The Madras Law Journal.

PART I. JULY, 1914, VOL. XXVII.

NOTES OF INDIAN CASES.

Nabin Chandra Tripati *v.* **Prankrishna De**, I.L.R., 41 C. 108. It is to be regretted that on a point of procedure frequently arising before the courts there should be a never ending conflict of Judicial opinion. Under the old code, the existence of S. 564 made the case for the recognition of inherent powers of remand somewhat difficult; and courts differed not merely as to the existence of such powers, but as to whether a remand outside the provisions of S. 562 was only an irregularity or an illegality and if the latter, it can be cured by consent of parties (see for instance I. L. R. 28 M. 437). The new Code does not reproduce S. 564, but the learned Judges in this case hold that having regard to the arrangement of the Code, this makes no difference in the law. It cannot of course be said that the present code recognises the existence of an inherent power to remand (though its policy is in favour of the recognition of inherent powers generally) but we are unable to agree with the learned Judges that there is anything in the scheme of the new Code which can be considered to 'take away' such inherent power, if it otherwise existed. We are inclined to think that the balance of reason and convenience alike is in favour of recognising such a power (as held in *Bohra Bibi* v. *Zobida Khatun*[1], *Gora Chand* v. *Basanta*[2], *Rani Dassi* v. *Ashutosh Roy*[3], *Kuppelan* v. *Kunjuwalli*[4], *Vemula Jamhalayya* v. *Iskala Rajamma* [5] though courts ought not to exercise it except when it is necessary to ensure a proper trial of the case. The decision of the Bombay High Court in *Narottam* v. *Mohan Lal* [6] is consistent with this view.

Debnarayan Dutt *v.* **Chunilal Ghose**. I. L. R., 41 C. 137. Much as we sympathise with the revulsion from the extreme technicality of the rule in *Tweddle* v. *Atkinson*, we are not sure if the decision in this case has not gone too far. A debtor transferring all his property to a third person provides by the sale deed

1. (1910) 12 C.L.J. 361.
2. (1911) 15 C.L.J. 258.
3. (1910) 15 C. L. J. 310.
4. (1911) 1 M.W.N. 199.
5. (1912) M.W.N. 1000.
6. (1912) 14 Bom. L.R. 1154.

(which is registered) that the vendee should pay off the debt which is specified in the sale deed and the vendee subsequently acknowledged and accepted this liability to the creditor. As a question of fact, the courts find that there was no 'novation' and the only way they consider the case is '*whether or not the creditor is entitled to sue the vendee on the registered sale deed.*' That, looking at the matter 'broadly' 'an obligation was undertaken by the vendee for the benefit of the creditor' few will doubt. Whether in the nature of a trust or otherwise, such obligation is enforceable by the creditor may also be conceded—though the proposition is not beyond doubt (cf. *Abdulla Beary* v. *Mammalai Beary*[1]) where however there appears to have been no acceptance or communication as between the vendee and the creditor *Siva Subramanya* v. *Gnana Summanda* [2] *Ragunathachariar* v. *Sadagopachariar* [3] where many of the earlier cases are referred to and *Iswaram Pillay* v. *Taregan* [4] where the present case itself is discussed. But it is a long step from this to the conclusion that the creditor's claim to be repaid by the debtor's vendee is one *on the instrument of sale* and is a claim for compensation *for breach of contract* in writing registered, within the meaning of Art. 116 of the limitation Act. Reference may be made in this connection to the decision of the Judicial Committee in *Jamna Das* v. *Rumtutar Pande* [5] though the question there was not the same as here.

Mahableshvar Krishnappa v. Ramachandra Mangesh I.L.R. 38 B. 94. Complaints are not unknown as to the needless prolixity of some recent judgments but learned judges err at least as often, on the side of baldness and brevity; and in view of the points arising in this case, the judgment leaves much to be desired. The questions arose in connection with the validity of an alienation by a manager of property belonging to certain infants and of the applicability of Art. 44 of the Limitation Act to a suit by the infants after attaining majority to recover possession from the alienee. Judging from the extract from the mukthiarnama set out on p. 96 of the report, it is difficult to find in it anything like the appointment of a legal guardian. Reference is made by the learned

1. (1910) 7 M.L. T. 376. 2. (1911) 21 M.L. J. 356.
3. (1911) 21 M.L.J. 988. 4. (1914) 26 M. L. J. 127.
5. (1911) I. L. R. 34 A. 63.

judges to a somewhat similar document considered by the Judicial Committee in *Rajlukee Debia's case* [1] but the point there was whether the Hibbanama constituted a *gift* of the properties in favour of the widows or merely provided a 'species of trust for management' and no question of 'guardianship' arose. It is next pointed out that considerations of practical convenience are in favour of upholding arrangements made by the father or senior member in a family for management during the minority of the members (in the event of his death). But assuming this to be so (cf. however *Kanakasabhai* v. *Ponnusami* [2] it is not *every* arrangement for management of an estate during the minority of its owners that will make the manager a 'guardian' within the meaning of Art. 44. At best he may be what is loosely termed a '*defacto*' guardian and whatever may be his power of binding the estate by his acts (as to which it is sometimes said there is a difference between Hindus and Mahomedans), it may now be taken as settled that Art. 44 won't apply to alienations made by such a person *Matadin* v. *Ahmad Ali* [3]. In the present case, the manager is given the same powers of management during Krishnappa's lifetime as after his death; it cannot be said that he was constituted guardian of the minors even during their father's lifetime.

A further question was raised as to the applicability of Art. 44 to suits for *possession*, but the Judgment contains no reference to this point, though it cannot be said that the authorities on the point are uniform.

The learned Judges also lay it down (almost as an obvious and indisputable conclusion) that if the eldest of the minors allows more than 3 years to elapse after attaining majority before suing to set aside the alienation, a suit by the younger brother, even if a minor at date of suit, would likewise be barred by the operation of section 7 of the Limitation Act. The same view was no doubt taken by a Full Bench of the Madras High Court in *Doraisami* v. *Nondisami* [4] (which we observe in passing has not even yet appeared in the authorised reports) but there is no reference to this case in the Bombay Judgment and one does not gather from a perusal of the judgment that attention was at all directed to the question whether in view of the language

1. (1869) 13 M. I. A. 209.
2. (1913) 21 I. C, 848.
3. (1911) I L. R. 34 A. 213.
4. (1913) 25 M. L. J. 405 F. B.

of the 3rd column of Art. 44. S. 7 (old S. 8) can apply to suits referred to in that Article—a point on which the two learned Judges (*Rahim and Sundara Aiyer JJ.*) who first heard the Madras case differed (Sec. 21 M.L.J, R. 1041.) With all respect to the learned Judges who sat on the Full Bench, the point seems to us open for fuller discussion.

Dholka Town Municipality v. Patel Desaibhai I. L.R. 38 B. 116

The decision in this case may be right if the District Municipalities Act of Bombay not merely invested the municipality with authority to spend moneys on repair of drainage works of the kind in question but imposed upon it an obligation to do so. The execution of municipal works by Government often gives rise to anomalous situations whenever the question of liability for *misfeasance* arises, for it will be hard to treat the Government as being merely the agent of the municipality in the construction of the work that is ultimately handed over to the latter. The liability in the present case was alleged with reference to the omission of the municipality to *maintain* the work in proper condition. It is not clear from the Judgment whether the learned Judges regard it as a case of misfeasance or nonfeasance, but they lay down the broad rule that the 'exemption from liability of local bodies on the ground of nonfeasance is confined to neglect of highways'. We venture to doubt the correctness of this limitation of the rule. In the *Pictou case* [2] as well as in *Municipal Council of Sydney v. Bourke*[1] the Judicial Committee clearly indicate that some of the observations in the *Bathurst case* [3] went too far in the direction of upholding liability and point out that the decision in that case—which arose out of the subsidence of a highway caused by a municipal drain—rested on the ground that the conduct of the municipality was not mere nonfeasance but misfeasance.

---

1. L. R. 1895 A C 433. 2. L. R. 1893 A. C 524.
3 (1878) L. R. 4 A. C. 256.

NOTES OF INDIAN CASES.

Subrao Mangesh *v.* **Mahadevi**, I. L. R. 38 B. 105, **Muthusami Chetti** *v.* **Chinnammall**, 26 M. L. J. 517.

These two decisions are directly in conflict and the Bombay decision seems to us open to question. As it is, the law prevailing in different parts of India in respect of the availability of joint family properties for the discharge of debts, is not without its anomalies and uncertainties and it is scarcely desirable to add to them. It is true that certain expressions occur in the Judgment of the Privy Council in *Suraj Bunsi Koer's case*[1] which, if the principle of the decision is not kept in view, are capable of being so interpreted as to lead to anomalous results, but such interpretation will hardly do justice to that Board. For instance, their Lordships say " the execution proceedings, under which the mouza had been attached and ordered to be sold had gone so far as to constitute in favour of the judgment-creditor a valid charge upon the land * * * * which could not be defeated by (the judgment-debtor's) death before the actual sale;" and in another part of the judgment they refer to 'sufficient proceedings' being taken by the creditor during the member's lifetime. The learned Judges of the Bombay High Court understand these expressions as making the creditor's remedy depend not merely upon an attachment effected during the member's lifetime but upon the extent to which *further* proceedings in execution had been carried; and they seek to interpret the decision in the light of the observations in *Moti Lal* v. *Karrabuldin* [2]. In the particular case the attachment was one obtained *before* judgment, but the decision is not based on this ground and the reasoning will equally apply to an attachment made *after* decree.

We regret to observe that beyond reproducing the language of the Privy Council judgment, the learned Judges do not examine on what principle the charge in favour of the judgment-creditor is recognised nor indicate what stage of execution proceedings will, in their opinion, suffice to create a charge. If the expression is to be literally understood or the question decided with reference to *Moti Lal* v. *Karrabuldin*, [3] we are aware of no stage in execution proceedings which can have that effect. An order for sale (following upon an attachment)—as in *Suraj Bunsi Koer's case*—

1. (1879) I. L. R. 5 C. 148. 2. (1897) I. L. R. 25 C. 179.
3. (1897) I. L. R. 25 C. 179.

can on no principle have the effect of creating an interest in or charge in favour of the judgment-creditor *Raghunath Das* v. *Sundar Das* [1]. As pointed out in *Sankaralinga Reddi* v. *Kandasami* [2], the charge referred to by their Lordships must be the right which the attaching creditor acquires to have the attached property applied in satisfaction of his debt (whether wholly or by way of rateable distribution)—(compare also 23 A. 467); otherwise the decision can never be given effect to. And the principle on which the charge is recognised must be, as suggested in *B. Krishna Rao* v. *Lakshmana Shambhogue* [3] *Bithal Das* v. *Nand Kishore*[4] *Pearilal Singh* v. *Chandi Charan Singh* [5] that by the attachment the property has been brought under the control of the Court for the purpose of executing the decree and those who claim to take it should satisfy the demand for which it has been brought into the custody of the law.

In the above view, a subsisting attachment without more should be sufficient to prevent the accrual of the title by survivorship. The reference in the P. C. Judgment to the sufficiency of the proceedings taken during the lifetime of the judgment-debtor will appear from the context to relate to the difference not between the several stages of the proceedings in execution but broadly between the mere existence of a bond-debt and the taking of proceedings to enforce it during the debtor's lifetime. The distinction indicated by their Lordships seems to be between a stage in which the claim subsists as a mere money claim (whether before suit or pending suit or even ripened into a decree) and that in which it has been brought into definite legal relation with the property of the debtor. *See Sankaralinga* v. *Kandasami* [6] as to the effect of an attachment in creating what may briefly be called a 'right in rem').

The decision of Sir John Edge in *Jagannath* v. *Sitaram* [7] cannot be understood as laying down anything to the contrary. He merely held that the passing of the money claim into a judgment-debt is not by itself sufficient, a proposition laid down as early as *Kooppookonan* v. *Chinnayan* [8], referred to by the

1. (1914) 18 C. W. N. 1058.
2. (1908) I. L. R. 30 M. 413.
3. (1881) I. L.R., 4 M, 392.
4. (1900) I.L.R., 23 A. 106.
5. (1906) 5 C.L. J. 80.
6. (1907) I.L.R. 30 M. 413.
7. (1888) I.L. R 11 A. 302.
8. 1 Mad. Reporter 63.

Judicial Committee without disapproval. And the learned Judge pointed out that in the case before him no steps had been taken during the judgment-debtor's lifetime to obtain attachment under or execution of the decree.

As to other decisions of the Indian High Courts, it is difficult to agree with the learned Judges of the Bombay High Court as to the effect of the disapproval of *Goor Pershad* v. *Sheodeen* [1] by the Judicial Committee and the weight due to the approval of that decision by Westropp, C.J. and West, J in *Udaram's case*.[2] In *Udaram's case* no question arose with reference to particular stages of execution proceedings taken during the debtor's lifetime. In fact, no suit had been instituted during the debtor's lifetime. If his share had been attached during his lifetime it is even doubtful if the learned Judges would have followed the Allahabad decision, for they disapprove of the principle of inalienability laid down in that case and take care to add that in the case before them "neither the decree sought to be executed against the joint family property, nor the attachment was made in the lifetime of Dhondu. His share had ceased before either of these events." Reference is also made to *Pallanji Shapurji* v. *E. V. Gordan* [3]. But that case only decides that according to the language of S. 295 of the Code, the judgment-creditor, though he might have obtained an attachment before judgment, should also *have applied for execution* before he can claim rateable distribution. The same remark applies to *Sewdit Roy* v. *Sree Cantomaity* [4]. It may also be pointed out that cases like *Shib Kisto* v. *Miller* [5]. *Sadayappa* v. *Ponnamma* [6]. *Peacock* v. *Madan Gopal* [7]. and *Krishnasami Mudaliar* v. *Official Assignee of Madras* [8] which deal with questions of competition between the attaching creditor and the Official Assignee (claiming under a vesting order made after the attachment but before sale)—though they are sometimes referred to in this connection—do not really throw any light on the present question; for according to the *rationale* of these cases, the Official Assignee will be entitled to succeed *so long as a sale has not actually taken place*—whatever may be the stage to which execution proceedings have been carried

1. (1872) 4 N. W. P. Rep. 137.
2. (1875) 11 Bom. H. C. R. 76.
3. (1888) I. L. R. 12 B. 400.
4. (1906) I. L. R. 33 C. 639.
5. (1883) I. L. R. 10 C. 150.
6. (1885) I. L. R. 8 M. 554.
7. (1902) I. L. R. 29 C. 428.
8. (1903) I. L. R. 26 M. 673.

(Cf. *Sarkies* v. *Mussamatt Bandho* [1] and *Raghunath Das* v. *Sundar Das* [2]. It is noteworthy that no reference is made in the case under notice to the decisions of the Calcutta High Court in *Beni Phrsbad* v. *Pareati Koer* [3] *Ramchandra* v. *Mudashwar* [4] *Pearilal Singh* v. *Chandi Charan Singh* [5] where the question is discussed at some length nor to that of the Allahabad High Court in *Bithal Das* v. *Nandkishore* [6].

Among Madras decisions, some reliance is placed on *Ramanayya* v. *Rangapayya* ; [7] *B. Krishna Row* v. *Shambhogue* [8] is considered by the learned Judges as not reliable after the decisions in *Sankaralinga* v. *Kandasami* [9] and *the Karvetnagar case* [10]. It is difficult to see how *Sankaralinga* v. *Kandasawmi* [9]. affects the decision in the 4 Madras case; and as to the 32 Madras case, it is submitted that the observation therein about the 4 Madras case does not touch this aspect of the question. The argument put forward in the case related, not to the question of the prevention of the accrual of survivorship but to the form of the proceeding to which the son should resort to impeach the decree against the father. Founding the contention on a literal interpretation of the expression in *Suraj Bunsi Koer's* case and the 4 Madras case, it was argued that the attachment during the father's lifetime created a lien over the attached property in favour of the attaching creditor and that the son could question the binding character of the debt and the lien only by a *Separate suit* and not by proceedings in execution. The learned judges observed that in view of the decision of the Privy Council in *Motilal's case* [11] that an attachment only prevented alienation and did not confer title, the 4 Madras case could not be relied on in support of that contention. This observation would equally apply even if the creditor had during the debtor's lifetime obtained not merely an attachment but also an order for sale ; but it would certainly be too much to say that the effect of the 32 Madras case is to let in the right by survivorship even in such a case.

As to *Ramanayya* v. *Rangappayya*, [12] the Bombay Judges note that in that case, the attachment was *before* judgment and

1. 1 N. W. P., p. 81.
2. (1914) 18 C.W.N. 1058.
3. (1892) I. L. R. 20.C. 895.
4. (1906) I. L. R 33 C. 1158.
5. (1906) 5 C. L. J. 80.
6. (1900) I. L. R. 23 A. 106.
7. (1892) I. L. R. 17 M. 144.
8. (1881) I. L. R. 4 M. 302.
9. (1906) I. L. R. 30 M. 413.
10. (1908) I. L. R. 32 M. 429.
11. I.L.R. 25 C. 179.
12. (1893) I. L. R. 17 M. 144.

the debtor had died *before decree* (though after suit) ; but they add that the result should be the same whether the defendant died before or after decree so long as no further step in execution had been taken before his death. In *Muthusami* v. *Chinnammal* [1] the Madras High Court holds otherwise and on this very ground distinguishes the decision in 17 Madras. A third view seems to us both possible and reasonable. If the true interpretation of the decision in *Suraj Bunsi Koer's* [2] case is as stated above, it would seem to follow that so long as there is a subsisting attachment, it should make no difference whether the defendant (debtor) died before or after decree; and in either case the attachment should suffice to prevent the rule of survivorship operating against the realisation of the decree that may be passed in *that* suit. Needless to, say, whether a decree should be passed at all in such a suit (after the defendant's death), and if so, against whom and for what relief are other questions, as to which the question of attachment or no attachment is immaterial. It is submitted that the observations in the 17 M. case mix up these two classes of questions and seem to a great extent *obiter*. Under the Code of Civil Procedure, an attachment before judgment (provided a decree is ultimately passed in that suit) is of precisely the same effect as one made after decree, to prevent alienation by the debtor and to make the attached property available for the satisfaction of the decree. The later attachment has no further or greater effect than the earlier and the one does not, just like the other, abate by the death of the debtor. It is then difficult to see on what principle the *passing of the decree* is to be regarded as a material circumstance in preventing the accrual of the right by survivorship. It is not too much to assume that until the decree is passed, the attachment (made before judgment) is as good as non-existent.

Re Mare Gowd: I. L. R. 37 M. 125 (F.B.) Everything that can be said on either side of this controversy has been said by one or other of the judges that have taken part in this case. Though upon the language of the sections and from the point of

1. (1914) 26 M. L. J. 511. 2. (1879) I. L. R. 5 C. 198.

view of scientific arrangement the judgment of *Sundara Aiyar J.* is to be preferred we do not think we need quarrel with the judgment of the Full Bench as it is substantially in favour of the liberty of the subject.

Re Solai Goundan; I.L.R. 37 M. 153 (F.B.) It is an anomaly that the appellate court should exercise powers which the first Court does not possess but there is no denying that the section can be read in the manner the Full Bench has done and there are the considerations referred to in *Dorasami Naidu* v. *Emperor*. [1]

Jawahir Mal *v.* **Indomati** I.L.R. 36 A. 201. So far as our Court is concerned the ghost of the controversy relating to the difference between a charge and a mortgage has been laid but the tastes of the profession in that part of India do not seem to be quite as cosmopolitan as here and the Madras cases do not seem to have been cited. Mr. Justice Banerjea takes the view which is in accordance with the Madras authorities and which on principle, we think is the sounder view. Another question that is much canvassed in this case, is as to whether the words in the document are sufficient to create a charge. So far as one can see, there is only a covenant not to alienate, thus resembling the case in *Sivanna* v. *Venkatakrishna* [2] in which it was held that a charge had not been created. Apparently both the judges were influenced by what did not but was clearly intended should appear on the face of the document.

K. R. V. Firm *v.* **Satyavada Seetharamaswami.** I. L. R. 37 M. 146. Much as we feel the force of the reasoning of Mr. Justice Wallis the case on the other side does not seem to be stated sufficiently. In the first place it is, hardly safe to rely on English decisions. Lord Tenterden's Act as well as the Mercantile Law Amendment Act speaks only of "joint contractors" not being liable by reason of payment or acknowledgment by one of them. It would be consistent with the English Act to hold that partnership is a feature that takes partnership contracts out of this rule and that payments or acknowledgments made by partners are binding on each other.

1. (1907) I. L.R. 30 M. 182. 2. (1913) 24 M. L. J. 474.

That amount of latitude would not be permitted under the Indian Act which speaks not only of joint contractors but also of partners. No doubt the section would be satisfied by taking some species of partnerships alone as coming within the rule. As we are told by Sir Frederick Pollock accepting the decisions in 10 Bombay 358 and 10 A 418, it looks *prima facie* possible to hold that there is a presumption that in a going mercantile firm, one partner is entitled to acknowledge or pay on behalf of the other and others. There are two difficulties however in the way of accepting this view of the law. It is hard to believe that it could ever be held after the rule as to joint contractors that a partner could be liable if the acknowledgment or payment was not in the ordinary course of business and authorised by S. 251 I.C.A. What then is the need for enacting a special rule for partners. ? Again, you could conceive of species of partnerships in which acknowledgment might not be in the ordinary course of the business but it is hard to conceive any case in which, granted the debt is properly contracted, payment would not be in the ordinary course of the trade. S. 20 of the Act of 1871 enacted the rule only as to cknowledgment whereas the Act of 1877 has extended it to payments as well. Upon the facts as stated by Mr. Justice Wallis, we respectfully think it might have been possible to hold that partners were authorised to acknowledge or pay for the other but on the general point of law, we think that there is much to be said in favour of the view taken in the earlier Madras cases *Valasubrahmania Pillai* v. *Ramanatha Chettiar* [1] *Shaik Mohideen Sahib* v. *Official Assignee* [2]

Ramanathan Chettiar, *v.* **Kalimuthu Pillai**: I. L. R. 37 M. 163. This case involves we think an extension of the rules as hitherto understood of private international law relating to submission to jurisdiction. Rules of international law are growing and it may be not only permissible but also desirable to extend them in some directions. We shall not discuss the case further as it appears to be under appeal to the Privy Council.

