularity but an illegality and that the acts of the Sub-Collector were without jurisdiction and that injury would result if the sale were allowed to stand.

(1877) L.R. 2 P.D. 203, referred to.

30 L.J.Ch. 379 at 380; Observations in Maxwell's Interpretation of Statutes (8th Edition), p. 321 and 40 L.W. 535, relied on.

B. Sitarama Rao for *N. S. Rangaswami Aiyangar* for Appellants.

Ch. Raghava Rao and *K. Venkateswaran* for Respondent.

K. C. .

Horwill, J. C. R. P. No. 605 of 1938.
20th October, 1939.

Practice—Plaintiff poor woman—Security for costs against—Discretion to order.

It would be most unjust if a poor woman were prevented from pursuing her suit (by being ordered to furnish security for costs of defendant) merely because she happened to be in indigent circumstances.

I.L.R. 21 Cal. 832, relied on.

V. Ramaswami Aiyar and *C. Somasundaram Chettiar* for Petitioner.

T. A. Ramaswami Reddy for Respondent.

K. S.

Horwill, J. C. R. P. No. 88 of 1939.
24th October, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 20—Property sold in execution and satisfaction entered—Delivery of property to purchaser—If can be stayed.

Merely because full satisfaction has been entered it does not mean that execution is at an end. If the property purchased by the decree-holder has not been delivered to him then execution is not at an end and S. 20 of Act IV of 1938 can therefore be applied to stay a delivery of possession.

K. Ramamurthi and *K. Someswara Rao* for Petitioner.

T. Satyanarayana for Respondent.

K. S.

Stodart, J. C. R. P. No. 963 of 1939.
24th October, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (Explanation)—Renewal of mortgage in favour of different persons successively—If last of such mortgagee "same creditor."

There were three successive mortgages each in renewal of the one before. The mortgagees were in each case different, namely, the petitioner's mother, the petitioner's uncle and finally the petitioner to whom the money lent belonged.

Held, the interpretation of the expression "same creditor" to include cases like this is not unreasonable.

T. K. Sundararaman for Petitioner.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. S. A. No. 125 of 1936.
24th October, 1939.

Mortgage — Construction — Clause "You will receive the principal amount whether demanded by you or paid by us"—If a personal covenant to pay.

In a mortgage the words "you will receive the principal amount whether demanded by you or paid by us" clearly amounts to a covenant to pay.

S. Rangachari for Appellant.

T. V. Ramanatha Aiyar and *M. Seshachalapathi* for Respondents.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J. C. M. P. No. 2235 of 1939.
25th October, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 10—Allowing creditor time for filing statement of claim—Power of Board.

The Board gave time to a creditor to file his statement of claim required by S. 10.

Held, in view of proviso to S. 10 the Board has power to extend the time for filing a statement of claim.

Ch. Raghava Rao for *S. Sitarama Aiyar* and *S. Rajarama Aiyar* for Petitioners.

A. V. Viswanatha Sastri for 1st Respondent.

K. S.

Lakshmana Rao, J. Crl. App. No. 382 of 1939.
26th October, 1939.

Criminal Procedure Code (V of 1898), S. 380—Magistrate to whom proceedings submitted—If can set aside under S. 380 conviction recorded by referring Magistrate.

It is not open to the Magistrate to whom proceedings are submitted under S. 380, Code of Criminal Procedure to set aside under that section the conviction recorded by the referring Magistrate.

I.L.R. 57 Mad. 85, followed.

G. Balaparameswari Rao for Accused.

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

K. S.

Lakshmana Rao, J. Cr. R. C. No. 879 of 1939.
26th October, 1939. Cr. R. P. No. 827 of 1939.

Indian Penal Code (XLV of 1860), S. 175—Failure of defendant in civil suit to produce certain records—Complaint under Criminal Procedure Code, S. 482—Competency.

After refusal by Court to sanction a complaint under S. 476 a complaint under S. 482, Criminal Procedure Code, was filed for failure by a defendant in a civil suit to produce certain documents.

Held, an offence under S. 175, Indian Penal Code, cannot be said to have been committed in the view or presence of the District Court and the complaint was not competent.

I.L.R. 13 Mad. 24, referred.

D. A. Krishna Variar and *M. C. Sridharan* for Petitioner.

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

K. S.

Kunhi Raman, J. C. R. P. No. 1212 of 1939.
27th October, 1939.

Civil Procedure Code (V of 1908), O. 37—Leave to defend—When conditions can be imposed.

In an order granting leave to defend, if the order was not made by consent it is necessary that the Court should apply its mind to the facts disclosed in the affidavits filed before it and arrive at the conclusion that unconditional leave should not be granted to defend the action.