---

1. (1909) I. L. R. 32 M. 421. 2. (1912) I. L. R. 35 M. 142.

Folkstone Coperation *v.* **Brookman.**

Attention may usefully be drawn to the recent decision of the House of Lords in *Folkstone Corporation* v. *Brockman* L.R. 1914, A. C. 338 as bearing on a question frequently arising before Courts in this country. The precise character of the presumption to be drawn in favour of dedication as a highway from proof of long, continuous and uninterrupted user of a way by the public, has from time to time been variously stated, but the decision of the House of Lords in the above case must be taken as settling the question. It is laid down that it is not a *presumptio juris* which, unless rebutted, must prevail. The question of dedication is treated as one of *fact* and in the words of *Lord Kinnear*, "the presumption is not an absolute and inflexible rule of law which imposes a pre-ordained conclusion upon the judges of fact." "It is a probable inference from facts proved to the fact in issue and it follows that in a particular case it is for the judges of fact to determine whether, on the evidence adduced, it can reasonably be drawn;" and where evidence on both sides of the question has been adduced, the presumption rests on the right interpretation of conflicting facts and that right interpretation cannot be reached until the whole body of evidence has been considered.

In this view the High Court in Second Appeal will have no power to interfere with the finding of the Lower Appellate Court on the evidence as to dedication or no dedication and cases like *Mannandi Mudali* v. *Nallayya Goundan* [1] will be no sound precedent.

In the words of Lord Atkinson, "an order made without any evidence to support it is, in truth, made without jurisdiction and is therefore invalid at law, but a refusal to find an affirmative in favour of the person on whom the burden of proof lies, cannot be so treated." In the English cases relied on in *Mannandi Mudali* v. *Nallayya Goundan* [1] the question as to dedication arose before Courts which were at liberty to deal with questions of fact as well.

1. (1909) I. L. R. 32 M. 527.

CRITICAL NOTE.

Kochu Rabia *v.* **Abdurahiman and others,** 26 M. L. J. 523.

The opinion of the Full Bench in the above case, it is submitted with the greatest respect to the learned Judges who composed the Bench, hardly seems to be in accordance with the plain meaning of S. 19 of the Malabar Tenants Improvement Act (Act 1 of 1900). The principal question referred for the opinion of the Full Bench was "whether a contract which is made prior to the 1st January 1886 and which regulates the rates of compensation claimable by the tenant for improvements or provides for methods of fixing the amount of compensation due to him but which does not expressly refer to the tenant's right to make improvements is *not* binding on him if such a contract is less favourable to him than S. 5 of the Act (Act 1 of 1900), and whether the tenant is entitled to repudiate the contract and to claim compensation according to the provisions of the Act and whether S. 19 of the Act affects such contract". Their Lordships (White, C. J. and Sankaran Nair and Oldfield, JJ.) have stated as their opinion that such a contract is not binding on the tenant, without any elaboration of the reasons which led their Lordships to come to that conclusion, and the result is that the law as understood by the people and administered by the lower Courts up to this time is no longer the correct law. The view of the referring Judges (Sadasiva Aiyar and Tyabji, JJ.) as is clear from the well-reasoned order of reference in this case seems to be in accordance with the provisions of the Act and the Full Bench decision in *Randupurayil Kunhisore* v. *Nereth Kunhi Kannan* [1] which has not been overruled by the decision under reference.

S. 19 of the Act runs thus. "Nothing in any contract made after the 1st day of January 1886 shall take away or limit the right of a tenant to make improvements and to claim compensation for them in accordance with the provisions of this Act". This means that parties are precluded from contracting themselves out of the Act by any contract made subsequent to 1st January 1886 and thus validates by implication all contracts

1. (1908) I.L.R. 32 M. 1.

made prior to that date. The history of the section makes it quite clear that it was never intended to affect contracts made prior to January 1886. This section is a reproduction of S. 7 of Act 1 of 1887 which again has been adopted from S. 178 (1) (*d*) of the Bengal Tenancy Act VIII of 1885. Under Act 1 of 1887 it has been held in *Viru Mammad* v. *Krishnan*[1] that S. 7 of the Act (present S. 19) could not be construed retrospectively so as to invalidate contracts made prior to January 1886. No reference seems to have been made to this case in *Kozhikot Sreemana A. Vikraman* v. *Chundayil Madathil Ananta Patter*[2] by their Lordships Mr. Justice Benson and Mr. Justice Krishnaswami Aiyar who for the first time there, put a construction on S. 19 which, it is submitted, does not appear to be warranted by the wording of the section. The corresponding section of the Bengal Act runs thus:—"Nothing in any contract between a landlord and a tenant made *before* or after the passing of the Act shall take away or limit the right of a tenant, &c. &c." The intentional omission of the word "before" in the present Act supports the contention that the section upholds contracts made prior to the Act.

While S. 19 is thus clear and presents no difficulties of interpretation their Lordships Justice Benson and Justice Krishnaswami Aiyar in *Kozhikot Sreemana A. Vikraman* v. *Ananta Patter*[2] have interpreted the words "to make improvements and claim compensation for them" as excluding a mere contract regulating only the rates of compensation. In other words their Lordships were of opinion that contracts made prior to the Act of 1887 regulating the rates of compensation are not to be respected and are of no use, but contracts cutting down the right to make improvements are left untouched and they can be enforced. This is straining the language of the section. Although this was only an *obiter dictum* it was followed without further examination of the question in *Paru Amma* v. *Moothoran*[3] by their Lordships Justice Benson and Justice Sundara Aiyar. The way in which the Full Bench decision in *Rundupurayil Kunhisore* v. *Nereth Kunhi Kannan*[4] was distinguished by the learned Judges is not at all

1. (1897) I. L. R. 21 M. 149.
2. (1910) I. L. R. 34 M. 61.
3. (1910) 22 M. L. J. 221.
4. (1908) I. L. R. 32 M. 1.

satisfactory. Reference to the Full Bench was necessitated in the latter case on account of the conflict of views expressed in *Viru Mammad* v. *Krishnan* [1] and *Kerala Varma Valia Raja* v. *Ramunni* [2]. The former decided that S. 19 applied to improvements effected after the Act though tenancy was created under a contract made prior to the Act with provisions for rates of compensation, *i. e.*, contracts made prior to the Act were valid only in respect of improvements effected prior to the Act which was opposed to the latter decision. The Full Bench in this conflict of views held that prior contract should govern the value of improvements effected either before or after the Act came into force. It thus does not make any distinction between contracts restraining the making of improvements and contracts prescribing a lesser rate of compensation. As it is, we have two Full Bench decisions one opposed to and not overruled by the other.

The tenants have been favoured by the legislature to a considerable extent. If the policy of the legislature is to further that object no doubt the decision helps it. But the interest of the landlord also ought to be protected if S. 19 is capable of both the interpretations. I would suggest a legislative interference by an amending Act in view of a number of suits that would come up for adjudication before Courts of law.

K. V. KRISHNAN NAIR.
VAKIL,
Taliparamba.

NOTES OF INDIAN CASES.

Chaudri Abdul Majid *v.* **Jawahir Lal** 27 M. L. J. 17 (P. C.)

In this case, Their Lordships lay down that the dismissal of a Privy Council appeal for non-prosecution does not give a fresh starting point for limitation under art. 179. Their Lordships do not state why it does not afford a fresh starting point. Their Lordships meet the argument that the order must be taken as having converted the decree of the High Court into a decree of the Privy Council by saying that it is not a judicial order at all. At the first blush, it might appear that Their

1. (1897) 1. L. R. 21 M. 492. 2. (1892) 3 M. L. J. 52.

Lordships hold the view that an order referred to in Cl. (2) of that article must be an order dealing judicially with the substance of the appeal. That might have the consequence that a dismissal for default of an appeal to the High Court also might not give a fresh starting point, in other words, a reading of the article differently from *Peria Jeeyangar* v. *Lakshmi Doss* [1]. Their Lordships' judgment cannot be taken at all as an authority for that position. The Board's decision cannot be taken as an authority for a point not raised and not considered but only inferentially decided. Counsel did not base any argument on the existence of a final order within the meaning of Cl. (2) for the obvious reason that the application would even then have been barred, being more than three years from the date of the Privy Council Order. It is doubtful if the Committee can be said to have decided even that. In the case of a dismissal for default, the order of the appellate Court does not have the effect of converting the decree of the first court into a decree of the appellate court. Reading this case with the case in *Batuk Nath* v. *Munni Dei* [2] all that Their Lordships must be taken to decide is that as the rules do not contemplate the passing of an order dismissing for default, an order if made under those circumstances cannot be taken as a judicial order but must be regarded as a mere statement that the preliminary conditions of a good appeal have not been complied with.

Can the Privy Council be taken to decide that before the new Civil Procedure Code an application for order absolute was an application for execution ? One is afraid that even for that, the judgment would only inferentially be an authority and therefore no authority at all.

Mata Palat *v.* **Beni Madho** I. L. R. 36 A. 172.

Unless one is inclined to be very technical, it is difficult to support this judgment in the face of the judgment of the Privy Council in *Parsotam Gir* v. *Narbada Gir* [3]. A petition for execution was dismissed on the merits but on appeal an application was made for withdrawing the petition with liberty to put in a fresh application. The other side consented and the appeal was dismissed. Unless one is prepared to say that the circumstance

1. (1906) 30 M. 1 (F. B.) 2. (1914) I. L.R. 36 A. 284.
3. (1899) I.L.R. 21 A. 505. (P.C.)

that these facts were not formally set out in the order dismissing the appeal should make a difference, it is hard to distinguish this case from the Privy Council case referred to above. There on appeal, a suit was dismissed but it was stated that the court decided nothing against the plaintiff and that he might bring another suit. Their Lordships said that the necessary essential of *res judicata, viz.*, a decision on the merits was lacking in the case and therefore there was no *res judicata*. It was argued that the court had no power to make the order, non-suit being unknown to the procedure of this country. Their Lordships overruled the contention. The reasoning of Their Lordships applies *a fortiori* to a case of execution which is not governed by S. 11, C. P. C., but by the general principles of *res judicata*.

Emperor v. Jaggun, I. L. R. 36 A. 239. It is just a little bit curious that reliance should have been placed on *Empress* v. *Nabo Gopal*[1] for the conclusion reached in this case. In that case the application for transfer was by the prosecution. Obviously considerations such as the effect of the Magistrate's attitude on the mind of the accused can have no place on such an application. In fact the view taken in the case under review represents a less liberal phase of thought in the construction of the section than *Empress* v. *Nobo Gopal*[1] and the Calcutta cases generally do. Local prejudice or excitement has been recognised under the English Law as a ground for transfer. But under a system where the jury plays no part, local prejudice or excitement is a less important circumstance than the real or fancied attitude of the Magistrate towards the accused. Apparently to meet the Indian requirements, larger powers of transfer are given under S. 526, Cr. P.C., than are given under the Crown Office Rules by enacting the last clause that a transfer may be ordered where it is considered expedient in the interests of justice. While criticising the view taken in 23 C. 495 and 19 A. 64 the learned Judge seems to have omitted to consider the last clause though he refers to it in another portion of his judgment. The first clause would apply to cases where the Court considers that the Magistrate is biassed. To say that before a court can order transfer, it should be satisfied that bias may reasonably be inferred does not really mean any advance. It is only when the court considers the accused's point of view, what the accused circumstanced as he is,

1. (1880) I. L. R. 6 Cal. 491.

might reasonably apprehend in the conduct of the Magistrate and on that ground transfers, the last clause of the section comes into operation. Ample reasons have been given by all the High Courts justifying the court's interference under those circumstances and a detailed criticism based on a consideration of only one part of the section is likely to lead to more mischief than good.

Triloki Nath *v.* **Badri Das,** I. L. R. 36 A. 250 (F. B.) The view taken by the Full Bench in this case is in accord with the view of our court in *Jeer Chetti* v. *Rangasami Chetti* [1] and is not in conflict with *Ponnusami Chetti* v. *Narasimma Chetty* [2] where the insolvency application itself showed that the applicant was not unable to pay his debts and their Lordships held that it was an attempt to make use of the court to administer his estate for him and therefore an abuse of the process of the court.

Indarpal Singh *v.* **Mewa Lal,** I. L. R. 36 A. 264.

In this case, Their Lordships hold that a statement in the plaint in the suit upon the covenant that the plaintiff relinquishes his claim on the security notwithstanding, it is open to him to sue on the security. Apart from any question of estoppel, having regard to the express provisions of O. 34, R. 14, the decision seems to be right.

Haidari Begam *v.* **Gulzar Bano,** I. L. R. 36 A. 322. This case decides a question of Court fee. In a suit for possession, the defendant set up her right to dower. The court gave a decree overruling her contention. The question was what Court fee she had to pay on an appeal questioning the correctness of the lower Court's judgment giving an unconditional decree Their Lordships hold that she need pay only on the footing of the claim for possession. This is in accordance with the view taken by our High Court in *Sekharam* v. *Echaran* [1].

---

1. (1911) 22 M. L. J. 52. 2. (1913) 25 M. L. J. 545
3. (1909) 20 M. L. J. 121.

NOTES OF INDIAN CASES.

Munna Lal *v.* **Munna Lal**, I. L. R. 36 A. 327. This case illustrates the spell of well-worn formulae which though pronounced to be unsound assert themselves when new situations not exactly covered by precedent arise. After considerable talk about merger, it has been ultimately decided that where there is a sale upon a first mortgage without joining the second mortgagee, the purchaser can set up the mortgage as a shield against the claims of the second mortgagee. Why should not the same principle apply where the action is not one for sale but for foreclosure? If a merger of the rights of the mortgagor and the mortgagee is a real difficulty, the difficulty is equally present in the case of sale. On the question of limitation, the judgment seems to be on a surer footing. The mortgagee having become the owner by the foreclosure decree, Art. 134 which applies only to the case of a mortgagee was rightly held to be inappropriate. Whether Art. 144 would not apply to such a case is another question but has not been considered.

Jankibai *v.* **Shrinivas Ganesh**, I. L. R. 38 B. 120. Courts in India as well as the Judicial Committee have from time to time recognised that the present state of the law as to the rights of the members of a Mitakshara joint family is sufficiently anomalous; but even as it is, the conclusion arrived at in the present case seems to be the only reasonable one. The claim for maintenance which the widow of a deceased co-parcener has against the surviving co-parceners cannot in any sense be regarded as one against an 'heir' of the deceased. Even the learned Judge however lapses into inaccurate language when he speaks of the survivors 'inheriting by survivorship'. The learned Judge again lays down broadly that when a co-parcener dies he 'leaves no estate' and that his widow's claim for maintenance is not against 'the estate of her deceased husband', but against 'the property in which he was a co-parcener at the time of his death'. It will be interesting to see how this theory will be applied to a case in which the co-parcener dies after alienating his undivided share. The co-parcener will not by such alienation cease to be a co-parcener (see for instance *Nanjayya Mudali* v. *Shunmuga Mudali* [1]) and yet one may venture to feel doubts as to whether a court will give his widow a decree for maintenance against the surviving co-parceners.

1. (1913) 26 M. L. J. 576.

Emperor v. Gangappa Kardeppa, I. L. R. 38 B 156.

The decision in this case adds one more to the variety of opinions regarding the construction of S. 30 of the Evidence Act. While *Heaton J.* would hold that the confession of a co-accused is evidence for the court to act upon, *Shah J.* is of opinion that it is not such evidence and on reference to a third judge, *Macleod J.* considers the question to be immaterial. Expressing it as his view that it might be evidence in the wider sense of the term, he decided the case on the rule of practice, deserving all the reverence of a rule of law, that a conviction cannot be based solely on the confession of a co-accused which in probative value ranks even lower than the testimony of an accomplice. The reasoning of *Heaton J.* that confessions of a co-accused are documents submitted to the inspection of the Court and therefore evidence within the definition in the Evidence Act hardly carries conviction. The Evidence Act does not contemplate any matter as evidence apart from its relevancy to the *factum probandi* and S. 5 of the Evidence Act permits evidence only in relation to facts " here inafter declared to be relevant." S. 21 enacts that confessions as a species of admissions are relevant and may be proved against the person making them and there is no other section in the Evidence Act that makes a confession of a co accused *relevant* as against the others. Hence it follows, reading S. 5 along with S. 21, that the confession of a co-accused is not evidence against the other accused. It is immaterial for the purpose of this argument whether the confession sought to be proved was reduced to writing or not, for the doctrine of relevancy enunciated in the Evidence Act is not affected by the nature (oral or documentary) of the *factum Probans*. S. 165 of the Evidence Act which gives to the Judge a wide power, apart from considerations of relevancy, to put questions to witnesses and to order production of documents expressly provides that the judgment must be based upon facts "declared by this Act to be relevant and duly proved." The confession of a co-accused is not declared relevant by the Act but the court is entitled to have regard to it in arriving at a conclusion whether on facts relevant and *duly* proved a particular conclusion could be reached. The case relied on by Heaton in *The Empress* v. *Ashootosh chuckerbutty* [1] really begs the question at issue. *Garth C. J.* says that the confession of a co-

1. (1878) I. L. R. 4 C. 483 (F.B.)

accused if it could be taken into consideration at all could not be except as 'evidence'. There is hardly any warrant for this statement as there are matters which the court is entitled to consider though not forming strictly evidence, as for instance where the court observes matters personally or makes a local inspection. Again the learned Chief Justice goes on to observe "There is no provision in the section by which the confession is to be receivable against one prisoner in one way and against another prisoner in another." But that only shows that S. 30 was not concerned with laying down a rule of relevancy but gives a discretion to the court to take into consideration matters not strictly evidence in arriving at a conclusion on the evidence. The learned Chief Justice further observes that "if a prisoner were convicted upon such evidence whether by a jury or othewise and were to appeal to this court the conviction ought to be set aside: and further that any Sessions Judge trying such a case before a jury ought to direct them to acquit the prisoner. One could hardly follow this conclusion if the confession of a co-prisoner were evidence for in that case such a direction to the jury would be improper as the jury are the exclusive Judges of fact though it would be correct to say that the jury ought to be cautioned against the infirmities of the confession as evidence. *Justice Heaton,* in the case under review, rightly demurred to the rather inconsistent position taken up by *Garth C. J.* There is also the additional circumstance that while in S. 133 the legislature by way of abundant caution, provided that a conviction based on the uncorroborated testimony of an accomplice is not illegal, there is no such provision added to S. 30 even though the matter referred to in S. 30 is considerably inferior in probative value to the evidence of an accomplice on oath. It seems to us that the omission is logical because the legislature not having provided for the confession of a co-accused being used as evidence there was no necessity for such a provision as no conviction could be based on such a confession. The Madras decisions in this matter appear to us to correctly expound the law on this point. Attention may also be drawn here to *Muthu Kumarasami Pillai* v. *King Emperor* [1], where the nature of the presumption under S. 114 regarding the evidence of accomplices is fully dealt with and

1. (1912) 35 M. 397 (F.B.).

to the recent decision of the House of Lords in *Rex* v. *Christie* [1]. See note in 27 M. L. J. 54).

Dahyabhai Motiram *v.* **Chunilal Keshoredas**, I. L. R. 38 B. 183. In connection with the observations of Beaman, J. in this case as to the proof of the adoption, by way of custom, of a rule of law not known to the personal law of the parties, we would invite attention to the discussion by Tyabji J. of an allied topic in *Kunhambhi* v. *Kalanthar* [2]. When asked to send down issues as to the existence of a custom of pre-emption among the Hindus of Gujarat, Beaman J. declined to do so as he was of opinion that on the facts of the particular case, the proof of the custom could do the plaintiff no good. A prior suit for pre-emption had been brought by the father of the plaintiffs and it abated on his death. The plaintiffs, if their right was to be regarded as independent of their father's, had not by themselves complied with the requirements of the Mahomedan law of pre-emption (as to demand, &c.,) and could not therefore maintain a suit on that basis. In these circumstances the learned Judge observed "The plaintiffs cannot have it both ways. They must either accept the Hindu Law or the Mahomedan Law.....They must stand or fall by the strict Mahomedan law of pre-emption..... .....They seek to evade this by a blending of the Hindu with the Mahomedan law.....I am however very clearly of opinion that the learned Judge on Appeal was entirely wrong in thus giving effect to the doctrine of representation by a manager peculiar to the Hindu law." If the allegation in the plaint was only of the adoption by the parties of the rule as laid down in the Mahomedan law, no exception can be taken to these remarks. But if the plaintiffs alleged generally a custom of pre-emption among the parties, it seems to us, with all respect, that the above remarks are too broadly expressed. It cannot be suggested that Hindus, in adopting pre-emption as a rule of custom, cannot engraft it on their own institutions so as in some measure to blend the two. There is nothing impossible or unreasonable in conceiving of the right of pre-emption as belonging to a family and not merely to an individual; nor is there anything in the nature of the right which precludes the recognition of the rule of representation. It will be admitted

1. L. R. 1914 A. C. 545. 2. (1914) 27 M. L. J. 156.

that on ordinary principles of agency, the demand for pre-emption may be made by a duly constituted agent: if that be so, it can as well be made by an agent made such by operation of the personal law of the parties. Of course, whether the cause of action in such a case will be only one and single for the whole family or will be different and personal to each member, will be a question of some nicety; but much will depend on the incidents of the custom as proved.