A. Lakshmayya for Petitioner.

P. Somasundaram and *P. Suryanarayana* for Respondent.

K. S.

Venkataramana Rao and Kunhi Raman, JJ.
2nd October, 1939.

App. No. 301 of 1936.

Limitation Act (IX of 1908), S. 7—Hindu Law—Eldest brother manager of joint family—Capacity to give discharge—Effect on minor brothers right to sue—Presumption as to capacity to give discharge.

When there is an eldest member of a family the presumption is that under the Hindu Law he is the manager of the family. If he is the manager, under S. 7 of the Limitation Act, discharge can be given without the concurrence of the other members of the family so far as the Madras Presidency is concerned.

Case-law referred to.

If anybody wants to displace the ordinary presumption that the eldest member acted as the manager and he was not in a position to give a valid discharge it is incumbent on that person to prove the facts rebutting the said presumption.

I.L.R. 31 All. 156, not approved.

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

P. Somasundaram for Respondent.

K. S.

Wadsworth, J.
5th October, 1939.

S. A. No. 50 of 1936.

Transfer of Property Act (IV of 1882), S. 3, Expl. 1—Oil engine installed as part of a cinema—Security bond relating to—If a transaction relating to immovable property.

The mere fact that the property in question was firmly but not permanently attached to the premises and also the fact that the registration department for its own purposes requires such a transaction to be treated as a transaction relating to immovable property will not affect the true nature of the transaction which was one regarding a chattel.

So a security bond pledging an oil engine installed as part of a cinema is not one relating to immovable property and explanation 1 to S. 3 of the Transfer of Property Act does not apply.

T. K. Sundararaman for Appellant.

N. R. Govindachari for Respondent.

K. S.

Pandrang Row and Venkataramana Rao, JJ.
16th October, 1939.

O. S. A. Nos. 68 and 82 of 1937.

Presidency Towns Insolvency Act (III of 1909), S. 46—Father's debts—If provable in son's insolvency—Creditors in respect of father's debts if entitled to priority.

The father's debt is provable in the insolvency of the son under S. 46 of the Presidency Towns Insolvency Act. Neither during the father's lifetime nor after his death the son's interest in the joint family property can be said to be charged for the father's debt. If a father's creditor chooses to prove in the insolvency of the son as a provable debt of the son he must submit himself to the provisions of the Insolvency Act which does not recognise any priority in his favour.

N. T. Shamanna for Appellant in O. S. A. No. 68 of 1937 and Respondent in O. S. A. No. 82 of 1937.

T. V. Ramiah for Respondent in O. S. A. No. 68 of 1937 and Appellant in O. S. A. No. 82 of 1937.

K. S.

Venkataramana Rao and Kunhi Raman, JJ.

16th October, 1939.

Appeal No. 295 of 1936.

Hindu Law—Widow—Maintenance—Decree for, against joint family—Subsequent partition—If a charge in circumstances necessitating a modification of the decree.

If when a member of an undivided family dies leaving him surviving his widow and his sons and brothers her right to maintenance is against the entire joint family composed of the sons and brothers of the husband. It may be that if she waits until a partition takes place she may have a lesser right, that is, instead of a right over those persons who take her husband's share. But if before partition is effected, she gets her right declared, defined and reduced to a certainty by a decree of Court, her rights cannot be taken away by any subsequent partition effected among members of the family.

Case-law discussed.

(1939) 2 M.L.J. 340 (F. B.), referred to and explained.

Where a widow has secured a charge on certain properties the charge is not defeated by any subsequent transfer of the said properties by the members of the family and she is entitled to enforce the charge in the hands of the transferee. Partition would be a subsequent transfer and her charge is liable to be enforced in respect of the properties charged in whosesoever's hands the properties may be.

V. S. Narasimhachari for Appellant.

D. R. Krishna Rao and *K. Umamaheswaram* for Respondents.

K. S.

The Chief Justice and S. A. No. 617 of 1938.
Krishnaswami Aiyangar, J.
24th October, 1939.

Landlord and tenant—Tenant taking water for second crop—Liability to pay for it—Payment by tenant of water cess to Government—Effect.

Where a tenant takes water for the second crop from the estate tank the *solum* of which is vested in the landholder, the tenant must pay for it. The fact that the Government water flowed into the landholder's tank did not mean that when the water got there it remained Government water. It mingled with the landlord's water and must be deemed to be his. The right of Government to levy water cess depends not upon the water belonging to the Government but upon its coming from a source belonging to the Government. Payment of water cess by tenant to Government does not affect the liability to pay for the water to the landholder.

P. N. Marthandam Pillai and *C. Rangaswami Aiyangar* for Appellant.

K. Swaminatha Aiyar for Respondent.

K. S.

The Chief Justice and C. R. P. No. 873 of 1939.
Krishnaswami Aiyangar, J.
25th October, 1939.