Mallik Saheb *v.* **Mallikarjunnappa**, I. L. R. 38 B. 224. We are not convinced by the reasons stated in the judgment in support of the conclusion that a written consent of the reversioner to an alienation by a Hindu widow does not require registration. There is first the question of the precise legal ground on which the *operation* of such consent rests; and further the registration law is concerned also to see what the document *purports* to do. The learned Judges lay stress on the fact that the reversioner has nothing but a *spes successionis* during the widow's lifetime and that the consent in writing *conveys* nothing. But S. 17 (*b*) of the Registration Act (S. 17 (*d*) in the Judgment is obviously a slip) is not confined to *vested* interests or to *tranfers* only. It would be difficult to maintain that the consent operates merely by way of (i) a personal covenant against taking proceedings to impeach the transaction or (ii) of estoppel; for in the first case, it will be inoperative in the absence of consideration and at best can only support a claim for damages and in the second, it cannot avail a person who knows the facts or against a person not in privity. Except in the view that the consent operates merely as presumptive evidence of the propriety of the alienation, it may well be asked, does it not 'limit' or 'extinguish' a 'contingent' right within the meaning of S. 17 (*b*).

As to the other question in the case, it is not easy to comprehend the exact significance of the laconic remark that "the legal point is completely covered by the authority of *Bajrangi Singh* v. *Manokarnika Baksh Singh* [1]." Some observations on this part of the case will be found in 26 M. L. J. at p. 180.

1. (1907) I. L. R. 30 A. 1.

Nallappa Reddi *v.* **Vridhachala Reddi,** I. L. R., 37 M. 270. It has been held by the Privy Council that S. 11 of the Civil Procedure Code does not exhaust the topic of *res judicata* though as regards the matters dealt with by that section it is exhaustive. This case shows that even the doctrine of *res judicata* is not exhaustive of the species of conclusive adjudications. The defendant had agreed to pay interest on a debt due from the plaintiff and to indemnify him against all losses in the event of non-payment. The creditor brought a suit making both the plaintiff and the defendant parties. The defendant contended that he had paid the interest but the court found against him and gave a decree. Plaintiff paid the amount decreed and sued the defendant. Defendant again pleaded that he had paid the amount and that the decision of the court in the previous case was wrong. Their Lordships hold that this plea was not open to him. The matter was obviously not *res judicata*. There was no contest between the plaintiff and the defendant and it was not necessary to decide any question between them to give the plaintiff in that suit relief. The right way of putting it is :—under the contract of indemnity the defendant was bound to pay the amounts which the plaintiff had to pay in the suit brought in respect of the subject matter of the contract of indemnity. See S. 125 of the Contract Act. The only question open was whether the plaintiff acted in good faith and due diligence. Cf. Cl. 3 of S. 125. If he gave notice of the action to the defendant *a fortiori* when the latter is a party to the action and has every opportunity of defending the action, no question of due diligence or *bona fides* could arise. This case is not like the case in *Ramamurthi* v. *Secretary of State* [1], which one should think, notwithstanding the doubts expressed in *Peari Mohan Shaka* v. *Durlan Dassya* [2] is a genuine case of *res judicata* or estoppel by judgment. A person setting up the plea of *jus tertii* is quod that plea, a person claiming under the party whose title is set up. He is entitled to raise all the defences that are open to that person and is equally liable to be met with all the pleas available as against that person.

---

1. (1911) 1. L. R. 36 M. 141.
2. (1913) 18 C. W. N. 949.

NOTES OF INDIAN CASES.

Sitaram Bhimaji *v.* **Sadhu**, I. L. R. 38 B. 240. The proceedings in this case in its several stages certainly do not impress one favourably; and even in the High Court we are not sure if on both occasions the learned Judges acted properly in interfering, as they did, in second appeal, though we are not disposed to quarrel with the ultimate result. The decision turned largely on the effect to be given to conflicting possessions held in succession. Amidst the large mass of Indian Case Law dealing with this subject in one form or another, it is not easy to find one's way to the correct legal bearings and even in the present judgment, the relevant rules do not seem to be stated as fully or accurately as one may wish. It therefore seems desirable to try and state the principal rules connected with the question in some logical order.

Several theories have been suggested as to the origin and basis of the protection thrown by law around the *factum* of possession (see for instance Pollock and Wright's Essay on Possession, pp. 3 and 4, and the other writers therein referred to) and there is probably some truth, and force in every one of them. For the present purpose it is enough to say that at the present day, leaving out of account the provisions of S. 9 of the Specific Relief Act, the relation of law to the fact of possession has a threefold aspect, well settled—(i) one by way of a rule of procedure, (ii) another by way of a rule of evidence and (iii) a third, by way of a rule of substantive law. The first is that a person suing in ejectment, *i.e.*, seeking to oust a man in possession, must succeed on the strength of his own title and must show a subsisting title (see for instance *Jowala Bhaksh* v. *Dharam Singh* [1] and *Dharani Kanta Lahiri* v. *Garbar Alikhan* [2]. The second is that possession is *prima facie* evidence of ownership and the burden of proving that the person in possession is not the owner lies on him who asserts that such person is not the owner. (S. 110 of the Evidence Act.) The third is that possession itself gives a species of *title*, an interest capable of being inherited, devised or conveyed. Cf. *Armory* v. *Delamirie* [3] *Asher* v. *Whitlock* [4] and the cases referred to in *Narayana Row* v. *Dharmachar* [5]. It is important to keep these three aspects

1. (1866) 10 M.I.A. 511. 2. (1912) 25 M L J. 95.
3. (1795) 1 Strange. 505 S.C. 93 E. R. 664.4. (1865) L. R. 1 Q. B. 1.
5. (1902) I. L. R. 26. M. 514.

distinctly in mind as the only way of reconciling seemingly contradictory decisions or dicta. Under the early Roman Law the privileges arising from possession attached only to possession *lawfully* obtained *nec vi nec clam*, etc, but there is no such limitation in modern law and legal possession however obtained receives a measure of protection and can in due course be perfected into a prescriptive title.

The first of the rules above stated has to be applied in the light of the other two. That is, a plaintiff in ejectment might succeed on title shown either by way of ownership or by way of possessory title only, the difference being that in the former case he can succeed as against all the world, but in the latter, as against all except certain persons. Again, even when alleging and seeking to prove a title by way of *ownership*, the plaintiff may rely on his possession as presumptive evidence of such ownership and the distinction between a case in which the plaintiff relies on possession as itself constituting his title and that in which he relies on it only to show his ownership, is material to a proper understanding of the rules as to the plea of *jus tertii*. We may add that the protection of a *defendant* in possession is properly brought under the first rule rather than under the third and it is neither correct nor desirable to place a plaintiff and a defendant on the same footing or to obscure the issue by using language appropriate only to the second rule. In this view, the observation in the case under notice that the presumption of right arising from possession applies al much to a defendant as to a plaintiff is open to exception. As a rule of evidence this is no doubt so, but that is not what the learned Judges evidently had in mind. In the case before them, neither party could show ownership or a title derived from the owner and the competition resolved itself into one between a defendant in possession and a plaintiff relying on a possessory title based on previous possession. The ground of decision would be properly stated to be that *in ejectment* a possessory title is a *prima facie* sufficient title in the plaintiff only as against a wrong doer, *i. e.*, a defendant whose 'possession commenced in wrong' *Arumugam Chetty* v. *Periyannan Servai* [1] see also *Narayana Row* v. *Dharmachar* [2]. The view taken by the High Court when the case first came up to it was that in the

1. (1875) 25 W. R. 81. P. C. 2. (1902) I.L.R. 26 M. 514.

circumstances the defendant's possession must have commenced in wrong, in which case plaintiff would be entitled to be restored to possession *unless* defendant could rely on something more than his possession, *i.e.*, a title by way of ownership or other right derived from the owner. When the case came up on the second occasion, the learned Judges held that the plaintiff's title, whatever it was, had ceased by *abandonment* several years before suit. This should have sufficed to dispose of the suit but they proceed to make some observations on the defendant's title as also on the availability of the plea of *jus tertii*.

In connection with the plea of *jus tertii*, the learned Judges do not sufficiently keep in view, the distinction between cases in which it is pleaded as against a possessory title and those in which it is put forward in answer to a title by way of ownership (whether direct, or derivative) and the same observation would apply to several Indian decisions, referred to in Mr. Mitra's Lectures on Limitation (Lecture. VI). A due recognition of the scope of rules 2 and 3 above stated will explain the difference in the availability of the plea of *jus tertii* in the two classes of cases. Where, as in rule (2), the plaintiff claims ownership and relies on his possession as evidence thereof, it is only *presumptive* evidence, which can be *rebutted* by showing that the ownership is really in some one else. It is immaterial whether the defendant claims *under* such third person or not, for the title of the latter is shown only in *disproof* of the plaintiff's alleged ownership. Where, on the other hand, the plaintiff rests his claim on a mere possessory title, the necessity for a plea by the defendant will be felt only on proof that he *dispossessed* the plaintiff or entered by wrong; and once this is established, the defendant (as a wrong doer) cannot resist the plaintiff's claim merely by pleading or even proving that a third person is the real owner, for the plaintiff admittedly did not claim to be the owner but only relied on his possession which in law is good against all but the true owner. The defendant must therefore fail unless he can go further and show that he is in *by the authority of the true owner* (*Cf Narayana Row* v. *Dharmachar* [1]). *Doe d Carter* v. *Barnard* [2], must be understood as falling in the first of the two groups of cases and *Davison* v. *Gent* [3], *Graham* v. *Peat* [4], *Chambers* v. *Donaldson* [5], in the second group. As pointed

1. (1902) I. L. R. 26 M. 514.
2. (1849) 13 Q.B. 945.
3. (1857) 26 L. J. Ex. 122.
4. (1798) 1 East 244.
5. (1809) 11 East 65.

out by Mr. Mitra, the general observations as to *jus tertii* in cases like *Vellanki* v. *Venkata Rama* [1] *Sivagnana Thevar* v. *Periasami* [2] *Girdhari Lall Roy* v. *The Bengal Government* [3] *Ranee Shornomoyee* v. *Watson & Co.*, [4] must be understood in the light of the fact that in those cases there was no question of prior possession by the plaintiff. In *Rajah Haimanchull Singh* v. *Koomer Ganesham Singh* [5], the plaintiff's prior possession could not prevail, as the defendant did not enter into possession unlawfully and plaintiff could not succeed on his title as owner as the adoption was held invalid. It will be a question on the pleadings in each case whether possession is relied on as a title by itself or as evidence of a title by way of ownership. In the English law, the distinction would till recently have been indicated by framing the action in trespass and in ejectment respectively.

Haribhai Hansji *v.* **Nathubhai Ratnaji.** I. L. R. 38 B. 249.

We doubt the correctness of applying S. 65 of the contract Act to the present case, though the decision may be supported on other grounds. The mortgage was *void* as being in contravention of a statutory provision, but the learned judges hold it to be a case of the agreement being *discovered* to be void' as there was nothing to show that, at the time of the mortgage, the mortgagee was aware of the fact that the bond was void. This is to make the party's knowledge of law a question of fact in each case and we doubt if that is permissible. Everybody is presumed to know the law and this being an irrebuttable presumption, it is an established rule that a mistake of law is no grouud for relief. Some remarks on this head will be found in 19 M.L.J. at pp. 76 *et seq*. On a proper construction of the section, in conformity with well known principles of contract law, it seems to us that an agreement can be said to be 'discovered to be void' only when this comes about from a knowledge of facts not known to the parties at the time of the agreement. The decision in *Jijibhai* v. *Nagji* [6], is of course also open to the same remarks.

---

1. (1876) I.L.R. 1 M. 174 P.C.
2. (1878) I. L. R. 1 M. 312.
3. (1868) 12 M.I.A. 448.
4. (1873) 20 W. R. 211 (P.C.)
5. (1834) 5 W. R P.C. 69,
6. (1909) 11 Bom. L. R. 693.

Pirsab Valad Kasimsab *v.* **Gurappa Basappa,** I. L. R., 38 B. 227.

Critical Note—Re Ante-adoption agreements.

The actual decision in this case seems to us unexceptionable but the numerous observations incidentally made by Beaman J. in his own way call for some comments. A widow gave certain leases in 1902 and died in 1907. A son who had been adopted during her husband's lifetime but who attained majority only in 1902, sued in 1909 to recover possession from the lessees. The widow had been in possession since her husband's death but the document showing an arrangement to this effect made about the time of the adoption had not been registered. The defendants put forward a plea of limitation. Art. 91 of the Limitation Act was first relied on, but was not pressed. In second appeal the defendants urged a plea of adverse possession by the widow as against the plaintiff. In discussing this question, the learned Judge deals mainly with two points (i) the nature and effect of the arrangement made about the time of the adoption and (ii) the character of the widow's possession, apparently to the exclusion of the adopted son; and the second point became material because of the view taken by him that the document showing the arrangement (dealt with under point (1)) could not be received in evidence for want of registration.

As to the first point, the document itself is not set out in the report, but we are not satisfied with the reason assigned in the judgment for holding it to be a deed *inter vivos* and not a will. No question seems to have been raised as to whether the property was ancestral so as to affect the validity of the arrangement if testamentary (as to which however, see *Lakshmi* v. *Subramanya* [1].) Giving a life interest to the widow is not inconsistent with its being a will, unless it appears clearly that the life interest was intended to vest as from the date of the document and not after the husband's death. Nor is the express reservation of title to the property in the executant himself during his life-time, a true test of its non-testamentary character. It is consistent with the document being a will, unless it is clear from the document that he thereby *cut down* his interest to a mere

1. (1889) I.L.R. 12 M. 490.

life-interest and parted with the rest. The extract at p. 228 of the report does not seem to us to import any such limitation.

Even in the view that the document was non-testamentary, the particular ground on which the learned Judge holds it to be compulsorily registrable seems to us open to question. He allows that in case of adoption *by a widow*, wherein the widow stipulates for the reservation of her life-interest as part of the adoption arrangement, decided cases have acted upon such documents even if unregistered ; but the adoption in the present case having been made by the husband, he says that whether by way of gift from the husband or by way of contract with the minor, there was *created* in the widow an interest in immovable property (of the value of more than Rs. 100) and such interest having been created by the document, the same required to be registered. Dealing with the question of registration, we have only to see what the document says. It nowhere in terms confers a life-estate on the widow, but seems to leave her interest to be *implied* or *inferred* from the fact of postponing the son's interest to the date of her death ; and it will be too much to hold that even for such implication in effect, it requires registration. It may however be that as limiting the son's right or as giving him a right by way of vested remainder which he may not otherwise have (taking the property to be self-acquired) the document is registrable, but that is a different matter.

By the way the learned Judge makes some interesting remarks as to the legal character of what are commonly called ante-adoption agreements. Looking at them as contracts or quasi-contracts, he says, he finds it most difficult to refer them logically to any true category of contract, for, in his opinion, they would if at all be contracts only complete when ratified by the minor after attaining majority.' He adds "If the minor desired to ratify any such contract on attaining majority, the previous existing contract would obviously be nugatory, since it would clearly be open to him as an adult to confer upon his adoptive mother a life-estate.....Nor is it easy to understand upon what ground the taking of a son in adoption can be regarded as consideration.....While it is open to the minor to resile from his share of the contract, it is quite *impossible for the* widow to resile from hers. An adoption once made cannot be

unmade.....So that it would appear that these instruments....., can hardly be regarded as true contracts." Though the learned Judge finally bows to the weight of authority on the question, this is a forcible statement of the case against such arrangements, on grounds somewhat different from those urged in the referring judgment in *Visalakshi Ammal* v. *Sivaramien* [1]. By his referring order in *Vyasacharya* v. *Venkubai* [2], wherein he said he adopted the arguments of the referring judgment in the Madras case, Beaman J. had invited the Full Bench to decide the general question of the validity of such agreements, but the Full Bench declined to do so. He had then indicated some of his present arguments as well. The judgment of the Full Bench in the Madras case in some measure meets the arguments of the learned Judge but it is desirable to examine them in their present shape, as the law on the point cannot even now be regarded as settled in all respects beyond controversy, particularly in view of the ambiguous remark of Lord Macnaghten in *Bhasba Rabidat Singh* v. *Indar Kunwar* [3] relied on in *Jagannadha* v. *Papamma* [4].

The first observation that occurs to one is that in his remarks in the present case as well as in *Vyasacharya* v. *Venkubai* [5] Justice Beaman has not sufficiently kept in view the true nature of 'voidable' contracts and has lost sight of one class of contracts well-known to law *viz.*, those connected with the creation of a status. One familiar instance of the kind in the English law, is that relating to marriage. If as is indisputable, marriage can be a 'consideration' in law, why not the taking of a boy in adption. A widow is not bound to adopt and she is free to adopt whom she likes. There is nothing inherently immoral or unmeritorious in a widow stipulating that she would adopt a boy or the particular boy only if certain rights are secured to her. The argument in the referring Judgment in the Madras Full Bench case was that the natural father cannot represent the boy in the transaction (in which case, it would be *ab initio* void) and that the parties cannot by contract exclude the boy from the incidents which the law attaches to the status of an adopted son. The Full Bench rely on the dictum of the Privy Council in *Ramasami Aiyan* v. *Venkatrama Aiyan* [6] as laying down

1. (1904) I. L. R. 27 M. 577.
2. (1912) I. L.R 37 B. 351.
3. (1888) I. L. R. 16 C. 556 (P. C.).
4. (1892) I. L R. 16 M. 400.
5. (1912) I. L. R. 37 B. 351.
6. (1879) I. L R. 2 M 91. (P. C)

that the natural father is competent in this behalf, for otherwise there can be no question of *ratification*. The arrangement is therefore only voidable and not void. Beaman, J. however asks, if the efficacy of the arrangement depends on its ratification by the adopted son, what is the virtue in referring back to the original contract? Or, as he put it in the earlier case, 'the agreement *per se* is not binding on him.' It is submitted that the assumption is fallacious. The Judicial Committee cannot be understood to suggest that till such ratification, the arrangement has no legal basis and is non-existent in the eye of the law; and it is scarcely necessary to add that a well marked distinction exists between a new contract and the ratification of a pre-existing contract. The acts and circumstances necessary to constitute a new contract are very different from those which will suffice to prove ratification. The recognition of the earlier contract, even as a voidable one, will legalise the widow's possession during the boy's minority and even after he attains age, the arrangement will in this view remain operative unless repudiated within a reasonable time. It is also not unreasonable to argue that as a result of the same view, the court will be justified in holding the arrangement to be binding on the adopted son, *even apart from any ratification or acquiescence*, if the court is satisfied that the arrangement was on the whole for the benefit of the minor. This is the basis of the decision in *Visalakshi Ammal* v. *Sivaraman* [1] and the numerous precedents referred to in the Judgment of the Full Bench in that case and there is nothing inconsistent with them in the more recent Bombay cases like *Venkappa* v. *Fakirgowda* [2], *Vyasacharya* v. *Venkubai* [3] and *Purshottam Rakhmabai* [4].

An interesting analogy will be found in the English common law as to infants' contracts, particularly contracts connected with marriage. They are not *ordinarily* void, but 'voidable' in the sense above explained, *i.e.*, 'valid until repudiated' and not 'invalid until confirmed (per Kekewich, J. in *Duncan* v. *Dixon* [5]) and binding unless repudiated within a reasonable time *Smith* v. *Lucas* [6]. In *Edwards* v. *Carter* [7], a marriage settlement was

1. (1904) I. L. R. 27 M. 577.
2. (1906) 8 Bom L. R. 346.
3. (1912) I. L. R. 37 B. 351.
4. (1913) 16 Bom. L. R. 57.
5. (1890) L. R. 44 C. D. at p. 213.
6. (1881) L. R. 18 Ch. D. 543.
7. (1893) A. C. 360.

entered into by the father of the intended husband (who was then a minor) and it was held that the husband could not seek to repudiate it, after the lapse of 5 years from his majority. And as suggested in some of the Indian cases bearing on ante-adoption agreements English Courts have also sometimes held that an infant's contract is absolutely void in cases where the court can pronounce it to be clearly to his prejudice, and completely valid *i.e.*, one which the infant has no right to repudiate, where the contract *taken as a whole* is clearly to his benefit. *Clements* v. *London & N. W. Railway Co.* [1] is an instructive case on the latter part of the rule (see also *Corn* v. *Mathews* [2].) Sir Frederick Pollock disputes the correctness of applying the description 'void' even to contracts coming within the first part of the rule, *i.e.*, those which are manifestly prejudicial to the infant (see Principles of Contract Ch. II, part 1, S. 1; see also Parsons on contracts) S. 295, Vol. I.; but some other text writers including Leake accept the rule.

The argument based on the fact that only one of the parties to the arrangement has a chance of resiling from it does not carry much force, for that is a feature common to all 'voidable' contracts. But the learned Judge proceeds to point out the anomaly that in the event of repudiation by the boy, no restoration of the *status quo ante* is possible, for the adoption once made cannot be unmade. The answer to this of course is that it is so in all cases of contracts bound up with the creation of a *status*. It however seems to him that so far as the 'legal incidents, rights and obligations arising out of such status are concerned, the contract should not be allowed to 'control, abrogate or restrict' them. The status, he grants, may be created by contract, but he thinks it a fallacy to borrow considerations from the law of contract to use in the domain of status (see the referring judgment in *Vyasachrya* v. *Venkubai*) [3]. He seeks to drive the point home by pointing out that the effect of the arrangement in cases like *Chitko Ragunath* v. *Janaki*[4] and *Ravji Vinayakaran* v. *Lakshmibai*[5] is that 'the adopted boy agreed to treat himself as not adopted so long as the adoptive mother lived. As well could a son 'agree not to be born'. This argument was also strongly

1. L. R. (1894) 2 Q B. 482. 2. (1893) 1 Q. B. 310.
3. (1912) I.L.R. 37 B. 351. 4. (1874) 11. B. H. C. R. 199.
5. (1887) I. L. R. 11. B. 381.

urged in the referring Judgment in *Visalakshi Ammal* v. *Sivaramien* [1] and it was suggested that the arrangements should be looked upon as 'agreements or conditions essentially repugnant to the status created by adoption and therefore not binding.' The Madras Full Bench, while recognising the force of the last argument in extreme cases, was of opinion that 'a fair and reasonable disposition of the property is not essentially repugnant to the Hindu law or the purposes for which adoption is allowed.' This does not meet the larger question of principle on which the objection is also rested, *viz*, that a private contract cannot control or restrict the legal incidents of a status arising out of that contract.

It is submitted that as a statement of a general principle, the above proposition is only partially true. A person cannot by contract divest himself of the status itself (Cf. for instance, the restrictions upon divorce) ; nor can he generally contract himself out of the duties incidental to that status. It will be noticed that the above disability exists as much *after* as *before* he acquires the status. So far as the *proprietary rights* accruing to the person by reason of the status are concerned, it is clear that there is nothing in law to preclude him from giving them up or waiving them *after* they had vested in him by reason of such status. What is there in principle then which stands in the way of his precluding himself from claiming them, by a contract entered into *before* such time? The rule prohibiting transfers of *spes successionis* will not apply here for several reasons. The transaction is not a transfer in any real sense and further the subject cannot be regarded as a *spes successionis* when the arrangement is part of the very transaction by which the rights would be acquired (in the absence of such a contract). The contract may be unenforceable for other reasons, such as want of consideration, personal incapacity like infancy &c., contravention of any well established rules of morality or public policy (as for instance when spouses stipulate for living apart) or gross unfairness which would induce the Court to refuse specific performance. But that is a different matter.

Here again, the English law furnishes a useful analogy. The effect of marriage under the common law was to give rise to certain rights in favour of each spouse in the property of the other.

Among them were those known as dowe (the wife's right to take a portion of the husband's property on his death) and curtesy (a similar right of the husband in the wife's property) and these were *indefeasible*. The wife was also entitled to a share (generally a third share) of the husband's personal estate under the Statute of Distribution. But it was well established that by an agreement in the marriage settlement, a wife may preclude herself from her right to claim dower (or a distributive share of the husband's personal estate)—*Gurly* v. *Gurly* [1], and that an agreement to accept a provision made for her in lieu of dower or thirds would bar her right to claim either *Thompson* v. *Watts* [2], Mr. Lush (in his book on the law of Husband and Wife) adds that in the same manner "the husband can doubtless bind himself by a similar contract not to claim his estate by the curtesy." It may be added that similar contractual modifications of the legal effect of marriage are in different degrees recognised by other systems of law also in Europe. (For the French system, see Burge's Colonial and Foreign law 1910 Ed. Vol. III, pp, 476, 477 and 561; for the Roman Law, p. 389, for the German law *ibid* pp. 590 and 596; and for the rules of Private International law governing such cases, *ibid* p. 799.)

Illustrations of contractual modifications of the adopted son's rights will also be found in other systems of law that recognise adoption. Thus under the German law, the contract of adoption may exclude the parental right of usufruct and the adopted child's right of intestate succession and *legitime* (Burge, Vol. II, p. 410). One other class of cases may also be usefully referred to here, in connection with the argument that the father of the boy cannot represent him in a transaction affecting rights which are to arise only *after and by virtue* of the adoption. In view of early decisions that the wife's right to dower may be excluded by a jointure, a question arose under the English law, whether if the intended wife was an infant, her parent or guardian could accept a jointure as a reasonable provision for her. After some difference of opinion, it was held that he could, "because her benefit and the convenience of families require it" (*Field* v. *Moore* [3] and *Stamper* v. *Barker* [4].) The reason

1. (1842) 8 Cl. and F. 743 S. C. 8 E. R. 291. 2. (1862) 31 L. J. Ch. 445.
3. (1855) 7 De. G.M. & G. at p. 709, 4. (1820) 6 Madd, 157.

assigned is significant. *Drury* v. *Drury* [1] illustrates both the above rules. Lord Northington there laid down that of the provision made by law for the wife, out of her husband's estate, 'she could not be deprived but by contract.....after the age of twenty one (at p. 51). That after majority a woman could so contract herself out of her right to dower has never been questioned. The House of Lords in that case went further and held that *even during infancy* an absolutely binding contract to that effect may be embodied in the marriage settlement. This view has been since criticised and disapproved of (see per Lord Herschell in *Seaton* v. *Seaton* [2]) but it has never been suggested that an arrangement of the kind made by the parent is a nullity in law, apart from any repudiation by the infant on coming of age (see note in 28 E. R. at p. 824).

Before concluding this note it is only necessary to add a few remarks on some of the observations of Justice Beaman in dealing with the question of adverse possesion. He says for instance. "I cannot conceive any circumstances in which a person could set out consciously to acquire a limited within a larger estate by adverse possession, the natural legal consequence of which would be to confer full ownership upon him." Again having regard to the conduct of the parties (though the document itself was excluded as already stated) and their belief that the mother was in possession in pursuance of the arrangement, the learned Judge holds that 'her possession, so long as she lived, would not be adverse to the plaintiff at any period but merely permissive' and that 'the intention to hold adversely in order to acquire an absolute estate' would be wanting. Understood in the light of the context, both these statements are open to exception. The fact that possession is held under an arrangement void in law but believed by the parties to be good will not render such possession 'permissive.' The true rule is that possession is adverse whenever held *without title*, but the possession of a person should whenever possible be referred to a lawful title. There are numerous cases in India, in which Courts have held that a prescriptive title was acquired by possession held in pursuance of a transfer invalid in law for want

1. (1760—1761), 2 Eden 9 and 60. S. C. 28 E. R. 810.
2. (1888) L.R. 13 A. C. at p. 67.

of registration or of other formalities (Cf. for instance *Venkatrayudu* v. *Subbamma* [1] *Budessa* v. *Hanmanta* [2]). The rule under the English law is also the same. For instance, a grant sale or gift of land by parol is void under the Statute of Frauds, but if the grantee enters into possession under such grant or under a deed not executed conformably to the statute, but which the parties by mistake believe good, the possession is adverse and cannot be said to be held in subordination to the title of the legal owner' (see Buswell on Limitation S. 367). The belief of the parties is material only to the extent of determining whether or not the *acts* of possession are done in assertion of a right (whether limited or plenary) in the person doing them. In the absence of such belief or assertion the person doing the acts cannot in law be regarded 'as the *de facto* exerciser of the powers of use and enjoyment' and the nature of the belief or assertion will determine the nature and extent of the right acquired by the possession when held for the statutory period. Hence it is that the same kind of external acts may in one case create a full right of ownership by prescription and in another only a 'limited' interest. When the possession is taken under an invalid document, the application of the above principle (as well as of a rule of estoppel) limits the prescriptive estate to that created by the document (See *Rajah Venkata Narasimha Appa Rao* v. *Rajah Surenani Venkata Purushottama Jagannadha Gopala Row* [3], *Subbiah* v. *Madduletiah* [4], *Vengamma* v. *Chelamayya* [5], *Icharan Singh* v. *Nilmoney Balidarh* [6].) The error in the learned Judge's remarks in the case under notice can be best shown by imagining a suit for possession, by the adopted son *against the widow herself*, more than 12 years after she took possession (and beyond 3 years after his majority). In view of the cases above cited, it would have to be held that the widow had, by adverse possession, acquired a prescriptive right to the estate conferred upon her by the arrangement under which she claimed to hold and that the suit for possession was barred to that extent.

---

1. (1902) 13 M. L. J. 302;
2. (1896) I. L. R. 21 B 509.
3. (1908) I. L. R. 31 M. 321.
4. (1907) 17 M. L. J. 469.
5. (1912) I. L. R. 36 M. 484.
6. (1908) I. L. R. 35 C. 470.

Paparayudu *v.* **Rattamma** I. L. R. 37 M 275.

This case rightly dissents from *Singam Setti Sanjivikondiah* v. *Draupadi Bojamma* [1]. That case had very little of principle to support it and even Mr. Justice Sankaran Nair who was a party to it, has refused to follow it in deference to *Bhagwat Dayal Sahu* v. *Debi Dayal Sahu* [2]. The law may thus be taken to be settled that a reversioner can have a declaration of the invalidity of an alienation by the widow though it is in part supported by necessity.

Sethai Ammal *v.* **Nachiar Ammal.** I. L. R. 37 M. 286.

If the stepmother cannot come in as a Sapinda, there is as the learned Judges observe a real difficulty in finding a place for her ; and the only conclusion possible seems to be that arrived at by their Lordships. The judgment of the Privy Council in *Ramachandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* [3], must chill the ardour of Hindu Law students in attempting any extension of Yajnavalkya' list of heritable relationships.

Kanakammal *v.* **Ananthamathi Ammal.** I. L. R. 37 M. 293.

The judgment in this case has the merit of recognising the claims of natural relations to inherit and at the same time we think may also be supported by authority. The leading texts of Yajnavalkya on Sridhana inheritance are अतीतायाम प्रजसिबांधवास्तदवाप्नुयुः, and the next verse, *viz.*, अप्रजस्त्रीधनं भर्तुर्ब्राह्मादिषु चतुर्ष्वपि.... शेषेषु पितृगामितत्. Commenting on the first text Vijnaneswara says बान्धवाभर्त्रादयः वक्ष्यमाणागृह्णन्ति and then adds सामान्येनबान्धवा धनगृहणाकारिणो दर्शिताः इदानीं विवाहभेदेन अधिकारिभेदमाह. Commenting on the next text, he says**अतीतायाः पूर्वोक्तं धनं प्रथमं भर्तुर्भवति (first becomes that of the husband), in his absence his प्रत्यासन्नानां सपिण्डानां; and then he goes on in the other four kinds पितृगामि in their absence तत्प्रत्यासन्नानां. Again at the end of the comment on this verse dealing with the grandmother's Sridhana he says पौत्राणाम् अप्यभावे पूर्वोक्तभर्त्रादयोबांधवाधनहारिणः. Thus it will be found that the rule is that her relations are to take it but there is a difference in the order according to the form of marriage. The husband and his relations are first to take it when the marriage is in the

1. (1908) I.L.R. 31 M. 153. 2. (1908) I.L.R. 35 C. 420 (P.C.
3. (1914) 18. C. W. N. 1154. (P.C.)

approved form, on the other hand, the father and his relations are to take it first when the marriage is in a disapproved form but the right of either to inherit is not excluded. Madana Parijata takes the texts to mean this. Stabaka 8. See *Bachha Jha* v. *Jugmon Jha* [1] Smriti Chandrika recognises the right of the sister's son to inherit. No doubt it is in connection with Brihaspati's text that most of the discussion centres. All the same, the fact that sister's son's right is recognised is significant. Similarly other leading commentaries. The Privy Council by suggesting distributive construction of the text of Brihaspati *Bachha Jha* v. *Jugmon Jha* [1], can hardly be said to have negatived the right of those relations under any circumstances. The rule of Manu as to Sapindas inheriting to a Sapinda is applied by Nilakantha to women. See *Bai Kesserbai* v. *Hunsraj Morarji* [2]. Father's relations are Sapindas and the definition of Sapinda as given in the Acharakanda is to be the governing definition. *Ramachandra Martand Waikar* v. *Vinayak Venkatesh Kollakar* [3]. Jagannatha also suggests that father's relations are entitled to come in after the failure of the husband's relations. 2 Colebrookes Digest 684. The text cited by the Mitakshara in the Acharakanda about the king being the lord and the protector of women only on failure of the *Matis* of the two pakshas also supports this view. See slso Dharma Sindhu cited in West and Buhler. Though the less said about the spirit of the Hindu Law the better See *Ramachandra Martand Waikor* v. *Vinayak Venkatesh Kollakar* [3] there seems to be some support for the conclusion arrived at in the case.

Radha Charan Das *v.* **Sharfudin Hussein** I. L. R. 41 C 276.

We are not quite sure as to the correctness of the way in which the decision in *Gobind Lal Roy* v. *Ramjaman Misser*[4] has been interpreted and applied in this case. That decision is no doubt conclusive in favour of the revenue sale in so far as the sale may be sought to be attacked on the grounds not raised in the appeal to the commissioner. To this extent their Lordship's pronouncement annuls the distinction betwen illegality and irregularity in connection with sales under the Bengal Revenue

1. (1885) I. L. R. 12 C 351.
2. (1906) I. L. R. 30 B 431.
3. (1914) 18 C. W. N. 1154.
4. (1893) I. L. R. 21 C. 70 (P. C.)

Sale law. But in respect of matters that may be regarded as the foundation for the jurisdiction or authority to sell, it would seem that even this restriction imposed by S. 33 of Act XI of 1859 will be no bar, having regard to the whole scheme of the Act. Thus for instance in *Haji Bauksh* v. *Durlav Chandra Kasi*, [1] and *Balkishen Das* v. *Simpson* [2] it appears from the facts that the objection to the sale which ultimately prevailed had not been put forward before the Commissioner and yet the objection was entertained and upheld. Of course, what matters would be regarded as relating to jurisdiction and what, are not such, so that the sale will be one held 'under the Act' it is not easy to say. In the case under notice the learned Judges go the length of holding that once the sale can be regarded as one *held under the Act*, the necessity of proving substantial injury before the sale can be set aside, applies as much when the sale is attacked on the ground of illegalities in connection with the sale as when the objection is taken on the score of irregularities. Here again it is not easy to decide whether a particular deviation from the prescribed procedure is an illegality or a mere irregularity. But assuming a case of illegality, we are not satisfied that the decision in *Gobind Lal Roy* v. *Ramjaman Misser* [3] requires substantial injury in such a case also. As pointed out by the Judicial Committee in that case, S. 33 has been obscured by inserting in it, without careful adaptation, the words relating to proof of injury. But, it is fairly gatherable from Their Lordships' observations that they were not prepared to lay down that the effect of the insertion was to sweep away the distinction between illegalities and irregularities. All that they had to say was that the concluding part of the section (relating to the grounds of appeal before the commissioner) was quite general and did not allow of any distinction being made between illegalities and irregularities. While nothing should be done unduly to impair the validity of revenue sales, it ought not to be forgotten that in connection with other kinds of involuntary sales language similar to that found in S. 33 had generally been understood as necessitating proof of substantial injury only in case of irregularities and not of irregularities in connection with the sale.

1. (1912) I. L. R. 39 C. 981. 2. (1898) I. L. R. 25 C. (P. C.) 933.
3. (1893) I. L. R. 21 C. 70 (P.C.)

Sadasiv Singh *v.* **Emperor** I. L. R. 41 C. 299.

If one occasionally comes across Judges who consider themselves above the law, one more often finds Judges who expect that every one of their acts or orders should in terms be provided for a section or ruling. We are aware of a recent instance in this Presidency when a District Judge on being requested to permit the cross-examination of a witness to be commenced the next day replied that there was no provision in the Code authorising him to do so. In the Calcutta case under notice, the learned Sessions Judge has not put on record his refusing to postpone the cross-examination for a day and it is not therefore possible to say whether he did so in what he considered the proper exercise of his *discretion* or in the belief that he had no power to postpone the cross-examination. The particular case is a strong illustration of the serious prejudice that may result from what may at the time appear but a small matter. The observations of the High Court are sufficiently clear and general to enjoin on subordinate Courts the duty of showing every *reasonable* indulgence in such matters.

Crompton and Co., Ltd. *v.* **Mohan Lal—Re Arbitration,** I. L. R. 41 C. 313.

Unlike the corresponding provisions of the Civil Procedure Code, the Arbitration Act of 1899 does not specify the reasons for which an award may be *remitted* for reconsideration ; and it has been held in Calcutta that the scope for remitting is wider under the Act of 1899 (*Protap Chunan Dey* v. *Toolsi Dass Dey* [1]). Again, where the reference to arbitration is through Court, the procedure under the Code, in case of 'misconduct' of the arbitrator would be to set aside the award and proceed with the suit and not to send the case back to the arbitrator, though the misconduct charged may be only *legal* (as distinguished from moral) misconduct. Where however the award is made on a private reference but the Court, in the course of proceedings to file it, finds that the arbitrator has been guilty of misconduct, the Code does not provide what is to happen; and the intricate questions may arise in such a case as to whether the parties should submit to arbitration over again or whether a suit will

1. (1902) I. L. R. 29 C. 798.

lie in spite of S. 21 of the Specific Relief Act and if a suit will lie, how the party is to be protected against any hardship arising from the lapse of the period of limitation during the arbitration proceedings. Having regard to the course of decisions in England in respect of statutory provisions on which Ss. 13 and 14 of the Indian Arbitration Act are based, we think the learned Judge was justified in holding that in the present case he had *power* to remit the award. But, with all respect, we beg leave to doubt the *expediency* of the course he adopted. Assuming the soundness of *Anning* v. *Hartley*[1] in this respect, we think there is great force in the following observations of Romilly M. R. *In Re Tidswell* [2]; "Notwithstanding the perfect honesty and *bona fides* of an arbitrator, it is impossible, where an award has been set aside and sent back upon such grounds, that there should not be, in spite of himself, some disposition to favour one side and to make it appear that the objections to the award were useless and that the sending it back was productive of no good." This would be all the more so, when, as in the present case, the objecting party makes in the course of the setting aside proceedings, allegations of a personal nature (though not strictly of corruption) against the arbitrator who denies them.

---

1. (1858) 27 L. J. Exch. 145. 2. (1863) 37 Beav. 213.

NOTES OF INDIAN CASES.

Sheo Prosad Bungshidhur *v.* **Ram Chunder**, I.L.R. 41 C. 323. **Bunsi Singh** *v.* **Kishun Lall Thakur** I.L.R. 41 C. 632.

With reference to the decisions under S. 622 of the Civil Procedure Code of 1882, a learned Judge of this Court used to remark that in most cases the interpretation of the true scope of the section had been adjusted to the willingness or reluctance of the court to interfere in each particular case. What is a question of jurisdiction pure and simple can never be exactly defined nor is it possible to conceive of a question of error of jurisdiction without some mistake of law underlying it. And as for the third clause of the section, relating to 'acting illegally or with material irregularity', one may well take a warning from the result of the attempt at definition in *Krishna Naidu* v. *Chapa Naidu* [1]. The opinions delivered by the Full Bench in *Vippûlûri Atchayyæ* v. *Seetaramachandra Row* [2] further illustrate the futility of expecting anything like a unanimity or even reasonable certainty as to the precise scope of the section. But we are, with all respect unable to agree with Woodroffe J. that the 'preferable' construction of the term 'jurisdiction' in S. 115, is that of jurisdiction 'local, pecuniary, personal or with reference to the subject matter, of the suit' as distinguished from 'the legal authority of the court to do certain things, *viz.*, to make a particular order in a case before it.'

The two Calcutta cases under notice seem to us to be rather extreme instances of self-imposed incapacity on the part of the High Court. Well may one ask as did Justice Fletcher in the first case, what then are the cases in which the High Court can interfere under S. 115 of the Code. Take for instance, the facts of the first case as stated by Fletcher J. A transferee of the landlords' right (reversion) terminates the lease by notice to quit and then sues for possession. The Court of first instance dismisses the suit on the ground that the *lease does not contain a covenant to evict.* But the plaintiff's case is that the lease has been put an end to. If such were the facts,—as to this, the judgment of the appellate Court is not very clear—the learned Judge could not help remarking as he did that it was impossible to understand what the first Court meant and we think a court of revision will not justify its existence if it feels itself powerless to interfere in such a case. Take

1. (1894) I. L. R., 17 M 410. 2. (1912) 24 M. L. J. 112.

again the facts of the second case, Coxe J. begins his Judgment by saying 'it must be conceded that the order against which complaint is made is hardly defensible' and in another part of the judgment, he refers to the omission to provide for costs 'as a grave injustice'. Yet both the learned Judges doubted their power to interfere, as it was not a 'case decided' by the lower Court within the meaning of S. 115. When an application is made for leave to withdraw a suit, with liberty to bring a fresh suit, the order granting such leave is one made in the exercise of the judicial discretion of the Court, putting an end to that suit and having this important further consequence that it removes the statutory bar to a fresh suit on the same cause of action. It is thus difficult to see why it is not a case *decided* by the Court and why a Court of revision should not interfere with the leave if granted in a case not falling within the section (see *Choraju Chinna Kottayya* v. *Raja Varadaraja Apparow* [1].) It is some consolation that the learned Judges of the Calcutta High Court rested their final decision not to interfere, on other grounds as well.

As to the preliminary question dealt with in the first case, *viz.*, the maintainability of an appeal under clause 15 of the Letters Patent against a judgment of a single Judge under S. 115 C. P. C. we are glad that the Calcutta High Court have held, in accordance with the view of the majority of the Madras Full Bench in *Chappan* v. *Moidin Kutti* [2], that the longstanding practice is warranted by the spirit, if not by the letter of the law.

Chatarbhuj *v.* **Raghubans Dayal** I. L. R. 36 A 354.

This case raises the point whether apart from Sch. II Ss. 5, 8 and 15, the Court has power to supersede an arbitration and proceed with the suit. Their Lordships were disposed to hold that it had not, though it was sufficient for the purpose of the case to hold that there was no occasion for the exercise of such an inherent power. The question raised is one of considerable difficulty. On a question like this, one ought to be careful in selecting the authorities. For instance, *Atlas Assurance Company* v. *Ahmedboy Habiboy*[3] from which their Lordships dissent is a decision under the Arbitration Act which relates only to references without the intervention of the Court and contains widely dissimilar provisions from those of the

1. (1914) 27 M. L. J. 244. 2. (1898) I. L. R. 22 M. 68.
3. (1908) 10 Bom. L. R. 351.