Negotiable Instruments Act (XXVI of 1881), S. 9—Holder in due course—Right against maker—Repayment by maker to original payee—Effect.

Respondent executed a pronote in favour of the second defendant. Respondent alleged that she repaid the amount two days later. But the payee indorsed the note in favour of the petitioner. The petitioner instituted a suit on the promissory note.

Held, the petitioner is entitled to sue and obtain a decree against the maker of the note.

J. Krishnamurthi for Petitioner.

K. Venkatarama Raju for Respondent.

K. S.

Horwill, J. S. A. No. 681 of 1936.
26th October, 1939.

Civil Procedure Code (V of 1908), S. 149—Presentation of appeal with deficit court-fees within time—Payment of deficit later within time allowed for it—Retrospective effect to make presentation valid.

S. 149, Civil Procedure Code, permits the Court to allow the appellant time to pay the deficit court-fee. The payment of the deficit court-fee within the time allowed has retrospective effect and is deemed to have been made at the time of the presentation.

P. Somasundaram for Appellants.

P. V. Vallabhacharyulu and *M. S. Ramachandra Rao* for Respondents.

K. S.

Lakshmana Rao, J. Crl. R. C. No. 899 of 1939.
27th October, 1939. Crl. R. P. No. 847 of 1939.

Criminal law—Practice—Joint Magistrate sanctioning prosecution—If can hear the appeal in that case—Procedure.

Where the prosecution of the petitioner was sanctioned by the Joint Magistrate, the appeal in the case should not be heard by the Joint Magistrate except with the permission of the Court to which an appeal lies from his Court.

T. M. Venugopal Mudaliar for Petitioner.

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

K. S.

Horwill, J. S. A. No. 640 of 1936.
27th October, 1939.

Clubs and Associations—Suit by some members against the institution—When competent.

In an action by five members of an Association called "Ram Mohan Roy Free Library and Reading Room Association" against the members of the managing committee and a donor (who had given an unconditional gift of a room erected above the original premises) to restrain the defendants from affixing in the room the name of the donor or any other name except that of the Association.

Held, the giving of a particular name cannot be in contravention of any rules of the Association. If the society as a whole does not approve of the acts of its management, it has power by summoning a general meeting and passing a resolution to correct and control the acts of the management.

It is only when an act is *ultra vires* the society that a member is entitled to come to a Civil Court and have the Act declared to be void.

Even a member of a club cannot sue the management because it does some act which he disapproves provided of course he is not personally damnified by expulsion or punishment or by loss to property of which he may be a joint owner.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

K. S.

The Chief Justice and Krishnaswami Aiyangar, J.
30th October, 1939.

C. M. P. No: 3042 of 1939.

Madras Agriculturists Relief Act (IV of 1938)—Constitutional validity—Leave to appeal to Federal Court of India.

On the application of one of the parties to the Full Bench reference in *Mada Nagaratnam* v. *Puvvada Seshayya*, (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F.B.), which held that the Madras Agriculturists Relief Act was *intra vires* the powers of the local legislature leave to appeal to the Federal Court of India was granted.

D. Narasaraju for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar) for Respondent.

K. S.

Horwill, J.
31st October, 1939.

S. A. No. 611 of 1936.

Co-operative Societies Act (II of 1912)—Award by registrar on one loan—Sale in execution without mentioning another mortgage loan—Effect.

A purchaser in sale in execution of an award filed a suit for declaration that the property purchased by him was free of encumbrances as there was no mention of encumbrances in the sale proclamation.

Held, there was no duty cast upon the co-operative society to reveal their mortgage and so there was no estoppel.

65 M.L.J. 317, referred to.

Ch. Raghava Rao for Appellants.

A. Bhujanga Rao for Respondent.

K. S.

Patanjali Sastri, J.
31st October, 1939.

S. A. No. 585 of 1936.

Limitation—Mortgage suit—Application for final decree after time.

The first respondent having obtained a preliminary mortgage decree on 8th April, 1926, filed an application for the passing of

the final decree for sale on 27th October, 1933. The appellant who had even before the institution of the mortgage suit attached the same property in execution of his money decree and purchased it in execution on 6th July, 1931, opposed the application as barred by limitation. The respondent contended that as he was placed in possession of the mortgaged property in pursuance of a private sale from the mortgagor in July, 1926, pending the attachment in execution of the appellant's decree, his receipt of rents and profits of the property should be regarded as payments by the mortgagor within the meaning of S. 20 (2), Limitation Act, so as to extend the period of limitation each time such rents and profits were received.

Held, it cannot be said that the receipt of rents by the respondent as the owner of the property under his purchase from the judgment-debtor was a payment within the meaning of S. 20.

(1937) 2 M.L.J. 170 and 153 I.C. 462, applied.

35 C.L.J. 58 and A.I.R. 1938 Mad. 465, distinguished.

Held also, that the preliminary mortgage decree could not be deemed to have been satisfied by the private purchase from the mortgagor so as to stop the running of time.

I.L.R. 42 Mad. 61, applied.

S. Ramachandra Aiyar for Appellant.

A. C. Sampath Aiyangar for Respondent.

K. S.

Stodart, J. S. A. No. 754 of 1936.

3rd November, 1939.

Hindu Law—Joint family—Two brothers jointly trading but separately appropriating his share of profits—Bequest by one brother of his property—Validity—Property originally derived by brothers under will of maternal uncle—Effect.

Though the properties are derived by two brothers under the will of a maternal uncle, where they trade jointly but there was a separate appropriation by each brother of his share of the profits it is his separate property and a will by one brother bequeathing his property to his wife is valid.

I.L.R. 28 Mad. 363, distinguished.

I.L.R. 23 Cal. 980, referred to.

Ch. Raghava Rao, M. V. Nagaramayya and *R. Muthuswami* for Appellant.

V. Govindarajachari for Respondent.

K. S.

Lakshmana Rao, J. Crl. R. P. No. 576 of 1939.

3rd November, 1939.

Criminal Procedure Code (V of 1898), S. 521—Defamatory passage in book—Conviction under Indian Penal Code, S. 500—Appropriate order for destruction and S. 521, Criminal Procedure Code.

The proper order under S. 521, Criminal Procedure Code, for destruction of defamatory passages contained in a publication after a conviction under S. 500, Indian Penal Code, is to direct deletion of the defamatory passages by means of destruction of those pages only, but not the destruction of the publication in its entirety.

D. Suryaprakasa Rao for Petitioner.

K. Ramamurti and *K. Someswara Rao* for Respondent.

K. S.

Venkataramana Rao and Kunhi Raman, JJ. App. No. 271 of 1936.

7th November, 1939.

Sea Customs Act (VIII of 1878), S. 39—Crown's right to recover deficiency arising from short levy of customs duty.

The only contention of the Government was that the short levy was due to inadvertence or error due to forgetfulness. S. 39 of the Sea Customs Act is a section of a taxing Act and must be construed with strictness and in favour of the subject. If the Crown wants to rely on any specific ground which entitled them to recover the deficiency on the basis of a short levy it was incumbent on them to plead specifically such a ground and in the absence of such a plea it is not open to a Court to consider it.

V. V. Srinivasa Aiyangar, V. K. Parthasarathi and *V. V. Ramadurai* for Appellant.

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

K. S.

Venkataramana Rao, J. Application No. 1552 of 1939 in O. P. No. 158 of 1938.

9th November, 1939.

Bankruptcy proceedings—Mutual credits—Equitable set off—Fixed deposit amount with Bankers in joint names payable 'to either or survivor'—Overdraft account in the name of one of them—Evidence let in as to amount of fixed deposit belonging to the one who owed to the Bank money on the overdraft account.

Where an applicant in the liquidation proceedings of a Bank claimed set off against a certain amount, owing by him to the

Bank on an overdraft account in his sole name, the amount due on a fixed deposit receipt with the same Bank but standing in the joint names of himself and his mother in the either or survivor's account,

Held, on evidence, the fixed deposit amount having been found to have actually belonged to the applicant alone and not to the mother whose name was joint with him on the fixed deposit receipt, he was entitled to the set-off claimed.

Hart on the 'Law of Banking' Vol. I, pp. 309 and 310, followed.

(1879) 12 Ch. D. 491, relied on.

(1938) 2 K. B. 801, referred to.

The words "without any terms or any further inquiry" in the judgment of Brett, L. J., on page 502 of 12 Ch. D. 491, interpreted and explained.

The Government Pleader (B. Sitarama Rao) and *K. Chandrasekharan* for Applicant.

King and Partridge for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 1603 of 1939.

20th November, 1939.

Madras Debt Conciliation Act (XI of 1936), S. 25—Necessity for stay of execution proceedings.

In view of S. 25 of the Madras Debt Conciliation Act, 1936 the provisions of which are mandatory the execuion petition pending in the Court cannot be proceeded with until the petition filed before the Board is dismissed.

(1938) 2 M.L.J. 1032, relied on.

S. Sitarama Aiyar and *S. Rajaraman* for Petitioner.

T. S. Venkatarama Aiyar for Respondent.

K. S.

Wadsworth, J. A. A. O. No. 349 of 1936.

2nd October, 1939.

Hindu Law—Maintenance — Permanently kept concubine though childless—If entitled to maintenance.

A permanently kept concubine of a Hindu may be entitled to maintenance even though she is childless.