Civil Procedure Code. S. 5 of that Act says that a submission is irrevocable except by leave of Court, thereby necessarily implying that it may be revoked at any stage by applying to the Court. S. 16 gives the Court power to remove a misconducting arbitrator and S. 8 power to appoint a new arbitrator in the place of the person so removed. Similarly the English Arbitration Act (52 and 53 Vict. ch. 49) S. 1 contemplates revocation by leave of Court. S. 11 gives the Court power to remove a misconducting arbitrator. S. 16 gives the Court the same power in case of references through Court as in the case of references outside Court. S. 15 makes the arbitrator an officer of Court subject to the directions of the Court. It will thus be seen that both under the English and Indian statutes, the Court has powers of revocation which it may not have, certainly has not been expressly given, under the Civil Procedure Code. Under the Civil Procedure Code, if the reference is outside Court and the Court is asked to file the agreement on good cause shown it may refuse to file it under rule 17. Where on the other hand the application is under rule 20 to file the award the Court may refuse to pass a decree in terms of the award on the ground that the submission had been validly revoked. Once the agreement to refer is made a rule of Court, the same rules govern the further stages of the reference as in a reference through Court. Under the common law, a party might have at any time revoked the authority of the arbitrator whether the reference was through Court or outside Court. In the former case, if he acted without leave of the court which would be given only on sufficient cause being shown, he was guilty of contempt and was liable to attachment. Having regard to the rule of equity and good conscience laid down by their Lordships of the Privy Council, in *Pestonjee* v. *Manackjee* [1], a party must be taken to possess the right to revoke a submission for good cause shown whether the submission is through Court or otherwise. *Perumala Suryanarayana* v. *Perumalla Venkatarangayya* [2] *Halimbhai Karimbhai* v. *Shamker Shai,* [3]. The question that is troubling the Courts is the stage at which effect can be given to this right, whether it can be done only after the award is made or whether it can be done before. The rule that convenience suggests is that the Court should have this power even before the award is made.

1. (1865) 12 M. I. A. 112. 2. (1902) I. L. R. 27 M 112.
3. (1885) I. L. R. 10 B. 381.

Perumalla Suryanarayana v. *Perumalla Venkatarangayya* [1], seems to assume this power. The English Courts always exercised this power. On the principle of *Ubi jus, ibi reme dium*, the Court would have inherent power to give effect to the rights of the parties. The difficulty in the way of assuming such power arises by the language of R 3 (2) of the second sechedule—which says: "Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in the Schedule, deal with such matter in the same suit." It may be that notwithstanding this provision the Court has power to review the order making the reference and then the arbitration must fail (cf. the analogous cases of preliminary decrees and *ex parte* decrees being set aside). It may, on the analogy of the power to review, be argued also that everything that has the effect of cancelling the original order of reference may be given effect to without doing violence to the language of R. 3 (2). Rule 15 (c) seems to contemplate a wider power of setting aside than is justified by rules 5 and 8. Rules 5 and 8 directly relate in fact only to appointment of arbitrators and extension of time for making the award, the provisions as to supersession being only ancillary. The non-existence of a provision in rule 15 as to other grounds of invalidity did not prevent Courts from recognising such grounds of invalidity. A view like this has the merit of making the least change in the law as understood previously. But the fact that though the law was understood differently in *Halimbhai Karimbha* v. *Shamker Shai* [3] and *Kothandarama Aiyar* v. *Sivagnana Desikar* [2] changes have been introduced by making room in rule 15 (c) for the consideration of those circumstances after the award is made, no change has been made in rules 3, 5 and 8 and the fact that there would be no appeal from the order, taken with the circumstance that in practice no difficulty has so far been felt for want of such provision and the power of review would be sufficient in ordinary cases and that even in England, the power of revocation by Court is but rarely exercised leads one to doubt if after all the plain reading of the rule that is adopted in *Halimbhai Karimbhai* v. *Shanker Shai* [3] is not the right rule.

1. (1902) I. L. R. 27 M: 112.

2 (1902) 11 M. L. J. 121. 3. (1885) I. L R. 10 B 381.

CRITICAL NOTE.

Thayammall *v.* **Kuppanna Goundan**, 27 M. L. J. 285.

Re. Art. 44 of the Limitation Act and De facto *guardians.*

The decision of their Lordships Sadasiva Iyer and Tyabji JJ. in the above case is the first decision extending the principle laid down in *Mata Din* v. *Ahmad Ali* [1], to cases of alienations made by *de facto* guardians under the Hindu Law. In spite of the observations in some earlier judgments (as for instance in *Sham Chandra* v. *Gadadhar* [2],) one may well doubt, even apart from authority, whether the article can reasonably be construed as applying to alienations by *de facto* guardians. It provides for a suit described as one by a ward who has attained majority to set aside a transfer of property by his *guardian.* The word 'guardian' *prima facie* connotes that the person holds that position by a right known to and recognised by law. Where there has been no regular appointment of a person as guardian or an appointment has been made without jurisdiction or some intermeddling with the minor's property has taken place, the person thus actually in charge of the minor's properties is only a quasi guardian or a *de facto* guardian as he is sometimes called [See Schouler's Domestic Relations Sec. 326]. Hence unless it could be said that according to the Hindu Law all persons who take upon themselves, even if it be officiously, the management of an infant's property are authorised by law to do so and that there is no distinction between officious intermeddling and an administration of an infant's properties under lawful authority, it seems impossible to stretch the applicability of Art. 44 of the Limitation Act to cases of transfers by persons who are loosely styled *de facto* guardians. There seems to be scarcely any system of jurisprudence which recognises these *de facto* guardians as a class of guardians at all and the Hindu law is no exception.

Certain observations in *Hanuman Prasad's case*[1] and the series of cases following it, have sometimes been interpreted as recognising a legal status in such persons. The question for consideration in *Hanooman Prasad's case* was whether a mortgage executed by the mother of a minor who for the purpose of

1. (1912) I.L.R. 34 A. 213 (P.C.) 2. (1911-13 C.L.J. 277.
1. (1856) 6 M. I. A. 393

the case was assumed to have come into the management of the property by wrong, was binding on the estate. Their Lordships distinctly point out at p. 413 that the question of the right to the management of the estates of the infant stands apart from the other question as to how far a charge created honestly by an intruder is affected by the want of *dejure* title. It may be that the Hindu Law treats persons dealing with honest intermeddlers of infant's property more favourably than other systems of jurisprudence when the transaction is for the infant's benefit. But this in no way warrants the conclusion that under the Hindu Law managers of infant's property without right are given the position occupied by guardians. It may be somewhat difficult to define in the abstract the distinction between the scope of the authority of a legal guardian and the result arrived at by the operation of the equity allowed by the Privy Council in favour of persons dealing with *de facto* managers. An attempt in that direction was made by their Lordships *Sundara Aiyar* and *Sadasivayyar JJ.* in *Vembu Iyer* v. *Srinivasa Iyengar* [2] where Sadasiva Aiyar J. states in the form of certain propositions the powers which a natural guardian has under the Hindu Law. It is sufficient for our present purpose to say that thedistinction between a natural guardian and an intermeddler is recognised therein.

There is however considerable difficulty, due mainly to paucity of authority, in determining whether a particular relation of a minor who manages the infant's property is or is not a guardian under the Hindu Law. There are very few Sanskrit texts dealing with the question of guardianship. According to the smritis the ruling power is the supreme guardian of the property of all minors male or female (*Vide* pp. 256, 680, 793 and 822 of Manmathanath Dutt's translation of Dharma Sastras. Also Colebrook's Digest Vol. II, p. 574 (1874) Ed.) Beyond this the Hindu Law texts do not seem to lay down any positive rules as to guardianship. Strange, in his book on Hindu Law Vol. I., page 71, says that the king is the universal superintendent of those who cannot take care of themselves. In this capacity it rests with him, *i. e.* with the Judicial power exercising for him this branch of his prerogative to select for this office the fittest among the infant's relations. He adds 'It is stated that in practice the mother is the guardian. But as the Hindu widow is herself liable to the same sort of tutelage it is more

2, (1912) 23 M. L. J. 638.

correct to regard her as proper, if capable, to be consulted upon the appointment of one'. Thus apart from the father whose right of control and management of the infant's properties is assumed and is perhaps traceable to the original 'patria potestas,' it is difficult to assume in the face of the texts conferring the right of guardianship on the sovereign as parens patriæ, that the mother or any other relation of the infant has any right to act as guardian [*Vide* in this connection Manmathanath Dutt's Translation of the Dharma Sastra p. 791 where the mother is not given the absolute power of disposal over the son as contradistinguished from the father, as also p. 796, where the ownership of the son being discussed the mother is not at all regarded as owning any right, *Vide* also 22 M.L.J. 68 per Sundara Aiyar, J.] Macnaughten in his Principles and Precedents of Hindu Law (Chap. VII) however lays down the following rule. "A father is recognised as the legal guardian of his children when he exists; and when the father is dead the mother may assume the guardianship of him. In default of her, an elder brother of a minor is competent to assume the guardianship. In default of such brother the paternal relations generally are entitled to hold the office of guardian; and, failing such relatives, the office devolves on the maternal kinsmen according to their degree of proximity; but the appointment of guardians universally rests with the ruling power.' No authority is cited by the author in support of the rule thus stated; nor are we able to find any authority in the Sanskirt texts to warrant it. Later writers like Trevelyan merely reproduce this passage. Mr. Mayne, states the rule in a somewhat different form, *viz*, that the father and after him the mother are natural guardians and in default of the mother, the nearest male kinsmen of the infant should be appointed, the paternal kindred having preference over the maternal, (Hindu Law S. 211). In the case under notice, the learned Judges make a reservation in favour of the elder brother and the direct male and female ancestors of the minor.

In dealing with passages in the texts that have any reference to guardianship, it must be remembered that in several systems of jurisprudence (such as the English and the Mahomedan) the rules relating to guardianship in respect of the property are not identical with those regulating the guardianship of the person of

a minor. In the common law of England, except in the case of the guardianship in socage, there is no provision at all for the guardianship of property. It will not therefore be safe to draw any inferences regarding the right of guardianship to property from provisions regulating the guardianship to the person of a minor. Hence, even accepting the rule stated by Macnaughten, as at all applicable to guardianship of property, all the persons mentioned therein ought not to be understood as having in turn an *absolute right* to take upon themselves the guardianship of a minor without any permission or authority from the ruling power Vide *Kristo Kissor* v. *Khadar Moye Dossee* [1], followed in the case under notice.

There is a passage in Apararka's commentary on Yagnavalkya, cited from Sankha, to the effect that where the mother is alive the sons have no independence in a joint Hindu family. The passage occurs in the Chapter relating to partition and could hardly be taken as an authority relating to guardianship, especially as the law as enunciated therein is now obsolete [Vide 21 M.L.J. 13, 14 Journal portion].

It is open to question whether there is any sanction in Hindu Law for the mother of a minor acting as 'guardian' of his property, so as to make Art. 44 of the Limitation Act applicable to alienations made by her. But after the decisions of the Madras High Court in *Ranga Reddi* v. *Narayana Reddi* [2]; *Madugula Latchiah* v. *Pally Mukkalinga* [3], *Sivavadivelu* v. *Ponnammal* [4], it is perhaps too late in the day to question the position that in the management of an infant's properties the mother acts as a legal guardian. It must however be pointed out that the above decisions as well as the decisions of the other High Courts on the point purport to be based upon the authority of the Privy Council decision in *Gnanasambanda* v. *Velu* [5]. With great respect to the learned Judges who took part in the above cases, it is submitted that the decision in *Gnanasambanda* v. *Velu*[5] can hardly be regarded as an authority on the interpretation of art. 44 of the Limitation Act. As was observed by their Lordships of the Judicial Committee in *Ma Nhin* v. *U. Shaw* [6] a decision to be an authority must decide clearly and broadly the point at issue in a subsequent litigation. The question as to whether the mother was the natural guardian of the property of the minor was not

1. (1878) 2 C.L.R. 583.
2. (1905) I. L. R. 28 M. 423.
3. (1907) I.L.R. 30 393 s.c. 17 M.L.J. 220.
4. (1912) 22 M.L.J. 404.
5. (1899) I. L. R. 23 M. 27 7 s.c. 10 M.L.J. 29. (P.C.)
6. (1914) 27 M.L.J. 41 (P.C.)

raised before the Privy Council in *Gnanasambanda* v. *Velu* [1] nor was it at all necessary that any reference should have been made to art. 44 of the Limitation Act. The claim of the 2nd defendant in that case would have been barred even otherwise, as the alienation by his mother was made on the 17th September 1868, he attained majority in 1880 and the suit was brought after the expiry of 12 years from his attaining majority. It does not appear from the argument in the case as reported that any reliance was placed on Art. 44. Further their Lordships hold that the alienation was *ab initio* void and in this view there was no necessity to set aside the same by a suit brought within a shorter period of limitation [cf. *Hazari Lal* v. *Jadoun Singh* [2] *Bakatram Nanuram* v. *Kharsetji* [3] *Malkarjun* v. *Narhari* [4].]

In these circumstances we cannot help feeling that it would be unduly straining the decision of the Privy Council if any portion of the Judgment in the above case should be treated as an authority for holding either (1) that a Hindu mother is a legal guardian of her minor son's property so as to bring her alienations within art. 44, or, (2) that, (were it otherwise,) art. 44 would apply to alienations by *de facto* guardians. In this view the cases which have applied art. 44 of the Limitation Act to transfers by Hindu mothers of their infant's property would seem to require reconsideration.

Whatever may be the position of the mother as a natural guardian, having regard to the rule of *Stare decisis*, it is submitted that the other relations of a minor can hardly claim any right under the Hindu Law to be his natural guardian, in respect of his property.

---

1. (1899) I. L. R. 23 M. 271 s. c. 10 M. L. J. 29.
2. (1882) I. L. R. 5 A. 76, 78. 3. (1903) I. L. R. 27 B. 560, 562, 563.
4. (1900) I. L. R. 25 B. 337 at 348 P. C.

NOTES OF INDIAN CASES.

Balakram *v.* **Gaydni**, I.L.R. 36 A. 370.

Whether one agrees with the conclusion reached in this case or not, it is certainly difficult to see how any question of limitation was involved in it so as to make it compulsory on the Court to consider the objection and give effect to it *suo motu*. No doubt when the amendment was made, the time for filing the suit on the amended basis had gone by. But that would not bring the case within S. 3 of the Limitation Act. Amendment whatever its character cannot amount to institution. The only way in which limitation comes into the question is as a self-imposed check on the exercise of the Court's discretion. That circumstance cannot make it compulsory on the Courts to notice the objection.

Turning to the main question itself as to how far limitation should impose a check on the Court's action in permitting amendments, judicial opinion seems to be divided. Sir Arnold White C. J. seems to take one extreme view, in (see *Mahammud Ayyab Sahib* v. *Gunnis & Co.* [1],) while Sadasiva Aiyar, J. seems to take another (see *Kumara Venkata Perumal* v. *Velayuda Reddi* [2].) Wallis, J. in the second mentioned case seems to take an intermediate position ; while holding that the fact that the other side is deprived of the plea of limitation is a ground for refusing an amendment, he thinks that in special circumstances the Court may relax the rule. *Kutti* v. *Achutan Nair* [3], *Sevugan Chetty* v. *Krishna Aiyangar* [4], *Varadiah* v. *Rajah Kumara Venkata Perumal* [5] incline to the view of Sadasiva Aiyar, J. *Krishandas Rupchand* v. *Rachappa Vithoba* [6], seems also to take the same view. *Mallikarjuna* v. *Pullayya* [7], *Elagappa Chetty* v. *Vellian Chetti* [8], which give expression to the contrary view are cases of addition of parties which is specially provided for by the legislature while *Sattappa Chetti* v. *Jogi Soosappa* [9], a case of amendment takes the more liberal view. Wherever the legislature has thought fit that a limit should be set to a party being deprived of an advantage

1. (1913)24. M. L. J. 562.
2. (1914) 27 M. L. J. 25.
3. (1911) 21 M. L. J. 475.
4. I. L. R. 36M. 378.
5. (1913) 26. M. L. J. 83.
6. (1909) I. L.R. 33 B 644.
7. (1892) I. L. R. 16 M 319.
8. (1894) I. L. R. 18 M. 33.
9. (1893) I. L.R. 17 M 67.

gained by the fault, negligence or misfortune of the other side in the matter of procedure it has expressly provided for it. (See the articles governing applications to set aside exparte decrees, dismissals for default, *etc.*). Even in cases of amendment, it has set a limit by providing that if a new party is to be added, that must be done within the period of limitation. When the legislature has not chosen to circumscribe the court's discretion, there is no reason why the court should impose any restriction. To put forward the acquisition of a right by the defendant as a ground for not interfering is to beg the question. The right, it may be answered, is subjected by the legislature to a discretion in the court to affect it by its order. (See *Murugachetty* v. *Rajasami* [1].) The provisions of the Civil Procedure Code dealing with amendment are S. 153 and O. 6, R. 17. S. 153 says that the Court may at any time on such terms as to costs or otherwise amend any defect or error and all necessary amendments shall be made for the purpose of determining the real question at issue raised by or depending on such proceeding. O. 6, R. 17, says on the other hand, that the court may at any stage of the proceedings allow either party to amend his pleadings on such terms and in such manner as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Whenever amendments are necessary for the purpose of determining the real questions in controversy between the parties, the Court has no discretion but is bound to allow them irrespective of any right acquired by limitation. Reading the two rules together, it seems also a legitimate deduction to make that where the Court is asked to supply a defect or error it has a wider discretion than when it is asked to alter the pleadings on other grounds. It may be, limitation is a good ground for refusing amendment whenever it is asked for purposes other than supplying an error or defect. Such a conclusion would bring the Indian Law in line with the English rule as laid down in *Weldon* v. *Neal* [2]. The old Code prohibited amendment when the result would have been to change the nature of the suit. It is fancied that in such cases, the plea of limitation of which the defendant might be deprived is a consideration for refusing amendment. Where by mistake one relief

1. (1912) 22 M. L. J. 284 at 302. 2. (1887) 19 Q. B. D. 394.

is asked for while another ought to have been, the cause of action being the same, (*Kutti* v. *Achutan Nair* [1], *Varadiah* v. *Raja Kumara Venkat Perumal* [2], *Sevugan Chetty* v. *Krishna Aiyangar* [3],) where the action is laid in one way while it ought to have been in another, the material facts alleged being substantially the same and the relief the same (*Krishnadas Rupchand* v. *Rachappa Vithoba*[4]) or where facts are alleged by a party which for no fault of his turn out to be inaccurate and as a consequence the action as laid becomes formally defective, the Court must have power to amend without regard to any question of limitation. Third parties' rights are sufficiently safeguarded by S. 22 of the Limitation Act. Where however the party has to alter his case on the facts of which he should have been aware, or has to add to his causes of action and not merely to substitute one cause for another the defendant might be considered as being deprived of a legitimate defence and the amendment might be refused. On the facts, the case under review would seem to come under the latter class of cases and in that view, the conclusion seems to be right.

Lakshminarasimham *v.* **Ramachandra** : I. L. R. 37 M. 319.

Having regard to the changes introduced by the Estates Land Act in the law of landholder and ryot, the judgment in this case seems to be right. Any other reading of S. 74 of the Local Boards Act would have had the anomalous result of giving the landholder a remedy in respect of the road cess which he does not have in respect of his rent. Unlike the Rent Recovery Act which dealt comprehensively with all classes of landlords and tenants, the Estates Land Act deals only with a special class. S. 134 which extends the remedies provided by certain sections of the Act to ryotwari proprietors etc., only emphasises this fact. The Act as it originally stood was intended to have a somewhat wider operation. S. 3 cl. (11) (c) defined rent so as to include quit rent, jodi and poruppu payable by Inamdars to landholders. But this clause has now been repealed. Even if it was not repealed, in the absence of any provision for reading "inamdar" for "ryot" in the sections concerned, this

1. (1911) 21 M. L. J. 475.
2. (1913) 26 M. L. J. 83.
3. (1911) I. L. R. 36 M. 378.
4. (1909) I. L. R. 33 B 644.

clause would have been of little use in extending the remedies provided by those sections ; on the other hand it would have caused considerable embarassment. Curiously enough, the decision makes no reference to S. 3 cl. (11) (a) which undoubtedly has some bearing. That clause includes in the definition of 'rent,' for the purposes of S. 77 and certain other sections "money recoverable under any enactment for the time being in force as if it was rent." The clause does not say " recoverable from a ryot." It may be argued that road cess comes within this description and as such the remedies provided by S. 77 are available to the landholder to whom road cess is due from the intermediate holder. Apart from the difficulty presented by the word "ryot" in S. 77 to which we have referred already, it is to be doubted if S. 74 of the Local Board's Act which gives the landholder " the same powers as may under any Act or Regulation be exercised by any landholder in the collection and recovery of rent " is an enactment which makes the money recoverable "as if it was rent." Having regard to the context and the enactment of a special clause for jodi, etc., the preferable construction of this clause would seem to be to confine it to moneys recoverable from ryots.

Amerchand & Co. *v.* Ramdas Vithaldas, I. L. R. 38 B. 255. The decision in this case that a railway receipt is a document of title within the meaning of Ss. 102 and 103 of the Contract Act is in conformity with the policy underlying those sections and the learned Judges have rightly, if we may say so, declined to follow the view taken in *G. I. P. Railway Co.* v. *Hanmandas* [1]. That case has been adversely commented on by Messrs. Shephard and Cunningham and is based on an erroneous view of Ss. 102 and 103 of the Contract Act. We are not however satisfied with the way it has been dealt with in the present case. The learned Judges, without examining its soundness, merely get over it by relying on the explanation to S. 137 of the Transfer of Property Act and by suggesting a distinction based on the fact that in the case before them the transit 'for part of the distance' (being by sea) was identical with the 'transit of goods

1. (1889) I. L. R. 14 B. 57.

shipped under a bill of lading'. We doubt if this distinction would suffice to assimilate the document to a 'bill of lading' for the present purpose; and as for the reference to 'railway receipt' in the explanation to S. 137 of the Transfer of Property Act, it seems to us putting the argument too high to treat it as anything more than a legislative *recognition* of the fact that in this country railway receipts are in the ordinary course of business used as instruments of title to goods.