Spencer, J.'s *obiter dictum* in I.L.R. 48 Mad. 805, not followed.

10 B.H.C.R. 381, discussed.

I. L. R. 50 Bom. 604, referred.

K. Kameswara Rao and *B. S. Ramachandrudu* for Appellant.

P. Somasundaram for Respondent.

K. S.

Patanjali Sastri, J. S. A. No. 605 of 1936.

10th October, 1939.

Madras Estates Land Act (I of 1908), S. 125—Mortgage executed after passing of Act to pay off mortgage created before the Act—If mortgage created before Act by reason of right of subrogation.

It will be stretching the language of S. 125 far too much to hold that by reason of a right of subrogation arising out of it a mortgage should be deemed to be an encumbrance created before the passing of the Act, although in fact it was executed subsequent to the Act.

46 M.L.J. 380, applied.

Ch. Raghava Rao for Appellant.

K. Krishnamurthi for Respondent.

K. S.

Wadsworth and Patanjali Sastri, JJ. S. A. No. 510 of 1936.

26th October, 1939.

Madras Irrigation Cess Act (VII of 1865), S. 1 (b) and Proviso 2—Irrigation of land registered under a particular Government work—Ryot storing water flowing from that work on his land in a private reservoir—If liable for penalty.

Per *Wadsworth, J.*—Where a ryot entitled to take water for irrigation from a particular government work, stores water flowing from that work on his land in a private reservoir does not justify the imposition of a penal water rate. The charge is leviable not by reason of the detriment to others caused by taking the water but by reason of the source from which the water is taken. The impounding of the water in the private reservoir cannot be held

to create a different or additional source other than that assigned by the revenue authorities.

Per *Patanjali Sastri, J.*—The act is one entailing penal consequences and should not be applied to any one who is not brought within its express language.

V. Govindarajachari for Appellant.

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

K. S.

Mockett and Krishnaswami Aiyangar, JJ.

Appeal No. 190 of 1936.

27th October, 1939.

Hindu Law—Convert to Christianity—If can come back to Hinduism without performance of formal expiatory ceremonies.

Per *Krishnaswami Aiyangar, J.*—A Hindu having renounced Hinduism once can revert back to it. As to need for the formal expiatory ceremonies, *held*, emphasis is to be laid on the prevailing sentiments and usages of the community and it is its approval or disapproval which should be the governing factor. The absence of a ceremony of reconversion or any other expiatory ceremony does not render a return to Hinduism and marriage with a Hindu woman invalid and at the time of his death for purposes of succession he is governed by Hindu law.

Per *Mockett, J.*—There is no warrant for holding that it is necessary to have a formal renunciation of religion and proof of performance of expiatory ceremonies for the validity of a return to Hinduism.

B. Jagannadha Das and *C. V. Dikshatulu* for Appellants.

C. Sambasiva Rao and *S. Suryaprakasam* for Respondents.

K. S.

Horwill, J.

S. A. Nos. 705 and 751 of 1936 and A. A. O. No. 388 of 1936.

31st October, 1939.

Hindu Law—Stridhanam—Anwadheyaka—Succession—Daughter's daughter—Preference—Difference between the Smriti Chandrika and Mitakshara—Preference.

The Mitakshara is the prevailing authority and in a competition between a widowed daughter and daughter's daughter to the succession to Anwadheyaka Stridhanam the daughter is preferred and the fact that she is a widow makes no difference.

M. S. Ramachandra Rao for Appellant.

K. Kameswara Rao and *M. Appa Rao* for Respondents.

K. S.

Patanjali Sastri, J. S. A. No. 232 of 1936.
3rd November, 1939.

Lease—Sub-lease for same rent—If absolute assignment of lease—English law as to if applicable.

It is no doubt true that in English law an underlease for the whole residue of the term operates as an assignment but as pointed out in I.L.R. 57 Cal. 1176 (P. C.), the law in India is different in this respect having regard to the provisions of the Transfer of Property Act. No question of assignment can therefore arise.

T. E. Ramabhadrachariar for Appellant.

M. Murugappa Chettiar for Respondent.

K. S.

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[F. B.]

The Chief Justice, Krishnaswami Aiyangar and Somayya, JJ. A. A. A. O. No. 135 of 1937.
3rd November, 1939.

Civil Procedure Code (V of 1908), S. 48—Limitation—Amendment of decree—Effect on time-barred decree.

A correction under S. 152, Civil Procedure Code, made in a time-barred decree still leaves the decree time barred. The amendment of a decree in conformity with the judgment does not have the effect of starting a fresh period of limitation.

Decision of Madhavan Nair and Cornish, JJ., in C. M. A. No. 264 of 1931 (unreported) overruled.

P. Satyanarayana Rao for Appellant.

A. Lakshmayya for Respondent.

K. S.

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Abdur Rahman, J. S. A. No. 734 of 1936.
3rd November, 1939.

Transfer of Property Act (IV of 1882), S. 55—Unpaid vendor—Taking promissory note for balance of purchase money—Effect on statutory lien.

Where a suit though instituted on the basis of a promissory note was really for the recovery of the balance of the price which had not been paid to the plaintiffs and the promissory note was not accepted unconditionally, the statutory lien could not be lost until the defendant succeeded in proving a contract to the contrary.

The mere execution of the promissory note could not be regarded as tantamount to a "contract to the contrary" which will put an end to the statutory lien for the balance of consideration on a sale of immovable property.

Case-law discussed.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Appellant.

M. S. Ramachandra Rao for Respondents.

K. S.

Abdur Rahman, J. S. A. Nos. 804 and 805 of 1936.

7th November, 1939.

Second appeal—Interpretation of document of title—If a question of law which can be gone into in second appeal—Finding of fact arrived at on incorrect construction—Interference.

The interpretation of a document of title is a question of law and a finding of fact arrived at by the Subordinate Judge upon an incorrect construction of the documents of title is not binding in second appeal and the view on such documents can be considered in second appeal.

Case-law reviewed.

S. Narayana Aiyangar for Appellant.

K. Rajah Aiyar and *V. Seshadri* for Respondent.

K. S.

Kunhi Raman, J. C. R. P. No. 714 of 1938.

9th November, 1939.

Provincial Insolvency Act (III of 1907), S. 66 (2)—Insolvency of a Hindu father—Right of daughter to have her marriage expenses from her father—If can have preference over the creditors of insolvent.

Held, on an examination of the authorities that it is not possible to contend that the daughter of a Hindu insolvent is entitled as a matter of right to claim her marriage expenses from out of the estate of the insolvent as against the creditors of the insolvent.

V. Viyyanna for Petitioner.

D. Narasaraju for Respondents.

K. S.

Kunhi Raman, J. A. A. O. No. 465 of 1937.

20th November, 1939.

Civil Procedure Code (V of 1908), O. 32, r. 3—Duly appointed guardian of minor appellant in existence—Locus standi *of another person to come forward as next friend.*

So long as there was a duly appointed guardian of a minor, no other person had any *locus standi* to come forward as his next friend.

M. S. Ramachandra Rao for Appellant.

K. Kameswara Rao for Respondent,

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1025 of 1936.
26th October, 1939.

Civil Procedure Code (V of 1908), S. 73—Different decrees of same Court for payment of money—Judgment-debtors same—Transfer of assets to credit of suit, decree in which was executed—Application by decree-holder who had attached before judgment in the other suit for rateable distribution—Rights to.

Where the assets are held in a different suit though on the file of the same Court the receipt of those assets within the meaning of S. 73 occurs only when and not later than the date of the actual transfer of the money from the suit in which it first came into Court to the suit in which the application for rateable distribution comes to be considered.

I.L.R. 44 Mad. 100 (F.B.), referred.

Petitioners obtained a decree in suit *A* for recovery of money and after attachment and execution a sum of Rs. 6,000, which stood to the credit of the judgment-debtor in another suit *B* in the same Court was transferred to the credit of the suit, in which execution had been taken, on 7th September, 1935 and on 12th October, 1935, petitioner applied for payment out. The respondent, another decree-holder against the same judgment-debtor had attached before judgment the amount originally standing to the credit of suit *B*. The respondent's decree was dated 28th September, 1935, three weeks after transfer of the money to credit of suit *A* had been made. Respondent on 17th October, 1935, made an application for execution and for rateable distribution of the amount standing to credit of suit *A*.

Held, the respondent's attachment before judgment conferred no rights and as there was no application for execution or for rateable distribution in suit *A* before the date of the receipt of the assets (7th September, 1935), his claim to rateable distribution is unsustainable.

A. C. Sampath Aiyangar for Petitioner.

K. Rajah Aiyar for Respondent.

K. S.

Stodart, J. S. A. No. 743 of 1936.
2nd November, 1939.

Civil Procedure Code (V of 1908), O. 34, r. 6—Personal remedy under mortgage barred—Effect on right to personal remedy for costs of mortgage suit.

The costs of the suit which are embodied in the amount declared due under the preliminary decree are intended to be re-

covered in the same manner and along with as the mortgage money and in no other manner and if the decree-holder is not entitled to have a personal decree for the recovery of any balance of the mortgage debt proper (here it was barred by limitation) he is equally not entitled to have a personal decree for any balance of the amount due as costs of the suit.

I.L.R. 14 Rang. 538, relied on.

Case-law discussed.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Appellant.