The error underlying the decision in *Hanmandas's case* is the assumption that Ss. 102 and 103 of the Indian Contract Act were intended to reproduce the English law as it stood prior to the Factors Act of 1877 and as declared in cases like *Farina* v. *Home* [1]. Up to 1877, the rule in England as to the defeasibility of the right of stoppage *in transitu* by the transfer of a document of title to the goods was *confined* to bills of lading. But the Indian Contract Act in expressly adding the reference to 'other documents' or instruments of title in Ss. 102 and 103, made a conscious departure from the English law as it stood at the time and anticipated the Factors Act of 1877. In this view, it is significant that, as pointed out by Sir Frederick Pollock, the sections in the original draft of the Law Commissioners mentioned only bills of lading and the reference to other documents was added by the legislative department in India. The reason for the change is not difficult to find. In treating some of these documents as mere 'offers' by the warehouseman to hold the goods for a particular person or mere 'tokens of authority to receive possession', the Courts in England put upon them an interpretation completely opposed to the view taken of them by the legislature (in the Factors Acts of earlier date) and by the business world and hence it was necessary to have a legislative inclusion of such documents within the scope of the rule applicable to documents which may be described as 'symbols of the goods' (See Benjamin on Sales, 5th Edn. p. 851). This was done in India by Ss. 102 and 103 of the Contract Act and in England by the Factors Act of 1877.

The unreported decision of Farran J. in *Trikam Panachand* v. *B.B. & C.I. Railway* referred to in *G.I.P. Railway* v. *Hanmandas*[2] may perhaps be supported on the ground that the language

1. (1846) 16 M. and W. 119. 2. (1889) I. L. R. 14 B. 57 at p. 66.

of the receipt in that case did not admit of its being construed as a document of title in any sense. That such was his idea is shown by the inclination of his opinion expressed in the other unreported case (*Chunilal* v. *G. I. P. Railway Co.*)[1] where the language of the receipt was capable of such construction. Reference may be made in this connection to *Gunn* v. *Bolckow Vaughan and Co.*[2] where Mellish L. J. defined the expression 'document of title' as signifying 'something which represents the goods and from which, either immediately or at some future time, the possession of the goods may be obtained'. The possibility of a distinction, suggested by Sargent C. J., between the definition for the purposes of Ss. 102 and 103 on the one hand and that for purposes of S. 108 on the other, seems to be untenable, for both sets of provisions are based on the same policy, which in England was carried out by the successive Factors Acts both as regards agents and as regards buyers left in possession of goods or documents of title to goods, *viz.*, the protection of transactions *bona fide* entered into on the faith of *apparent* ownership.

Brenden *v.* **Sundarabai**, I. L. R. 38 B. 272.

On the principal question in the case, the conclusion of the learned Judges seems to us the only reasonable one possible, *viz.*, that a service inam, when disannexed from service, becomes ordinary private property and that inalienability arising from the nature of the tenure will not suffice to support a plea of a *custom* of inalienability independent of the tenure.

There were one or two other questions in the case and some of the observations of the court in connection with them call for a few remarks. For instance, referring to the fact that the last owner who was alleged to have disposed of the property by will had no coparceners at the time of his death, the learned Judges say "if he did make a will, as is alleged, it is difficult to see how a subsequently adopted son can defeat the provisions of that will." It is not clear whether the Court proceeded on the footing that the property was self-acquired or regarded it as ancestral (as to this, see *Gunnaiyen* v. *Kamakshi* [3] *Pingala* v. *Chalamayya* [4]). But if it was the latter, the law as to the effect of the adoption on the

1. Referred to (1889) I.L.R. 14 B. 56 at p. 67. 2. (1875) L.R. 10 Ch. Ap. 491.
3. (1902) I. L. R. 26 M. 339. 4. (1907) I.L.R., 30 M. 434.

operation of the will cannot as yet be regarded as beyond doubt. Two eminent Hindu Judges of the Madras High Court have of course held that the title of the son adopted by the widow will not relate back to the death of the adoptive father so as to affect the dispositions made by him (per *Subramanya Aiyar* J. in *Ganapati Aiyan* v. *Savitri Ammall* [1] and *Bhashyam Aiyangar J.* in *Sriramalu* v. *Kristnamma* [2]) and in the first mentioned case Sir Subramanya Aiyar went further and held that even if the adopted son's title so related back, the devise was nevertheless not defeated by survivorship because the son's title in such a case was not *prior* to, but only *simultaneous* with the title under the will. Justice Shephard on the other hand held in the same case, almost as a matter of course, that 'the interest of the adopted son clearly could not be defeated by a will' and he upheld the devise in the particular case only on the ground that the adoption was made *on condition* that the gift under the will was not objected to. The effect of a subsequent adoption in divesting prior estates is to a certain extent indisputable and the question may well be raised that this effect extends as much to titles derived by *volunteers* under the will of the adoptive father as to titles vested by *inheritance* to him.

Another point of view is also possible. So early as the middle of the last century, the Pundits of the Sadar Dewani Adawlut at Madras expressed it as their opinion that if a Hindu testator died giving verbal instructions to his wife to adopt, her compliance with those instructions would invalidate the will 'it being incompetent for the testator who authorised the adoption of a son to alienate the whole of his estate and thereby injure the means of maintenance of his would-be heir' (see *Nagalutchmee Ammal* v. *Gopu Nataraja Chetty* [3]). Though the question does not appear to have been decided in any reported case, the principle underlying the above opinion has been accepted in many a later case (see for instance *Vinayak Narayan Jog* v. *Govindrav* [4]).

Another question dealt with in the case under notice is as to the effect of certain prior probate proceedings on the contention that after the date of the will the testator, in revocation of a

1. (1897) I. L. R., 21 M. 10. 2. (1902) I. L. R. 26 M. at pp. 151,152.
3. (1856) 6 M. I. A. 309 at p. 320. 4. (1869) 6 B. H. C. R. A. C. 221.

clause therein against adoption, gave his widow permission to adopt. It is not clear whether the revocation pleaded in the second suit was of the whole will or only of the clause against adoption. In the former case, the Probate will of course bar the plea; but if and in so far as the alleged revocation related to the adoption clause, the matter will stand on a very different footing. The question of the permission to adopt and the effect of the adoption on the will did not fall within the scope of the Probate proceedings and any findings of that court thereon would not be *res judicata* even *inter partes* and much less *in rem*. In this view we are unable to accept as correct the conclusion of the learned Judges that the words in the will about adoption 'as part of the will, formed part of the testamentary document speaking from the death of the testator and that conclusively determined between the parties the question.....whether or not the statement, as to his having given any authority to his widow to adopt, expressed his wishes at the time of his death.' Any observations or even findings on the adoption question in the probate proceedings can stand on no better footing than those relating to the question of the domicil of the testator in the leading English case of ***Concha*** v. ***Concha*** [1].

Secretary of State for India *v.* **Major Hughes**, I. L. R. 38 B. 293.

Two questions are dealt with in this case, one as to the bar of limitation and the other as to the power of the court to interfere with an assessment made by a local body (the cantonment authority) under statutory rules. The plea of limitation was raised with reference to the fact that the payment under protest had been made by a cheque given more than three years before date of suit, though it was cashed within that period. It is somewhat curious that the point has rarely come up for consideration before and no authority is referred to in the Judgment but the decision of the learned Judges overruling the plea is supported by *Garden* v. *Bruce* [2], extracts from which will be found in *Komal Prasad* v. *Savitri Bai* [3].

1. (1886) L. R. 11 A. C. 541 and L. R. 29 C. D. 268.
2. (1868) L. R. 3 C. P. 300.
3. (1905) I. L. R. 28 A. 54.

As to the Jurisdiction of the court to interefere with the assessment, the learned Judges base their conclusion on two grounds *viz.*, (1) that in fixing a period of only 3 days for objections, the cantonment Magistrate 'was disregarding the express provisions of the Regulations' and there was accordingly no substantial compliance with them and (ii) that in assessing the rate upon the gross income of the plaintiffs, the cantonment Magistrate wholly disregarded the basis upon which the rate is to be assessed under the rules. The case is a striking, but by no means uncommon, instance of the way that local bodies exercise their powers and it would be unfortunate if the court had felt hampered by any rule of law in interfering to give redress in such cases. In our own Presidency, some illustrations of the kind will be found in *Leman* v. *Damodaraya* [1], *Tuticorin Municipality* v. *S. I. Railway* [2], *Fischer* v. *Twigg* [3], *Municipal Council of Cocanada* v. *The Standard Life Assurance Co* [4], *and Municipal Council of Mangalore* v. *The Codial Bail Press* [5].

1. (1876) I. L. R. 1 M. 158.
2. (1889) I. L. R. 13. M. 78.
3. (1897) I. L. R. 21 M. 367.
4. (1900) I. L. R. 24 M. 205.
5. (1903) I. L. R. 27 M. 547.

NOTES OF INDIAN CASES.

China Veeraya *v.* **Lakshminarasimma.** (1912) 37 M. 406.

In *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* [1] the Full Bench of our Court while holding that the judgment in a suit by a reversioner to set aside an adoption would operate as *res judicata* against the actual reversioner, expressed that there might be difficulty in extending the rule to cases of alienation owing to certain dicta of the Privy Council. For a moment it looked by the decision in *Muthusami* v. *Masilamani* [2] as if our Court was prepared to disregard those dicta and hold that the suit by the reversioner even in the case of alienations is a representative suit, that it would not abate on his death, and that the adjudication would be binding on the actual reversioner. The decision under review is apparently not prepared to accept those positions and holds that the suit abates on the death of the person that brings the suit. The decision need not however be regretted for it seems to contain a compensating advantage. It explains *Muthusami* v. *Masilamani* [2] on the ground that there, the action was on behalf of the whole body of reversioners. If by the simple expedient of purporting to bring the suit on behalf of the whole body of reversioners or bringing the suit under O. 1, R. 8. the consequence of the suit abating or the adjudication not operating as *res judicata* for or against the actual reversioner could be averted, we shall have achieved an easy solution of a difficult problem. As pointed out by the Chief Justice Sir Arnold White and Benson J. in *Arunachalam Pillai* v. *Vellaya Pillai* [3] there is no necessary conflict between the position that a suit by the reversioner will abate on his death and the position that the adjudication if arrived at would be binding on the whole body of reversioners. Their Lordships seem to have had in mind the rule of English Law that class actions abate on the death or bankruptcy of the plaintiff on record, though if the suit proceeds to the stage of judgment, the judgment will bind the whole class. A different rule is enunciated by Abdur Rahim J. in *Sivagurunatha Chettiar* v. *Ramaswami Aiyangar* [4] with regard to class actions in India and if accepted, might avoid the necessity for fresh action even in the case of reversioners' actions. The solution is an attractive one

1. (1906) I.L.R. 29 M. 390.
2. (1909) 33 M. 342.
3. (1912) 23 M. L. J. 719.
4. (1913) 25 M. L. J. 630.

but one is afraid may not be accepted without demur. The reasoning of *Chirovulu* v. *Chirovulu*[1] might support the rule but the objections to the extention of the rule laid down in that case to cases of alienation affects also the new development. To bring people with different rules of limitation for their suits and with rights not concurrent but successive within O. 1 R. 8 does certainly involve considerable strain on the language used.

Vadivelam Pillai *v.* **Natesam Pillai.** I. L. R. 37 M. 435.

We confess we prefer the decision in 23 M 89 to the decision in this case. It is an attempt to give effect to the equities in favour of the alienee in a co-parcener's suit for his share in the alienated property which is deprecated by the Full Bench Case in *Ibramsa Rowthan* v. *Thirumalai* [2]. Where one of two co-parceners makes an unauthorized alienation, the other co-parcener may either exercise his right of interdiction and sue for the recovery of the entire property or affirm the alienation to the extent of the share of the vendor and sue for the recovery of his share which then becomes his separate property. *Chinna Sanyasi* v. *Suriya* [3], *Kadegan* v. *Periya Munusami* [4]. If he does the former, at the option of the alienee he might be given an unconditional decree for possession with liberty to the defendant alienee to work out his equities in a separate suit for partition *Iburamsa Rowthan* v. *Thirumalai Muthuvara Thiruvenkatasami Nair* [2], *Ashanulla* v. *Kali Kinkur Kuro* [5], *Suraj Bunsi Koer* v. *Sheo Persad Singh* [6], or he might be given a decree conditional on refunding the amount found binding on the family on whose behalf really he is suing (cf. widow's and Karnavan's alienations). Even where he chooses to affirm the sale and sue for his share it looks *prima facie* equitable that he should be made liable for his proportion of the consideration found to be binding. But this is to overlook, as Mr. Justice Subramania Aiyar rightly points out the possibility of the half-share being worth very much more than that for which it is sold, and the consequent hardship on the other co-parcener.

---

1. (1906) I. L. R. 29 M. 390.
2. (1910) I. L. R. 34 M. 269.
3. (1882) I. L. R. 5 M. 196.
4. (1903) 18 M. L. J. 477.
5. (1884) I. L. R. 10 C. 626.
6. (1880) I. L. R. 5 C. 148.

The learned judges seem to assume that the value of the vendor's share is no concern of the plaintiff. That this is a wrong assumption can be shown if we take a concrete example. Suppose the property sold is worth Rs. 2,000 while it is sold only for Rs. 1,000 of which Rs. 500 is found to be for a binding purpose. Let us assume that the other family property is worth only 200, while the debts amount to Rs. 1,000. At a proper partition, the vendor's share would have been liable for ½ of 1000, + ½ of 500 *i. e.*, 750 Rs, and the other co-parcener's share for the balance, *i. e.*, Rs. 750. If the view of the learned Judges is right, the result would be that the vendor would be let off with at the utmost Rs. 200 + Rs. 250, *i. e.*, 450, and the other co-parcener would be liable for the whole of the balance of the debts because the creditor of the family cannot obviously be asked to proceed *pro rata*. It may be answered that this is an equity which may be considered in the action itself but that would be converting the suit into one for general partition at the instance of the defendant which as we have stated, is not permissible according to the Full Bench in 34 M. 269. On strict theory, the courts would not be justified in apportioning liabilities between the vendor in whose shoes the purchaser stands and his coparcener in a suit other than a suit for general partition. From their tenderness to purchasers and creditors Courts have proceeded sufficiently far in derogation of the rights of coparceners that they may properly be asked to halt and to consider whether it is right to remove what seems to be a desirable "check on a disposition on the part of speculative persons to enter with some co-parceners into transactions calculated to affect the rights of other coparceners who are not parties thereto."

Rajah of Venkatagiri *v.* **Chinta Reddi**, I. L. R. 37 M. 408

We have no doubt that this case has been rightly decided though we are not so sure that some of the propositions on which it is based are not a little too broadly stated. It may be correct enough to say that a suit can be terminated only in certain known ways though in the face of the Privy Council decision in *Moonshee Ameer Ali* v. *Maharanee Inderjeet Singh*[1] the universal application of the rule may be doubted. In that case, their Lordships refused to entertain an appeal on the ground that there was

1. (1871) 14 M. I. A. 203

an engagement by the counsel for the appellant that he would not file an appeal and by reason of such understanding the party had gained certain advantages in the disposal of the case. It could hardly be said that such an undertaking was an adjustment of the suit. Again, it may be doubted if a Court is bound to hear the evidence adduced by a party when he has closed his case preferring to abide by the decision in another case. No doubt, the parties could not require the Court to give effect to an agreement of that sort but if the Court chose to act on the agreement and wait for the decision, would it then be open to the parties to resile from the agreement and ask the Court to decide the case on evidence? This, we doubt. But at the same time, as observed in *Vasudeva Shanbhog* v. *Naraina Pai* [1] there being no provision of law entitling the Court to settle the case on the happening of an event in accordance with the agreement of parties (when such agreement does not amount to an adjustment or compromise), unless the parties continued to be of the same mind in which case the Court could make a consent decree, it would be put to the necessity of deciding the case as it stands, *i. e.*, with no materials or to get out of the *impasse* it may have to allow parties to adduce evidence. In this case, the burden of proof being on the defendant, if no evidence was permitted to be given, the decision should have gone in favour of the plaintiff, a result neither in accordance with the agreement of the parties nor on the merits. Such being the case, the only proper course was that followed by their Lordships. But if the burden of proof lay on the plaintiff it would have been within the power of Court to work out the result contemplated by the parties. Whether in a particular case, the court should allow that result to happen would be a matter entirely within its discretion. On the other hand, if there was evidence on the record or if the party had not finally closed the case, the court would have no option but to hear the case on the merits. Similar questions have arisen with reference to agreements to settle cases by oath and we may observe, have been decided on these lines (see *Vasudeva Shanabhog* v. *Naraina Pai* [1] *Ayyakannu* v. *Muthia* [2] *Mogan* v. *Pathu Kuth* [3].

1. (1879) I. L. R. 2 M 356. 2. (1906) 17 M. L. J. 99,
3. (1907) I. L. R. 31 M. 1.

Meera Kasim Rowther *v.* **Foulkes,** 37 M. 432.

In this case, their Lordships hold and we think rightly, that there is nothing in the Estates Land Act to preclude the operation of any custom or contract conferring on the tenants a larger right of using the land than is given by S. 11 of the Act. In the absence of anything in the wording of the section or in S. 187 which enumerates the cases in which the right of private contract is taken away, the conclusion arrived at seems to be the only conclusion possible.

Pratap Chandra Shaha *v.* **Mahomed Ali Sarkar,** I. L. R. 41 C. 342.

We are not quite sure as to the correctness of the decision in this case. The document provided for payment of interest at one anna per rupee but did not state whether this rate was payable per mensem or per annum. The learned Judges hold that 'oral evidence was not admissible to show what was intended by the parties' and they rely on the analogy of blanks left in a document (*Vide* illustration (*b*) to S. 93 of the Evidence Act). It seems to us that the analogy is not true and that the case is really governed by the first proviso to S. 92. A blank like, the other kind of patent ambiguity illustrated under S. 93, indicates a 'subjective' uncertainty, *viz.*, that the author of the document has not made up his mind what to put in; and that is the basis of the rule excluding parol evidence in such cases. But the present case belongs to a different category. When the parties mention interest at one anna per rupee, it is really an 'imperfect expression' of their mind; it cannot reasonably be assumed that they had not agreed as to whether this rate was payable per mensem or per annum. The omission to refer to it in the document must be due either to mistake in *reducing the agreement to writing* or to the fact that according to the course of business between the parties or in the locality it was usual to provide for the monthly rate of interest only. Thus for instance in Southern India, it is quite common to find interest being spoken of as being ½ per cent. or ¾ per cent, meaning of course the rate *per mensem*. On either of the above views, we think parol evidence would have been admissible, of the intention of the parties in the one case or the usage in the other and nothing in the Evidence Act affects the correctness, in this sense, of the early decision in *Mahomed*

Sumsoodeen v. *Moonshee Abdool Huq* [1].Surely when the landlord found out the mistake, it was open to him to sue for rectification of the document and for that purpose extrinsic evidence of the *agreement* between the parties would be admissible under the first proviso to S. 92 of the Evidence Act. But a rectification suit is not compulsory and so far as the admissibility of evidence is concerned, it does not turn on the form of the suit (see *Mahendra Nath* v. *Jogendra Nath* [2].) If the evidence did not disclose an enforceable *agreement* between the parties as to the interest, that would be a different matter.

Amir Ali *v.* **Yakub Ali Khan,** I. L. R. 41 C. 347.

Here, on the other hand, the learned Judges seem to have laid down the rule of admissibility somewhat too broadly. If the transaction is one to which S. 107 of the Transfer of Property Act will apply, the result of the non-registration of the lease would be that the *contract* cannot be proved or enforced at all. Even where the transaction is not one 'required by law to be reduced to the form of a document', if, as a matter of fact, the parties enter into a written contract which becomes inadmissible for want of registration, other evidence of the terms of the contract would be excluded under S. 91 of the Evidence Act, except of course, where the document was by common consent allowed to become inoperative. The decision in the particular case may perhaps be justified on the last mentioned ground. But the observations in the judgment are quite general and ignore S. 91 altogether. It is possible, according to one view, to prove the *relationship* of landlord and tenant *dehors* the document, but that is not the same thing as proving the *terms* of the tenancy. Whether, though the contract cannot be proved and enforced as such, the landlord may not recover by way of damages or as for use and occupation and if so, whether the rent fixed may not be proved as the proper measure of damages, are different questions and cases like *De Medina* v. *Polson* [3] seem to be relevant only in that connection. In referring to English decisions under the Statute of Frauds, it must also be borne in mind that the operation of that statute is not quite the same as that of the Indian Registration Act.

1. (1861) W. R. 379. 2. (1897) 2 C. W. N. 260.
3, (1815) Holt N. P. 47.

NOTES OF INDIAN CASES.

Kalyan Chand Lalchand *v.* **Sitabai,** I.L.R. 38 B. 309.

Whatever may be the precise scope of the English rule as to judgments *in rem*, the Indian law on the point is definitely laid down in S. 41 of the Evidence Act and the Full Bench seem to us to have correctly interpreted that section in holding that it does not apply to a finding of 'not proven' in probate proceedings. The laconic opinion recorded by the Full Bench must have been a disappointment to Mr. Justice Beaman. We are disposed to agree with him that the fact of probate being optional in cases not governed by the Hindu Wills Act should make no difference in the application of S. 41 of the Evidence Act. Nor has S. 59 of the Probate and Administration Act any bearing on the question. But his general proposition that in every case where the judgment is *in rem*, if it would have been *res judicata inter partes*, it is also *res judicata* against all the world' is too broadly expressed and it is further by no means easy to determine what are judgments 'in rem,' for the purpose of the above rule.

That a finding in probate proceedings *may* be *res judicata inter partes* seems to have been recognised by the House of Lords in *Concha* v. *Concha*.[1] and by the Privy Council in *Mirza* v. *Pear Saheb* [2]. The principle that the Court which pronounced the judgment pleaded as a bar must be competent to try the *subsequent* suit is satisfied so far as contentious probate proceedings are concerned, because they are tried by the District Court. The requirement that the former adjudication must have been in a 'suit' should not be taken literally, though the present case is not altogether analogous to cases like *Ram Kirpal* v. *Rup Kuari* [3]. It is however somewhat curious that neither in the judgments of the Court nor in the arguments (as reported) is any reference found to cases like *Arunmoyi Dasi* v. *Mohendranath Wadadar* [4] *Pratap Chandra Shaha* v. *Kali Bhanjan Shaha* [5] *Sheik Azim* v. *Chandranath Namdas* [6] *Khirodamayi Barmani* v. *Bagala Sundari Barmani* [7].