S. V. Rama Aiyangar for Respondent.

K. S.

Abdur Rahman, J. — A. A. O. Nos. 360 and 450 of 1939
16th November, 1939. — and C. M. P. No. 4642 of 1939.

Practice—Temporary injunctions and orders on interlocutory applications—Duty of Courts to avoid expressions of opinion on the main points of controversy which have to be determined in the suit—Interim injunctions—Principles on which to be issued—Evidence Act, S. 114 (d)—Presumption as to continuance of tenants in possession—Limits.

The Subordinate Courts should as far as possible, in passing orders on interlocutory applications and granting temporary injunctions, avoid expressions of their opinion which may lead the parties or higher Courts to apprehend that they have finally made up their minds on the main points of controversy which have to be determined in the suits and have been thus committed to a view from which they would find it difficult to extricate themselves at the time when they are disposing of them finally. The person who comes to Court and asks for a temporary injunction is not required to make out a legal title before the Court orders it to be issued but he must satisfy the Court (*a*) that he has a *bona fide* claim and that there is a serious question to try in regard to the existence of the legal right which he asserts; (*b*) that he has a strong *prima facie* case in support of the title which he sets up, or in other words, that there is a probability of his success; (*c*) that the balance of inconvenience caused to the party asking for an injunction will be greater if the injunction is not granted than if it is; and (*d*) that it is necessary for the Court to interfere and protect him from a grave or irreparable injury or serious damage before a suit is heard and finally decided.

If a tenant was in possession of a property in 1933, he cannot be presumed to be in possession of the property in 1939 unless he shows that he was actually in possession in that year.

K. Rajah Aiyar, K. S. Desikan and *K. Raman* for Appellants.
V. Ramaswami Aiyar for Respondents.
K. S.

Kunhi Raman, J. C. R. P. No. 1657 of 1938.
17th November, 1939.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 10, sub-S. 2 (2)—Mortgage for price of land purchased—If excepted from scaling down by reason of S. 10, sub-S. 2 (2)—Subsequent mortgage of other property for original mortgage debt—Effect.

A mortgage was executed for Rs. 7,000 on 4th November, 1914, the whole of the mortgage debt being the price payable by the mortgagors for lands purchased by them from the mortgagees and subsequent to the mortgage there was a partition among the mortgagors and after the partition the mortgage debt was split up and a subsequent mortgage for Rs. 2,500 of other ancestral properties was executed by the new mortgagor for the portion of the debt that fell to him and a decree was passed on that mortgage. When it was sought to be scaled down under S. 19 of Act IV of 1938,

Held, that S. 10, sub-S. 2 (2) of Act IV of 1938 is a sufficient answer to the petition for scaling down. In view of the scheme of the Act the giving of other property as security did not affect the applicability of the clause in S. 10 as to the lien for unpaid purchase-money.

K. P. Ramakrishna Aiyar for Petitioner.
K. S. Ramabhadra Aiyar for Respondent.
K. S.

Stodart, J. C. R. P. No. 1852 of 1939.
17th November, 1939.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8 and 10 (2)—Pronote of 1935 for balance of interest on unpaid purchase-money under sale-deed of 1931—Debt under—If wiped out as interest outstanding by S. 8 of the Act—S. 10 (2)—If applicable.

For price of land sold defendant executed a pronote in 1931. In 1935 interest amounting to Rs. 900 was due on this promissory note. Defendants paid Rs. 760 towards that in cash and executed a new subsidiary pronote for the balance, namely, Rs. 140. In a suit to recover this amount,

Held, that S. 10 (2) is not applicable to the case as this small fragment of the sum is not charged under S. 55 (4) of the Transfer of Property Act. The money is not unpaid purchase-money and is wiped out as interest outstanding by S. 8 of Act IV of 1938,

V. T. Rangaswami Aiyangar for Petitioner.
K. S.

Wadsworth and Patanjali Sastri, JJ. A.A.O. Nos. 125 and 126 of 1939.

22nd November, 1939.

Indian Tea Control Act (VIII of 1938), S. 23, Rules framed under—Rule 4 and schedule to it—Validity.

The effect of the rules is that in ascertaining the crop basis of a particular estate you work it out in accordance with the pre-existing rules under the 1933 Act and to that figure you make an addition which is arrived at by taking the appropriate figure for the locality in Schedule I to r. 4 and deducting therefrom the young clearings allowance (which has already been in the crop basis as calculated under the old rules) and also the yield from young areas which has contributed to the figure for the production of their estate (taken into consideration in arriving at the crop basis under the old rules).

In the present suit the estate which is almost entirely made up of young tea gets no addition at all, for the two deductions in rule 4 (*b*) (1) and (2) together exceed the amount of young clearings allowance to which the estate would be entitled with reference to the figure in Schedule I. It was contended that this rule is *ultra vires* in so far as it provides for deductions from the figure of young clearings allowance laid down in Schedule I.