Kaluram Pirchand *v.* **Gangaram Sakharam,** I.L.R.38 B. 331.

Though the language of the Code seems to suggest that the passing of a preliminary decree is in some cases optional

1. (1886) L. R. 11 A. C. 541.
2. (1905) L. R. 32 I. A. 244.
3. (1883) L. R. 11 I. A. 37.
4. (1898) I. L. R. 20 C. 888.
5. (1900) 4 C. W. N. 600.
6. (1904) 8 C. W. N. 748.
7. (1906) 4 C. L. J. 492.

(cf. O. 20, R. 15) and in certain cases obligatory (cf. O. 20, Rr. 13 and 16 and *Rajunath* v. *Ganapatji* [1] we think that the learned Judges have rightly held that it is the duty of the Court to draw up such a decree and the disability imposed by S. 97 cannot apply in cases where no preliminary decree was drawn up. That in the absence of a separate decree, there can be no appeal from the findings or even decretal portions in the judgment may now be taken to be the established rule (see, for instance, *Bai Diwali* v. *Vishnav* [2] and *Ayyappa Mudaliar* v. *Gopalasami Mudaliar* [3].

Ahmedbhoy Habibbhoy *v.* **Waman Dhondu.** I.L.R. 38 B. 337.

While agreeing that no second appeal will lie in Land Acquisition proceedings, we are unable to accept the view that the appeal provided for in S. 54 of the Land Acquisition Act can be entertained by Courts other than the High Court. The question is of little practical importance in this Presidency as references under the Act are here made only to the District Court from which the appeal can lie only to the High Court. But even where, in pursuance of the definition of 'Court' in the Act, the reference is made to any other tribunal, it seems to us difficult to override the language in S. 54 prescribing a specific appellate forum by any argument based on the general reference to 'the provisions of the Code of Civil Procedure applicable to appeals from original decrees.' Whatever may be the effect of these words, the Code nowhere prescribes the appellate forum but leaves it to be declared by other enactments. The correct view was taken in *Balaram* v. *Sham Sunder* [4]. It is not easy to follow the reasoning on this point in *Nathubhai* v. *Manordas* [5], but in so far as it rests on the ground that the award of the Court is a 'decree', it cannot stand after the opinion expressed by the Judicial Committee in the *Rangoon Botatoung Company's Case* [6].

Bhupendra Nath Basu *v.* **Ranjit Singh I. L. R.** 41 C, 384.

We have our own misgivings as to whether some of the observations of Fletcher J. though unexceptionable in the particular case, are not likely to be misapplied on account of the generality of the language used. It would hardly be safe to

1. (1904) I. L. R. 27 A. 374.
2. (1909) I.L.R. 34 B. 182.
3. (1912) 16 I. C 45.
4. (1896) I.L.R. 23 C. 526.
5. (1911) 14 Bom. L.R. 325.
6. (1912) I.L.R. 40 C. 21 (P. C.)

apply to suits relating to election disputes in this country, the principles of the English law relating to prerogative writs. The two classes of proceedings do not rest on the same legal theory. To take for instance one of the considerations mentioned by his Lordship, it would be too much to hold that a suit in connection with a municipal election must be viewed with disfavour because of the fact that the plaintiff first availed himself of an appeal provided for by the election rules. And again the argument based on prejudice to the defendant from a possible change in the electorate can easily be pushed too far.

Adhar Chandra Pal *v.* **Dobakar Bhuyan** I.L.R. 41 C. 394.

In their reluctance formally to reconsider the rule in *Nisa Chand* v. *Kanchiram*,[1] the learned Judges have certainly strained a point in favor of the appellant before them. We are unable to agree that in the circumstances of the case, the facts referred to in the judgment established a *right to* possession (as distinguished from a mere possessory title). The particular title relied on in the plaint had been found against, and in the case of a proprietary estate, where the landholder's right is only to the rent and not to actual possession, it seems too much for a Court of *second appeal* to infer a *right* to possession from the payment of rent (coupled with the possession.) It is no better than drawing the inference from payment of Kist to Government. One may doubt, even as a matter of pleading, whether when a plaintiff relies on a title and possession in pursuance thereof, the Court can properly give relief on another title, inferring the latter, only from the possession alleged in the plaint for a different purpose.

Nafar Sheikh *v.* **Emperor** I.L.R. 41 C. 406.

This decision and the earlier one in *Lukhi Narain Serowji* v. *Sri Ram Chanda* [2] cover a point that has of late been raised more than once before the Madras High Court, *viz.*, whether an appellant (in a civil or a criminal case) can be restricted to any selected ground out of those specified in his petition of appeal. A proceeding by way of *revision* may stand on a different footing.

---

1. (1899) I. L. R. 26 C. 579. 2. (1911) 15 C. W. N 921

On the merits the learned Judges dispose of the case on the point raised under S. 118 of the Evidence Act and express no opinion of their own as to the effect of S. 13 of the Oaths Act in cases in which the Court *deliberately* omits to administer the oath to a witness.

Israil *v.* **Shamser Rahman**, I. L. R. 41 C. 436.

There can be little doubt as to the soundness of the principles here laid down by their Lordships for the guidance of the Court. While also fully sympathising with every endeavour of the Court to put down what the learned Judges call conduct amounting to 'defiance' of its authority, we venture to doubt if the particular case is not an extreme instance of the exercise of the Court's revisional powers whether under the Code or under the Charter Act. It can scarcely be denied that the granting of a temporary injunction is a matter of discretion and it is difficult to view the conclusion of the lower appellate Court as vitiated by anything more than an error of law if not merely an error of discretion.

In re **An Attorney**, I. L. R. 41 C. 446.

We would invite attention to the interesting observations of their Lordships in this case with reference to the mass of case law that has grown up in connection with the grant of sanction under S. 195 of the Criminal Procedure Code. We are however, not without doubt whether the argument that, the disciplinary proceedings against the attorney being of a quasi-criminal nature, any statements made by him therein could not form the basis of a charge of perjury, did not deserve more serious consideration than the Chief Justice seemed inclined to give to it. (*Cf. Kotha Subba Chetti* v. *The Queen* [1].)

(1883) I. L. R. 6 M. 252.

NOTES OF INDIAN CASES.

Durga Prasad Singh *v.* **Rajendra Narayan Bagchi** I. L. R. 41 C. 493 (P.C).

The decision of their Lordships is substantially one on facts. But scattered through the judgment are observations in the nature of legal principles to one of which we think it necessary to draw attention, only to guard against a possible mis-interpretation. This relates to the admissibility in evidence of the preliminary negotiations, in connection with the construction of a contract as ultimately reduced to writing. Their Lordships' carefully expressed dictum that the construction of the document 'could not be varied by extraneous evidence as to the negotiations which led up to the contract' should not be understood as shutting out such evidence *for all purposes.* It will be sufficient to refer to the observations of the House of Lords, in the case mentioned by Lord Shaw in the course of the argument,—*Gordon Comming* v. *Houldsworth* [1], as indicating the purposes for which and the limits within which such evidence will be admissible. Nor can their Lordship's decision be construed as laying down *as a rule of law* that where properties transferred are described with reference to both extent and boundaries, one of them alone—boundaries—ought to prevail and the other to count for nothing.

Chinna Kotayya *v.* **Raja Appa Row** (27 M. L. J. 244) [*Appellate Courts and O.* 23, *R.* 1. *C. P. C.*]

Till recently it was taken for granted in this Presidency that an Appellate Court can under O. XXIII, R. 1 C. P. C. (S. 373 of Act XIV of 1882) grant permission to the plaintiff to withdraw his suit with liberty to bring a fresh suit. The decision of their Lordships (*Oldfield and Napier JJ.*) in the above case is admittedly a departure from this view. Referring to *Tirupathi* v. *Muthu* [2] and *Chidambara Mudali and others* v. *Kozhandavelu Mudali and others* [3] as instances of the exercise of the power the learned Judges point out that the question was not raised in those cases. Considering the importance of the question and the long-standing practice, it would be permissible to examine the soundness of this decision.

---

1. L. R. (1910) A. C. 537. 2. (1888) I.L.R. 11 M. 322.
3. (1912) M. W. N. 1003.

Their first argument is thus stated at p. 245, 'As therefore cl. (3) applies entirely cl. (1), it necessarily follows that in all suits withdrawn without permission, the court has got power to award costs after the withdrawal. This power cannot exist where the suit has terminated in a decree against the plaintiff, because costs have already been provided for in the decree and cannot be awarded after the withdrawal.' This reasoning about costs though applicable to the first Court is inapplicable to the Appellate Court, because when an appeal is entertained by the Appellate Court, fresh costs are incurred by all the parties, The above reasoning and apparently all the remarks at pp. 246, 247 refer to the power of the First Court to grant permission to withdraw after decree is passed, as would be seen from the last paragraph at p. 247. And the argument seems to be, since after decree the first Court cannot grant permission, the Appellate Court also cannot do it. But the First Court after passing a decree is not competent to alter or vary the decree or in any way nullify its effect except under S. 152 C.P.C., or O.XX, r. 11. See the observations of their Lordships of the Privy Council in *Subbamma Rao* v. *Venkatarama Rao* [1], and of Mr. Justice Bhashyam Aiyangar in *Venkatagiri Aiyar* v. *Sadagopachari* [2]. When an appeal is filed, it is the Appellate Court that is seized of the matter and in that case, one would think that it is the Appellate Court alone that can grant permission to withdraw after decree and not the first Court.

Coming to cl. (2), Their Lordships say cl. (2) is applicable in terms only to a pending *suit*. There appears to be no reason however why this provision cannot be read as applicable to pending *appeals* also, particularly in view of the wide provisions of S. 107 (2). Many cases occur where the Appellate Court finds without the defect being noticed by the first Court, that a suit has to be dismissed owing to some formal defect, as in the case of *Vavuthu Naicker* v. *Venkata Seshaiyer* [3], where all the trustees had not been made parties in the suit by one of the trustees. The next argument of their Lordships is, the words

1. (1900) I.L.R. 24 M. 1 : 10 M.L.J. 221. 2. (1904) 14 M. L. J. 359.
3. 24 I. C. 806.

'abandon part of a claim' are not applicable to a suit which has terminated in a decree, for the claim must be deemed to have merged in the decree. This really presents no difficulty. If the *defendant* is the appellant the decree of the first court is re-opened. And, when plaintiff is the Appellant, the appeal must certainly relate only to such claims or part of a claim as have not been decreed by the first Court. No question of merger in the decree will therefore arise in either case.

Their Lordships also suggest in the second paragraph at p. 247 that if the word 'appeal' be substituted for 'suit', it would lead to some difficulty. But this is exactly what S. 107 (2) provides for, *viz.*, 'The Appellate Court shall have the same powers and shall perform *as nearly as may be* the same duties as are conferred and imposed by this Code on Courts of Original Jurisdiction.' In view of these wide terms there is little force in the argument that the word 'appeal' cannot appropriately be substituted for 'suit' in O. 23, R. 1.

In referring to S. 107 in the last paragraph at p. 248, their Lordships content themselves with saying that S. 107 is inapplicable because a special provision as in the case of O. XXII, R. 11 could have been made here also. It must be noted that O. XXII, R. 11 and S. 107 (2) formed one section under the old Code *viz.* S. 582. The fact that they now appear in different parts of the Code is no argument for saying that a special provision should have been made in this case also and should be made in all cases where it is intended that the Appellate Court should exercise the powers of the original Court. This would be giving little or no effect to S. 107, and if the same reasoning be applied to other parts of the Code as well, *e. g.* to O. XXIII, R. 3 (passing a decree in terms of compromise), it would be defeating the ends of justice.

The only decision their Lordships refer to is that in *Eknath* v. *Ranoji*[1]. There the appeal was dismissed by the District Judge before it was admitted and leave to withdraw was granted without notice to the Respondent. Such a procedure is certainly objectionable, see *Kalyan Singh* v. *Lekhraj Singh*[2] and *Kareem Bee* v. *Begam Bee*[3]. The judgment in *Eknath* v. *Ranoji*[1] does

1. (1911) I.L.R. 35 B. 261. 2. (1884) I.L.R. 6 A. 211.
3. (1867) 3 M. H. C. R. 368.

not even refer to S. 107 C. P. C. It cannot therefore be regarded as an authority on the present question. The Allahabad High Court seems to uphold the wider interpretation suggested. In *Genda Mal* v. *Prabhu Lal* [1], *Edge C. J.* and *Bannerjee J.* say at p. 99, "When an order is made under S. 373 in the course of an appeal permitting to withdraw the suit with permission to file a fresh suit, it decides nothing as to the merits of the decree of the first Court, but it merely wipes out that decree by reason of the suit being withdrawn." The Calcutta High Court has exercised this power in various cases, see *Ram Pershad* v. *Bhurosa* [2], *Nazir* v. *Moheboolah* [3], *Kunwar* v. *Narain Singh* [4]; some later cases of the Calcutta High Court only point out the circumstances under which this power should be exercised.

As to the desirability of the existence of such a power in the appellate Court, there can be no doubt, for as their Lordships *Sundara Aiyar* and *Sadasivalu Aiyar JJ.* remark in *Chidambara Mudali* v. *Kozhandavelu Mudaly* [5], a plaintiff may state all the facts of his case clearly and produce all his evidence, and yet misconceive his rights. It may be a sound rule of practice that courts should not exercise such a power except under exceptional circumstances. But where circumstances do justify it, we think courts ought not to be deprived of this power. It is therefore to be hoped that the point will be authoritatively settled ere long, either by a ruling of a Full Bench or by the exercise of the rule making power.

K, P. R.

---

1. (1895) I.L.R. 17 A. 97.
2. (1868) 9 W. R. 328.
3. (1872) 17 W. R. 164.
4. (1873) 20 W. R. 163.
5. (1912) M. W. N. 1003.

NOTES OF INDIAN CASES.

Sheo Sankar Ram *v.* **Juddo Kunwar** : I. L. R. 36 A. 383 (P.C.)

In this case, their Lordships agreeing with the Allahabad High Court affirm the principle "that there are occasions including foreclosure actions when the managers of a joint Hindu family so effectively represent all the other members of the family that the family as a whole is bound." Their Lordships go on to say "it is quite clear from the facts of the case and the findings of the court upon them that this is a case where this principle ought to be applied. There is not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family." This is certainly very far from affirming generally that the manager represents the family in all actions affecting the family interest; on the other hand it looks like an echo of the earlier cases which regarded the non-joinder of the other members as an irregularity which will not vitiate the proceedings unless injury is shown to have resulted. Earlier in the judgment their Lordships take care to state that the purchase of the property was in the names of the persons who were made parties to the action. Viewed from this standpoint, this case only carries the principle of *Kishan Prasad* v. *Har Narayan Singh*[1] a step further. Nevertheless the observations in that case taken with the approval which is expressed in this case of the cases cited in *Jaddo Kunwar* v. *Sheo Shankar Ram*[2] seem to come very near affirming the general principle above referred to.

Muhammad Amir *v.* **Sumitra Kuar**, I. L. R. 36 A. 424.

The facts on which their Lordships pronounced the earlier decision to operate as *res judicata* are not quite clear. If the earlier suit was by the admitted trustee the decision would be obviously right and does not call for any comment. If on the other hand the previous suit was by two persons one of whom alleged himself to be a trustee in their private capacity in vindication of some private right of theirs though the private right which they asserted depended on its being found that there was a valid Wakf the judgment does seem to be open to exception. It would be in effect to read S. 11 C. P. C. so as to conflict with S. 41 of the Evidence Act. For whereas under S. 41 of the Evidence Act judgments relating to matters of public nature are not conclusive proof of the matters they state, this reading of S. 11 would

1. (1911) I.L.R. 33 A. 272 (P. C.). 2. (1910) I.L.R. 33 A. 71.

make them conclusive. Again in respect of private rights claimed in common it has been held that the adjudication will bind only if the relief also is claimed in common. Though a private right may be dependent on a public right, it could hardly be said that a person is litigating in respect of a public right when he is asserting only his private right. For instance an action is maintainable by any private individual for obstruction of highway on proof of special damage. If the reading of the learned Judges is right, the adjudication in such a suit as to the character of the way would be binding on the public for ever thereafter. Even supposing any litigation in respect of a public right will bind there is no justification in the section for holding that even unauthorised litigation will bind. Public rights can be litigated upon only in certain known ways. Because the Court wrongly adjudicated upon them in a private party's suit or because they had to be litigated upon for the determination of private rights, it could not be that the public is bound. No doubt, Order 1, rule 8, cannot be said to exhaust representative litigation. Suits under S. 92 C.P.C., suits under S. 14 Religious Endowments Act, suits in respect of public nuisance and several other kinds of suits can be thought of. Nevertheless, it seems to be an undue extension of the principle embodied in the section to apply it to suits brought by private parties in the assertion of their private rights, simply because those rights are dependent upon public rights.

Mita Prasad *v.* **Ramachara Sahu :** I. L. R. 36 A. 446.

Much of the confusion (there is a great deal of it) that surrounds the subject of Benami is due to a want of clear perception as to what that term imports. The true connotation of that term is that the person in whose name the property is purchased is a mere *alias* or *prete nom* : *Annada Pershad Panja* v. *Prasannamaji Dasi* [1], *Petherpermal Chetti* v. *Muniandi Servai* [2]. In this view a benamidar is not entitled to maintain a suit on behalf of the real owner and as their Lordships of the Privy Council point out in the first mentioned case, an adjudication against him would not bind the real owner in the absence of grounds for raising an estoppel. But the word Benami not being a term of art, it is loosely used to represent transactions that partake of the character

1. (1907) I.L.R. 34 C. 711 (P.C.) 2. (1908) I.L.R. 35 C. 551. P.C.

of trust or agency. *Kuthu Perumal Rajah* v. *The Secretary of State for India* [1]. The legal consequences of a benamidar so situated suing or being sued must obviously be different from those in cases of genuine benami. Where the case is one of trust, on principle, the adjudication should without more bind the beneficial owner unless fraud or collusion is made out. Except that estoppel can be much more easily raised and except in so far as in the case of contracts the benamidar may be viewed as an agent for an undisclosed principal cases of agency do not stand on a much different footing from the ordinary benami. The conditions of estoppel in cases of transfer of immoveable property are laid down in S. 41 of the Transfer of Property Act. Having regard to the prevalence of benami in this country (the section requires in addition to good faith reasonable inquiry by the transferee as to the powers of the transferor to make the transfer. In this matter this section may be usefully contrasted with S. 108 of the Contract Act where the buyer is protected provided he acts in good faith under circumstances which are not such as to raise a reasonable presumption that the person in possession of the documents of title has no right to sell the goods. It is conceived that the same conditions should be fulfilled before the real owner can be held to be estopped from contesting the judgment obtained against the benamidar.

In determining what is proper inquiry, the circumstance that the benamidar is the plaintiff may turn the scale and in the absence of anything in the circumstances to put the defendant in possession upon inquiry as to who is the real owner, the latter may properly not be allowed to recover on his secret title.—See *Shangara* v. *Krishnan* [4]. It may be that even this exception should be limited to cases where the true owner is aware of the litigation and does not object to it. Anyhow, where the real owner is in possession or as in the principal case, the benamidar pointedly tells the plaintiff that he is not the real owner there could be no justification for holding that the real owner is bound by the result of such litigation. The ordinary presumption of agency (See *Shangaran* v. *Krishnan*) [2] would not justify the raising of estoppel when the other side

1. (1907) I. L. R. 30 M. 245; s.c. 17 M.L.J. 174. 2. (1891) I. L. R. 15 M 267.

knows or is put upon inquiry as to the true state of title *Vyankappa* v. *Yamanasami* [1].

Nokunja Behari Sen *v.* **Harendra Chandra Sinha**, I. L. R. 41 C. 514.

The Calcutta and Allahabad cases having taken the view that for purposes of the criminal law the doctrine of 'absolute privilege' cannot be recognised in this country, in the absence of such a provision in S. 499 I. P. C. the learned Judges deal with the case on the footing of the applicability of the 9th Exception. It is to be regretted that on a matter of this kind, there should be such a fundamental difference of opinion between the several courts in India and the suggestion of a distinction between civil liability and criminal liability does not help to improve matters. The application of Exception 9 will give but a very inadequate protection. So far at any rate as counsel are concerned, courts have endeavoured to make the best of the situation by giving them the benefit of a presumption that the question complained of was asked in 'good faith' and 'for the protection of the interest of the client.' But we cannot help doubting if this position is logically defensible in the face of the definition of 'good faith' in S. 52 I. P. C. and of the rule in S. 105 of the Evidence Act which not only throw upon the accused the onus of proving the existence of circumstances bringing the case within the exception but positively directs that the *court shall presume the absence of such circumstances.*

Thakur Barmha *v.* **Jiban Ram Marwari**, I.L.R. 41 C. 590 (P. C.)

In view of what follows, the remark at the top of p. 599, that the property attached is 'conclusively' described in and by the schedule cannot be taken quite literally. The distinction drawn by their Lordships between 'description' and 'identity' is clear enough in the abstract, but we are afraid not always easy of application. Where the words of the schedule correctly apply to an existing property, the case is of course simple. But, where the question is not exactly one as to the identity, but as to the extent or the quantum of the property attached and sold the appropriate procedure to be followed to have any mistakes connected with it set right, is often a matter of doubt and the general observations in this Judgment do not materially help towards a solution.

---

1. (1911) I. L. R. 35 B. 269.

NOTES OF INDIAN CASES.

Baroda S. & W. Co., *v.* S. M. & F. Insurance Co., I. L. R., 38 B. 344.

It is well established that the time allowed by law for the institution of suits cannot be *extended* by agreement of parties. In the present case the learned Judges were asked to say whether by a carefully worded agreement, it could legally be *curtailed*. The question had been dealt with in *Hirabhai's* case [1] in a manner which the Chief Justice and Batchelor J. do not seem to consider altogether beyond doubt. But they thought the case before them stood on a better footing, as to the inapplicability of S. 28 of the Contract Act, as the agreement in question did not 'limit the time within which, he (the insured) was to enforce his rights' but operated to 'limit the time within which he is to have any rights to enforce.' We do not dispute the distinction, but with all respect we doubt if this difference should be allowed to defeat the policy underlying S. 28 of the Contract Act. The theory of 'freedom of contract' is not without its proper limitations and cannot be safely used to aid the circumventing of a legislative prohibition by a verbal contrivance. This brings us to the question of the precise scope and policy of S. 28.

It is difficult to follow the argument of the learned Judges based on decisions like *Ford* v. *Beech* [2], *Thimbleby* v. *Barren* [3] and *Gibbons* v. *Vonillon* [4]. There was no question in those cases of the *invalidity* of the covenant restricting the right of suit. The point was whether a covenant not to sue was to be construed as a release of the original obligation, so as to be a sufficient plea in bar to a suit on the original claim or it was to be regarded only as an *independent contract*, not of itself barring a suit on the original claim but giving rise to a cross claim, in the event of suit brought in violation of the covenant. We are unable to find in these decisions, the 'genesis' of S. 28 of the Indian Contract Act which declares such restrictive covenants *void*. It may also be pointed out that the section differs from *Thimbleby* v. *Barron* and *Walker* v. *Neville* [5], in

1. (1912) 14 Bom. L. R. 741.
2. (1848) 11 Q. B. 852.
3. (1838) 3 M. & W. 210.
4. (1849) 8 C. B. 463.
5. (1864) 3 H. and C. 408.

dealing not with covenants against suit *for* a limited time, but with covenants not to sue *beyond* a limited time as well. The learned Judges have suggested no reason why the Indian legislature, if it had these English decisions in view, should have invalidated such covenants when they were good and enforceable under the English law; and it is far from convincing to be told that the legislature did not mean to prohibit the substantial negation of rights by such restrictive covenants, but was only anxious to avoid the theoretical anomaly of a right kept alive but debarred of a remedy.

The distinction taken between the mere 'restriction of the remedy' to a particular period and the waiver or 'forfeiture' of the right (in default of suit within the prescribed period) is no doubt supported by some observations in Porter's Laws of Insurance (4 Edn., pp. 214, 215) based on certain American cases. But the author himself points out that other American Courts and Courts in Lower Canada have held against the validity of such restrictive clauses and so far as we have been able to see, there is no case upholding such a covenant in the face of a statutory prohibition like that contained in S. 28. The American Cyclopædia lays down the rule only 'in the absence of special statutory provision to the contrary.' (Vol. 25, p. 1017; see also *ibid* p. 910; Vol. 9 p., 511 and Vol. 19 pp. 905, 906).

It is of course only natural that insurance companies are anxious to protect themselves against stale claims being made upon them, but that is a matter for the legislature to consider, in fixing the period of limitation for such suits.

Lang *v.* **Heptullabhai Ismailji**, I. L.R. 38 B. 359.

But for the fact that Mr. Justice Davar had held otherwise in the case reported in the foot-note, we should have thought that the view taken by *Beaman J.* in the present case and confirmed by *Sir Basil Scott C. J.* and *Batchelor J.* is the only possible construction of the proviso to S. 17 of the Presidency Towns Insolvency Act. A proviso in almost identical terms is found in S. 16 of the Provincial Insolvency Act; and if, as Davar J. held, it is to be understood to save the mortgagee's

power to realise his security *only so far as he could do so without a suit* the proviso will practically effect nothing, for in the *mofussil* to which alone the Act applies, a mortgagee of immoveable property cannot realise his security except by resort to court. Sir Dinshaw Davar's reasoning as to the probable phrasing of the proviso, if the intention of the legislature was different from what he thought, seems to overlook the fact that the proviso was *widely* worded not for the purpose of *excluding* the right of suit from the scope of the saving clause but for *including* within it, other substantive rights as well which would be swept away by the general language of the first part of the section.

Laxman Ganesh *v.* **Mathurabai** I. L. R. 38 B. 369.

We cannot help thinking that the decision in this case could have been more appropriately based on a somewhat different ground. A person having two mortgages over the same property sues on the first and obtaining a decree, himself purchases the property in execution sale 'subject to his second mortgage'. The learned Judges hold that after this purchase the second mortgage could not be held to be kept alive, as the mortgagee "could have had no cause of action against himself". This reason will not apply if the purchaser happens to be a stranger; but all the same, the effect of a sale on the first mortgage is, except when the puisne mortgagee is not a party, to rid the property of the subsequent incumbrance and transfer the charge to the surplus sale proceeds. When the same person holds both the mortgages, there is no room for the plea that the puisne mortgage right was not represented in the suit. (See *Doraisami* v. *Venkatasesha*.[1]

Behram Rashid *v.* **Sorabji Rustomji** I. L. R. 38 B. 372.

We do not know what led *Beaman J.* to doubt whether it was ever intended by the legislature (in enacting the proviso to S. 59 of the Transfer of Property Act) to extend the doctrine of equitable mortgages to *lands outside* the Presidency Towns, though the deposit of title deeds is made within the towns. In

1. (1902) I. L. R. 25 M. 108.

so far as we have any means of ascertaining that intention apart from the language used, it may be worth while pointing out that what the majorty of the select committee (who introduced this saving clause) wanted to protect was the practice as it then existed of such deposits being made in the Presidency Towns, &c. Dr. Stokes, who was opposed to this exception, seems to recognise that it would take in these transactions, even though they may relate to property situate outside those towns (see the footnote to S. 59 in Stokes' Anglo-Indian Codes); that the council so understood it, would appear from the remark of Mr. Evans (in the course of his speech before the council) that he 'should have preferred to see equitable mortgages abolished altogether or at least confined to land situated within a Presidency Town.' As to the inference arising from the language of the clause, it will be useful to compare the words used here with those in S.69 whereby the mortgagee's power of private sale is in terms confined to cases in which the mortgaged property or part thereof is situate within the Presidency Towns.

Rasul Karim *v.* **Pirubhai**, I. L. R. 38 B 381.

The *quære* suggested by *Beaman J.* as to the power of Courts in India to grant a mandatory injunction on an interlocutory application raises a question of some difficulty. We do not agree with the learned Judge in the undue stress that he lays upon the word 'Temporary', but it must be owned that the language of O. 39, r. 1 cannot cover a mandatory injunction and the use of the word 'restrain' in r. 2 makes it difficult to import into this country the practice now well settled in England.

NOTES OF INDIAN CASES.

Sheo Gopal *v.* Najib Khan, I. L. R. 36 A. 398.

This case raises a somewhat novel point. In a suit for pre-emption plaintiff obtained a decree and in execution deposited the sale amount. The defendant did not take out the money but appealed. In the appeal, the decree of the first Court was reversed. Plaintiff filed a second appeal. Pending the second appeal, a creditor of the plaintiff attached the money in court deposit and notwithstanding the opposition of the plaintiff, the creditor was paid out of it. In the second appeal, plaintiff succeeded and the decree of the first Court was restored. A time was as usual fixed in the second appeal decree for payment of the sale amount. Plaintiff did not deposit the deficit within that time but contended that he had discharged his duty by making the original deposit and should not be held responsible for the creditor taking away the amount. His contention found favour with a learned Judge of the High Court of Allahabad; but on appeal the judgment of the learned Judge was reversed, the Judges of the appeal Court holding that though the payment out to the creditor before the second appeal was finally disposed of was wrong, the money having gone in discharge of the plaintiff's debt at a time when there was no pre-emption decree subsisting, equity required that defendant should be paid the full amount due to him. Their Lordships accordingly gave the plaintiff some time for payment of the deficit. Under O. 20, R.13, on payment of the money into Court, defendant was bound to deliver possession. If the view of Mr. Justice Davies in 20 M. 224 is right, the money became defendant's as soon as it was deposited. By the reversal the right of the plaintiff would be one only to restitution and not to the specific amount in Court deposit. The wrong order for payment should in that view not affect the plaintiff. If, on the other hand, the view of Mr. Justice Shephard is the right view, the money remained the plaintiff's till payment over to the defendant; in any event on the reversal of the decree of the Original Court the money became attachable at the instance of the plaintiff's creditors and by reason of such attachment not being available for payment to the defendant, the defendant was entitled to have the amount deposited within the time fixed by the appellate Court. The position

taken by the Allahabad HighCourt in this case, is an intermediate one *viz.*, that the money was in *custodia legis* subject to the orders of the Court, and the Court ought not to have paid over the amount to the creditior *pendente lite* but should have awaited the final disposal of the suit. But the Court having made the mistake, while plaintiff should not suffer for its fault, at the same time the defendant also should not suffer, and the plaintiff who had the benefit of the payment over to his creditor should pay the amount to the defendant. *Srinivasa Ayyangar* v. *Ayyathorai Pillai* [1], *Tirumal Rao* v. *Syed Sastaghiri Miyah* [2], *Makbool Ahmed Chowdhry* v. *Bazie Sabhin Chowdhry* [3], recognise the Court's power to extend the time under such circumstances.

Mata Prasad *v.* **Baran Barhai,** I. L. R. 36 All. 469.

The Allahabad High Court has been consistently holding that in the case of sanctions under S. 195, Cr.P. Code, there is only one appeal. Their Lordships were asked to reconsider the earlier rulings in deference to the decision of a Full Bench of this Court. Their Lordships on the principle of *stare decisis* refused to do so.

Bhagawati Sasan Man Tiwari *v.* **Parmesher Das,** I. L. R. 36 All. 476.

The only point of interest in the case to us in this Presidency is the decision on a question of practice, whether a party may sue for possession on the footing that he has acquired a valid title to the property and in the alternative if it should be found that his purchase of a part in execution of a decree against the widow in possession was not binding against the reversioner, claim to pre-empt the share by virtue of his right as a co-sharer in respect of the balance. Their Lordships held he could, a conclusion which seems to be obviously right.

---

1. (1897) I. L. R. 21 M. 416. 2. (1898) I. L. R. 22 M. 286.
3. (1898) I. L. R. 25 C. 609

Ali-Husan *v.* **Fazal Husain,** I. L. R. 36 All. 431.

In this case their Lordships held that under the Shia Law, a wakf made in death illness is valid only to the extent of one-third if not assented to by the heirs. Their Lordships declined to accede to the appeal of the appellant's counsel to follow texts that allow an unfettered right of bequest in charity, on the principle laid down by their Lordships of the Privy Council in *Baquar Ali Khan* v. *Anjuman Ara Begam*[1] against introducing "new rules of law because they seem to lawyers of the present day to follow logically from ancient texts however authoritative. Though the Ramnad case lays down a similar rule as to Hindu Law, the courts including the Privy Council have not refrained from using the original authorities to vary the rules of law laid down by the commentators.

Amina Bibi *v.* **Banarsi Prasad,** I. L. R. 36 All. 439.

Very liberal construction has been put upon the words "step in aid of execution" in art. 182 of the Limitation Act. Compared with the other cases to hold that an application for substituted service of the notice of execution is a step in aid involves little or no strain on the language used.

Rupan Bibi *v.* **Bhagelu Lal,** I. L. R. 36 All. 443.

In this case, their Lordships hold that a suit will not lie to set aside a succession certificate and a decree obtained on the strength of it on the ground that the certificate was obtained by giving false evidence. The suit was brought by the debtor. Their Lordships say that under S. 16 of the Succession Certificate Act, the certificate is conclusive against the debtor and the only way that a succcession certificate can be revoked is by an application under S. 18. No doubt the succession certificate is conclusive as against the debtor but the certificate affords indemnity for payments made only if they are made in good faith. Could payments made after notice of the fraud be regarded as payments made in good faith? Has a creditor *locus standi* to apply under S. 18 for revocation of certificate? These are questions that do not directly arise but seem to have a bearing on the question decided.

1. (1912) I. L. R. 25 All. 236.

Narayan Purushotham *v.* **Laxmibai,** I. L. R. 38 B. 416.

While in view to secure uniformity of practice both the learned Judges concur in the order to be made, they differ in opinion as to the correctness of the Full Bench ruling of the Madras High Court in *Chenna Reddi's case* [1]. In so far as the Full Bench rely on the argument that there is no provision by which the jurisdiction, once acquired, over the review proceeding is taken away on the subsequent filing of an appeal, there is nothing that can be definitely urged against it. But two points seem fairly clear as to the intention of the Code (i) that a party who otherwise would not appeal should not be obliged to appeal merely to get a relief which he could obtain by way of review, but (ii) that, whatever relief can be had in a *pending* appeal (even by a *respondent*) should be asked for and obtained in the appellate Court. The decision in *Ramanathan Chetti* v. *Narayanan Chetti*[2] lays undue stress on the theory that by the filing of the appeal the appellate Court becomes seised of the whole case, ignoring the fact that the Code distinctly contemplates review proceedings in the Court of first instance in spite of the pendency of an appeal. The Full Bench decision on the other hand fails to take sufficient note of the clear intention of the legislature, under (ii) above. In deciding the question absolutely with sole reference to the state of things *at the time the review petition is filed*, the learned Judges do not give due effect to the opening words of cl. (2) of O. 47, R. 1, which run 'A party *who is not appealing* from a decree' and not 'who has not appealed.' This seems calculated to deny relief by way of review to a party who *intends* to appeal and appeals in due course. But it will give rise to serious *hardship* to hold that as an invariable rule a party can prefer an appeal only on penalty of foregoing absolutely a relief which he is seeking in pending review proceedings—as for instance when a person is trying to open certain questions of *fact* by way of review of an appellate Judgment and has in the meanwhile to prefer a second appeal (within the time allowed) against such portions of the decree as depend on questions of law. It seems on the whole best to view the question as one not of 'jurisdiction' but of discretion.

1. (1909) I. L. R. 32 M. 416. 2. (1904) I. L. R. 27 M. 602.

Kishorbhai Revadas *v.* **Ranchodia Dhulia,** I.L.R. 38B. 427.

The conclusion that the dismissal of the revocation proceedings was a bar to all further attempt to impeach the probate seems to us unexceptionable; and it would follow that a third person cannot set up even by way of *jus tertii* the title of a person so barred (*cf. Ramamurti* v. *Secretary of State*[1]). But we are not able to agree in the broad position stated by the learned Judges that 'where the demand is made by the executor claiming title under an unrevoked probate, a debtor to the estate has no answer unless possibly he is sued in a Court having jurisdiction to revoke the probate'. S. 59 of the Probate and Administration Act no doubt affords sufficient protection to the debtor, *if he pays*, but it would not preclude the debtor from questioning the executor's title, except for the words which declare the probate 'conclusive as to the representative title'. These words must however be understood in the light of S. 44 of the Evidence Act which expressly refers to Judgments, orders &c., relevant under S. 41 of that Act (*i. e.*, Probate proceedings &c.) ; and the objections under S. 44 can certainly be raised by *any person* and that, by way of 'collateral attack' *in any Court*, whenever such Judgment, Order &c., is sought to be put in evidence. The fact that these grounds may also be relied on to support an application for revocation of the probate cannot affect this. Cases like *Allen* v. *Dundas*,[2] *A. G.* v. *Partington* [3] and *In re Ivory*[4] throw no light on this aspect of the question. On the other hand, the following passage in Bigelow on Fraud (Bk. I, Ch. II) clearly supports the view above submitted. " Indeed Lord Hardwicke has said that while fraud in making or obtaining a will must be enquired into and determined by the Ecclesiastical Court, fraud in procuring a will to be established in that Court, fraud not upon the testator but upon the person disinherited thereby, might be the subject of inquiry in equity. (*Barnesley* v. *Powell* [5]). And the same distinction has been recognised by other Judges (*Meadows* v. *Duchess of Kingston* [6]) *Kennell* v. *Abbott*[7], *Robert Allen* v. *McPherson*[8] ". Lower down, Dr. Bigelow

1. (1913) I. L. R. 37 M.
2. (1789) 3 Durn & E. 125.
3. (1864) 3 H. & C. 193.
4. (1878) L. R. 10 Ch. D. 372.
5. (1749) 1 Ves. Sen. 284 s. c. 28 E. R. 482.
6. (1775) Amb 762 s. c. 27 E. R. 487.
7. (1797) 4 Ves. Jun 802 s. c. 31 E. R. 416.
8. (1847) 1 H. L. C. 191 s. c. 9 E. R. 727.

instances the case of fraud in obtaining the consent of the next of kin to the probate (See also 1 Story's Eq. S. 440) and proceeds to point out that there is nothing peculiar or paradoxical in thus allowing the 'exclusive domain' of the Court of Probate to be invaded. (See also Black on Judgments S. 634; observations of *Markby J.* in *Komollochun* v. *Nilrutun* [1] and White J. in In the *Matter of Bhobosoonduri* [2]). Reference may be usefully made in this connection to the observation of Cozens-Hardy L. J. in *Birch* v. *Birch* [3] that though ordinarily a Judgment obtained by fraud can be set aside only as against the person who committed or procured the fraud, this limitation does not apply to an action to set aside a probate, inasmuch as a will must be either good or bad against all the world.

Kashinath Ramchandra *v.* **Nathoo Keshav**, I. L. R. 38 B. 444.

The learned Judges hold that if a landlord first sues for *possession* on foot of a forfeiture clause in the lease, a later suit for *rent* accrued due prior to the date of the ejectment suit will be barred by O. 2, R. 2, C. P. C. The correctness of this view seems open to question. They themselves point out that up to the time of the Judicature Act of 1873, the Common Law courts entertained actions for rent upon the covenant in the lease after ejectment on the ground of forfeiture for non-payment of rent. Beyond the fact that now the two claims *can be* included in one suit, is there anything which makes it *obligatory* on a party to do so? This depends upon the question whether the two claims constitute only one cause of action. The numerous attempted definitions of the expression 'cause of action' do not afford any material help; the test of identity of evidence is a very unsatisfactory criterion. The decision in *Mewa Kuar* v. *Banarsi Prasad* [4] relates to mesne profits and is against the preponderance of authority in all the other courts and a Full Bench of the Madras High Court recently held that a suit for possession does not bar a second suit for mesne profits. Does it make any difference then that in the one case the cause of action is in tort while in the other it is on contract? In the only reported case in which the claim related to rent (as distinguished from mesne profits) the learned judges expressly say that the contractual

1. (1878) I. L. R. 4 C. 360.
2. (1880) I. L. R. 6 C. 460.
3. L. R. 1902 P. 130.
4. (1895) I. L. R. 17 A 533.

basis affords a *stronger* reason for the inapplicability of the bar *See Subraya Chetti* v. *Ratnavelu* [2] Curiously enough we find no reference to this case in the judgment under notice. We quite agree that R. 4 of O. 2 throws little light on the point. But the considerations urged in Subraya Chetti's case are not met in the Bombay Judgment. Both claims no doubt arise out of the *same contract*, but that won't make it a single 'cause of action.' As observed in the Madras case "The cause of action for any portion of the rent is complete when that part of the rent is due and is unpaid: the cause of action for recovey of the property does not arise until the tenancy is determined &c., &c." It is only to a limited extent that by the older practice (as shown by the illustration to S. 43) and by the express language of the present Code several claims arising out of the same contract, but at *different times* are treated as nevertheless constituting but one cause of action *viz.*, where they are 'Successive obligations'— *i. e.*, of the same kind. The present case will not fall under that rule.

Natcheappa Chetti *v.* Irrawaddy Flotilla Company,
I. L. R. 41 C. 670.

The principal question in the case turned substantially on the nature and true construction of the document called the 'mate's receipt' in the case. Attention is invited in this connection to the notes (at pp. 55 to 57 of this Volume of the Journal) on the decision of the Bombay High Court in *Amerchand and Co.* v. *Ramdas Vithaldas* [2]. As to the true legal character of 'mate's receipt' and the effect of its possession or loss, reference may be made to Carver's Carriage of goods by sea. S. 60 and the cases there discussed :—Particularly *Cowasjee* v. *Thompson* [3] *Hathesing* v. *Laing* [4].

---

2. (1908) I. L. R. 32 M. 330.
3. (1845) 5 Moo. P. C. 165.
2. (1913) I. L. R. 38 B. 255.
4. (1878) L. R. 17 Eq. 92.

Ravi Veera Ragavulu *v.* **Venkata Narasimha Naidu Bahadur :** I.L.R. 37 M. 543 (P.C.)

The judgment of the Privy Council in this case sets at rest the doubts that were frequently raised as to the right of appeal from the decrees of District Courts in appeal from special tribunals constituted by the various special acts like the Forest Act, the Rent Revovery Act and the Estates Land Act. The effect of their Lordships' decision is that the decree of the District Court being a decree passed in appeal, a second appeal would lie in all such cases. Proceedings under the Land Acquisition are a class *sui generis* and their Lordships are apparently not prepared to extend the principle of the decision in the *Rangoon Botatoung Co.* v. *The Collector Rangoon* [1] to other cases. Another point of interest in their Lordships' judgment is the inkling of their Lordships' views as to what is meant by a point of law within the meaning of S. 584 C. P. C. Their Lordships are clear that misconstruction of documents which form only a portion of the evidence in the case is not a point of law. Their Lordships seem to assume that misconstruction of documentary evidence which is the sole evidence in the case would be a question of law. That was also the opinion of their Lordships in *Fateh Chand* v. *Kishen Kunwar* [2]. It is open to question whether their Lordships' judgment permits a distinction to be made between misconstruction of documents' and wrong inference from documents by reason of misconstruction.

The decision of their Lordships on the merits hardly calls for any notice, though a reading of the judgment leaves upon one's mind the impression that the point of the High Court's judgment has been missed in their Lordship's Judgment. The point was not whether there was a permanent arrangement but whether there was any arrangement at all on the point at issue. If the arrangement covered the point at issue, there was no dispute that that arrangement was permanent.

[*The End of Vol. 27.*]

---

1. (1913) I.L.R. 40 C. 21 (P.C.) 2. (1912) I.L.R. 34 Al. 579 at 585.