Held, there is no reason to hold that the provision in the rule for making these deductions in arriving at the figure of additions is *ultra vires*. Nor is it possible to hold that it is possible to treat the schedule to r. 4 as something apart from r. 4 which can operate without regard to the provisions of the rule of which it forms an integral part.

T. R. Venkatarama Sastri, T. B. Balagopal and *S. A. P. Alvares* for Appellant.

Nugent Grant instructed by *King* and *Partridge* for Respondent.

K. S.

Kunhi Raman, J. S. A. No. 853 of 1936.

22nd November, 1939.

Promissory note—Endorsement without consideration—Suit on pronote—Plea of discharge by the defendant—If barred by failure to take back discharged pronote.

Where in a suit by the endorsee without consideration of a promissory note the defendant raised a plea of discharge, the endorsee contended that the defendant was estopped from pleading discharge as against an endorsee because by reason of the defendant's negligence in not taking back the promissory note the plaintiff had been induced to take an endorsement of the pronote.

Held, the objection is not tenable as the endorsement was found to be without consideration.

In any event there was no duty cast upon the defendant so far as the plaintiff is concerned to get back the document when he is alleged to have discharged the debt and in the absence of evidence of any negligence on his part the rule of estoppel cannot apply.

Case-law discussed.

M. Murugappa Chettiar for Appellant.

S. Srinivasan for Respondent.

K. S.

Stodart, J. C.R.P. No. 1962 of 1939.
28th November, 1939.

Madras Agriculturists Relief Act (IV of 1938)—Promotes standing in the name of father—Renewal in name of son—If in favour of same creditor under S. 8, Explanation—Definition of "creditor" in S. 3 (v)—Applicability—Debtor—If to be same for applicability of S. 8—Legal representatives of original debtor—Rights of.

Where the renewal of a promissory note is in favour of the heir of the promisee who was ill, he will come under the definition of a creditor in S. 3 (*v*) of the Act. So too an assignee of a prior promisee.

Sec. 8 does not lay down that under the explanation to the section the debtor must be the same. A change in "debtors" especially where he is the legal representative of the original debtor does not debar him from claiming the reliefs under the Act in the payment of those debts.

T. E. Ramabadrachariar for Petitioner.

K. S.

The Chief Justice and
Krishnaswami Ayyangar, J. Application No. 1900 of 1939.
8th December, 1939.

Madras City Municipal Act (IV of 1919), S. 287—Power of Commissioner of Corporation to refuse to renew a license to carry on a business of manufacturing beedis in a particular premises.

In an application for the issue of a writ of certiorari against the refusal of the commissioner to renew a license to carry on a business of manufacturing beedis in a particular premises,

Held that, there is nothing in S. 287 which indicates an intention on the part of the legislature to withhold power of refusal to renew a license if the circumstances of the case demanded.

S. 287 must be construed according to the wording within the four corners Commissioner has in a proper case power to refuse a license.

T. R. Venkatarama Sastri and *K. S. Rajagopala Aiyangar* for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *A. Suryanarayana* for the Commissioner.

K. S.

The Chief Justice and
Krishnaswami Aiyangar, J. C. R. P. No. 1129 of 1939.
11th December, 1939.

Madras Agriculturists Relief Act (IV of 1938), S. 19—Order under—Revision—Provision of right of appeal against such orders by the new rules—If retrospective—Effect on competency of pending revision petitions—S. 3 (Proviso) and S. 27—Certificate as to assessment to house tax of debtor filed in evidence—Finding of Munsif contrary to the certificate without other evidence on record—Revision.

The petitioner claiming to be an agriculturist applied for the amendment of the decree against him under S. 19 of Act IV of 1938. The District Munsif dismissed the petition on 4th May, 1939. The petitioner then filed the present petition under S. 115 of Civil Procedure Code for revision of the Munsif's order. The respondent raised the objection that the petition for revision does not lie because the amended rules under the Act dated 27th October, 1939 provided an appeal against the orders under S. 19.

Held: The amended rules cannot have retrospective effect and do not govern the present case.

On the merits *held*, where the certificate issued under S. 27 of the Act (of assessment to house-tax) showed that the petitioner was an agriculturist for the purposes of the Act and the respondent did not insist on the assessment register being produced, and unless the certificates were incorrect the Munsif had no right to refuse the petitioner's claim that he was an agriculturist, the decision of the Munsif is clearly perverse and must be reversed as it was a material irregularity in the exercise of his jurisdiction.

A. C. Sampath Ayyangar for Petitioner.

T. E. Ramabadracharlar for Respondent.

K. S.

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